No. _______

In the Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S APPENDIX

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APPENDIX TABLE OF CONTENTS

Order and Amended Opinion, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. May 14, 2024) 1a

Opinion, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 1, 2024)............ 263a

Opinion, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. June 24, 2022) 518a

Order, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021)............ 604a

Order, *Apache Stronghold v. United States*, CV-21-00050-PHX-SPL (D. Ariz. Feb. 12, 2021) 622a

U.S. Const., amend. I 653a

Religious Freedom Restoration Act, 42 U.S.C. 2000bb, *et seq*. 654a

National Defense Authorization Act, P.L.113-291 3003 (2014) 658a

Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1853) 680a

Excerpts from Final Environmental Impact Statement (U.S.D.A. Jan. 5, 2021) 685a

Reporter's Transcript of Proceedings – Hearing on Motion for Preliminary Injunction (Feb. 3, 2021) 937a

Declaration of Cranston Hoffman Jr. (Jan. 10, 2021) 1023a

Declaration of Clifford Levenson (Jan. 13, 2021) 1027a

Declaration of Naelyn Pike (Jan. 10, 2021) 1029a

Declaration of Wendsler Nosie, Sr., Ph.D. (Jan. 11, 2021) 1038a

Declaration of John R. Welch, Ph.D. (Jan. 11, 2021) 1050a

Declaration of Tracy Parker (Jan. 21, 2021) 1136a

Proclamation No. 795, Tonto National Forest Arizona (Second Proclamation of Theodore Roosevelt) (Jan. 13, 1908) 1139a

Letter from Wendsler Nosie., Sr., Ph.D. to John Fowler (Nov. 13, 2020) 1143a

Letter from International Council of Thirteen Indigenous Grandmothers (Feb. 10, 2021) 1176a

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

APACHE STRONGHOLD, a 501(c)(3) nonprofit organization, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA; THOMAS J. VILSACK, Secretary, U.S. Department of Agriculture (USDA); RANDY MOORE, Chief, USDA Forest Service; NEIL BOSWORTH, Supervisor, USDA Forest Service, Tonto National Forest; TOM TORRES, Acting Supervisor, USDA Forest Service, Tonto National Forest, *Defendants-Appellees*, RESOLUTION COPPER MINING, LLC, *Intervenor*.	No. 21-15295 D.C. No. 2:21-cv-00050-SPL ORDER AND AMENDED OPINION

Appeal from the United States District
Court for the District of Arizona

Steven Paul Logan, District Judge, Presiding

Argued and Submitted En Banc March 21, 2023
Pasadena, California

Filed March 1, 2024

Amended May 14, 2024

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Marsha S. Berzon, Carlos T. Bea, Mark J. Bennett, Ryan D. Nelson, Daniel P. Collins, Kenneth K. Lee, Danielle J. Forrest, Lawrence VanDyke and Salvador Mendoza, Jr., Circuit Judges.

Order:
Per Curiam Opinion; Opinion by Judge Collins;
Partial Concurrence and Partial Dissent
by Judge Bea;
Concurrence by Judge R. Nelson;
Concurrence by Judge VanDyke;
Dissent by Chief Judge Murguia;
Dissent by Judge Lee

SUMMARY*

Religious Freedom Restoration Act / Free Exercise Clause

The en banc court filed (1) an order denying a petition for rehearing en banc before the full court and amending Judge Collins's opinion, and (2) Judge Collins's amended opinion in a case in which the en banc court affirmed the district court's order denying Apache Stronghold's motion for a preliminary injunction against the federal government's transfer of Oak Flat—federally owned land within the Tonto National Forest—to a private company, Resolution Copper.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Oak Flat is a site of great spiritual value to the Western Apache Indians and also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute—the Land Transfer Act—directed the federal government to transfer the land to Resolution Copper, which would then mine the ore.

Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches.

The per curiam opinion provides an overview of the votes of the en banc court:

- A majority of the en banc court (Chief Judge Murguia, and Judges Gould, Berzon, R. Nelson, Lee and Mendoza) concluded that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and RFRA are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overruled the narrow definition of substantial burden under RFRA in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).
- A different majority of the en banc court (Judges Bea, Bennett, R. Nelson, Collins, Forrest, and VanDyke) concluded that

> (1) RFRA subsumed, rather than overrode, the outer limits that *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), placed on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." Apache Stronghold's claims under the Free Exercise Clause and RFRA failed under these *Lyng*-based standards and the claims based on the 1852 treaty failed for separate reasons.

In his opinion for the court, Judge Collins, joined by Judges Bea, Bennett, R. Nelson, Forrest, and VanDyke, held that Apache Stronghold was unlikely to succeed on the merits on any of its three claims before the court, and consequently was not entitled to preliminary injunctive relief.

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Copper would violate the Free Exercise Clause failed under the Supreme Court's controlling decision in *Lyng* because the project challenged here is indistinguishable from that in *Lyng*. As in *Lyng*, the government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs," but it would

have no "tendency to coerce" them "into acting contrary to their religious beliefs." Also, as in *Lyng*, the challenged transfer of Oak Flat for mining operations did not discriminate against Apache Stronghold's members, did not penalize them, or deny them an "equal share of the rights, benefits, and privileges enjoyed by other citizens."

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Cooper would violate RFRA failed for the same reasons because what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*.
- Apache Stronghold's claim that the 1852 Treaty of Sante Fe created an enforceable trust obligation that would be violated by the transfer of Oak Flat failed because the government's statutory obligation to transfer Oak Flat abrogated any contrary treaty obligation.

Concurring in part and dissenting in part, Judge Bea, joined by Judge Forrest except for footnote 1 and by Judge Bennett with respect to Part II, dissented from paragraph one of the per curiam opinion's purported overruling of *Navajo Nation* because a majority of the panel already affirmed the district court, under the different rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA. He concurred in full with Judge Collins's majority opinion, and wrote separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA.

Concurring, Judge R. Nelson stated that en banc review was warranted to correct the faulty legal test (not outcome) in *Navajo Nation*. He explained that since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition *Navajo Nation* gave it under RFRA, and a majority of the en banc court now rejects the narrow construction of "substantial burden" in *Navajo Nation*. While the dissent raises a plausible textual interpretation of "substantial burden" under RFRA, Judge R. Nelson ultimately disagrees with it. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim.

Concurring, Judge VanDyke agreed with the majority that this decision is controlled by *Lyng*, and wrote separately to elaborate on why the alleged "burden" in this case is not cognizable under RFRA and to explain why reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination.

Dissenting, Chief Judge Murguia, joined by Judges Gould, Berzon, and Mendoza, and by Judge Lee as to all but Part II.H, wrote that the utter destruction of Oak Flat, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under RFRA. *Navajo Nation* wrongly defined "substantial burden" as a narrow term of art and foreclosed relief. In light of the plain meaning of "substantial burden," RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious

belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. Chief Judge Murguia would hold that Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and would remand for the district court to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. Finally, Chief Judge Murguia rejected the government's eleventh-hour argument that RFRA does not apply to the Land Transfer Act.

Dissenting, Judge Lee joined all of Chief Judge Murguia's dissent except for Section II.H because the government waived the argument that RFRA cannot apply to the Land Transfer Act.

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ORDER

The slip opinion filed on March 1, 2024 is amended as follows:

1) On page 33, after "(quoting *Lyng*, 485 U.S. at 451).", delete the remainder of the paragraph through and including "neutral and generally applicable." Immediately after that shortened paragraph, add the following new paragraph:

> But the Court has not said, and could not have said, that the *holding* of *Lyng* rested on the view that *Lyng* was itself a case involving a neutral and generally applicable law. As we have set forth, *Lyng* rested on a holding about the scope of the term "prohibiting" under the Free Exercise Clause and never mentioned or endorsed a *Smith*-style rule. At most, the Court has suggested in dicta that *Lyng* fits a pattern of cases in which the Court had upheld laws that were "neutral and generally applicable without regard to religion" in the sense that they did not "'penalize religious activity by

denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017) (quoting *Lyng*, 485 U.S. at 449). But *Trinity Lutheran* did not have before it the more focused question whether, in light of the parcel-specific rigging of the statutory framework in *Lyng*, the underlying statute at issue in *Lyng* could be properly deemed to qualify as "neutral and generally applicable" under the details of *Smith*'s framework. As we have explained, *Lyng* involved a situation in which, *after* religious objections had been raised to the G-O road and the road's construction had been enjoined, Congress proceeded to adopt an explicit statutory gerrymander for the precise parcel at issue. *See supra* at 27–28. That manifestly would *not* fit the Court's current understanding of a case involving a neutral and generally applicable law. *See*, *e.g.*, *Church of the Lukumi*, 508 U.S. at 542 (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). In all events, even if the law in *Lyng* were deemed, in hindsight, to be neutral and generally applicable within the meaning of *Smith*, the fact remains that the holding of *Lyng* did not rest on any such premise, but instead on the view that the challenged actions there lacked the sort of features that would

qualify as "prohibiting" the free exercise of religion.

2) On page 43, in the sentence that begins "Consequently," add "pre-*Smith*" immediately before "framework for applying".

An amended version of the opinion, reflecting these changes, accompanies this order. The per curiam opinion, the concurrences, and the dissents are unchanged. The full court has been advised of the petition for rehearing en banc before the full court filed on April 15, 2024 (Dkt. No. 184), and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35; Ninth Circuit General Order 5.8. Accordingly, the petition for rehearing en banc before the full court is DENIED. No further petitions for rehearing will be entertained.

OPINION

PER CURIAM:

A majority of the en banc court (Chief Judge MURGUIA and Judges GOULD, BERZON, R. NELSON, LEE, and MENDOZA) concludes that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overrules *Navajo Nation v. U.S. Forest Service* to the extent that it defined a "substantial burden" under RFRA as "imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." 535 F.3d 1058 (9th Cir. 2008) (emphasis added).

A different majority (Judges BEA, BENNETT, R. NELSON, COLLINS, FORREST, and VANDYKE) concludes that (1) RFRA subsumes, rather than overrides, the outer limits that the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), places on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal

share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. The same majority holds that Apache Stronghold's claims under the Free Exercise Clause and RFRA fail under these *Lyng*-based standards and that the claims based on the 1852 Treaty fail for separate reasons.

We therefore AFFIRM the district court's order denying the motion for a preliminary injunction.

COLLINS, Circuit Judge, delivered the following opinion for the court, in which BEA, BENNETT, R. NELSON, FORREST, and VANDYKE, Circuit Judges, join:

Oak Flat, an area located on federally owned land within Tonto National Forest, is a site of great spiritual value to the Western Apache Indians, who believe that it is indispensable to their religious worship. But Oak Flat also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute directed the federal Government to transfer the land to a private company, Resolution Copper, which would then mine the ore. Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the Government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches. The district court denied Apache Stronghold's request for a preliminary injunction on the ground that Apache Stronghold had not shown a likelihood of success on the merits. *See Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 598 (D. Ariz. 2021). We affirm.

I

A

Apache Stronghold is an Arizona nonprofit corporation "based in the Western Apache lands of the San Carlos Apache Tribe." It describes itself as "connecting Apaches and other Native and non-Native

allies from all over the world." Its declared mission is "to battle continued colonization, defend Holy sites and freedom of religion, and . . . build[] a better community through neighborhood programs and civic engagement." The San Carlos Apache Tribe of the San Carlos Reservation is a federally recognized Indian tribe located on the San Carlos Reservation, roughly 100 miles east of Phoenix.

Apache Stronghold's members engage in traditional Western Apache religious practices. Among the locations that are central to their religion is a place called "Chí'chil Biłdagoteel," which in English means "Emory Oak Extends on a Level." That accounts for the site's more common name, which is "Oak Flat." According to Apache Stronghold's expert witness, Western Apache religious practices at Oak Flat date back at least a millennium. The Western Apache believe that Oak Flat is a "sacred place" that serves as a "direct corridor" to "speak to [their] creator." Specifically, they believe that Oak Flat is the site where one of the "Ga'an"—spirit messengers between the Western Apache and their Creator—"has made its imprint, its spirit." The Western Apache believe that the Ga'an, and the Western Apaches' interaction with the Ga'an, constitute "a crucial part" of their "personal being," and that Oak Flat thus provides them "a unique way . . . to communicate" with their Creator.

Members of the tribe report that they "cannot have this spiritual connection with the land anywhere else on Earth." Oak Flat is "the only area" with these unique features, making it "crucial" to Western Apache religious life. As one example, members of the tribe stated that certain Western Apache religious

practices must occur at Oak Flat and cannot take place anywhere else. And even among those religious practices that need not necessarily occur at Oak Flat, some trace their origins to practices that were first begun there. One such practice is the "Sunrise Ceremony," a rite of passage for Western Apache girls to recognize "the gift of life and the bearing of children to the female." The Western Apache believe that "the place the ceremony takes place is the life thread forever connecting the place and the girls who have their ceremony there." One member testified that "the most important part about" the Sunrise Ceremony "is that everything that we are able to use for the ceremony comes from Chí'chil Biłdagoteel, Oak Flat." Accordingly, in Western Apache religious belief, harms to Oak Flat work a corresponding spiritual harm to those who performed their Sunrise Ceremonies there, damaging their "life and their connection to their rebirth."

B

In addition to being a sacred site for the Western Apache, Oak Flat is also a place of considerable economic significance. Located near the "Copper Triangle," Oak Flat sits atop the third-largest known copper deposit in the world. Roughly 4,500 to 7,000 feet beneath Oak Flat is an ore deposit containing approximately two billion tons of "copper resource." The U.S. Forest Service estimates that, if mined, this deposit could yield around "40 billion pounds of copper." For that reason, there has long been considerable interest among mining companies in gaining access to the Oak Flat deposit.

Believing the copper beneath Oak Flat to be a significant asset, various members of Arizona's

congressional delegation drafted legislation to compel the Government to transfer Oak Flat and its surroundings to Resolution Copper, a private mining company. Such legislation was introduced in each Congress from 2005 through 2014.[1] Although these bills were the subject of numerous hearings and other congressional action over the years,[2] these legislative

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[1] *See, e.g.*, *Southeast Arizona Land Exchange and Conservation Act of 2005*, H.R. 2618, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2005*, S. 1122, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2006*, H.R. 6373, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2006*, S. 2466, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2007*, H.R. 3301, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2007*, S. 1862, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2008*, S. 3157, 110th Cong. (2008); *Southeast Arizona Land Exchange and Conservation Act of 2009*, H.R. 2509, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2009*, S. 409, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2011*, H.R. 1904, 112th Cong. (2011); *Southeast Arizona Land Exchange and Conservation Act of 2013*, H.R. 687, 113th Cong. (2013); *Southeast Arizona Land Exchange and Conservation Act of 2013*, S. 339, 113th Cong. (2013).

[2] A House subcommittee held a hearing on H.R. 3301 in the 110th Congress, but no further action was taken on that bill. *See H.R. 3301, Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 110-52 (Nov. 1, 2007). In the 111th Congress, a Senate subcommittee held a hearing on S. 409 on June 17, 2009, and that bill was subsequently reported on March 2, 2010 to the Senate floor, where no further action was taken. *See Public Lands and Forests Bills: Hearing Before the Subcomm. on Pub. Lands & Forests of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 111-65 (June 17, 2009); S. REP. NO. 111-129 (March 2, 2010). In the 112th

efforts did not bear fruit until late 2014, when Congress passed, and the President signed, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("NDAA"). *See* Pub. L. No. 113-291, 128 Stat. 3292 (2014). Included as § 3003 of the NDAA was a version of the previously oft-proposed "Southeast Arizona Land Exchange and Conservation Act."[3] *Id.* § 3003, 128 Stat. at 3732–41 (classified to § 539p of the unenacted title 16 of the United States Code).

Congress, H.R. 1904 was considered at a June 14, 2011 House subcommittee hearing, reported out of committee on October 14, 2011, and passed by the full House on October 26, 2011. *See H.R. 473, et al.: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 112-40 (June 14, 2011); H.R. REP. NO. 112-246 (Oct. 14, 2011); 157 CONG. REC. H7090–110 (Oct. 26, 2011). A Senate committee then held a hearing on H.R. 1904 on Feb. 9, 2012. *See Resolution Copper: Hearing Before the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 112-486 (Feb. 9, 2012). In 2013, both House and Senate subcommittees held further hearings in the 113th Congress on the respective versions of the legislation, and the House bill was reported to the House floor on July 22, 2013. *See Oversight Hearing Titled "America's Mineral Resources: Creating Mining and Manufacturing Jobs and Securing America": Hearing on H.R. 1063, et al., Before the Subcomm. on Energy & Mineral Res. of the H. Comm. on Nat. Res.*, SERIAL NO. 113-7 (March 21, 2013); *Current Public Lands, Forests, and Mining Bills: Hearing Before the Subcomm. on Pub. Lands, Forests, & Mining of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 113-342 (November 20, 2013); H.R. REP. NO. 113-167 (July 22, 2013).

[3] Apache Stronghold derides § 3003 as a "midnight" rider attached to a "must-pass" bill, but that characterization ignores the extensive hearings and congressional consideration given to the land transfer proposal over the previous seven years. *See supra* note 2.

Section 3003's declared purpose is "to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). To that end, it directs that "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper" in certain "non-Federal land," then "the Secretary [of Agriculture] is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land." *Id.* § 539p(c)(1). The referenced "Federal land" consists of "approximately 2,422 acres of land located in Pinal County, Arizona," including Oak Flat and the surrounding area. *Id.* § 539p(b)(2); *see* U.S. Forest Service, Resolution Copper Project & Land Exchange, Map of Land Exchange Parcels, (2015), https://www.resolutionmineeis.us/documents/usfsresolution-land-exchange-parcels-2016 [https://perma.cc/JEC7-GUC4].

The land exchange is subject to certain conditions. For example, title to the land the Government would receive from Resolution Copper must be in a form that is acceptable to the Secretaries of Agriculture and the Interior, and must conform to the Department of Justice's "title approval standards." 16 U.S.C. § 539p(c)(2)(A), (B). The federal and non-federal land must be independently appraised, *id.* § 539p(c)(4), and the value of the exchanged land equalized as set forth in the statute, *id.* § 539p(c)(5). Other provisions of § 3003 provide direction concerning ancillary matters related to the exchange. *E.g.*, *id.* § 539p(i).

In recognition of the Western Apaches' religious beliefs, Congress incorporated an accommodation provision into § 3003. That provision directs the

Secretary of Agriculture to "engage in government-to-government consultation with affected Indian tribes" to address concerns "related to the land exchange." 16 U.S.C. § 539p(c)(3)(A). Further, the statute obligates the Secretary to work with Resolution Copper to address those concerns and to mitigate any possible "adverse effects on the affected Indian tribes." *Id.* § 539p(c)(3)(B). The statute also requires Resolution Copper to keep Oak Flat accessible to the public for as long as safely possible, *id.* § 539p(i)(3), and Congress explicitly set aside another religiously significant area, Apache Leap, in order to "preserve [its] natural character" and "allow for traditional uses of the area." *Id.* § 539p(g)(2).

Lastly, Congress expressly stated that the land exchange would generally be governed by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Thus, § 3003 requires that an environmental impact statement ("EIS") be prepared under NEPA prior to the Secretary executing the land exchange. 16 U.S.C. § 539p(c)(9)(B). Congress supplemented the ordinary NEPA requirements for such statements and required that the EIS for the land transfer also "assess the effects of the mining" on "cultural and archaeological resources" in the area and "identify measures . . . to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C). The EIS was then to form "the basis for all decisions under Federal law related to the proposed mine," such as "the granting of any permits, rights-of-way," and construction approvals. *Id.* § 539p(c)(9)(B).

The statute commands that the land transfer take place "[n]ot later than 60 days after" the publication of the EIS. 16 U.S.C. § 539p(c)(10). Nowhere in § 3003

does Congress confer on the Government discretion to halt the transfer. The statute mandates that the Government secure an appraisal of the land, *id.* § 539p(c)(4)(A); that it prepare the EIS, *id.* § 539p(c)(9)(B); and that it then transfer the land, *id.* § 539p(c)(10). Although Resolution Copper could theoretically prevent the transfer by refusing "to convey to the United States all right, title, and interest . . . in and to the non-Federal land," *id.* § 539p(c)(1), no corresponding authority exists for the Government.

Once the land transfer takes place, Resolution Copper plans to extract the ore by using "panel caving," a technique that entails digging a "network of shafts and tunnels below the ore body." Resolution Copper will then detonate explosives to fracture the ore, which will "move[] downward" as a result. That, in turn, will cause the ground above to begin to collapse inward. Over the next 41 years, Resolution Copper will remove progressively more ore from below Oak Flat, causing the surface geography to become increasingly distorted. The resulting subsidence will create a large surface crater, which the Forest Service estimates will span approximately 1.8 miles in diameter and involve a depression between 800 and 1,115 feet deep.

This collapse will not occur immediately upon transfer of the land. Even once Resolution Copper begins construction on the mine, it will be as much as six years before the mining facilities will be operational. And during that time, Resolution Copper is required by the terms of § 3003 to keep Oak Flat accessible to "members of the public, including Indian tribes, to the maximum extent practicable, consistent

with health and safety requirements." 16 U.S.C. § 539p(i)(3). Even so, the Government conceded at argument that "the access will end before subsidence occurs, because it wouldn't be safe to have people accessing the land when it could subside." Once the mine is operational, the Forest Service estimates that it will produce ore for at least 40 years before closure and reclamation activities commence to decommission the mine.

C

On January 4, 2021, the Forest Service announced that the EIS for the land transfer would be published in 11 days, on January 15. That publication would trigger the 60-day window for the federal Government to transfer title to the land. 16 U.S.C. § 539p(c)(10). Seeking to halt the transfer, Apache Stronghold sued the federal Government and its relevant officials on January 12, requesting declaratory relief, "a permanent injunction prohibiting" the "Land Exchange Mandate," and ancillary fees and costs. Three days later, on January 15, the Government released the EIS as planned.

Apache Stronghold asserted several different claims in support of its prayer for relief. First, it alleged that the Government provided too little advance notice of the publication of the EIS, thereby infringing Apache Stronghold's members' rights under the Due Process Clause and under the Petition Clause of the First Amendment. Next, Apache Stronghold alleged that the land transfer would violate its members' rights under the 1852 Treaty of Sante Fe. As this treaty-based claim has been described by Apache Stronghold in this court, the 1852 treaty assertedly imposed fiduciary trust obligations on the

Government to "protect the traditional uses of ancestral lands," even if the Government "has formal title to the land." The transfer would allegedly violate the treaty—and this corresponding federal trust obligation—because it would "allow total destruction" of the property and prevent the Western Apache from conducting their traditional religious practices.

Apache Stronghold also argued that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment and under RFRA. With respect to its Free Exercise Clause claim, Apache Stronghold argued that § 3003 was not a neutral law of general applicability and was therefore subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And, according to Apache Stronghold, the transfer was neither in support of a compelling governmental interest nor narrowly tailored to accomplish such an interest. As to RFRA, Apache Stronghold argued that the land exchange "chills, burdens, inhibits, and destroys" the religious exercise of its members, thus substantially burdening their exercise of religion in violation of RFRA. As with the Free Exercise Clause claim, Apache Stronghold's RFRA claim asserted that the transfer was not narrowly tailored to accomplish a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). Lastly, Apache Stronghold alleged that the federal Government intentionally discriminated against its members on account of their religion in violation of the Free Exercise Clause.

Two days after filing suit, Apache Stronghold moved for a temporary restraining order ("TRO") and preliminary injunction. Specifically, Apache

Stronghold sought an order "preventing Defendants from publishing a Final Environmental Impact Statement . . . and from conveying the parcel(s) of land containing Oak Flat."

On January 14, 2021, the district court denied Apache Stronghold's motion for a TRO. After conducting an evidentiary hearing on February 3, the district court denied the preliminary injunction motion on February 12. Because the district court concluded that Apache Stronghold had not demonstrated "a likelihood of success on, or serious questions going to, the merits" of its claims, the district court did not consider the remaining preliminary injunction factors. *See Apache Stronghold*, 519 F. Supp. 3d at 598, 611. Apache Stronghold timely appealed.

On March 1, 2021, during the pendency of this appeal, the Government withdrew its EIS for the land transfer and mine. It explained that "additional time is necessary to fully understand concerns raised by Tribes" and to "ensure[] the agency's compliance with federal law." To date, the Government has provided the court no concrete estimate of when the EIS will be issued, except to pledge that it is not awaiting the decision in this case and to state that it will provide the court and Apache Stronghold at least 60 days' notice prior to issuing the EIS.

II

We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review the district court's refusal to issue a preliminary injunction for abuse of discretion. *See AK Futures LLC v. Boyd Street Distro, LLC*, 35 F.4th 682, 688 (9th Cir. 2022). We review the district court's

"underlying legal conclusions *de novo*" and its "factual findings for clear error." *Id.*

To show that it is entitled to a preliminary injunction, Apache Stronghold "must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The first factor— likelihood of success on the merits—is "the most important," and "when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citations and internal quotation marks omitted). In this court, Apache Stronghold only challenges the district court's likelihood-of-success determination with respect to its claims under the Free Exercise Clause, RFRA, and the 1852 treaty. Because, as we shall explain, Apache Stronghold has no likelihood of success on any of those three claims, we have no occasion to address the remaining *Winter* factors.

III

Apache Stronghold asserts that the transfer of Oak Flat from the Government to Resolution Copper would "violate the Free Exercise Clause." This claim fails under the Supreme Court's controlling decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

A

The dispute in *Lyng* arose from the Government's long-running effort to build a road connecting the

northwest California towns of Gasquet and Orleans (the "G-O road"). 485 U.S. at 442. One of the final components of that project involved the construction of "a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest," a section that had "historically been used for religious purposes by Yurok, Karok, and Tolowa Indians." *Id.* As part of its preparation of a final environmental impact statement concerning the completion of the road through Chimney Rock, the Forest Service "commissioned a study of the American Indian cultural and religious sites in the area." *Id.* That study recommended against completion of the road, because "any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'" *Id.* (citation omitted). The Forest Service nonetheless decided to proceed with the construction of the road. *Id.* at 443. "At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest." *Id.*

The Forest Service's actions were promptly challenged in a federal lawsuit brought by "an Indian organization, individual Indians," the State of California, and others. *Lyng*, 485 U.S. at 443. The district court permanently enjoined both the timber management plan and the construction of the remaining section of the road, holding that these actions would infringe the rights of tribal members under the Free Exercise Clause as well as violate other provisions of federal law. *Id.* at 443–44. While the case was pending on appeal in this court, Congress intervened by enacting the California Wilderness Act

of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984). *See Lyng*, 485 U.S. at 444. That statute designated much of the land governed by the Forest Service's timber management plan as protected wilderness, thereby barring "commercial activities such as timber harvesting." *Id.* However, the Act specifically "exempt[ed] a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment of the G-O road, from the wilderness designation." *Id.* This was done precisely "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." *Id.* (quoting S. REP. NO. 98-582, at 29 (1984)). A panel of this court subsequently vacated the district court's injunction to the extent that it had been mooted by the wilderness designations in the California Wilderness Act, but otherwise largely affirmed the district court. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 698 (9th Cir. 1986); *see also Lyng*, 485 U.S. at 444–45.

The Supreme Court reversed. In addressing the Free Exercise Clause issue, which was a necessary component of the relief granted by the district court, the Court began by acknowledging that "[i]t is undisputed that the Indian [plaintiffs'] beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion." *Lyng*, 485 U.S. at 447. As the Court explained, it was undisputed that the "projects at issue in this case could have devastating effects on traditional Indian religious practices," and the Court therefore accepted the premise that "the G-O road will virtually destroy the Indians' ability to practice their religion." *Id.* at 451 (simplified); *see also id.* (acknowledging that the threat to the Indian plaintiffs'

"religious practices is extremely grave"). Despite these acknowledged severe impacts, the Court nonetheless held that the Government was *not* required to demonstrate a "compelling need" or otherwise to satisfy strict scrutiny. *Id*. at 447. That was true, the Court held, because the plaintiffs would not "be coerced by the Government's action into violating their religious beliefs," nor would that action "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449.

The Court held that the case was, in that respect, comparable to *Bowen v. Roy*, 476 U.S. 693 (1986), in which the Court rejected a Free Exercise challenge to a federal statute "that required the States to use Social Security numbers in administering certain welfare programs." *Lyng*, 485 U.S. at 448–49. The plaintiffs in *Roy* contended that the governmental assignment of a "numerical identifier" would seriously impede their ability to practice their religion by "rob[bing] the spirit of their daughter and prevent[ing] her from attaining greater spiritual power." *Id*. at 448 (simplified) (quoting *Roy*, 476 U.S. at 696). Although the result would be a significant interference with the *Roy* plaintiffs' religious beliefs, the *Roy* Court held that the challenged governmental action—the state and federal governments' "internal" use of a Social Security number— nonetheless did not implicate the Free Exercise Clause. *Id*. As the Court explained, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id*. (quoting *Roy*, 476 U.S. at 699). "The Free Exercise Clause affords an individual protection from certain forms of

governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* (quoting *Roy*, 476 U.S. at 700).

The *Lyng* Court acknowledged that "[i]t is true that this Court has repeatedly held that *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." 485 U.S. at 450 (emphasis added). Such indirect coercion or penalties would include a denial of program benefits "based solely" on the claimant's religious beliefs and practices, as well as any other denial of "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449–50. But the Court held that the Free Exercise Clause's protection against government conduct "prohibiting" the free exercise of religion, *see* U.S. CONST. amend. I, does not protect against the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450; *see also id.* at 451 (noting that the "crucial word in the constitutional text is 'prohibit'").

In light of these principles, the Court concluded, the claim in *Lyng* could not "meaningfully be distinguished" from that in *Roy*. *Lyng*, 485 U.S. at 449. Although the resulting effects on the religious practices of the Indian plaintiffs would "virtually destroy" their "ability to practice their religion," those religious impacts nonetheless did not implicate the Free Exercise Clause because the governmental actions that caused them had "no tendency to coerce individuals into acting contrary to their religious

beliefs." *Id*. at 450–51. Nor was this a situation in which the Government had "discriminate[d]" against the plaintiffs, as might be the case if Congress had passed "a law prohibiting the Indian [plaintiffs] from visiting the Chimney Rock area." *Id*. at 453. According to the Court, the Indian plaintiffs sought, not "an equal share of the rights, benefits, and privileges enjoyed by other citizens," but rather a "religious servitude" that would "divest the Government of its right to use what is, after all, *its* land." *Id*. at 449, 452– 53.

The project challenged here is indistinguishable from that in *Lyng*. Here, just as in *Lyng*, the Government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," but it would have "no tendency to coerce" them "into acting contrary to their religious beliefs." 485 U.S. at 449–50. And just as with the land use decisions at issue in *Lyng*, the challenged transfer of Oak Flat for mining operations does not "discriminate" against Apache Stronghold's members, "penalize" them, or deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449, 453. Under *Lyng*, Apache Stronghold seeks, not freedom from governmental action "prohibiting the free exercise" of religion, *see* U.S. CONST. amend. I, but rather a "religious servitude" that would uniquely confer on tribal members "*de facto* beneficial ownership of [a] rather spacious tract[ ] of public property." *Lyng*, 485 U.S. at 452– 53. Under *Lyng*, Apache Stronghold's Free Exercise Clause claim must be rejected.

B

Apache Stronghold's various arguments for distinguishing *Lyng* are all without merit.

First, Apache Stronghold argues that *Lyng* is distinguishable because, in that case, the virtual destruction of the "Indians' ability to practice their religion" was accomplished *without* actually destroying any "sites where specific rituals take place." 485 U.S. at 451, 454. According to Apache Stronghold, *Lyng*'s holding is limited to cases involving only interference with "subjective" spiritual experiences and therefore does not apply to a case, such as this one, involving "physical destruction of a sacred site." Although the dissent does not directly address the merits of Apache Stronghold's Free Exercise Clause claim, *see* Dissent at 192, the dissent's discussion of *Lyng* (undertaken in the context of analyzing RFRA) seeks to distinguish the case on the comparable ground that the project at issue there would not have precluded *physical access* to the relevant sacred sites, *see* Dissent at 215–21. These efforts to distinguish *Lyng* are refuted by *Lyng* itself.

In *Lyng*, the State of California argued that *Roy* was distinguishable on the ground that it involved only interference with the plaintiffs' "religious tenets from a *subjective* point of view," whereas *Lyng* involved a "proposed road [that] will '*physically destroy* the environmental conditions and the privacy without which the religious practices cannot be conducted.'" 485 U.S. at 449 (simplified) (emphasis added). The Court rejected this proffered subjective/physical distinction, expressly holding that there was no permissible basis to "say that the one form of incidental interference with an individual's spiritual

activities should be subjected to a different constitutional analysis than the other." *Id*. at 449–50. This holding requires rejection of Apache Stronghold's analogous proffered distinction between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises.

The dissent contends that "*Lyng* did not specifically address government action that *prevented* religious exercise," and that it therefore does not apply to a case, such as this one, in which the Government's actions will physically destroy the site and thereby literally prevent its future use for religious purposes. *See* Dissent at 223–24 (emphasis added). This effort to distinguish *Lyng* also fails, because, once again, it ultimately relies on too expansive a notion of what counts as "prohibiting" the free exercise of religion. We readily agree that "prevent" can often be synonymous with "prohibit," *see Prohibit*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1981 ed.) ("WEBSTER'S THIRD") ("to prevent from doing or accomplishing something"), and in that sense it is true that "prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief" qualifies as prohibiting free exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (citing, *inter alia*, *Lyng*, 485 U.S. at 450); *see also Graham v. Comm'r*, 822 F.2d 844, 850–51 (9th Cir. 1987). But "prevent" also can have the broader sense of "frustrate," "keep from happening," or "hinder," which is how the dissent uses the term here. *See Prevent*, WEBSTER'S THIRD, *supra*, at 1798. *Lyng* squarely rejected *that* broader notion of "prohibiting the free exercise" of religion:

> The dissent begins by asserting that the "constitutional guarantee we interpret today . . . is directed against any form of government action that *frustrates or inhibits* religious practice." The Constitution, however, says no such thing. Rather, it states: "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."

485 U.S. at 456 (emphasis altered) (citations omitted).

Thus, contrary to what the dissent posits, it is not enough under *Lyng* to show that the Government's management of its own land and internal affairs will have the practical consequence of "preventing" a religious exercise. Indeed, *Lyng* explicitly rejected that broader notion of "prohibiting" religious exercise, concluding that it was foreclosed by *Roy*:

> . . . *Bowen v. Roy* rejected a First Amendment challenge to Government activities that the religious objectors sincerely believed would "'rob the spirit' of [their] daughter and *prevent* her from attaining greater spiritual power." The dissent now offers to distinguish that case by saying that the Government was acting there "in a purely internal manner," whereas land-use decisions "are likely to have substantial external effects." Whatever the source or meaning of the dissent's distinction, it has no basis in *Roy*. Robbing the spirit of a child, and *preventing* her from attaining greater spiritual power, is both a "substantial external effect" and one that is remarkably similar to the injury

> claimed by [the plaintiffs] in the case before us today. The dissent's reading of *Roy* would effectively overrule that decision, without providing any compelling justification for doing so.

Lyng, 485 U.S. at 456 (emphasis added) (citations and further quotation marks omitted).

Second, Apache Stronghold argues that *Lyng* is distinguishable because it involved application of a neutral and generally applicable law, inasmuch as "the road in *Lyng* was carried out pursuant to the California Wilderness Act of 1984." By contrast, according to Apache Stronghold, this case involves legislative action directed at "one 'particular property,'" which is the antithesis of a "generally applicable" law. The dissent also endorses this ground for distinguishing *Lyng*, arguing that *Lyng* merely stands for the "proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws." *See* Dissent at 224 (citation omitted). Once again, *Lyng* itself refutes this ground for attempting to distinguish that decision.

As *Lyng* itself makes clear, the California Wilderness Act was *not* a neutral and generally appliable law in the sense that Apache Stronghold posits, because it contained an express exemption for the "narrow strip of land" that exactly "coincid[ed] with the Forest Service's proposed route for the remaining segment of the G-O road." 485 U.S. at 444. Thus, contrary to what Apache Stronghold claims, the relevant provisions of the statute at issue in *Lyng* likewise involved legislative action directed at "one 'particular property.'" Indeed, it was precisely this feature of the challenged actions in *Lyng* that the

plaintiffs there sought to invoke as a ground for distinguishing *Roy*: whereas *Roy* involved the "mechanical" application of a general program requirement for the welfare program at issue, *Lyng* involved "a case-by-case substantive determination as to how a particular unit of land will be managed." 485 U.S. at 449. In rejecting this effort to distinguish *Roy*, the *Lyng* Court did not dispute that such a distinction existed as a factual matter between the two cases. Instead, the Court held that the distinction simply provided no grounds for distinguishing *Roy*. *Id*. at 449–50. That was true, the Court explained, because the central ingredient of a Free Exercise Claim—some "tendency to coerce individuals into acting contrary to their religious beliefs"—was absent in both cases. *Id*. at 450.[4]

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[4] The dissent nonetheless insists that the Forest Service's plan and the special legislative carve-out in *Lyng*—both of which were tailored for the specific property at issue—were "generally applicable" because "there was no indication" that they were "made *because of*, rather than in disregard of," the religious interest in that particular property. *See* Dissent at 227–28 (emphasis added). This contention fails, because it mixes up the distinct issues of whether a particular law is "neutral" and whether it is "generally applicable." Even if the plan and legislation at issue in *Lyng* were "neutral" in the limited sense that it was not their "object . . . to infringe upon or restrict practices *because* of their religious motivation," *Church of the Lukumi*, 508 U.S. at 533 (emphasis added), they were plainly not "generally applicable" as that phrase is currently understood, given that they were directed at one particular property. *See, e.g.*, *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) ("In this case, while the zoning scheme itself may be facially neutral and generally applicable, the *individualized assessment* that the City made to determine that the Church's rezoning and CUP request should be denied is not." (emphasis added)).

The dissent claims that, even if the *Lyng* decision did not view itself as resting on a rule about neutral and generally applicable laws, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and other post-*Smith* decisions have read it that way. *See* Dissent at 224–26. That is not correct. All that the Court has stated is that *Smith* and its progeny "*drew support* for [*Smith*'s] neutral and generally applicable standard from cases involving internal government affairs," such as *Lyng*. *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021) (emphasis added). Thus, in *Smith*, the Court stated that its core holding—*i.e.*, that strict scrutiny does not apply to neutral laws of general applicability—was supported by *Lyng*'s broader observation that the boundaries of the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451).

But the Court has not said, and could not have said, that the *holding* of *Lyng* rested on the view that *Lyng* was itself a case involving a neutral and generally applicable law. As we have set forth, *Lyng* rested on a holding about the scope of the term "prohibiting" under the Free Exercise Clause and never mentioned or endorsed a *Smith*-style rule. At most, the Court has suggested in dicta that *Lyng* fits a pattern of cases in which the Court had upheld laws that were "neutral and generally applicable without regard to religion" in the sense that they did not "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017) (quoting *Lyng*, 485 U.S. at 449). But *Trinity Lutheran* did not have before it the

more focused question whether, in light of the parcel-specific rigging of the statutory framework in *Lyng*, the underlying statute at issue in *Lyng* could be properly deemed to qualify as "neutral and generally applicable" under the details of *Smith*'s framework. As we have explained, *Lyng* involved a situation in which, *after* religious objections had been raised to the G-O road and the road's construction had been enjoined, Congress proceeded to adopt an explicit statutory gerrymander for the precise parcel at issue. *See supra* at 27–28. That manifestly would *not* fit the Court's current understanding of a case involving a neutral and generally applicable law. *See*, *e.g.*, *Church of the Lukumi*, 508 U.S. at 542 (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). In all events, even if the law in *Lyng* were deemed, in hindsight, to be neutral and generally applicable within the meaning of *Smith*, the fact remains that the holding of *Lyng* did not rest on any such premise, but instead on the view that the challenged actions there lacked the sort of features that would qualify as "prohibiting" the free exercise of religion.

The dissent also points to *Lyng*'s observation that, because the "Constitution does not permit government to *discriminate* against religions that treat particular physical sites as sacred," a "law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added); *see also* Dissent at 220. According to the dissent, "the Land Transfer Act is *exactly* that kind of 'prohibitory' law." *See* Dissent at 220. That contention is refuted by the fact that, under the statute, any post-transfer prohibitions that

Resolution Copper may impose on public access to Oak Flat would be nondiscriminatory. *See* 16 U.S.C. § 539p(i)(3) (stating that, "[a]s a condition of conveyance," Resolution Copper must "provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable . . . until such time as the operation of the mine precludes continued public access for safety reasons"). To the extent that the dissent instead reads *Lyng* as endorsing the broader notion that the Free Exercise Clause would be violated by a *nondiscriminatory* law that will ultimately have the effect of precluding public access to a particular parcel of land, that view cannot be squared with *Lyng*'s explicit rejection of such a broad concept of "prohibiting." Indeed, under the dissent's expansive view, any transfer of Government land *without* a condition guaranteeing access to a sacred site on that parcel would amount to a prohibition on free exercise. *Lyng*, however, explicitly rejects the view that the Free Exercise Clause requires any such "religious servitude" on Government land, which would confer "*de facto* beneficial ownership of some rather spacious tracts of public property." 485 U.S. at 452–53.

In sum, *Lyng* stands for the proposition that a disposition of government real property is not subject to strict scrutiny when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. In such circumstances, the essential ingredient of "prohibiting" the free exercise of religion is absent, and the Free Exercise Clause is not violated.

And because *Lyng*'s application of that rule in the context of that case cannot meaningfully be distinguished in this case, Apache Stronghold has no likelihood of success on its Free Exercise claim.

IV

Apache Stronghold also contends that the sale of Oak Flat to Resolution Copper would violate its members' rights under RFRA. Congress enacted RFRA in 1993 "in direct response" to *Smith*'s narrow construction of the Free Exercise Clause, *see City of Boerne v. Flores*, 521 U.S. 507, 512 (1997), and Congress did so precisely "in order to provide greater protection for religious exercise than is available" under the Free Exercise Clause as construed in *Smith*, *see Holt v. Hobbs*, 574 U.S. 352, 357 (2015). The question here is whether the broader protection afforded by RFRA has the practical effect of displacing, by statute, the pre-*Smith* decision in *Lyng*. The answer to that question is no.

A

In order to understand what RFRA enacts, it is important to begin with the decision that RFRA sought to supersede, namely, *Employment Division v. Smith*.

Smith involved a denial of unemployment benefits to two Oregon workers who "were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both [were] members." 494 U.S. at 874. The claimants appealed that denial of benefits to the Oregon Court of Appeals, which held that the denial violated the Free Exercise Clause. *Id*. On the State's

further appeal, the Oregon Supreme Court agreed. *Id.* at 875. The U.S. Supreme Court granted certiorari, but it initially held only that, "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 485 U.S. 660, 670 (1988). The Court therefore remanded the case to the Oregon Supreme Court to address "whether [the plaintiffs'] sacramental use of peyote was in fact proscribed by Oregon's controlled substance law." *Smith*, 494 U.S. at 875. On remand, the Oregon Supreme Court answered that question in the affirmative and otherwise "reaffirmed its previous ruling" in the plaintiffs' favor. *Id.* at 876. The U.S. Supreme Court again granted review. *Id.* Thus, although *Smith* had started out as an unemployment compensation case, it returned to the Supreme Court as squarely presenting the question of whether Oregon's *criminal prohibition* on all use of peyote violated the Free Exercise Clause. *Id.* Accordingly, unlike *Lyng*, *Smith* presented no threshold question as to whether the challenged Oregon law actually "prohibit[ed]" the claimants' religious exercise. *See* U.S. CONST. amend I.

A sharply divided Court held that there was no violation of the Free Exercise Clause. Justice Scalia's majority opinion for five Justices acknowledged what it described as "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. The

Court noted that it had applied the *Sherbert* test in three cases to "invalidate[] state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Id.* The Court also observed that, in several other decisions, the Court "purported to apply the *Sherbert* test in contexts other than that," but that it had "always found the test satisfied." *Id.* Citing specifically to (among other decisions) *Roy* and *Lyng*, the Court further noted that, "[i]n recent years [the Court] ha[s] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id.* The Court then held that, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a *generally applicable* criminal law." *Id.* at 884 (emphasis added). Reviewing its caselaw more broadly, the Court held that its decisions had "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citation omitted). Citing *Lyng*, the Court held that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* at 885 (quoting *Lyng*, 485 U.S. at 451).

The Court's holding that the *Sherbert* test does not apply to neutral and generally applicable prohibitions drew the sharp disagreement of four Justices, in a

separate opinion written by Justice O'Connor.[5] According to Justice O'Connor, the Court's caselaw has "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). Citing the unemployment compensation case of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), Justice O'Connor elaborated on her understanding of what it meant for government to impose a substantial burden on religious exercise:

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[5] The dissent nonetheless insists that the Forest Service's plan and the special legislative carve-out in *Lyng*—both of which were tailored for the specific property at issue—were "generally applicable" because "there was no indication" that they were "made *because of*, rather than in disregard of," the religious interest in that particular property. *See* Dissent at 227–28 (emphasis added). This contention fails, because it mixes up the distinct issues of whether a particular law is "neutral" and whether it is "generally applicable." Even if the plan and legislation at issue in *Lyng* were "neutral" in the limited sense that it was not their "object . . . to infringe upon or restrict practices *because* of their religious motivation," *Church of the Lukumi*, 508 U.S. at 533 (emphasis added), they were plainly not "generally applicable" as that phrase is currently understood, given that they were directed at one particular property. *See*, *e.g.*, *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) ("In this case, while the zoning scheme itself may be facially neutral and generally applicable, the *individualized assessment* that the City made to determine that the Church's rezoning and CUP request should be denied is not." (emphasis added)).

> [T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As [the Court] explained in *Thomas*:
>
> > "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U.S., at 717–718.

Smith, 494 U.S. at 897 (O'Connor, J., concurring in the judgment). Thus, Justice O'Connor concluded, "[t]he *Sherbert* compelling interest test applies" to both "cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct." *Id*. at 898. In either type of case, Justice O'Connor concluded, it did not matter whether the law was a "neutral" or "generally applicable" one. *Id*. at 898–900. The Court's precedents, she explained, reflected a "consistent application of free exercise doctrine to

cases involving generally applicable regulations that burden religious conduct." *Id.* at 892.

B

Congress promptly sought to supersede, by statute, *Smith*'s holding that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause." *Holt*, 574 U.S. at 356–57. As stated expressly in § 2 of RFRA, Congress's primary purpose in enacting the Act was to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). That stated purpose was based on RFRA's express finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(1).

Section 3(a) of RFRA establishes the general rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). In its current form, that prohibition extends to any "branch, department, agency, instrumentality, [or] official (or other person acting under color of law) of the United States" or of the District of Columbia, the Commonwealth of Puerto Rico, or the United States' territories and possessions. *Id.* § 2000bb-2(1), (2). The sole exception to this general rule is contained in § 3(b), which states:

> Government may substantially burden a person's exercise of religion only if it

> 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.

Id. § 2000bb-1(b). The net effect is that the government may substantially burden a person's exercise of religion if and only if the government's action can survive "strict scrutiny." *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430 (2006).

Congress also made clear its intent that RFRA operate as a framework statute, "displacing the normal operation of other federal laws." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020). Specifically, § 6 of RFRA provides that the Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" the date of RFRA's enactment. 42 U.S.C. § 2000bb-3(a). Congress further provided that "[f]ederal statutory law adopted after [RFRA's enactment] is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." *Id.* § 2000bb-3(b).

RFRA does not define what it means to "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb1(a), (b). But "Congress legislates against the backdrop of existing law," *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013), and the meaning of that phrase is clearly elucidated by considering the body of law discussed in the "separate opinions" in

Smith, which "concerned the very issue addressed" by Congress in § 3 of RFRA. *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 411 (2000).[6]

As *Terry Williams* explained, in the unusual situation in which the "broader debate and the specific statements" of the Justices in a particular decision "concern[] precisely the issue" that Congress later addresses in a statute that borrows the Justices' terminology, Congress should be understood to have "adopt[ed]" the relevant "meaning given a certain term in that decision." 529 U.S. at 411–12. Thus, in construing the standards of review applicable in deciding habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *Terry Williams* turned to "[t]he separate opinions" in *Wright v. West*, 505 U.S. 277 (1992), which concerned that "very issue." 529 U.S. at 411. As *Terry Williams* recounted, the respective opinions of Justice Thomas and Justice O'Connor in *Wright* vigorously debated whether habeas review should be deferential, with Justice O'Connor concluding that a federal court should review de novo whether the state court's resolution of the federal issue was "correct," and Justice Thomas concluding that a federal court should "simply" inquire as to whether the state decision was "reasonable." *Id.* at 410–11. In addressing the issue of the appropriate standards of review in AEDPA's amendments to the habeas statute, *see* 28 U.S.C.

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[6] We refer to this case as "*Terry Williams*" because, in an extraordinary coincidence, the Supreme Court on the very same day decided another case named "*Williams v. Taylor*" (in which the petitioner was Michael Williams). *See* 529 U.S. 420 (2000); *see also Shinn v. Martinez Ramirez*, 596 U.S. 366, 381 (2022) (similarly referring to the other case as "*Michael Williams*").

§ 2254, "Congress specifically used the word 'unreasonable,'" thereby confirming that it had effectively adopted Justice Thomas's position and rejected Justice O'Connor's. *See Terry Williams*, 529 U.S. at 411.

RFRA presents exactly the sort of distinctive situation in which the principles discussed in *Terry Williams* are applicable. *Terry Williams* invoked those principles with respect to AEDPA even though the Court conceded that there was "no indication in § 2254(d)(1) itself that Congress was '*directly* influenced' by Justice Thomas' opinion in *Wright*." 529 U.S. at 411 (emphasis added). As the Court explained, "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision." *Id*. But where, as with RFRA, Congress *does* specifically "mention a prior decision of this Court by name in a statute's text," *id*., the inference is all the more inescapable that, when Congress borrows the Justices' same phrasing, it does so against the backdrop of how those terms were understood in the relevant opinions accompanying that decision. Here, RFRA was enacted against the backdrop of the vigorous debate between Justice Scalia and Justice O'Connor in *Smith*; both of their opinions used variations of the phrase "substantially burden" in describing the pre-*Smith* framework for evaluating Free Exercise Clause claims[7]; RFRA's text states that

[7] *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that *substantially burden* a religious practice must be justified by a compelling governmental interest." (emphasis added)); *id*. at 894 (O'Connor, J., concurring

its purpose is to supersede, by statute, the decision in "Employment Division v. Smith, 494 U.S. 872 (1990)," *see* 42 U.S.C. § 2000bb(a)(4); and, in superseding *Smith*, RFRA uses the phrase "substantially burden," *id.* § 2000b-1(a), (b). The inference is overwhelming that Congress thereby "adopt[ed]" the "meaning given [that] certain term in that decision." *Terry Williams*, 529 U.S. at 411. Consequently, RFRA unmistakably sought to enshrine, by statute, the basic principles reflected in the pre-*Smith* framework for applying the Free Exercise Clause that is described in those opinions, and that framework clearly includes *Lyng*.

Thus, for example, Justice O'Connor's separate opinion in *Smith* confirms that the "substantial burden" rule established in the Court's caselaw is consistent with, and does not abrogate, the Court's decision in *Lyng* (which she wrote). As Justice O'Connor explained in her separate opinion in *Smith*, *Lyng* did *not* "signal" a "retreat from [the Court's] consistent adherence to the compelling interest test" in evaluating governmental action prohibiting the free exercise of religion; instead, it reflected the underlying limits in the governmental conduct *reached* by the Free Exercise Clause. *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment). She argued that, like *Roy*, *Lyng* involved the Government's "conduct [of] its own internal affairs" in a way that did not implicate the Free Exercise Clause's rule about "what the government cannot *do* to the individual." *Id.*

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in the judgment) (stating that, under the Court's existing caselaw, the government is required "to justify any *substantial burden* on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest" (emphasis added)).

(emphasis added) (citation omitted). That view is consistent with *Lyng*, which—as we have exhaustively explained earlier—rests on the premise that the Government's actions there, although substantially destructive of the Indians' religious interests, did not involve "*prohibiting* the free exercise" of religion within the meaning of the Free Exercise Clause. *See supra* at 24–27.

Moreover, Justice O'Connor's *Smith* concurrence contained a detailed explication of what counts as a cognizable burden under the Court's then-existing caselaw, and it closely dovetails with *Lyng*. As she explained, such burdens may be "imposed directly through laws that *prohibit or compel* specific practices"; they may be imposed "indirectly through laws that, in effect, make *abandonment* of one's own religion or conformity to the religious beliefs of others the *price* of an equal place in the civil community"; or they may involve benefit conditions that "put[] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs." *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) (emphasis added) (citation omitted).

Likewise, nothing in Justice Scalia's majority opinion in *Smith* suggested that the Court thought that *Lyng* was inconsistent with the substantial burden test. Instead, in the course of arguing for a broader jettisoning of *Sherbert*'s compelling interest test, the *Smith* majority simply cited *Lyng* as an instance in which that strict scrutiny test had not been applied. *See Smith*, 494 U.S. at 883. As noted earlier, the *Smith* majority also argued that its broader position drew support from *Lyng*'s general observation that the limitations imposed by the Free Exercise

Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," *id.* at 885 (quoting *Lyng*, 485 U.S. at 451), but that likewise reflects no criticism of *Lyng*'s holding about the scope of "prohibiting" under the Free Exercise Clause.

Indeed, the only debate that Justice Scalia and Justice O'Connor had concerning *Lyng* related to the majority's use of this latter comment to bolster its broader rule about neutral laws of general applicability. Justice O'Connor objected that the majority took that comment out of *Lyng*'s specific context, which involved only the Government's conduct of its "internal affairs" and therefore did not implicate the Free Exercise Clause's rule about "what the government cannot do to the individual." *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (citation omitted). The Court responded that there was no basis for limiting the cited principle in the way that Justice O'Connor posited. *Lyng*'s observation should apply more broadly, the Court explained, because "it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, *supra*, or its administration of welfare programs, *Roy*, *supra*." *Id*. at 885 n.2. This debate about whether and how to *extend* an observation made in *Lyng* reflects no criticism of *Lyng*'s ultimate holding.

Accordingly, both Justice O'Connor's concurrence and the majority opinion in *Smith* strongly confirm that, under the then-existing framework of Free Exercise Clause jurisprudence, the proposition that

the government must justify, by strict scrutiny, any "substantial burden" on religious exercise is one that subsumes, rather than overrides, *Lyng*'s holding about the scope of government action that is reached by the constitutional phrase "prohibiting the free exercise thereof." U.S. CONST. amend. I. As a decision about the scope of the term "prohibiting," *Lyng* defines the outer bounds of what counts as a *cognizable* substantial burden imposed by the government. That is plainly how Justice O'Connor viewed *Lyng* in *Smith*, and the *Smith* majority did not disagree. When Congress copied the "substantial burden" phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise. *See Terry Williams*, 529 U.S. at 411–12; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction.").

C

The dissent's exclusive reliance on its composite understanding of the dictionary definitions of "substantial" and "burden," *see* Dissent at 196, contravenes the interpretive principles discussed in *Terry Williams*, as well as the crucial context supplied by *Smith* and *Lyng*. As a result, the dissent's construction of the phrase elides the crucial ingredient that *Lyng* reflects, which is that the phrase "substantial burden" must ultimately be bounded by what counts as within the domain of the phrase

"*prohibiting* the free exercise thereof." U.S. CONST. amend. I (emphasis added).

It is no answer to say, as the dissent does, that we have applied that dictionary definition in construing the meaning of the identical term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* Dissent at 203–05. The dissent overlooks the fact that RLUIPA expressly applies only to "substantial burdens" in two specific contexts—namely, "impos[ing] or implement[ing] a land use regulation," 42 U.S.C. § 2000cc(a)(1), and restrictions on "a person residing in or confined to an institution" affiliated with a government, *id*. § 2000cc-1(a). *See id*. § 1997; *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). Because both of these specific contexts inherently involve coercive restrictions, they do *not* raise a similar *Lyng*-type issue about the bounds of what counts as "prohibiting" religious exercise. In RLUIPA's two specific contexts, where that crucial element is already baked in, the dictionary definitions of "substantial" and "burden" will adequately flesh out the concept of "substantial burden" *against* that backdrop. The same is true under RFRA, once it is recognized that RFRA preserves *Lyng*'s understanding of what counts as "prohibiting" the free exercise of religion. But the same is *not* true if, with respect to RFRA, the critical context supplied by *Smith* and *Lyng* is overlooked. That would yield a very *different* concept of "substantial burden" under RFRA, one that (unlike RLUIPA) is shorn of any requirement to show that the governmental action has a "tendency to coerce individuals into acting contrary to their religious beliefs," "discriminate[s]" against religious adherents, "penalize[s]" them, or denies them "an equal share of

the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. Nothing in RFRA indicates that Congress intended to eliminate this crucial element or to abrogate *Lyng*.

The dissent's contrary conclusion that RFRA *does* supersede *Lyng* rests on the premise that *Lyng* was based on a *Smith*-style holding about neutral and generally applicable rules. *See* Dissent at 224–28. For the reasons that we have already explained, that premise is patently incorrect. The law at issue in *Lyng* was manifestly *not* generally applicable, and nothing in *Lyng* rests upon, or endorses, the broad rule later adopted in *Smith*. *See supra* at 24–25, 31–33. Indeed, the most that the *Smith* majority claimed was that one particular statement in *Lyng* should be *extended* in a way that would support differential treatment of neutral laws of general applicability. *See Smith*, 494 U.S. at 885.

The dissent is also wrong in asserting that a 2000 amendment to RFRA—enacted as part of RLUIPA—demonstrates Congress's intent that RFRA *not* be tied to the constitutional understanding of what counts as "prohibiting" the free exercise of religion. *See* Dissent at 200–01. Prior to RLUIPA, RFRA defined the specific term "exercise of religion" to "mean[] the exercise of religion under the First Amendment to the Constitution." *See* Pub. L. No. 103-141 § 5(4), 107 Stat. 1488, 1489 (1993). However, a circuit split developed as to whether, as a result, RFRA's protections were limited to only those practices that are "central" to, or "mandated" by, a person's faith. *Compare Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (adopting those limitations) *with Mack v. O'Leary*, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (noting the circuit split and

rejecting *Bryant*), *vacated on other grounds*, 522 U.S. 801 (1997). Congress, of course, cannot statutorily change the scope of the Free Exercise Clause as construed by the courts, but it could effectively abrogate decisions such as *Bryant* by decoupling RFRA's definition of "exercise of religion" from the Free Exercise Clause and then giving it a broader meaning for purposes of RFRA. That is exactly what Congress did in RLUIPA. In § 7(a)(3) of RLUIPA, Congress rewrote the definition of "exercise of religion" in RFRA to mean "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc5]." *See* Pub. L. No. 106-274, § 7(a)(3), 114 Stat. 803, 806 (2000). Section 8 of RLUIPA, in turn, defines "religious exercise" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and further provides that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." *See* 42 U.S.C. § 2000cc-5(7)(A)–(B). But in thus decoupling the definition of what *activities* count as the "exercise of religion" from the Free Exercise Clause," Congress did not alter the phrase "substantial burden," nor did it suggest that *that* phrase should be understood as somehow being decoupled from any notion of what counts as "prohibiting" the free exercise of religion under pre-*Smith* caselaw.[8]

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[8] To the extent that the dissent insinuates that the amended RFRA's borrowing of RLUIPA's definition of religious exercise has the effect of abrogating *Lyng*, *see* Dissent at 200–01, that is quite wrong. The dissent has not cited any authority—and we are

The dissent further errs in contending that our construction of "substantial burden" here disregards the Supreme Court's rejection of the view that "RFRA merely restored th[e] Court's pre-*Smith* decisions in ossified form." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 715–16 (2014); *see also* Dissent at 201. The proposition the Court rejected in *Hobby Lobby* was that RFRA protected only the particular collection of practices that happened to have been "specifically addressed in [the Court's] pre-*Smith* decisions," much like AEDPA requires a showing of "'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 714 (quoting 28 U.S.C. § 2254(d)(1)). That "absurd" view, the Court explained, would mean that "resident noncitizen[s]" would not be protected by RFRA, given that there was no "pre-*Smith* case in which th[e] Court entertained a free-exercise claim brought by a resident noncitizen." *Id.* at 715–16. *Hobby Lobby* thus does not stand for the quite different— and erroneous—proposition that RFRA is somehow exempt from the settled rule that "Congress legislates against the backdrop of existing law." *McQuiggin*, 569 U.S. at 398 n.3. Indeed, even the dissent concedes that RFRA must be construed in light of "the Supreme Court's pre-*Smith* Free Exercise jurisprudence." *See* Dissent at 205–06; *see also id.* at 210 (noting that we have previously "relied on pre-

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aware of none—that would support the extraordinary proposition that RFRA and RLUIPA purport to grant freestanding rights to obtain otherwise unavailable access to the real property of *others* for religious use. Put simply, neither statute purports to grant persons a "religious servitude" over the property of others. *Lyng*, 485 U.S. at 452.

Smith Free Exercise Clause cases to define substantial burden").

* * *

Accordingly, RFRA's understanding of what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*. That holding therefore governs Apache Stronghold's RFRA claim as well, and that claim therefore fails for the same reasons discussed earlier. *See supra* at 27.

V

Finally, Apache Stronghold also argues that an 1852 treaty of "perpetual peace and amity" between the "Apache Nation of Indians" and the United States, *see* TREATY WITH THE APACHES, July 1, 1852, art. 2, 10 Stat. 979 (1853), created an enforceable trust obligation that would be violated by the transfer of Oak Flat. That trust obligation, Apache Stronghold argues, stems from Article 9 of the treaty, which provides, in relevant part, that

> Relying confidently upon the justice and the liberality of the [federal] government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's [*sic*] that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Id., art. 9; *see also id.*, art. 11 (stating that "the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians"). Specifically, Apache Stronghold argues that the Government's treaty obligation to "pass and execute . . . such laws as may be deemed conducive to the prosperity and happiness'" of the Apaches should be "construed to obligate the United States to preserve traditional Apache religious practices on their historic homeland." Thus construed, Apache Stronghold contends, the Government's obligations under the treaty override any power or obligation to transfer Oak Flat under § 3003. This contention fails. Even assuming *arguendo* that Apache Stronghold's interpretation of the Government's treaty obligations is correct, the Government's statutory obligation to transfer Oak Flat under § 3003 clearly abrogates any contrary treaty obligation, not the other way around.[9]

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[9] Although Apache Stronghold has adequately shown that its members face an imminent threatened injury in fact that is fairly traceable to the alleged treaty violation, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014), the district court concluded that allowing its members to assert what it deemed to be the *tribe's* treaty rights violated the "prudential requirement that a plaintiff 'cannot rest his claim to relief on the legal rights or interests of third parties.'" *Apache Stronghold*, 519 F. Supp. 3d at 598 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Because the parties' dispute over this "prudential" requirement does not involve our subject matter jurisdiction, we are not required to resolve it before addressing the merits of the treaty issue. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (finding that the relevant plaintiffs had Article III standing and then rejecting a claim on the merits after assuming *arguendo* that "prudential, *jus tertii* standing" was met); *cf.*

"Congress has the power to abrogate Indians' treaty rights," but Congress generally must "clearly express its intent to do so." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). To the extent that Apache Stronghold is correct in contending that the Government has a treaty-based trust obligation to *retain* Oak Flat for the benefit of the tribe and its members, § 3003 clearly and manifestly abrogates any such obligation. Section 3003 was passed to accomplish a single goal: to "authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). The entirety of the statute is built around that ultimate objective. There are various preparatory requirements, like consultations and report generation, *e.g.*, *id.* § 539p(c)(3), (c)(4), (c)(6)(A), (c)(9), and post-transfer rules about land disposition and management, *id.* § 539p(d)(2), (e), (g), (h), but they all lead up to the transfer of Oak Flat. Indeed, § 3003 unambiguously states that, upon completion of the preparatory steps, "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, *the Secretary is* authorized and *directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land*." *Id.* § 539p(c)(1) (emphasis added). Section 3003's clear direction that, after consultation with the tribe, the transfer *shall* occur simply cannot co-exist with Apache Stronghold's claim that the treaty requires

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Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–28 (2014) (clarifying that "'prudential standing' is a misnomer" and must be distinguished from the jurisdictional requirements of Article III (citation omitted)).

that it shall *not* occur. Section 3003 plainly abrogates any tribal treaty rights that would otherwise preclude the transfer. *See Bourland*, 508 U.S. at 687.

VI

For the foregoing reasons, Apache Stronghold is unlikely to succeed on the merits of any of the three claims before this court. It consequently cannot show that it is entitled to preliminary injunctive relief, and we need not consider the remaining *Winter* factors. *See Garcia*, 786 F.3d at 740. The district court's order denying Apache Stronghold's motion for a preliminary injunction is therefore affirmed.

AFFIRMED.

BEA, Circuit Judge, dissenting in part and concurring in part, with whom Circuit Judge FORREST joins except for footnote one; Circuit Judge BENNETT joins with respect to Part II:

I.

I dissent from paragraph one of the per curiam opinion, which announces that the term "substantial burden" as used in RFRA and RLUIPA "are interpreted uniformly," declares that *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), is overruled as a result of this interpretation of uniformity between RFRA and RLUIPA, and volunteers, in place of that 15-year precedent, a new test for when a government action imposes a "substantial burden" under RFRA that broadly asks whether the government conduct "prevent[s] access to religious exercise." We also did not apply this test to arrive at the ultimate decision of this Court, and this test does not address any "issue [that is] germane to the *eventual resolution* of th[is] case." *United States v. Johnson*, 256 F.3d 895, 914–16 (9th Cir. 2001) (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.) (emphasis added). That is because a majority of this panel has already *affirmed*, under the *completely different* rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA.[1]

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[1] The statements in paragraph one of the per curiam can be characterized only as dicta that address "question[s] . . . not essential to the decision" reached in this case. *Judicial Dictum*, Black's Law Dictionary (11th ed. 2019); *see* Bryan A. Garner et

II.

I concur in full with Judge Collins's majority opinion. I agree that RFRA's term "substantial burden" does not include the governmental action at issue here "because the plaintiffs would not 'be coerced by the Government's action into violating their religious beliefs,' nor would that action 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by

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al., *The Law of Judicial Precedent* 46–47 (1st ed. 2016). Our decision today—the *only* decision that resolves this controversy—is that the transfer of Oak Flat will impose no "substantial burden" on Apache Stronghold's religious exercise under RFRA. To state the obvious, it is unnecessary to overrule *Navajo Nation* to reach that outcome because *Navajo Nation* directly supports our holding. *See, e.g.*, *infra* Part II.C.

Nor do I think the separate majority's pronouncements in paragraph one of the per curiam opinion deserve binding weight in future cases even under our "well-reasoned" dicta rule. *See Johnson*, 256 F.3d at 914–16 (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.), *adopted as the law of the circuit in Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003). No majority of this panel has filed a separate opinion setting forth the rationale behind paragraph one of the per curiam opinion. Neither Chief Judge Murguia's dissent nor Judge R. Nelson's concurrence reflect the rationale *of this Court* that would support overruling *Navajo Nation*. We have, in other words, two sentences of dicta in the opening of a majority per curiam opinion—which purport to effect a seismic shift in our RFRA jurisprudence—but no guiding rationale that explains this sea change in our law. This cannot be the scenario that *Johnson*'s "well-reasoned" dicta rule was meant for. When we held in *Johnson* that a panel's ruling on an issue, though "[un]necessary in . . . a strict logical sense," can become the law of this circuit so long as the panel "decide[s] [it] after careful analysis," the "analysis" we had in mind was the analysis "in a published opinion" *of the court*, *id.* at 914; *see id.* at 909 n.1, not the separate rationales of a fractured majority expressed in different writings.

other citizens.'" And I agree that Congress "adopted the limits that *Lyng* places on what counts as a governmental imposition of a substantial burden on religious exercise" when Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. ("RFRA"). Further, I agree that RFRA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"), are applied in contexts so distinguishable from one another as to make RLUIPA cases entirely unhelpful when interpreting RFRA.

I write separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA. First, I will discuss the further textual and contextual evidence that the term "substantial burden," as used in RFRA, has the same limited meaning it had in federal court cases decided prior to RFRA's enactment. Second, I will discuss how RFRA and RLUIPA, in addition to having distinguishable applications, also have distinguishable texts, such that RLUIPA cases ought not to be used to interpret RFRA for this additional reason. Third, I will discuss the serious practical problems that would arise with the test proposed by Chief Judge Murguia in her lead dissent. Last, I will discuss how, even were RFRA to provide the Apache a viable claim for relief, RFRA's application in this case would nonetheless be abrogated by Congress's express direction in the Land Exchange Act that the land exchange be consummated.

FACTUAL BACKGROUND

Congress passed the Land Exchange Act in 2015. The Land Exchange Act authorizes and directs the exchange of land between the United States

Government and two foreign mining companies (known collectively as "Resolution Copper"). 16 U.S.C. § 539p. The 2,422-acre parcel of Arizona land that Congress has expressly authorized and directed the Secretary of the Interior to convey to Resolution Copper is located within the Tonto National Forest and includes a sacred Apache ceremonial ground called Chí'chil Biłdagoteel—known in English as "Oak Flat."

On January 12, 2021, Apache Stronghold, a nonprofit organization with members who belong to Western Apache tribes, filed suit seeking to prevent the land exchange and ensure that its members would forever have a right to access Oak Flat. Two days later, Apache Stronghold filed a Motion for Temporary Restraining Order and Preliminary Injunction. The district court held a hearing on the motion on February 3, 2021, and denied it nine days later. The district court found "that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021). The district court also found that the Apache believed that "Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood." *Id.* at 604. This finding is undisputed.

Apache Stronghold appealed, and on June 24, 2022, a three-judge panel of this court affirmed the denial of the preliminary injunction. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). The panel opinion relied on our en banc decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069–70

(9th Cir. 2008) (en banc), to decide the RFRA claim. 38 F.4th at 753.

On November 17, 2022, upon a vote of a majority of the non-recused active judges, the court sua sponte ordered that this case be reheard en banc.

LEGAL BACKGROUND

A. Pre-RFRA Jurisprudence

Before the 1993 enactment of RFRA, in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court had laid out a strict scrutiny test for certain governmental actions that interfered with the constitutional right of free exercise of religion as set forth in the First Amendment. Under that strict scrutiny test, the government cannot impose a substantial burden on the exercise of a religious adherent's sincerely held religious beliefs unless that burden is outweighed by a compelling governmental interest. *Sherbert*, 374 U.S. at 403–06.[2]

In *Sherbert*, the plaintiff was fired from her job for refusing to work on Saturday, the Sabbath day of her faith. The Court held that the state's denial of unemployment benefits to the plaintiff substantially burdened her religious exercise by forcing her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

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[2] When we assess claims that the government has infringed on the free exercise of religion, we use the terms "strict scrutiny" and "the compelling interest test" to refer to the same test. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77, 1881 (2021).

In *Yoder*, members of the Old Order Amish religion appealed their convictions under a law that required them to send their children to school until the age of sixteen—a violation of the tenets of the Amish religion, which prohibit the schooling of children beyond the eighth grade. The Court held that the state's schooling mandate, as applied to three Amish children who had completed the eighth grade but who had not yet reached the age of sixteen, caused a substantial burden because it "affirmatively compel[led] [the Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

The Supreme Court's analysis of burdens in *Sherbert* and *Yoder* represented a fundamental inquiry: whether the governmental action *coerces* the individual religious adherent to violate or abandon his sincere religious beliefs. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) ("[T]he forfeiture of unemployment benefits for choosing [to engage in religious conduct] brings unlawful coercion to bear on the employee's choice." (citing *Sherbert*, 374 U.S. at 404)); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality) ("Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs."); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion."); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

The Supreme Court specifically addressed the application of *Sherbert*'s and *Yoder*'s tests to the Government's excavation and reconfiguration of the government's own land in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the United States Forest Service wanted to build a road through an area "significant as an integral and indispens[a]ble part of Indian religious conceptualization and practice." *Id.* at 442. The road was to be built on Forest Service land, generally available to the public—Indians included. A study by the Forest Service found that the construction of the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* The Indians filed suit, seeking to enjoin the construction of the road.

The Supreme Court held that the construction of the road did not burden the Indians' religious practices in a way that would require the government to meet the compelling interest test—not because the religious practices were unaffected, but because the construction of the road did not "coerce[ ]" the Indians "into violating their religious beliefs," as in *Yoder*, nor "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," as in *Sherbert*. *Id.* at 449. In other words, it was irrelevant that "the Indians' spiritual practices would become ineffectual" or made "more difficult" because there was "no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450. Thus, the burden suffered by the Indians was qualitatively different than the burden required to be proven to obtain relief under *Sherbert* and *Yoder*. Even accepting that the

road-building project "could have devastating effects on traditional Indian religious practices" or even "virtually destroy the Indians' ability to practice their religion," *id.* at 451, the project did not put the Indians to the choice between violating or abandoning their religious tenets and losing vested benefits or incurring a governmental penalty. Because there was no personal coercion, the new road did not substantially burden the Indians' constitutional right to the free exercise of their religion. *Id.* at 447.[3]

The lead dissent argues, however, that *Smith* interpreted "*Lyng* [as] stand[ing] for the proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws" because *Smith* quoted from *Lyng* when it established that rule. We addressed and rejected this same argument fifteen years ago. *See Navajo Nation*, 535 F.3d at 1072–73. The fact that *Smith* divined some support for its rule from the *Lyng*'s language does not mean that *Lyng* was the case that established the rule that "neutral, generally applicable laws" are exempt from the

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[3] In dicta, the Supreme Court in *Lyng* mentioned that "a law prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions." *Id.* at 453. The Supreme Court gave no indication as to what "different . . . constitutional questions" would be raised under such circumstances, what analysis the Court would use to answer those questions, or what answers the Court would reach. We do not give any weight to "an unconsidered statement" found in Supreme Court dicta, *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1131–32 (9th Cir. 2010), *aff'd*, 565 U.S. 207 (2012), and this language in *Lyng* does not establish that the term "substantial burden" has any greater or different meaning than used in the remainder of the opinion in *Lyng* and in other pre-RFRA cases.

Sherbert and *Yoder* test.[4] That case was *Smith*. And Congress cited *Smith*, not *Lyng*, as the case that "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *See* 42 U.S.C. § 2000bb(a)(4).[5]

Smith, if anything, construed *Lyng* as one of several examples where the Court declined to apply the compelling interest test because the government action in that case was not coercive, making the burden it imposed on religious practice not "substantial[ ]" within the meaning of *Sherbert*. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402–03). *Smith* explained that the government action in *Sherbert* "substantially burden[ed] . . . religious practice" because it coerced a religious adherent into violating her beliefs by "condition[ing] the availability of [unemployment] benefits upon [her] willingness to work under conditions forbidden by h[er] religion." *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03). But the Court had "never invalidated any governmental action on the basis of the *Sherbert* test" outside the unemployment benefit context because

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[4] I agree in full with Judge Collins's explanation as to *why* the law at issue in *Lyng* was not neutral or generally applicable. Simply put, an Act of Congress that deals with a specific stretch of road in Northern California is not, by definition, a "neutral law of general application."

[5] RFRA also explicitly endorsed "the compelling interest test as set forth *in prior Federal court rulings*"—that is, the test used in federal court rulings prior to *Smith*. 42 U.S.C. § 2000bb(a)(5) (emphasis added). *Lyng* was handed down two years prior to *Smith*. Thus, *Lyng* was one of the "prior Federal court rulings" which Congress explicitly wanted to restore.

none of the challenged state actions in those cases were coercive. *Smith*, 494 U.S. at 883. Whether it was the "military dress regulations [in *Goldman v. Weinberger*] that forbade the wearing of yarmulkes," the state "prison's refusal [in *O'Lone v. Estate of Shabazz*] to excuse inmates from work requirements to attend worship services," the federal statute in *Bown v. Roy* "that required [Social Security] benefit applicants . . . to [obtain and] provide their Social Security numbers," or the "devastating effects on . . . religious practices" caused by the "Government's logging and road construction activities on [sacred] lands" in *Lyng*—these activities, at most, interfered with religious exercise *as an incident* to the operation of governmental affairs. *Smith*, 494 U.S. at 883–84 (internal citations and quotations omitted). They did not entice religious adherents into violating the tenets of their faith in exchange for government benefits, as the government had done in *Sherbert*. *See id.*

Pre-RFRA cases applying (or refusing to apply) *Sherbert*'s compelling interest test only confirm what *Smith* later observed: that coercion is the *sine qua non* for what constitutes a "substantial[] burden" under *Sherbert*. *Id.* at 883. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a religious adherent was fired for refusing to participate in the production of armaments, and the state denied him unemployment benefits. Although *Thomas* was a relatively easy application of *Sherbert*, the Supreme Court took the occasion to reiterate that only personal coercion qualifies as a substantial burden under the Free Exercise Clause: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by

religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717–18. The Supreme Court held that a substantial burden was placed on the religious adherent and granted relief under the Free Exercise Clause. *Id.* at 720.

In *Bowen v. Roy*, 476 U.S. 693 (1986)—one of the examples that *Smith* identified as not involving a substantial burden, *see Smith*, 494 U.S. at 883—an Indian religious adherent challenged the Government's internal use of a Social Security number to identify the religious adherent's daughter, *Bowen*, 476 U.S. at 699. The religious adherent testified that the Government's use of a Social Security number would "rob" his daughter of "her spirit." *Id.* at 697. The Supreme Court explained how the use of the Social Security number was not a substantial burden by drawing a distinction between burdens that coerce the religious adherent to violate or abandon his sincere religious beliefs and those that do not:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices . . . .

Id. at 699–700. In other words, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700. The

Supreme Court concluded that the use of the Social Security number did not create a substantial burden, even though it might "rob" the "spirit" of the adherent's daughter, because "in no sense d[id] it affirmatively compel [the adherents], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they f[ound] objectionable for religious reasons." *Id.* at 703. The Supreme Court thus denied relief under the Free Exercise Clause. *Id.* at 712.

Only a few years before RFRA, the Supreme Court decided *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), in which the Court held that a generally applicable tax does not impose a "constitutionally significant burden on [the religious adherent's] religious practices or beliefs." *Id.* at 392. In explaining why the tax did not impose a substantial burden, the Supreme Court reasoned that "in no sense has the State 'conditioned receipt of an important benefit upon conduct proscribed by a religious faith, or denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 391–92 (alterations adopted) (quoting *Hobbie*, 480 U.S. at 141).

In sum, pre-RFRA jurisprudence set forth very clear guidelines as to what *type* of burden is "substantial" enough to require the government to demonstrate a compelling interest: government action that coerces a religious adherent to violate or abandon the tenets of his religion—by threatening, for example, the denial of a governmental benefit to which the person is otherwise entitled or the imposition of a

penalty based on the religious adherent's choice to act in accordance with the protected tenets of his religion. Whether one might think the phrase "substantial burden" admits a broader definition, the Supreme Court did not. It was with this clear jurisprudential history that RFRA adopted "substantial burden" as a statutory term. [6]

The lead dissent disagrees, arguing that "pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions)." Instead, the dissent argues that "the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: *preventing a religious adherent from engaging in religious exercise*." The dissent cites two cases to support this theory.

First, the dissent cites *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam). In *Cruz*, Texas state prison officials barred a Buddhist prisoner from using a prison chapel, which was available to prisoners who

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[6] The Supreme Court's jurisprudence prior to *Smith* used the term "burden" or "undu[e] burden," and did not specifically use the term "substantial burden"—though our own pre-*Smith* jurisprudence certainly did. *See Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984). The use of the term "substantial burden" did not appear in Supreme Court case law until *Smith* itself. *See* 485 U.S. at 883. Nonetheless, *Smith*'s use of the term "substantial burden," as well as our own use of that term in pre-*Smith* jurisprudence, invoked the entire line of cases, beginning with *Sherbert* and *Yoder*, in which the Court had identified the kinds of burdens on religious adherents which the government must justify with a compelling interest.

were members of other religious sects. *Id.* at 319. Prison officials had also facilitated distribution of religious materials of non-Buddhist faiths. *Id.* at 319–20. But when the prisoner shared Buddhist religious material with other prisoners, prison officials retaliated by placing the prisoner in solitary confinement and on a diet of bread and water for two weeks, without access to newspapers, magazines, or other sources of news. *Id.* at 319. Further, the prison officials prohibited the prisoner from corresponding with his religious advisor, even though prison officials facilitated correspondence with religious advisors for prisoners of other faiths. *Id.*

The Buddhist prisoner sued the prison officials under 42 U.S.C. § 1983 for violating his rights to the free exercise of his religion under the First and Fourteenth Amendments. The district court denied relief under the theory that a prisoner's exercise of religion should be left "to the sound discretion of prison administrators," and held that "disciplinary and security reasons . . . may prevent the 'equality' of exercise of religious practices in prison," and thus ruled that prisoners do not enjoy a right to the free exercise of religion under the First and Fourteenth Amendments. *Id.* at 321. The Fifth Circuit affirmed.

The Supreme Court reversed in a five-page, per curiam opinion. The Court held that prisoners enjoy the right to the free exercise of religion and held that the allegations in the prisoner's complaint were sufficient to state a claim under the First and Fourteenth Amendments. *Id.* at 322. When the Court analyzed the prisoner's complaint, the Court did not discuss which of the prison officials' actions—the denial of access to the chapel, a religious advisor, and

news sources, or the placement of the prisoner in solitary confinement and on a diet of bread and water for two weeks—constituted a qualifying burden for First Amendment purposes. The Court never held that the denial of access to the prison chapel was a sufficient burden on its own or that the burdens discussed in *Sherbert* and *Yoder* were merely two examples of a broader inquiry. The Court never even cited *Sherbert* or *Yoder*.

It was unnecessary for the Court to conduct a detailed analysis of the burden on the religious adherent in *Cruz*: the religious adherent's complaint easily stated enough facts to allege a plausible Free Exercise Clause violation under *Sherbert* or *Yoder*. The religious adherent in *Cruz* alleged that prison officials denied access to governmental benefits that were generally available to similarly situated prisoners of other religions. The denial of those benefits plainly qualified as a cognizable burden under *Sherbert*, 374 U.S. at 404.[7] Further, he alleged that the prison officials placed the prisoner in solitary confinement and on a diet of bread and water for two weeks as punishment for his distribution of religious materials. Those penalties easily qualified as burdens under *Yoder*, 406 U.S. at 218. Nowhere in the Court's decision is there any mention of a First Amendment right to access and use governmental property for exercise of a religious rite.

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[7] Moreover, these denials likely qualified as violations of the Equal Protection Clause of the Fourteenth Amendment, which the prisoner had also invoked as a basis for relief. *See Cruz*, 405 U.S. at 320 n.1.

Second, the dissent cites *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *O'Lone*, prison officials in a New Jersey state prison forced some Muslim prisoners to work outside the prison during workdays, which included Friday afternoons, the Muslim holy day. *Id.* at 345–47. The Muslim prisoners filed suit to challenge the prison regulation because the regulations prevented the prisoners from attending a religious service, which their faith commanded them to perform on Friday afternoons. *Id.* at 345. The Supreme Court analyzed the claim not with *Sherbert* and *Yoder*'s compelling interest framework, but with a "reasonableness" test that the Court had used at that time for Free Exercise claims arising in the prison context. *Id.* at 349. The Court held that the prison regulations were reasonable. *Id.* at 351–53.

O'Lone is clearly inapplicable. The Court barely mentioned that the Muslim plaintiffs were barred from attending their religious event and never analyzed whether that bar constituted a qualifying burden under the First Amendment. There was no discussion whether the bar might have constituted or been backed by the denial of a vested governmental benefit or the imposition of a penalty. The Court, of course, did not need to address the issue whether the burden was a qualifying burden because the Court ruled against the prisoners on the grounds that the prison regulations were "reasonable." Even had the court provided some guidance on whether the denial of access to a religious site was a qualifying burden in *O'Lone*, it would have been inapplicable in the present case because RFRA adopted *Sherbert* and *Yoder*'s compelling interest framework, not the now-

abandoned "reasonableness" framework in use in prisoner cases at the time of *O'Lone*.

The mere fact that the governmental actions in *Cruz* and *O'Lone* had caused, as one of their effects, what one could describe as the prevention or denial of access to a location for sincere religious exercise, does not mean that the Supreme Court recognized that such an effect constitutes a "substantial burden" for purposes of the *Sherbert* test. That simply was not a finding in either case.

B. *Smith*, RFRA, and RLUIPA

In 1990, the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, two individuals were fired from their jobs at a private drug rehabilitation organization because they ingested peyote at a ceremony of the Native American Church. *Id*. at 874. An Oregon agency denied both individuals unemployment compensation because the agency determined that the individuals had been discharged for work-related misconduct. *Id*. Oregon courts reversed, holding that *Sherbert* and *Yoder* prohibited the denial of unemployment benefits to the religious adherent on the basis of his participation in religious conduct. *Id*. at 874– 76. The Supreme Court, however, disagreed, holding that *Sherbert* and *Yoder*'s substantial burden test does not prevent a state from enacting and enforcing "neutral, generally applicable laws" such as Oregon's criminal law prohibition against the use of peyote. *Id*. at 878–82.

Congress responded to *Smith* in 1993 by enacting RFRA. Congress disagreed with *Smith*'s exempting "neutral, generally applicable laws" from the reach of

Sherbert and *Yoder*, saying that *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress required that "the compelling interest test as set forth in prior Federal court rulings" apply no matter whether the challenged law was one of neutral, general applicability. 42 U.S.C. § 2000bb(a)(5). RFRA then pointedly and specifically cited two Supreme Court cases; RFRA explained that Congress's intent was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

Against this backdrop, Congress provided the following statutory language: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 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)(1)–(2).

In 1997, the Supreme Court curtailed the scope of RFRA. In *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional as applied to the actions and laws of state governments because Congress had exceeded the authority delegated to it in the Fourteenth Amendment to the Constitution. 521 U.S. 507 (1997). When Congress passed RFRA, Congress invoked its authority under the Fourteenth Amendment to extend the reach of RFRA to regulate state actions and lawmaking. *Id.* at 516; *see also* U.S.

Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). In *City of Boerne*, the Supreme Court held that Congress's reliance on the Fourteenth Amendment as a basis for regulating state actions and lawmaking was misplaced because the Fourteenth Amendment permits Congress to enforce only existing constitutional rights, not to define new constitutional rights. *Id*. at 536. And because the Supreme Court had held in *Smith* that the Free Exercise Clause of the First Amendment did not provide any right to be exempt from a neutral law of general applicability, the rights protected in RFRA went beyond the rights protected under the First Amendment and therefore exceeded Congress's power to regulate the state and local actions under the Fourteenth Amendment. *Id.* at 534–35.

In 2000, in response to *City of Boerne*, Congress passed a new, different, and narrower statute: RLUIPA. RLUIPA's application and text differs from RFRA's in many important and decisive ways, discussed further below. Most significantly, RLUIPA makes no mention of *Sherbert* or *Yoder* or any other case and does not purport to restore any test "set forth in prior federal court rulings."

C. *Navajo Nation*

In 2008, we took *Navajo Nation v. United States Forest Service* en banc to resolve disagreement over what kinds of burdens qualify as "substantial burdens" on the exercise of religion under RFRA. 535 F.3d 1058 (9th Cir. 2008) (en banc). In *Navajo Nation*, a coalition of Indian tribes and environmentalist organizations filed a lawsuit seeking to prohibit the United States Forest Service from approving planned

upgrades to a ski resort located on federal property. *Id.* at 1062. The Indian plaintiffs, who considered the whole mountain at issue to be a sacred place in their religion, contended that the planned use of artificial snow made from recycled wastewater containing microscopic amounts of human fecal matter would spiritually contaminate the entire mountain. *Id.* at 1062–63. The Indian plaintiffs claimed that the use of recycled wastewater would cause:

> (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.

Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1039 (9th Cir. 2007) (vacated panel opinion). The panel opinion held that the planned use of recycled wastewater would create a substantial burden on the Indians' religious practices, and the panel granted relief under RFRA. *See id.* at 1042–43.

In reversing the panel decision, our en banc decision noted that RFRA used "substantial burden" as "a term of art chosen by Congress to be defined by reference to Supreme Court precedent." *Navajo Nation*, 535 F.3d at 1063. While RFRA did not include a definition of "substantial burden" among its several definitions, *see* 42 U.S.C. § 2000bb-2, the en banc panel

reasoned that "[w]here a statute does not expressly define a term of settled meaning, 'courts interpreting the statute must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term.'" *Id.* at 1074 (alterations adopted) (quoting *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

The en banc panel therefore applied the *Sherbert* and *Yoder* framework and concluded that the planned use of recycled wastewater to make artificial snow did not coerce the religious adherents to violate the tenets of their religion and therefore did not qualify as a "substantial burden." *Id.* at 1078. Despite the fact that the use of recycled wastewater might destroy "an entire way of life," the en banc panel concluded that a substantial burden was not present because the use of recycled wastewater did "not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*," nor did it "coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*." *Id.* at 1070.

Since our decision in *Navajo Nation*, a majority of circuits have followed suit, defining the term "substantial burden" as including only government actions which coerce individual religious adherents to violate or abandon their sincere religious beliefs.[8]

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[8] *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 818 (Nov. 9, 2020); *Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014) (per curiam); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 (3d Cir. 2017); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100 (4th Cir. 2013); *U.S. Navy Seals 126 v. Biden*, 27 F.4th 336,

DISCUSSION

A. The Textual and Contextual Evidence Compels the Conclusion That Congress Intended "Substantial Burden" to Be Defined by Its Case-Based, Technical Definition, Rather Than Its Dictionary Definition.

"Words are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal*

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350 (5th Cir. 2022); *New Doe Child #1 v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008).

Four circuits have used a definition of "substantial burden" that includes both governmental actions that coerce religious adherents to violate or abandon their sincere religious beliefs and governmental actions that prevent the religious adherent from participating in religiously motivated conduct. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). The dissent cites to these circuits as support for its proposed test. But these four circuits failed to provide any statutory, textual, or historical reason for expanding the definition of "substantial burden." "An authority derives its persuasive power from its ability to convince others to go along with it." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 509 (9th Cir. 2018) (quoting Bryan A. Garner, et al., *The Law of Judicial Precedent* 170 (2016)), *rev'd in part and vacated in part on other grounds*, 140 S. Ct. 1891 (2020); *see also* Chad Flanders, Toward A Theory of Persuasive Authority, 62 Okla. L. Rev. 55, 65 (2009) ("[T]he force of persuasive authority is the unforced force of the better argument."). Decisions from other circuits made without any analysis are not valuable as persuasive authorities.

Texts 69 (2012) (emphasis added). When a statute addresses a subject already addressed in jurisprudence, "ordinary *legal* meaning is to be expected, which often differs from common meaning." *Id.* at 73 (emphasis added). "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)) (alteration adopted); *see also Twitter, Inc., v. Taamneh*, 143 S. Ct. 1206, 1218 (2023); *Sekhar v. United States*, 570 U.S. 729, 733 (2013).

"If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction." Scalia & Garner at 322. Of course, "[t]he clearest application" of this canon occurs when the legislature codifies a test previously expressed in judicial cases. *Id.*; *see also United States v. Hansen*, 143 S. Ct. 1932, 1942 (2023) ("[W]hen Congress 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).[9]

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[9] The lead dissent cites *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020), to support the proposition that dictionary definitions should be used to define RFRA's terms. In *Tanzin*, the Supreme Court used a dictionary to define the term "appropriate relief" under RFRA because no party argued that the term had taken on a technical meaning. The fact that one term in a statute does or does not have a technical meaning has no effect on the interpretation of other terms in the statute.

When the full context is considered—the discussion in pre-*Smith* jurisprudence of which governmental actions generate cognizable burdens, the agreement between the majority and concurrence in *Smith* that only those governmental actions that coerce the religious adherent to violate or abandon his religious tenets are cognizable burdens, the use of the term "substantial burden" by both the majority and concurrence in *Smith* to describe such burdens, the fact that RFRA cited to *Smith*, and the fact that RFRA adopted the term "substantial burden" without modification and without noting any disapproval of the limited scope given to that term by the majority and concurrence in *Smith*—it is clear that Congress employed the term "substantial burden" in RFRA not for its dictionary definition but for the technical definition given to that term by *Smith* and prior federal court rulings.

This view is confirmed by two pieces of textual evidence in the body of RFRA itself: RFRA's statement of purpose and RFRA's dual citation to *Sherbert* and *Yoder*.

1. *RFRA states that its purpose is to "restore" the free exercise of religion test "as set forth in prior federal court rulings."*

When Congress expressly states a purpose for a statute, [10] that statement of purpose "is 'an appropriate guide' to the 'meaning of the statute's

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[10] My discussion here references Congress's statements of purpose explicitly laid out in the text of 42 U.S.C. § 2000bb, not any purpose which might be divined from the legislative history of the statute, such as the records of the Congressional committee reports or debates.

operative provisions.'" *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (quoting Scalia & Garner at 218) (alteration adopted). "Purpose sheds light . . . on deciding which of various textually permissible meanings should be adopted." Scalia & Garner at 57.

Congress's expressed desire to "restore" the free exercise of religion test "as set forth in prior federal court rulings" is a strong indication that Congress meant to have the term "substantial burden" in RFRA mean the same thing the term had meant "in prior federal court rulings." 42 U.S.C. § 2000bb(a)(5).

The lead dissent argues that this analysis prioritizes RFRA's statement of purpose over RFRA's operative language. Not so. As the dissent acknowledges, "RFRA does not define 'substantial burden.'" Thus, there is no such "operative language" in the statute to be overridden and the statement of purpose is "an appropriate guide" to clarify the undefined term. *Gundy*, 139 S. Ct. at 2127.

2. *RFRA directly cites and incorporates* Sherbert *and* Yoder *as setting forth Congress's desired test.*

RFRA's direct citation to *Sherbert* and *Yoder*—and lack of citation to any other pre-*Smith* case—cannot be overstated for purposes of properly interpreting RFRA. Congress rarely chooses to cite and incorporate directly *a* judicial case into the body of a statute. When it does so, courts interpreting that statute always give

the case citation and its incorporation dispositive or at least highly persuasive effect.[11]

But even more impressive is that in *no* statute other than RFRA has Congress *ever* cited more than one case in setting a single statutory test. Bearing in mind the canon of statutory interpretation against surplusage—which teaches us that neither citation "should needlessly be given an interpretation that

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[11] *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191–94 (9th Cir. 2018) (giving dispositive weight to 12 U.S.C. § 25b's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2d Cir. 2022) (same); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011) (same); *United States v. Alabama*, 691 F.3d 1269, 1297 (11th Cir. 2012) (giving dispositive weight to 8 U.S.C. § 1643's citation to *Plyler v. Doe*, 457 U.S. 202 (1982)); *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 405 (6th Cir. 2001) (giving dispositive weight to 15 U.S.C. § 6701's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Nat'l Treasury Emps. Union v. United States*, 950 F.2d 1562, 1568 (Fed. Cir. 1991) (giving dispositive weight to 19 U.S.C. § 1451's citation to *United States v. Myers*, 320 U.S. 561, 566 (1944)); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 287 (9th Cir. 1987) (using *Arizona v. California*, 376 U.S. 340 (1964), to define the Government's duties under 43 U.S.C. § 1524 because § 1524 cites *Arizona*); *United States v. Bell*, 761 F.3d 900, 913 n.6 (8th Cir. 2014) (holding that 22 U.S.C. § 7101's citation to and *rejection* of the narrow scope of *United States v. Kozminski*, 487 U.S. 931 (1988), means that the scope of § 7101 must at least include the scope of *Kozminski*); *United States v. Calimlim*, 538 F.3d 706, 714 (7th Cir. 2008) (same); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (same), *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101 (2005); *see also Taamneh*, 143 S. Ct. at 1218 (using *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), to define aiding and abetting under 18 U.S.C. § 2333 because Congress cited *Halberstam* in the findings section of the Justice Against Sponsors of Terrorism Act, which amended § 2333).

causes it to duplicate another provision or to have no consequence," Scalia & Garner at 174—we must ask why Congress saw the need to cite *both Sherbert and Yoder*.

Sherbert and *Yoder* both held that no government action can burden an individual's free exercise of religion without using means narrowly tailored to a compelling governmental interest. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 213–15. If that was all the law that Congress wanted to "restore," 42 U.S.C. § 2000bb(b)(1), then citation to *either Sherbert* or *Yoder* would have been adequate. Yet Congress, legislating in response to *Smith*, nonetheless felt the need to cite *both Sherbert and Yoder*.

The material difference between *Sherbert* and *Yoder* was in the *kind* of coercive burden the Supreme Court recognized as substantial in each case. In *Sherbert*, the Court recognized that the denial of governmental benefits to which the claimant was otherwise entitled because of her choice to engage in religiously motivated conduct can be a substantial burden; in *Yoder*, the Supreme Court recognized that the imposition of a governmental penalty because of the religious adherent's participation in religiously motivated conduct can have the same coercive effect. *Sherbert*, 374 U.S. at 403–04; *Yoder*, 406 U.S. at 218. Because Congress cited both *Sherbert* and *Yoder*, those two cases and the two types of coercion they recognized provide the lens through which courts interpret RFRA's "substantial burden."[12]

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[12] The dissent and Judge R. Nelson argue that RFRA's statement of purpose referred to the "compelling interest" portion

We must then ask why Congress cited *only Sherbert* and *Yoder*. The canon of statutory interpretation *expressio unius est exclusio alterius* teaches us that "[t]he expression of one thing implies the exclusion of others." Scalia & Garner at 107. Thus, by citing *only Sherbert* and *Yoder*, Congress did more than merely endorse the two types of coercive burdens recognized in those cases as determinative of the scope of the term "substantial burden." Congress could have just as easily cited *Cruz* or *O'Lone* as additional examples of cases where the burden at issue was "substantial," but it did not. Congress therefore implied that any other kinds of burdens on religious exercise are excluded from the meaning of "substantial burden" in RFRA. *See United States v. Giordano*, 416 U.S. 505, 514 (1974) (a statute's listing of two individuals authorized to enforce the statute implied that others were not authorized to enforce the statute).

Nor does RFRA's choice of words suggest that Congress cited *Sherbert* and *Yoder* as mere *examples*

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of *Sherbert* and *Yoder*, but not the definition of "substantial burden." The definition of "substantial burden" used in pre-RFRA jurisprudence was a core predicate part of the test that RFRA, in its own words, sought to "restore." 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."); *see also Tanzin*, 592 U.S. at 45 ("RFRA sought to . . . restore the pre-*Smith* 'compelling interest test' . . . .'") (quoting 42 U.S.C. § 2000bb(1)–(2)). *Smith* itself defined the test as follows: "Under the *Sherbert* test, governmental actions *that substantially burden* a religious practice must be justified by a compelling governmental interest." 494 U.S. at 883 (emphasis added). It is impossible to "restore" the compelling interest test without restoring the original definition of its essential predicate, the "substantial burden."

of the pre-*Smith* test. We should not read into a statute a phrase that "Congress knows exactly how to adopt . . . when it wishes," but which Congress has not adopted in the statute at issue. *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1942 (2022); *see also Astrue v. Ratliff*, 560 U.S. 586, 595 (2010). There are several phrases Congress has, and could have again, employed to communicate that *Sherbert* and *Yoder* should be treated as mere examples of substantial burdens. *See, e.g.*, 8 U.S.C. § 1368 ("for example"); 15 U.S.C. § 769 ("to include"); 34 U.S.C. § 12621 ("such as"). But Congress used none of these phrases. The lead dissent offers no rationale nor cites any authority for its suggestion that *Yoder* and *Sherbert* were mere "examples" of substantial burdens.

These canons of statutory interpretation reinforce the conclusion that RFRA codified only a limited definition of "substantial burden": "substantial burden" means personal coercion, limited to the threatened denial of a vested benefit or the threatened imposition of a penalty because of the religious adherent's participation in protected religious conduct, as set forth in *Sherbert* and *Yoder*.

3. Hobby Lobby *did not remove or alter the technical definition of "substantial burden" adopted by Congress.*

The lead dissent cites *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 714–15 (2014), for the proposition that RFRA "goes 'far beyond what is constitutionally required' under the Free Exercise Clause" and thus "*Navajo Nation* made too much of the fact that RFRA explicitly mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose."

The dissent's citation to *Hobby Lobby* is an unfortunate example of "snippet analysis": the use of selected words in a case as the basis for an argument, without mention of the case's actual issues, reasoning, and holding, or to what those words actually referred to in that case. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . [T]heir possible bearing on all other cases is seldom completely investigated." (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.))).

The *Hobby Lobby* decision lends no support to the dissent's proposed expansion of the definition of "substantial burden." At issue in *Hobby Lobby* was a governmental mandate that required employers to provide insurance coverage to employees for certain forms of contraception. *Id.* at 689–90. The government threatened penalties against the employers if they did not comply with the mandate. The employers sued to enjoin the imposition of such penalties, invoking RFRA. The question presented to the Supreme Court was whether corporations, such as Hobby Lobby, enjoy protection under RFRA even though pre-RFRA jurisprudence had been applied only to protect the right to free exercise of religion of natural persons. The Supreme Court held that RFRA applies to a broad category of plaintiffs, including plaintiffs who do not necessarily "f[a]ll within a category of plaintiffs one of whom had brought a free-exercise claim that [the Supreme] Court entertained in the years before *Smith*." *Id.* at 716. The Supreme Court therefore held that certain corporations may bring suit under RFRA.

Hobby Lobby emphasized that RFRA is not limited to the factual incidences of pre-RFRA jurisprudence as to *who* can sue the federal government under RFRA. But neither *Hobby Lobby* nor RFRA went "far beyond" pre-RFRA First Amendment cases as to *what* could be sued on: what constituted an actionable "substantial burden." *Hobby Lobby* never rejected the *test* used by pre-RFRA jurisprudence, including the portion of the test at issue here: the definition of "substantial burden." Nothing about *Hobby Lobby* can be read to suggest that "substantial burden" is anything but a term of art or that it extends past the definitions provided in *Sherbert* and *Yoder*. To the contrary, *Hobby Lobby* held that a substantial burden was present in that case *by using* the pre-RFRA test. *See id*. at 726 (holding that regulation at issue created a "substantial burden" under RFRA because the governmental action threatened penalties against religiously adherent employers who refused to provide contraceptive care as part of their heath provision plans, and therefore involved "coercion"). Thus, the snippet of *Hobby Lobby*'s language quoted by the dissent dealt with the expansion of the list of *who* could sue under RFRA. It did not expand the list of what constitutes a "substantial burden," or which government actions can be halted. As to *what* constituted a "substantial burden," *Hobby Lobby* simply followed *Yoder* and pre-RFRA Supreme Court decisions.[13]

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[13] The dissent also cites 42 U.S.C. § 2000bb-3(c). Section 2000bb-3, enacted as part of RFRA, is entitled "Applicability." Subsection (c) says: "Nothing in [RFRA] shall be construed to authorize any government to burden any religious belief." 42

B. The Textual Differences Between RFRA and RLUIPA Make RLUIPA Cases Inapposite in the RFRA Context.

Rather than utilize straightforward methods of statutory interpretation based on the language of RFRA, as explained above, the lead dissent gets to its proposed definition of burden" by way of a different statute: RLUIPA. The dissent argues that the term "substantial burden" "has the same meaning under both RFRA and RLUIPA." And because, "under RLUIPA," "denying access to or preventing religious exercise qualifies as a substantial burden," the lead dissent's conclusion then follows: "transferring Oak

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U.S.C. § 2000bb-3(c). This statutory language is unhelpful for two reasons. First, this kind of statutory language merely acts as a failsafe provision, included to prevent any unintended consequences of the operative language of the statute. Here, the language ensures that RFRA's terms are not somehow construed to *expand* the government's ability to burden religion. The language is unhelpful for determining what the rest of the statute in fact prohibits. We have reached the same conclusion when interpreting similar language in other statutes. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994); *Cath. Soc. Servs., Inc. v. Thornburgh*, 956 F.2d 914, 923 (9th Cir. 1992), *vacated on other grounds sub nom. Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43 (1993).

But second, even if the statute said what the dissent claims—that the government "may not burden any religious belief"—that language would nevertheless be unhelpful because we would still be required to determine what kinds of government actions qualify as "burdens" and whether the term "burden" is used in a technical sense. Nothing about this statutory language states or implies that RFRA's use of the term "substantial burden" is anything but a reference to a term of art or that Congress intended to expand the kinds of burdens that qualify under RFRA beyond those identified in *Sherbert* and *Yoder*.

Flat to Resolution Copper will amount to a substantial burden under RFRA."

This reasoning is erroneous for two reasons. First, as explained by the majority, RFRA and RLUIPA apply in contexts so distinguishable as to make any discussion of burdens in RLUIPA cases entirely unhelpful when interpreting RFRA. But second, RLUIPA cases are unhelpful for interpreting RFRA because the text of RLUIPA, especially its land use provision, uses language that implies a broader test.

What the dissent refers to as "RLUIPA" in fact encompasses two different statutory provisions. RLUIPA's first operative provision governs state land-use and zoning regulations. 42 U.S.C. § 2000cc(a)(1). Its second operative provision governs state regulation of institutionalized persons. 42 U.S.C. § 2000cc-1(a). No party argues that RLUIPA applies to this case. The Land Exchange Act is not a state land-use law. The members of Apache Stronghold are not institutionalized persons. Yet, Apache Stronghold and the dissent argue that somehow the similarities between RFRA and the two provisions of RLUIPA should make all RLUIPA precedent binding when we interpret RFRA.

RLUIPA's two operative provisions are somewhat similar to RFRA, but they are not identical. The dissent argues that RFRA and RLUIPA are "distinguished only in that they apply to different categories of governmental actions." [14] However,

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[14] The dissent cites Hobby Lobby for this proposition. The Court in Hobby Lobby remarked in a passing comment that RLUIPA "imposes the same general test as RFRA but on a more limited

several other distinctions must be drawn between RFRA and RLUIPA, especially RLUIPA's land-use provision. First, RFRA cites and incorporates *Sherbert* and *Yoder*, but no provision in RLUIPA mentions either case, nor indeed any case. Second, RFRA restores a test "set forth in prior Federal court rulings," but no provision in RLUIPA invokes any "prior Federal court rulings" as a framework for its test. Third, RFRA must be construed using normal tools of statutory interpretation, including the presumption that Congress intended to incorporate the settled meaning of a term of art, but RLUIPA must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by" its terms. 42 U.S.C. § 2000cc-3(g).

For RLUIPA's land-use provision in particular, the distinctions from the text of RFRA are dramatic: RFRA requires the government to provide a compelling interest to justify substantial burdens on any *person*'s religious exercise, but RLUIPA's land-use provision requires a compelling interest to justify

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category of governmental actions." 573 U.S. at 695. Remember: Hobby Lobby was exclusively a federal law action; no state, state land-use regulation, or state prisoner was involved; hence, RLUIPA was inapplicable. The Court never analyzed the differences between RFRA and RLUIPA and never held that RFRA and RLUIPA are distinguished only in that they apply to different categories of governmental actions. In any event, that Hobby Lobby stated in the abstract that RLUIPA and RFRA "impose[ ] the same general test" (i.e., that the Government may not "substantially burden" a person's "religious exercise" unless it is "in furtherance of a compelling government interest" and does so by the "least restrictive means") is hardly a full-throated endorsement of the notion that the discrete test for determining when Government action imposes "substantial burden" is the same between the statutes.

substantial burdens on the religious exercise of any *person, religious assembly, or religious institution*. *See* 42 U.S.C. § 2000cc(a)(1). And RLUIPA's land-use provision contains multiple commands specifically seeking to eliminate "land use regulations" that substantially burden "[t]he use, building, or conversion of real property" for religious purposes, but RFRA contains no analogous language. *See* 42 U.S.C. § 2000cc(b)(1), (b)(2), (b)(3).

Even accepting that the institutionalized-persons portion of RLUIPA imposes the same standard as RFRA in some ways, *see Holt v. Hobbs*, 574 U.S. 352, 358 (2015), that comparison does not require any change to our interpretation of RFRA. Under RLUIPA's institutionalized persons provision, the Supreme Court has assessed the question whether the government action has created a "substantial burden" by assessing whether the government action coerces the religious adherent to violate or abandon his sincere religious beliefs. *E.g.*, *id.* at 361 ("If petitioner contravenes [the prison grooming] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.").[15] Thus, the fact that the Supreme Court

[15] The dissent cites *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), for the proposition that a prison official's denial of an inmate's access to the inmate's pastor during the inmate's execution is a substantial burden. The Supreme Court made no such holding in *Ramirez*. The Supreme Court merely noted that there was no dispute on the "substantial burden" prong and moved on with the analysis. The Supreme Court never discussed whether a threat of governmental sanctions might have backed the prison official's decision or whether the denial of affirmative approval for the

has implied a connection between RFRA and RLUIPA's institutionalized-persons provision serves only to reaffirm the result we reached in *Navajo Nation*.

RLUIPA's land-use provision, however, clearly requires a different standard. *See Navajo Nation*, 535 F.3d at 1077. *Sherbert*'s and *Yoder*'s personal coercion test cannot provide the full test for "substantial burden" under RLUIPA's land-use provision because the land-use provision does not protect merely persons, nor does it protect merely the "exercise of religion" as that term is understood in Free Exercise Clause jurisprudence. Instead, the land-use portion of RLUIPA targets a far broader kind of burden: regulations that have any substantial effect on a religious assembly's or institution's use, building, or conversion of real property owned by that religious assembly or institution.

When addressing claims under the land-use provision of RLUIPA, we have thus naturally taken a broader view of the phrase "substantial burden"—though we have honored the presumption of consistent usage by analogizing the burden of the land-use regulations to the burden of personal coercion set forth in *Sherbert* and *Yoder*. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (comparing the burden of the land-use regulation to the laws struck down by the Supreme Court under the Free Exercise Clause as having a "tendency to coerce individuals into acting contrary to their religious beliefs").

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minister's presence might count as the denial of a vested governmental benefit.

The Supreme Court has never held that RFRA and the land-use provision of RLUIPA must be interpreted using the same standard, nor has the Supreme Court ever cited a RLUIPA land-use case as setting the standard for a claim brought under RFRA. Passing comments by the Supreme Court which might suggest some connection between RFRA and the institutionalized-persons portion of RLUIPA do not mean that the Supreme Court meant to overrule its clear pre-RFRA jurisprudence. Nor do such comments suggest the Supreme Court intended to establish a legal rule that yoked the definition of "substantial burden" under RFRA to the analysis conducted under the textually distinguishable land-use portion of RLUIPA.

Application of normal tools of statutory interpretation to RFRA—the statute actually before us—provides a clear result: the term "substantial burden" is a term of art and is limited to those burdens identified in *Sherbert* and *Yoder*. [16] When the law

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[16] Judge R. Nelson argues that "substantial burden" is not a term of art because pre-RFRA cases used it "not as [a phrase with a precise] definition" but as a shorthand way for describing a "legal framework" or test. But terms of art often *are* words that describe legal tests and standards. *See, e.g.*, *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, 60–61 (1942) ("[T]he phrase 'fair and equitable' had become a term of art, [and] Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan *met the test of* fairness and equity long established by judicial decision was . . . a question to be answered . . . by the court as a matter of law."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1300 (9th Cir. 1982) ("[']Substitutability in production,['] while a more technical term of art, is another way of describing the analysis required by the first *Tampa Electric* test.")

provides such a clear result under RFRA, it is unnecessary to divine what the Supreme Court might do under RLUIPA.

William of Ockham's razor teaches that when one is faced with two competing ideas, the simplest explanation is generally the best. *See United States v. Newhoff*, 627 F.3d 1163, 1166 (9th Cir. 2010). "Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The dissent's circuitous route through RLUIPA to define a term for which RFRA already provides a clear definition is unnecessary and contrary to these principles of statutory interpretation.

C. The Lead Dissent Understates the Sea Change That Its Proposed Definition of "Substantial Burden" Would Cause.

For the entire history of our nation's Free Exercise jurisprudence, we have focused our analysis on "what the government cannot do to the individual, not . . . what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). Yet the lead dissent would violate this simple principle by holding that RFRA empowers any individual to exact what is in effect a government easement that entitles his access and use of that land, so long as that is what his sincere beliefs require. In so holding, my colleagues purport to overrule the very type of claim that the Supreme Court unambiguously rejected in *Lyng*. *Id.* at 452 (rejecting that the First Amendment's Free Exercise

Clause entitled the religious adherent to a "religious servitude" on federal land).[17]

If the dissent's reading of RFRA were accepted, such easements would be granted to sincere religious adherents for access to and use of vast expanses of federal land[18]—perhaps even *all* federal land. *See Lyng*, 485 U.S. at 475 (Brennan, J., dissenting) ("Because of their perceptions of and relationship with the natural world, Native Americans consider *all land* sacred." (emphasis added)). Even sensitive federal

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[17] Easements are a subset of servitudes. *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014).

[18] *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1066 n.7 (9th Cir. 2008) (en banc) ("In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. The district court also found the Navajo and the Hualapai Plaintiffs consider the entire Colorado River to be sacred. New sacred areas are continuously being recognized by the Plaintiffs."). One religious adherent has testified that the "entire state of Washington and Oregon" is "very sacred" to him. Excerpts of Record at 716, *Slockish v. U.S. Dep't of Transp.*, 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (No. 21-35220), ECF No. 18-5. Another has claimed as sacred an area "extending 100 miles to the east and 100 miles to the west of the Colorado River from Spirit Mountain [in Nevada] in the north to the Gulf of California in the south"—some 40,000 square miles. Excerpts of Record at 27, *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 603 F. App'x 651 (9th Cir. 2015) (No. 13-56799), ECF No. 12-3.

facilities such as military installations could be encumbered by such easements.

To obtain such an easement of access and use, the only determinative issue would be whether the religious adherent sincerely believes that such access to federal land is important to him for his religious exercise. Binding precedent forbids us from evaluating whether the religious adherent's professed need to access federal land is true to his religion's tenets. *Id.* at 449–50 (majority op.). Equally out of bounds is whether the access to federal land is necessary or central to the religion. *See Hobby Lobby*, 573 U.S. at 696. Were the religious adherent to say that access—at all times of the day and on all days of the year—was necessary for his religion, it would not be "for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

So there is no limiting principle to the dissent's proposal of defining "substantial burden" to include all government actions "prevent[ing] or den[ying] access to sincere religious exercise."[19] The result of each case would turn on the sole issue of the litigant's religious sincerity. And when assessing that sincerity, the district court would not be permitted to ask whether the religious adherent's profession of faith is "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714. In addition, if the religious adherent only recently began to profess his beliefs, that would be generally irrelevant because,

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[19] The Supreme Court cautions us not to adopt a test that has "no real limiting principle." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 n.11 (2020); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021); *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013).

after all, it is possible that his beliefs were simply "late in crystallizing." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (quoting *Ehlert v. United States*, 402 U.S. 99, 103 (1971)); *see also Hobbie*, 480 U.S. at 144 ("The timing of [the plaintiff]'s conversion is immaterial."). With so many traditional indicators of testing sincerity off the table, a district court might be required to grant a religious easement to nearly any religious adherents who brought a land-based RFRA claim. It is difficult to conceive of a sincerely held claim that would be rejected. Even our appellate review of the district court's sincerity determination would be limited because we would be required to affirm unless the sincerity determination was wholly "without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

This low bar the dissent would set to obtain such religious easements contrasts sharply with the burden that the government would be required to meet to forestall or extinguish the easement: the compelling interest test. This test requires the government "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest." *City of Boerne*, 521 U.S. at 509. Our relatively brief review of plaintiffs' claims under the dissent's proposed test would be followed by a searching and detailed inquiry of the government's motivations and methods. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). And, of course, it would not be enough for the government merely to assert a broad interest in the security of a particular piece of land: the government must justify the application of its exclusionary policies to each individual religious

adherent who seeks access. *See Hobby Lobby*, 573 U.S. at 726. Courts would be required to "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. The government would be forced to face "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 509, just to keep trespassers, albeit *devout* trespassers, off its land and out of its installations and buildings.

The dissent's proposed expansion of the definition of "substantial burden" is also not limited to this new easement right. The dissent argues that "substantial burden" is not a term of art, and should be defined as any "government action that 'oppresses' or 'restricts' 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' to a 'considerable amount,'" without any objective criteria or limiting principle as to what constitutes either "substantial" in "substantial burden" or "considerable" in "considerable amount." Where *Sherbert* and *Yoder* provide two clear qualitative burdens that meet the definition of "substantial burden," the dissent would insert more—and argues that *Sherbert*'s and *Yoder*'s qualitative burdens are merely illustrative "examples" of burdens that would meet its objectively standardless, *quantitative* definition of "substantial burden" (i.e., "considerable amount"). No part of the dissent's test would prevent a panel in a future case from recognizing an additional "example," or would prevent a panel from simply turning to the dissent's dictionary definition of "substantial burden" and ignoring the "examples" altogether.

In future cases, we would be asked to determine whether religious exercises are "oppresse[d] or

restrict[ed] . . . to a considerable *amount*," and we would thus be forced to conduct a quantitative, rather than qualitative, analysis. In other words, we would have to assess *how much* the government action interferes with the religious practice—i.e., an examination of the *effects* of the government action—rather than *in what way* the government action interferes with the religious practice—i.e., an examination of the *kind* of government action at issue. This quantitative approach would be inconsistent with Supreme Court precedent, as explained above, but it also would be very difficult for a court to administer.

So long as "substantial burden" is defined by reference to the character of the governmental action, rather than the particular effect it has on the claimant, the test is not difficult to administer: we simply ask whether the government action involves coercion in the form of denying the religious adherent a vested benefit or imposing a penalty on the religious adherent because of his participation in religiously motivated conduct. But for a court to determine whether a religious practice has been "oppresse[d] or restrict[ed] . . . to a considerable amount," the court would be required to assess the importance of the particular religious practice to the religious adherent and to the religious adherent's religion, and assess the extent to which the practice is impaired by the relevant governmental action—inquiries that not only stray far from our expertise but also enter areas into which the Supreme Court has repeatedly told us courts cannot venture.[20] *See Lyng*, 485 U.S. at 449–50 ("This Court

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[20] A "substantial burden" on economic activity, for example, can be measured in dollars and cents. *See, e.g.*, *Groff v. DeJoy*, 143 S.

cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other." (citation omitted)); *id.* at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."); *Hobbie*, 480 U.S. at 144 n.9 (citing *United States v. Ballard*, 322 U.S. 78, 87 (1944)) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (Gorsuch, J.) ("[W]e also lack any license to decide the relative value of a particular exercise to a religion. That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings

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Ct. 2279, 2294 (2023). But our precedent has yet to recognize a spiritual "currency" or other quantitative way to measure a governmental action's impact on religion.

of less familiar religions—but also favoritism for religions found to possess a greater number of 'central' and 'compelled' tenets.").

To convince the reader that its proposed test is "narrow," the dissent attempts to distinguish between the facts of this case and the facts of *Navajo Nation* and *Lyng* on the grounds that the Indians in *Navajo Nation* and *Lyng* suffered only "subjective" burdens, whereas the Indians here will suffer an objective burden through the loss of access to the land. However, the government actions in both *Navajo Nation* and *Lyng* undoubtedly meet the dissent's proposed test. In both cases, the Government "prevent[ed] [the religious adherents] from engaging in sincere religious exercise." In *Lyng*, the excavation and construction of the road caused "the Indians' spiritual practices [to] become ineffectual." 485 U.S. at 450. In *Navajo Nation*, the use of recycled wastewater caused "the inability to perform" certain religious ceremonies and destroyed "an entire way of life." 479 F.3d at 1039.

The ability to perform a ceremony gutted of all religious meaning cannot be equated to the ability to perform the full religious ceremony. Access to an area stripped of spiritual significance—the mountain in *Navajo Nation*, the land near the road in *Lyng*—is not the same as access to an extant shrine for the religious adherent who wishes to use the land as a shrine.[21]

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[21] For instance, at the corner of Fillmore and Fell Streets in San Francisco, California, stands a building once known as Sacred Heart Catholic Church. Today, the building has been de-consecrated and converted into a roller-skate discotheque. *See* Amanda Font, *Wanna Try Roller-Skating in San Francisco?*

The "sincere religious exercises" in *Navajo Nation* and *Lyng* were not only "prevent[ed] or denie[d]," they were completely destroyed, even if the lands themselves were not destroyed.

In any event, the dissent's discussion of what might count as the "prevent[ion] or deni[al of] access to sincere religious exercise" is frankly irrelevant in light of the fact that such prevention or denial of access would be merely one "example" of a substantial burden under the dissent's proposed test. The real question under the dissent's proposed test would be whether the governmental action "oppresses or restricts" the religious exercise "to a considerable amount." Under that test, the government actions in *Navajo Nation* and *Lyng* would easily qualify as "substantial burdens"—results that would directly contradict our precedent and the Supreme Court's precedent, respectively.

The dissent, in sum, favors the plaintiffs in this case over the plaintiffs in *Lyng* and *Navajo Nation* simply because the plaintiffs in this case will lose an aspect of their religious practice that one can see and hear, whereas the plaintiffs in *Lyng* and *Navajo Nation* lost an intangible aspect of their religious practices. In short, the dissent would distinguish and prioritize the tangible aspects of religious activity over the intangible. This distinction finds no support in our precedent. *Cf. Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("[T]he Federal Government . . .

Better Head to Church, KQED (Sept. 22, 2022), https://www.kqed.org/news/11924576/wanna-try-rollerskating-in-san-francisco-better-head-to-church. Can a Catholic register as a parishioner at this roller disco—or expect to observe the Stations of the Cross therein during Holy Week?

can[not] pass laws which aid one religion . . . or prefer one religion over another.").

D. Even Were Apache Stronghold's Claim Cognizable Under RFRA, the Land Exchange Act Mandates That the Land Exchange Occur.[22]

Most claims under RFRA challenge a regulatory or discretionary decision of a federal agency. However, the claim in this case seeks to stop a federal action mandated by an Act of Congress. The Land Exchange Act states that the Secretary of Agriculture is "authorized and *directed* to convey" more than two thousand acres of land, including Oak Flat, to Resolution Copper if three main conditions are met. 16 U.S.C. § 539p(c)(1) (emphasis added).

The three conditions are simple: (1) the Secretary must "engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange," and then "consult with Resolution Copper and seek to find mutually acceptable measures to (i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from

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[22] Judge Lee contends that the Government forfeited this argument when it failed to raise it below. However, "in adjudicating a claim or issue pending before us, we have the authority to identify and apply the correct legal standard, whether argued by the parties or not." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). When a statute is invoked by the parties, we can inquire, even *sua sponte*, whether the statute has been expressly or impliedly repealed. *See generally U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993).

mining and related activities on the Federal land conveyed to Resolution Copper under this section," 16 U.S.C. § 539p(c)(3); (2) the Secretary must ensure that the land exchanged is of equal value, 16 U.S.C. § 539p(c)(5); and (3) the Secretary must ensure that the land exchange complies with the National Environmental Policy Act of 1969, 16 U.S.C. § 539p(c)(9).

Congress knew the adverse effects that the Land Exchange Act would have upon the Indian tribes with respect to the planned excavation of the Oak Flat area. Wendsler Nosie, Sr., Chairman of the San Carlos Apache Tribe and leader of Apache Stronghold, testified before the House Natural Resources Committee, Subcommittee on National Parks, Forests, and Public Lands, in a hearing on the Land Exchange Act. Nosie testified that "[t]he lands to be acquired and mined . . . are sacred and holy places." *Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing on H.R. 3301 before the H. Comm. on Nat. Res., Subcomm. on Nat'l. Parks, Forests, and Pub. Lands.*, 110th Cong. 18 (2007). Nosie explained that Apache Leap is "sacred and consecrated ground for our People" because "seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom." *Id.* at 19. He testified that "Oak Flat and nearby Devils Canyon are also holy, sacred, and consecrated grounds" that should not be transferred. *Id.* at 21–22.

Ultimately, Congress struck a compromise. The Land Exchange Act directed the Forest Service to transfer the Oak Flat parcel to Resolution Copper, 16 U.S.C. § 539p(c)(10), but also required Resolution

Copper to surrender all rights it held to mine under Apache Leap, 16 U.S.C. § 539p(g)(3). The Act directs the Forest Service to preserve Apache Leap "for traditional uses of the area by Native American people." 16 U.S.C. § 539p(g)(1), (2)(B).

The question is whether Congress's careful compromise in the Land Exchange Act can be undone by Apache Stronghold's invocation of a prior Act of Congress— namely, RFRA. The dissent argues that "[i]f Congress meant to exempt the Land Transfer Act from RFRA, Congress could and would have done so explicitly." The dissent therefore argues that "RFRA applies to the Land Transfer Act." But one Congress cannot prohibit a future Congress from using one of the most commonplace tools of lawmaking—the implied repeal. *See Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). And while a statute's anti-implied-repeal provision should be given some interpretive weight, the dissent's proposed test would turn RFRA's anti-implied-repeal provision into an impenetrable fortress—in direct contradiction to multiple Supreme Court cases.

1. *RFRA's Anti-Implied-Repeal Provision*

RFRA states that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). The Land Exchange Act, in turn, is silent on the applicability of RFRA.

Such statutory language purporting to restrict the ability of later Congresses to repeal an act of an earlier Congress by implication cannot bar all implied repeals. *See Great N. Ry. Co.*, 208 U.S. at 465 ("As the

section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.").

In *Dorsey v. United States*, 567 U.S. 260 (2012), for example, the Supreme Court invalidated a statute which purported to authorize criminal prosecutions under any later-repealed criminal statute that was in force at the time of the crime unless the repealing statute "expressly provide[d]" that such prosecutions would be barred.[23] The Court held:

> statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly *or by implication* as it chooses.

Id. at 274 (emphasis added) (citations omitted). Thus, a statutory provision that requires future Congresses to use express language to exempt an enactment from the earlier statute's terms is not constitutional.

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[23] *See* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.").

However, that is not to say that the anti-implied-repeal language has no effect whatsoever. In *Dorsey*, the Court said that the anti-implied-repeal provision created "an important background principle of interpretation" and that the provision required courts, before finding an implied repeal in the face of an anti-implied-repeal provision, "to assure themselves that ordinary interpretive considerations point clearly in that direction." *Id.* at 274–75; *see also Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (giving significant weight to an anti-implied-repeal provision). The Supreme Court "has described the necessary indicia of congressional intent by the terms 'necessary implication,' 'clear implication,' and 'fair implication,' phrases it has used interchangeably." *Dorsey*, 567 U.S. at 274. And in two cases, the Supreme Court has given some weight to RFRA's anti-implied-repeal provision. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020); *Hobby Lobby*, 573 U.S. at 719 n.30.[24]

But the dissent's proposed method of interpreting anti-implied-repeal provisions is incompatible with the Supreme Court's method. The Supreme Court has held that one Congress cannot force a future Congress "to employ magical passwords in order to effectuate an

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[24] Of course, even without an anti-implied-repeal provision, a party seeking to prove implied repeal carries a weighty burden. "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas*, 296 U.S. at 503).

exemption" from a statute. *Marcello*, 349 U.S. at 310. Yet the dissent argues that the Land Exchange Act should be required to employ one of two passwords to avoid the reach of RFRA: either an explicit reference to RFRA or "some variation of a 'notwithstanding any other law' provision." The Supreme Court has held that implied repeals must remain available to future Congresses. *See Dorsey*, 567 U.S. at 274; *Great N. Ry. Co.*, 208 U.S. at 465. But the dissent argues that an implied repeal, as traditionally understood, is impossible because the Land Exchange Act must include an "explicit[ ]" exemption to avoid the reach of RFRA. The dissent's approach affords far too much power to RFRA's anti-implied-repeal provision.

2. *Whether the Land Exchange Act Can Be Reconciled with RFRA*

The irreconcilability question must be read in the context of the relief sought by Apache Stronghold. As is relevant to Apache Stronghold's RFRA claim, Apache Stronghold's complaint sought a declaration that *the land exchange* between the United States and Resolution Copper "violate[s] the Religious Freedom Restoration Act." The complaint prayed that the district court "[i]ssue a permanent injunction *prohibiting* [*the land exchange*]." Apache Stronghold's motion for a temporary restraining order and preliminary injunction filed in the district court sought "to preserve the status quo by preventing Defendants from publishing a Final Environmental Impact Statement ('FEIS') on the 'Southeast Arizona Land Exchange and Resolution Copper Mine Project' *and from conveying the parcel(s) of land containing Oak Flat*." Similarly, Apache Stronghold's motion for

injunction pending appeal sought an injunction against "*the transfer* and destruction *of Oak Flat*."

The Land Exchange Act grants some authority to the Secretary to "minimize the adverse effects on the affected Indian tribes" and to ensure that the land exchange complies with the National Environmental Policy Act of 1969. 16 U.S.C. § 539p(c)(3)(B)(ii), (c)(9). But the plain text of the Land Exchange Act requires that the land exchange, including the exchange of Oak Flat, *must* occur if the preconditions are met. In fact, Apache Stronghold's complaint refers to the land exchange as "The Land Exchange *Mandate*" and recognizes that "Section 3003 of the [Land Exchange Act] *mandates* that the [land exchange] *shall be done*."

Apache Stronghold claims that the Government should be enjoined from transferring the land to Resolution Copper pursuant to RFRA. But that is the one thing that the Land Exchange Act clearly requires. If RFRA did provide a legal basis for Apache Stronghold's claim, RFRA would be in "irreconcilable conflict" with the Land Exchange Act. *See Branch*, 538 U.S. at 273.

That is not to say that all potential RFRA claims would be irreconcilable with the Land Exchange Act. Instead of seeking to block the entire land exchange, a plaintiff might, for example, claim that the conditions imposed upon Resolution Copper in the FEIS should be modified to provide greater accommodation for the religious practices of the Indians.

But that is not the claim advanced by Apache Stronghold, and adopted by the dissent, in this case.[25] The claim here is that the land exchange should be stopped altogether. And that relief is directly in conflict with the Land Exchange Act. *See* 16 U.S.C. § 539p(c)(1). Because the RFRA claim advanced by Apache Stronghold is irreconcilable with the terms of the Land Exchange Act, the Land Exchange Act necessarily requires that the claim be rejected. *See Dorsey*, 567 U.S. at 274.

CONCLUSION

Pre-RFRA jurisprudence demonstrates that only governmental actions which coerce religious adherents to violate or abandon their religious tenets can constitute "substantial burdens" on the free exercise of religion. *See Hobbie*, 480 U.S. at 144; *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249; *Schempp*, 374 U.S. at 223; *Lyng*, 485 U.S. at 450; *Bowen*, 476 U.S. at 703. For coercion to affect a religious adherent personally, the coercion must involve either the denial of a vested benefit to the religious adherent or the imposition of a penalty on the religious adherent because of the religious adherent's participation in religiously motivated conduct. *See Hobbie*, 480 U.S. at 144; *Lyng*, 485 U.S. at 449; *Bowen*, 476 U.S. at 703; *Thomas*, 450 U.S. at 717–18; *Jimmy Swaggart*, 493 U.S. at 391–92.

RFRA incorporated this settled definition of the term, and RFRA made this incorporation explicit when it stated that its purpose was to "restore" the free exercise of religion test "as set forth in prior federal

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[25] Indeed, such a claim would likely fail on ripeness grounds because the terms of the final FEIS are not yet known.

court rulings," and when it directly cited *Sherbert* and *Yoder*. The text of the statute and pre-RFRA jurisprudence command that the definition of "substantial burden" be limited to those burdens recognized in *Sherbert* and *Yoder*.

Our en banc decision in *Navajo Nation* correctly interpreted RFRA, and our limited definition of "substantial burden" has served as a workable test for fifteen years.[26]

The proposed copper mine would not force the Apache to choose between violating or abandoning their sincere religious beliefs and receiving a governmental penalty or losing a governmental benefit. Without any such coercion, there is no substantial burden. Thus, the Apache's claim under RFRA must fail.

Moreover, even were the Apache's claim cognizable under RFRA, the language of the Land Exchange Act is clearly irreconcilable with the Apache's claim for relief under RFRA. In such cases of direct conflict, the later statute—the Land Exchange Act—must be given effect over the earlier statute—RFRA.

For these reasons, in addition to those expressed in Judge Collins's majority opinion, I agree that the judgment of the district court must be affirmed, and I

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[26] Principles of *stare decisis* caution us not to overrule our precedent lightly. *See United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (en banc). These principles have a heightened effect in matters of statutory interpretation because the losing parties in such cases can seek relief in the halls of Congress. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

dissent from the per curium's purported overruling of *Navajo Nation*.

R. NELSON, Circuit Judge, concurring:

In my view, en banc review was warranted to correct our faulty legal test (not the outcome) in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Generally, we adopt the same definition of a term— like "substantial burden" here—when that term is used in similar statutes. For that reason, RFRA and RLUIPA apply the same legal definition of "substantial burden." Since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition we gave it under RFRA. Today, a majority of the panel rejects the narrow construction of "substantial burden" in *Navajo Nation*. *See* Per Curiam at 10–11; Murguia Dissent at 180, 202 n.8. Six judges adopt a new test to define "substantial burden" going forward for both RFRA and RLUIPA. *See* Per Curiam at 10–11. A government act imposes a "substantial burden" on religious exercise if it (1) "requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief," (2) "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief," or (3) "places considerable pressure on the plaintiff to violate a sincerely held religious belief." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *see also Bryant v. Gomez,* 46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (citing *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987)) (holding that the "substantial burden" test is met when a religious adherent proves that a government action "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th

Cir. 2000); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996); *see also* Per Curiam at 10–11.

Even Judge Collins's majority, which I join, adopts a new test without relying on *Navajo Nation*. As explained more fully in section V, the strained interpretation of "substantial burden" announced in *Navajo Nation* is not sustainable. In the last 15 years, the Supreme Court and virtually all the lower courts have recognized that "substantial burden" holds the same definitional meaning in RFRA and RLUIPA. While the terms may apply in different contexts that arise under the statutes, the definitions are the same.

But the question remains—can RFRA be used to protect a religious practice exercised on government property? This case raises the prevent prong of RFRA's "substantial burden" definition announced by our court today. As Chief Judge Murguia's dissent notes, the ordinary meaning of "substantial burden" suggests that in selling the land, the government is preventing the Apache's participation by restricting their access to the land. *See* Murguia Dissent at 195–96. That much is true. But that conclusion conflicts with the Supreme Court's direction in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Under *Lyng*, a "substantial burden" analysis does not apply to the internal affairs of the government. I therefore reach a different conclusion from the same beginning premise as the dissenters.

Preventing access to religious exercise generally constitutes a substantial burden on religion. But the parameters of "substantial burden" are not unconstrained. We cannot ignore RFRA's statutory context. The Supreme Court has distinguished the boundaries of cognizable burdens under the Free

Exercise Clause. Through decades of case law, the Court formulated a test that examined whether there was a cognizable, substantial burden on religious exercise justified by a compelling government interest. In RFRA, Congress then applied the Court's terminology, essentially codifying both the test and those parameters. Neither the Court nor Congress has defined "substantial burden." But in *Lyng*, the Court held that the government's use and alienation of its own land is not a substantial burden. And the Court repeated that principle even more broadly: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699 (1986)) (internal citation omitted).

This case thus turns on whether Congress's codification of "substantial burden" in RFRA overruled *Lyng*'s application of substantial burden under the First Amendment. I am reluctant to conclude that a Supreme Court opinion is implicitly reversed by Congress when Congress specifically adopts a term used in the Court's prior opinions. I therefore conclude that Congress through RFRA did not reverse the Supreme Court's holding in *Lyng*. As such, I join Judge Collins's majority to affirm the district court's denial of injunctive relief.

I

The National Defense Authorization Act for Fiscal Year 2015 (NDAA) includes a section known as the Southeast Arizona Land Exchange and Conservation Act (Land Exchange). The Land Exchange requires the conveyance of federal land, including a parcel known as Oak Flat, to Resolution Copper, a foreign

mining company. *See* 16 U.S.C. § 539p. Resolution Copper intends to construct a large copper mine on Oak Flat. Once the transfer is complete, Oak Flat, as it is now known, by all accounts will eventually be destroyed by the mining activity. The planned mining technique will leave a two-mile-wide crater hundreds of feet deep and will affect about eleven square miles. The mining will thus permanently alter Oak Flat beyond recognition, destroying the Apache's "cultural landscapes" and barring all access to that land for religious or other purposes. Additionally, spiritually significant objects, like Emory Oak, that play a key role in Apache ceremonies will be destroyed.

Congress acknowledged the impact that the Land Exchange would have on the Apache's religious practice. It included several provisions in the NDAA to balance this concern. The Land Exchange requires the Secretary to engage in "government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange." *Id.* § 539p(c)(3)(A). Additionally, after consulting the tribes, the Secretary shall consult Resolution Cooper to "address the concerns of the affected Indian tribes" and "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." *Id.* § 539p(c)(3)(B).

Noticeably, despite the undisputedly significant impact that would befall Apache religious practice, Congress did not exempt the Land Exchange from RFRA. *See* Murguia Dissent § II.H. Perhaps Congress declined to do so because it believed that under preexisting Supreme Court precedent, including *Lyng*,

no substantial burden was implicated and RFRA did not apply. This case thus requires us to answer whether RFRA imposes additional strictures on the land transfer.

II

The Constitution provides Congress with plenary power over Indian affairs. *See United States v. Lara*, 541 U.S. 193, 200–01 (2004); U.S. Const. art. I, § 8. Congress addressed religious liberty for Native Americans in the American Indian Religious Freedom Act of 1978 (AIRFA), declaring that it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. 42 U.S.C. § 1996.

In accordance with AIFRA, President Clinton signed Executive Order No. 13007, 61 Fed. Reg. 26,771 (1996). Like the Land Exchange, it requires agencies to, as practicable, "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." *Id.* § 1. But that same Order meant "only to improve the internal management of the executive branch" and did not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person." *Id.* § 4.

AIFRA does not confer "so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights" and is merely a policy statement. *Lyng*, 485 U.S. at 455. This paradox fuels the criticism that "despite its assertion of sweeping plenary power over Indian affairs, the federal government has done little of consequence to protect the ability of tribes to access and preserve sacred sites." Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1297 (2021).

We would be daft to ignore that, historically, the relationship between the American government and native tribes has not been a pristine example of intergovernmental relations. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("[I]t's equally clear that Congress has since broken more than a few of its promises to the Tribe[s]."). Although this reality is regrettable, we are bound to enforce only those statutory rights prescribed by Congress.

Apache Stronghold asserts that Congress has protected native access to government land for religious practices in RFRA, and that the statute prevents the government from transferring Oak Flat to Resolution Copper. I do not agree. We apply the law as Congress wrote it and as the Supreme Court has interpreted it. Examination of the Supreme Court's pre-RFRA jurisprudence illuminates why RFRA does not provide Apache Stronghold the right it seeks.

III

A

RFRA does not appear in our legal system from the ether. It is a legislative response to the culmination of decades of caselaw interpreting the Free Exercise Clause. So I begin with the Free Exercise Clause.

Religious liberty and the concept of free exercise are grounded in the bedrock of our founding and the structure of our system of government. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). At the founding, various state constitutions recognized a right to free exercise of religious beliefs. Even before ratification of the First Amendment in 1791, many state constitutions reflected the sentiment that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." N.C. Const. art. XIX (Dec. 18, 1776), *reprinted in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2787, 2788 (Francis Newton Thorpe ed., 1909); *see also* Nathan S. Chapman, *Disentangling Conscience and Religion*, Ill. L. Rev. 1457, 1466 n.44 (2013) (listing state constitutional provisions). In Virginia, for instance, Thomas Jefferson drafted a 1779 bill establishing religious freedom that no one "shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion . . . ." *A*

Bill for Establishing Religious Freedom (June 12, 1779), *reprinted in* 5 Founders' Constitution.

Virginia's view was echoed on the national level, too. Of the newly established American government, George Washington said: "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." *Letter to The Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), The Papers of George Washington, Presidential Series, vol. 6, 1 July 1790–30 Nov. 1790, ed. Mark A. Mastromarino. Charlottesville: University Press of Virginia, 1996, pp. 284–86. Washington echoed this same sentiment to other religious groups: "[t]he liberty enjoyed by the People of these States, of worshipping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights." *From George Washington to the Society of Quakers* (Oct. 13, 1789), The Papers of George Washington, Presidential Series, vol. 4, 8 Sept. 1789–15 Jan. 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 265–69. Washington conveyed this same sentiment to various religious groups, including Roman Catholics, Presbyterians, the Moravian Society for Gospel, and others. *See George Washington to Religious Organizations*, https://www.mountvernon.org/georgewashington/religion/george-washington-to-religious-organizations/. From the founding, free exercise of religion was intended to apply to all faiths. Native American religious practice is no exception. Their religious practice is honored and respected the

same as any other religious practice or belief.[1] But their right to practice religion, like all religious practice protected by the Free Exercise Clause and our legal system, must track the law.

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[1] The criticism that accommodating the Native American religious practices here "would inevitably require the government to discriminate between competing religious claimants," VanDyke Concurrence at 162, is misguided. I disagree with my dissenting colleagues' conclusion in this case because Apache Stronghold's RFRA claim does not raise a cognizable substantial burden under *Lyng*. The dissenters are not wrong, however, because under their view "only *some* religions would benefit from the precedent created by such a decision." *Id.* Almost any recognition of a substantial burden on religious practice would be subject to the same criticism. Our court has issued opinions more hostile to religion than any other court in the country. *See, e.g.*, *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 76 F.4th 962, 968 (9th Cir. 2023); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021), *reversed* 597 U.S. 507 (2022); *Tandom v. Newsom*, 992 F.3d 916 (9th Cir. 2021), *disapproved* 593 U.S. 61 (2021); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. Appx. 460 (9th Cir. 2019), *reversed* 140 S. Ct. 2049 (2020); *Freedom from Religion Found., Inc. v. Chino Valley Uni. Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018). But if courts were to deny religious claims based on how the decision may benefit one religion over another, we would pit religious interests against each other and undermine religious liberty far more than any position previously taken by our court. Would we deny a Muslim from growing a reasonable beard in prison because other religious prisoners would not get the same benefit? Or would we deny allowing a church to build a 100-foot spire because other religions do not have a similar religious belief? Or would we deny a religious school a voucher because some other religions do not operate schools? Such considerations by the courts would be grossly inconsistent with religious liberty. *Cf.* VanDyke Concurrence II.B.iii & II.C.

Even the Founders recognized that religious exercise in a pluralistic society was bound to conflict with government structure. From the beginning, the Founders attempted to reconcile these competing views by distinguishing the freedom to believe from the freedom to act. As to religious freedom, Jefferson said that "the legislative powers of government reach actions only, and not opinions." *The Works*, vol. 8 (Correspondence 1793-1798). G. P. Putnam's Sons, 1905. Jefferson was not alone. Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice of the United States, wrote: "But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion." Connecticut Courant, Dec. 17, 1787, *reprinted in* 1 Stokes, Church and State in the United States, 535. The question is, what are those cases?

B

The First Amendment right to free exercise of religion is not absolute. The Supreme Court has long formulated a legal framework balancing the interests of religious free exercise against the competing demands of government. For example, the government cannot restrict an individual's religious opinion but may restrict individual religious action when the government has a sufficient interest. *See Reynolds v. United States*, 98 U.S. 145, 166 (1878) (While government laws "cannot interfere with mere religious belief and opinions, they may with practices.").

The right to belief is distinct from the right to act and the latter is not free from government restrictions. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)

(citing *Cantwell v. State of Connecticut*, 310 U.S. 296, 303–04, 306 (1940)) ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."). Abraham Braunfeld, an Orthodox Jew, owned a retail store, but state law prohibited him from opening on Sunday, and his faith, from working on Saturday. *See id.* at 601. He challenged the law as a violation of the religious liberty clauses, claiming economic concerns required his store to be open six days a week. *See id.* at 602.

Braunfeld reflects the early development of the "substantial burden/compelling interest" test that would later be expanded by the Supreme Court and codified by Congress in RFRA. The Court noted: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* at 606.

The Supreme Court later clarified the government interest analysis. In *Sherbert v. Verner*, a Seventh-day Adventist was terminated from her job and rejected alternative employment because she would not work on Saturday, her Sabbath. 374 U.S. 398, 399 (1963). South Carolina law barred her unemployment benefits because she declined an alternate suitable employment offer. *See id.* at 401.

The Court held that South Carolina's law was unconstitutional because the burden on Sherbert's exercise acted as a fine imposed against her worship and was not justified by a compelling state interest. *See id.* at 403 ("[A]ny incidental burden on the free

exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))). The Court first examined whether Sherbert's claim fell within the class of cognizable Free Exercise claims. *See id.* at 402–03. Because it was cognizable, the Court then examined whether Sherbert suffered a burden to her religious practice and whether a compelling state interest justified that "substantial infringement on [Sherbert's] First Amendment right." *Id.* at 403–06.

A decade later, the Court reiterated that in some cases the government can regulate "religiously grounded conduct." *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972). The Court did not use the phrase "substantial burden" but invoked the same theory: Wisconsin could not require religious parents to send their children to school until age 16 because "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215, 220.

The Court returned to the idea of a "substantial burden" another decade later. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). It held that, while compulsion regarding religious exercise could be incidental, "the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Because Thomas quit his job due to his religious convictions against producing military weapons, the denial of unemployment benefits was an unconstitutional burden. *See id.* But the Court also stated that "[t]he mere fact that the petitioner's religious practice is burdened by a governmental

program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* (citing *Yoder*, 406 U.S. at 215). The Court's citation to *Yoder* confirms that the substantial burden/compelling interest framework was consistent even in cases that did not mention it by name.

The Court continued to make clear that its balancing framework did not guarantee relief for all religious burdens, even if those incognizable burdens were substantial in the ordinary sense. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry."). The Court held that "[n]ot all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* (internal citations omitted). The Court did not analyze how substantial the burden of the tax law was on Amish beliefs when it analyzed whether the burden was cognizable. *See id.* at 257. The Court instead couched its holding on the government's "very high" interest in managing the social security system. *Id.* at 259. And the government's compelling interest in preserving the social security program outweighed the burden on religious exercise. *See id.* at 261.

The Court followed up in *Bowen v. Roy*, in which Native American parents challenged the constitutionality of requiring a social security number for their child to receive federal food stamps and

related benefits. 476 U.S. 693 (1986). The parents believed that a social security number would "rob the spirit." *Id.* at 696. In rejecting the religious challenge, the Court echoed that "[n]ot all burdens on religion are unconstitutional." *Id.* at 702.

The Court again noted that the First Amendment does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699 (emphasis omitted). Instead, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* The Court in *Bowen* did not analyze whether there was a "substantial burden" on any religious practice; it determined that the claim itself was not cognizable. *Id.* at 700 ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.").

Two years later, the Court decided *Lyng*, the most factually relevant case here. In *Lyng*, Native American tribes challenged the construction of a road connecting two towns. 485 U.S. at 442–43. The proposed six-mile paved road would affect sacred area used for religious purposes and rituals by Yurok, Karok, and Tolowa Indians. *See id.* A study commissioned by the U.S. Forest Service concluded that constructing the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*

The Court declined to interpret the Free Exercise Clause as permitting a significant burden on religious practice to weigh as equally, or even overrule, the government's use of its land. *See id.* at 452. Indeed, it echoed that the Constitution "does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Id.* at 452.

Lyng's analytical framework was not new. The Court started by assessing whether the harms alleged were cognizable under the First Amendment, holding that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land." *Id.* at 452–53.

And the Court acknowledged that the burden on religion was substantial because "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." *Id.* at 451. No doubt a "devastating" impact that would foreclose religious practice is substantial in the ordinary sense. *See* Substantial, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Of real worth and importance; of considerable value; valuable."). But, like in several prior cases, the Court determined that even the potential foreclosure of the religious practice did not render the tribes' religious claim cognizable under the First Amendment. *See Lyng*, 485 U.S. at 451–53. *Lyng* held that the Free Exercise Clause does not encompass claims relating to government management of its land. *See id.* And the Court stated *Lyng*'s holding even more broadly: The "Free Exercise Clause simply cannot be understood to

require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (citing *Bowen*, 476 U.S. at 693) (internal citation omitted).

Cases following *Lyng* but pre-*Smith* invoked the Court's preexisting framework, but notably use the phrase "substantial burden." This represents no new test but articulates the test the Court had formulated all along: "Our cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). Within this framework, the Court separated cognizable substantial burdens from the incognizable. In so doing, it was not applying a uniform or literal dictionary construction of "substantial." It was defining the applicable constitutional framework.

In the pre-*Smith* cases, the Supreme Court used different variations to articulate the "substantial burden" standard. *See Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty" with "an overriding governmental interest."); *Thomas*, 450 U.S. at 717–18 ("[T]he infringement . . . is nonetheless substantial."); *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 406 (assessing whether a compelling state interest

justified a "substantial infringement of appellant's First Amendment right"). But there is no indication these were different tests; they are consistent applications of the same legal standard over several decades.

Employment Division v. Smith, 494 U.S. 872 (1990), is no exception. The Court again made clear that the Free Exercise Clause recognizes only certain cognizable substantial burdens. And "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* at 883 (citing *Sherbert*, 374 U.S. at 402–03; *Hernandez*, 490 U.S. at 699). Although Justice Scalia's majority opinion held that the *Sherbert* test does not apply to neutral, generally appliable laws, it did not overrule *Lyng*. *Smith*, 494 U.S. at 883; *see also* Collins Maj. at 45–46. Therefore, *Lyng* is within the very pre-*Smith* framework reinvigorated by RFRA.

IV

RFRA was a direct rejection of *Smith*'s holding that all generally applicable laws that incidentally burden religious practice present no First Amendment claim. *See Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015). RFRA codified the compelling interest test as set forth by *Yoder* and *Sherbert*. *See id.* As discussed above, under RFRA, a government's "substantial burden" on the exercise of religious practice must be justified by a compelling interest narrowly tailored to accomplish that interest. 42 U.S.C. § 2000bb-1(b). RFRA's text reflects the Supreme Court's pre-*Smith* jurisprudence: "[G]overnments should not substantially burden religious exercise without compelling justification," and "the compelling interest test as set forth in prior

Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb-(a)(3), (5). Additionally, RFRA's purpose was "to restore the compelling interest test." *Id*. § (b)(1). RFRA expressly draws this restored test from the Court's free exercise caselaw, discussed above.

Like the several cases to predate it, RFRA does not define "substantial burden," except "as set forth in prior Federal court rulings." *Id*. § (a)(5). But RFRA's religious protections are plainly robust. RFRA applies to all federal law, statutory or otherwise, whether adopted before or after RFRA's enactment. *Id.* § 2000bb-3(a).

Shortly after RFRA was passed, the Court held that it only applied to the Federal Government. *See City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Congress then doubled down on its codified protections for religious exercise. *See* The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq. RLUIPA amended RFRA's definition of free exercise, both broadening it to include the use of real property for religious purposes and ensuring that RFRA and RLUIPA share the same definition. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014). RLUIPA echoes the same command as RFRA that no government shall impose a "substantial burden" on religious exercise unless the government demonstrates that such an imposition "is in furtherance of a compelling governmental interest;

and is the least restrictive means of furthering that compelling governmental interest."[2] *Id.* § 2000cc(a)(1).

As the court today holds, RFRA and RLUIPA apply the same test—that is clear from the text of both statutes and from the Supreme Court's discussion of them.[3] *See* Per Curiam at 11; Murguia Dissent at 202 n.8. RFRA and RLUIPA are "sister statute[s]" enacted "in order to provide very broad protection for religious liberty," and RLUIPA protects religious accommodations "pursuant to the same standard as set forth in RFRA." *Holt*, 574 U.S. at 356, 358 (internal citations omitted). Although I agree with Chief Judge Murguia that RFRA and RLUIPA are interpreted uniformly, I cannot join her in assigning "substantial burden" its dictionary definition

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[2] Chief Judge Murguia contends that RLUIPA's amendment to RFRA's definition of "substantial burden" signals that *Lyng* does not apply to this case. *See* Murguia Dissent at 200–01. Even though the Supreme Court has noted that RLUIPA removed mention of the First Amendment and the Court has questioned "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," *Hobby Lobby*, 573 U.S. at 714, this is not the same as finding pre-*Smith* constructions of "substantial burden" inapplicable to its meaning. *See* Murguia Dissent at 200–01. While pre-*Smith* cases do not define "substantial burden," this does not foreclose a holding that certain categories of cases do not apply to the "substantial burden" analysis.

[3] The Supreme Court in *Hobby Lobby* also disavowed differing constructions of another phrase used in both statutes. "[T]he phrase 'exercise of religion,' as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means 'religious exercis[e] as defined in [RLUIPA].' . . . It necessarily follows that the 'exercise of religion' under RFRA must be given the same broad meaning that applies under RLUIPA." 573 U.S. at 695 at n.5.

meaning. *See* Murguia Dissent at 195–96. "[W]e do not follow statutory canons of construction with their focus on 'textual precision' when interpreting judicial opinions." *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir. 2023) (quoting *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000)); *see also Parker v. Cnty. of Riverside*, 78 F.4th 1109 (9th Cir. 2023) (R. Nelson, J., concurring). Although "substantial burden" is in RFRA, Congress adopted "substantial burden" in RFRA from "prior Federal Court rulings," 42 U.S.C. § 2000bb-(a)(5). Thus, we do not use the ordinary meaning of "substantial burden," but the context given in those prior judicial opinions.

Interpreting "substantial burden" in RFRA and RLUIPA consistently also follows rules of construction. Our notion of "*in pari materia*," stemming from the related-statutes canon states that statutes concerning the same topic are to be interpreted together, as though they were one law. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). To conclude otherwise would depart from the presumption of consistent usage—which has special force where, as here, there is a recognized "connection" between "the cited statute" and "the statute under consideration." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 172–73. Because RFRA and RLUIPA both restrict governments' ability to impose "substantial burdens" on religion, there is no reason to define the same term differently. *See id.*

Although RFRA and RLUIPA share the same definition, neither defines "substantial burden." And the need to discern that definition is central to this appeal.

V

Before *Navajo Nation*, our court consistently invoked pre-*Smith* Free Exercise Clause cases and held that a "substantial burden" under RFRA includes preventing an individual from engaging in religious practice. *See, e.g., Goehring*, 94 F.3d at 1299 (quoting *Graham*, 822 F.2d at 850–51) ("substantial burden" test met when government "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Bryant*, 46 F.3d at 949 (citing *Graham*, 822 F.2d. at 850–51); *see also Worldwide Church of God*, 227 F.3d at 1121; *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996).

We then held that a substantial burden under RFRA "is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1070 (emphasis added). A majority of the panel reverses this narrow holding of *Navajo Nation* today—specifically the limitation to "only" the specific circumstances of *Sherbert* and *Yoder*. *See* Per Curiam at 11; Murguia Dissent at 202 n.8. Not only has the Supreme Court foreclosed the definition applied in *Navajo Nation*, but almost every circuit has declined to adopt such a narrow construction of "substantial burden." "Substantial burden" is not limited to the burdens that were at

issue in *Sherbert* and *Yoder*. *See* Per Curiam at 11; Murguia Dissent at 202. While I conclude that *Navajo Nation* was wrong for some overlapping and differing reasons than Chief Judge Murguia in her dissent, a majority of the panel rejects that test, thus controlling this question in future cases in this court.

A

The Supreme Court disavowed the narrow definition applied by the majority in *Navajo Nation* and asserted by Judge Bea here. *See* Bea Dissent at 87–88. The Supreme Court said: "Even if RFRA simply restored the status quo ante, there is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

The Supreme Court, however, has left lower courts to tackle the underlying definitional question; it has never defined a "substantial burden" in post-*Smith* cases, either. In *Burwell*, the Court had "little trouble concluding" that the contraceptive mandate, which permitted millions of dollars in fines, constituted a substantial burden on the exercise of petitioner's religious beliefs. *Id.* at 719–20, 726. And in *Holt*, the Court found that a prison grooming policy constituted a substantial burden because petitioner was required to shave his beard in serious violation of his religious beliefs or face discipline. *See* 574 U.S. at 361–62.

Here, both *Burwell* and *Holt* involved instances of coercion akin to *Yoder*. *See* Bea Dissent at 82–83. While true, the Court did not limit its definition of substantial burden to *Yoder* or to any additional pre-*Smith* cases. *Burwell*, 573 U.S. at 706 n.18.

Most of our sister circuits have heeded the Supreme Court's words. Many have analyzed "substantial burden" in the presence of coercion like in *Sherbert* and *Yoder*. Still, none have expressly limited the definition of substantial burden only to that universe. *Contra* Bea Dissent at 73 n.8. And aside from whether "substantial burden" under RFRA is the same as under RLUIPA, many of our sister circuits have rejected the notion that a substantial burden must fall only under *Sherbert* or *Yoder*, and no other scenario.

To begin with, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have treated RFRA and RLUIPA as analogous statutes and define "substantial burden" the same.[4] This underscores that

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[4] *See, e.g.*, *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) (citing *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007)) ("although *Klem* examined the definition of 'substantial burden' in the context of RLUIPA, the two statutes [RFRA and RLUIPA] are analogous for purposes of the substantial burden test"); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350 (5th Cir. 2022) (citing *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), a RLUIPA case, to define "substantial burden" in a RFRA case); *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 588, (6th Cir. 2018) (citing *Haight v. Thompson*, 763 F.3d 554, 565–66 (6th Cir. 2018), a RLUIPA case, to define "substantial burden" in a RFRA case); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) (citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a RLUIPA case, to define "substantial burden" in a RFRA case); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682 (describing RLUIPA as "a statute that adopts RFRA's 'substantial burden' standard"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237 (11th Cir. 2004) ("RLUIPA revives RFRA's substantial burden test"); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) ("several factors

RFRA and RLUIPA share the same definition of "substantial burden" and that *Navajo Nation* should be overruled on that issue.

It is not correct, *see* Bea Dissent at 73, that the majority of circuits have followed *Navajo Nation* and these circuits limit "substantial burden" to *Sherbert* and *Yoder*. Without question, all courts apply the coercion and benefit tests identified in *Navajo Nation*. But no other court expressly limits RFRA to only those scenarios. The D.C. Circuit, for example, held that a substantial burden exists when the government leverages

> "substantial pressure on an adherent to modify his behavior and to violate his beliefs," as in *Sherbert*, where the denial of unemployment benefits to a Sabbatarian who could not find suitable non-Saturday employment forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (first quoting *Thomas*, 450 U.S. at 718; and *Sherbert*, 374 U.S. at 404). The First Circuit applied a similar definition and cited *Navajo Nation* favorably. *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020) ("[C]ase law counsels that a substantial

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cause us to conclude that Congress intended that the language of the act [RLUIPA] is to be applied just as it was under RFRA"). None of these cases reference *Sherbert* or *Yoder*, let alone limit the definition of "substantial burden" to them.

burden on one's exercise of religion exists '[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'") (citing *Navajo Nation*, 535 F.3d at 1069–70). And while the Second Circuit recognizes *Sherbert* and *Yoder* as examples of substantial burden, it does not limit the definition to only those cases. *See Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

Indeed, several other circuits adopt a test inconsistent with *Navajo Nation* but consistent with our approach today. The Eighth Circuit, for example, has held that a "substantial burden"

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunity to engage in those activities that are fundamental to a person's religion.

United States v. Ali, 682 F.3d 705, 709–10 (8th Cir. 2012) (citing *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)). There is no way to square the Eighth Circuit's definition of "substantial burden" with *Navajo Nation*.

The Seventh Circuit has also held that RFRA and RLUIPA adopt the same meaning of "substantial burden": "[A] law, regulation, or other governmental command substantially burdens religious exercise if it

'bears direct, primary, and fundamental responsibility for rendering a religious exercise . . . effectively impracticable.'" *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013). The Seventh Circuit definition of "substantial burden" is more expansive than just *Sherbert* and *Yoder*.

The Tenth Circuit has similarly held that a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *Yellowbear*, 741 F.3d at 55. This is plainly contrary to our prior holding in *Navajo Nation*. And it is the legal test the majority adopts today to govern future RFRA cases.

A survey of the caselaw from our sister circuits is clear. Our definition of substantial burden as articulated in *Navajo Nation* has not been adopted by any court since it was announced 15 years ago. "Substantial burden" is not limited only to coercion or denial of a government benefit as articulated under *Sherbert* and *Yoder*. The narrow interpretation of "substantial burden" from *Navajo Nation* misses a crucial nuance: what satisfies a condition does not automatically set its parameters in stone. The Supreme Court's opinions in *Holt* and *Burwell*, and the holdings by virtually all other circuits, supports our holding today. *Navajo Nation*'s express limitation on the RFRA definition of "substantial burden" is properly overruled and no longer good law.

B

The majority's holding overruling *Navajo Nation*'s legal test of "substantial burden" is a fully binding holding of the court. Judge Bea claims that the first paragraph of the per curiam opinion is dicta and not well-reasoned. *See* Bea Dissent at 54 n.1. He is wrong on both counts.

First, the holding is not dicta. To the contrary, when we "confront[] an issue germane to the eventual resolution of the case, and resolve[] it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004)). Judge Bea quotes that language (Bea Dissent at 54 n.1), but conveniently omits the relevant phrase: "regardless of whether doing so is necessary in some strict logical sense." He does not get to dictate what reasoning is necessary to the ultimate conclusion in the case; nor does that matter under *McAdory*. I voted to take this case en banc to correct the wrong legal test of "substantial burden" in *Navajo Nation*. The issue was central to the parties' arguments and fully briefed before the district court, the three-judge panel, and the en banc panel.

Judge Bea would resolve this case on narrower grounds. But had a majority of the panel been willing to uphold the legal test for "substantial burden" in *Navajo Nation*, this case could have been resolved on those narrower grounds. That position, however, failed to garner a majority; it failed to garner even a plurality. And rejecting the prior *Navajo Nation* legal test was important to the legal analysis of a majority

of the judges on the panel in deciding this case. Indeed, without a majority of the court rejecting *Navajo Nation*'s legal test, this case could have been resolved simply by applying *Navajo Nation* as the panel opinion did, rather than on the narrower basis adopted in Judge Collins's majority opinion. To be clear, Judge Collins's opinion would not have garnered a majority vote of the panel had *Navajo Nation* not been overruled. So it was important to address that question.

Moreover, defining "substantial burden" in a case that asks precisely whether the government imposed a substantial burden can hardly be viewed as so tangential to the case to be dicta in any meaningful sense. Nor can a majority's rejection of a primary argument raised by the parties before resolving the case on other grounds be considered dicta. It is clearly "germane" under our precedent. We do that every day in our opinions. Judge Bea's expansive view of dicta would have far-reaching consequences for potentially hundreds of our opinions if future panels were allowed to parse what issues were germane to support a particular result–and reject all other reasoning as dicta.

Second, the holding is well reasoned. I explain why *Navajo Nation* applied the wrong legal definition of "substantial burden." *See supra* § V.A. And Chief Judge Murguia explains why *Navajo Nation* was wrong, joined by four other judges. *See* Murguia Dissent § II.A-C. True, some of the reasoning differs. But much of it overlaps. For example, I agree with Chief Judge Murguia's reasoning that RFRA and RLUIPA both apply the same legal test. *See* Murguia Dissent § II.A (192–94); *see also id.* at 204 (quoting

Holt, 574 U.S. at 356–57, and citing *Gonzales v. O Centro Espírita Beneficente Uniaõ do Vegetal*, 546 U.S. 418, 436 (2006); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019)). I also agree with her reasoning that *Navajo Nation* adopted a narrow reading of 'substantial burden.' *See id.* at 201–02. And my analysis that no other circuit has adopted the "substantial burden" test in *Navajo Nation* largely tracks with her similar reasoning. *See id.* § II.C (204–05).

Judge Bea's contention that the first paragraph of the per curiam opinion is not well reasoned ignores the dozens of pages of reasoning provided in my concurrence and Chief Judge Murguia's opinion. "Only 'statements made in passing, without analysis, are not binding precedent.'" *City of Los Angeles v. Barr*, 941 F.3d 931, 943 n.15 (9th Cir. 2019) (quoting *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007)). The first paragraph of the per curiam opinion was neither made in passing nor without analysis. If anything, the holdings in the first paragraph of the per curiam opinion are "too well reasoned." No reasonable reader (though perhaps aided by a strong dose of caffeine) can walk away after reading the various opinions without a plain understanding of how forcefully a majority of this panel believes that *Navajo Nation*'s legal definition of "substantial burden" was wrongly decided and must be overruled to resolve this case; and the reasoning behind that conclusion. Judge Bea is free to dissent from that view. But he cannot bind future panels. No future panel of this court (except a future en banc panel) may adopt Judge Bea's dissenting view.

VI

Even in overruling this aspect of *Navajo Nation*, our inquiry is not complete. We still must decide this case. We unanimously hold that Apache Stronghold has no First Amendment claim under *Lyng*. *See* Collins Maj. at 35; Murguia Dissent at 216–24. Apache Stronghold's claim under RFRA, however, is much closer. The question remains—what constitutes a substantial burden and has that standard been met here? I agree with Judge Collins's majority opinion that the burden here does not satisfy the "substantial burden" applied under RFRA.

Two main theories emerge from the majority and concurrences. The majority holds that because Congress "copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." Collins Maj. at 46. I agree, but for additional reasons. I disagree, however, with the separate theory that "substantial burden" is a term of art with a specific definition.[5] *See* Bea Dissent at 88.

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[5] "Terms of art are words having specific, precise meanings in a given specialty." Terms of Art, GERNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011); *see also* Term of Art, BLACK'S LAW DICTIONARY (11th ed. 2019) (same). Judge Bea attacks this position, noting that "legal tests and standards" can "often" be a "term of art." Bea Dissent at 88 n.16. His sole example, however, is the term "fair and equitable" which the Supreme Court described as a term of art 80 years ago. But "fair and equitable" had become a term of art because of the precise and consistent definition attached to it over time. If 200 plus pages in six separate opinions in this case prove anything, it is that the definition of "substantial burden" has not been defined with the

While RFRA relies on the prior Supreme Court analytical framework of "substantial burden," that term was never defined as a term of art.

A

It is a longstanding principle that "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citations and internal quotation marks omitted). The question is what "old soil" regarding "substantial burden" was grafted into RFRA. As explained above, "substantial burden" was not defined by the Supreme Court before the adoption of RFRA. "Substantial burden" or related phrasing was used by the Court not as a definition that could be transplanted, but as a legal framework to apply the Free Exercise Clause. And a legal framework differs from a precise definition.

Judge Bea asserts that we must look only to pre-RFRA cases to define "substantial burden," because the term was taken by Congress, without modification, from the Supreme Court's pre-RFRA First Amendment jurisprudence; because RFRA states that its goal is to restore the test used by pre-RFRA federal court rulings; and because RFRA directly cites two Supreme Court decisions—*Sherbert* and *Yoder*—as determinative of the scope of the term "substantial

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precision necessary to be a well-defined term of art. The Supreme Court had not defined "substantial burden" prior to Congress adopting RFRA. And other federal courts had not adopted a consistent definition of the term either. Our definition of "substantial burden" today, *see* Per Curiam at 10–11, is consistent with the definition adopted by other federal courts and may well constitute a term of art going forward.

burden." *See* Bea Dissent at 76–83. But even taking these three assertions to their logical conclusions, this does not cabin "substantial burden" to *Sherbert* and *Yoder*.

1

As outlined above, "substantial burden" was used in several pre-*Smith* and pre-RFRA cases and referenced a prior analytical approach. *See supra* § III.B; *Jimmy Swaggart Ministries*, 493 U.S. at 384–85; *Hernandez*, 490 U.S. at 699. Congress adopted "substantial burden" from those "prior Federal court rulings." 42 U.S.C. § 2000bb-(a)(5). None of those cases define "substantial burden." But Congress, in adopting RFRA, expressly incorporated the contours and limitations of the "substantial burden" framework into RFRA.

This aligns with how the Supreme Court described its own Free Exercise Clause jurisprudence. For example, the Court in *Sherbert* held that the government may not compel affirmation of a belief or penalize groups for holding certain views. 374 U.S. at 402. Same with *Bowen*: Free Exercise violation arises when "compulsion of certain activity with religious significance was involved." 476 U.S. at 704. These holdings describe categories of claims protected by the First Amendment, but do not define "substantial burden" itself. There is again no definition of "substantial burden." Thus, the legal context here reveals no technical definition or term of art.

2

Judge Bea next asserts that there is no evidence that Congress intended to expand or alter the

definition of "substantial burden" in pre-RFRA cases.[6] *See* Bea Dissent at 82. But this again assumes, incorrectly, that there ever was a precise definition. True, RFRA's use of "substantial burden" strongly supports the conclusion that Congress was satisfied with that portion of the test as set forth in prior federal court rulings. But that does not mean that the terms were defined as a term of art. *Cf.* Bea Dissent at 88.

Indeed, our sister circuits do not speak of "substantial burden" as a term of art. *See, e.g.*, *Mack*, 839 F.3d at 286; *U.S. Navy Seals 1-26*, 27 F.4th at 336; *New Doe Child #1*, 891 F.3d at 578; *Korte*, 735 F.3d at 654; *Hobby Lobby*, 723 F.3d at 1114; *Midrash*, 366 F.3d at 1214; *Murphy*, 372 F.3d at 979. And for good reason: There is no definition by which they could do so. So while *Lyng* forecloses Apache Stronghold's RFRA claim here, *see* Collins Maj. at 35, that is not because *Lyng* is part of any "old soil" that was used to define "substantial burden," Bea Dissent at 75. Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of "substantial burden" "carried over into the soil" of RFRA. *Taggart*, 139 S. Ct. at 1801 (emphasis added).

3

Judge Bea's approach, which purports to be one grounded in the statute's text, also violates fundamental principles of textualism. *See* Bea Dissent

[6] The Supreme Court seems to reject that premise: "[T]here is no reason to believe . . . that [RFRA] was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

at 74–89. His application of the soil theory disregards a textual analysis of half of RFRA's statutory language. The words of a governing text are of paramount concern. We must analyze those words in their full context and not focus exclusively on particular provisions. *See* Textualism, BLACK'S LAW DICTIONARY (11th ed. 2019).

Here, Judge Bea stresses that RFRA directly cites *Sherbert* and *Yoder*. *See* Bea Dissent at 77–81. But this only addresses half of the relevant textual inquiry. Section 2000bb states that a purpose of RFRA is "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." The rest of § 2000bb, however, reads "*and* to guarantee its application in all cases where free exercise of religion is substantially burdened; *and* (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(1)–(2) (emphasis added).

Congress explicitly codified the test formulated in *Sherbert* and *Yoder.* But it did far more than that. It also extended RFRA's reach to include any other substantial burdens (consistent with the Supreme Court's application) on religious practice. Congress employs not one but two uses of "and." *Id.* And Judge Bea ignores them both. We cannot ignore statutory language like that. If Judge Bea were correct, Congress would not need to have included language guaranteeing RFRA's application in *all* cases in which there is a substantial burden. This is true even considering that Congress referenced *Sherbert* and *Yoder* to the exclusion of other cases, *see* Bea Dissent at 79–80, and that Congress declined to use phrases

like "for example" to indicate that *Sherbert* and *Yoder* were mere examples of substantial burdens, *id*. at 80. The entire text of the subsection does not start and end with *Sherbert* and *Yoder*—it extends further to all substantial burdens. We cannot read Congress's words out of existence. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) ("We are 'reluctant to treat statutory terms as surplusage in any setting' . . . .").

Not only should we not read the statutory text out of existence, we also ought not read words *into* RFRA that are not there. That certain members of Congress made statements about RFRA's scope as Congress debated its enactment does not provide any reliable evidence of RFRA's meaning. *See* VanDyke Concurrence at 155–56. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). The use of such legislative history has been properly criticized as being "neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States . . . ." *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); *see also Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1146 (9th Cir. 2022) (R. Nelson, J., concurring). And that remains true even though one of the comments came from Senator Hatch who sponsored and championed RFRA. Particularly when legislative history supports our textual interpretation of a statute, we must even more vigilantly guard against encroaching on fundamental

statutory principles of construction.[7] Therefore, our assessment of substantial burden and of any implication of pre-RFRA cases, namely *Lyng*, must come from analysis grounded in the text. And because "substantial burden" is not a term of art with a specific definition, the soil theory is inapplicable.

B

I ultimately agree with Judge Collins's majority opinion, which relies on a more compelling theory in this case than the soil theory. *See Medina Tovar v. Zuchowski*, 982 F.3d 631, 644 (9th Cir. 2020) (en banc) (Callahan, J., dissenting) ("In the battle of competing aphorisms I think that 'context matters' prevails over the interpretive canon 'bringing the old soil with it.'"). Judge Collins essentially invokes a different understanding of the Canon of Prior Construction. *See* Collins Maj. at 41–42 (citing *Williams v. Taylor (Terry Williams)*, 529 U.S. 362 (2000)). This familiar canon is one of context: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction." Scalia &

[7] Whether RFRA's sponsor or a slew of law professors agree with our reading of prior federal law has no bearing here where the statutory text makes clear that RFRA did not overrule *Lyng*. Had these commentators instead suggested that RFRA overruled *Lyng*, that would have similarly been irrelevant. Relying on those subjective views undermines the longstanding understanding that, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Garner, *Reading Law: The Interpretation of Legal Texts* 322.

But construction is different than definition. *Compare* Construction, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act or process of interpreting or explaining the meaning of a writing") *with* Definition, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute"). Here, the Supreme Court has not defined "substantial burden." Even so, the Court has construed the term. We apply that context to this case. *Lyng* is an authoritative construction that the substantial burden test codified in RFRA is inapplicable to certain challenges, including one in which the government manages its own land. True, the *Smith* majority rejected that the application of the *Sherbert* test strictly turned on "the government's conduct of 'its own internal affairs.'" 494 U.S. at 885 n.2 (citing *Lyng*, 485 U.S. at 439). But this was to justify *Smith*'s rule of general applicability, which was expressly overruled in RFRA. RFRA, however, does not address, nor overrule *Lyng*.

This said, I do not read RFRA as enshrining just Justice O'Connor's view in her *Smith* concurrence. *Cf.* Collins Maj. at 46. Justice O'Connor's articulation of *Sherbert*'s compelling interest test in her *Smith* concurrence was not her mere opinion, nor was it "her" test—it was the test established by decades of judicial precedent. Thus, in overruling *Smith*, Congress codified this preexisting framework in RFRA. And it follows that because RFRA's stated purpose was to reject *Smith*, § 2000bb(a), and its effect was to codify the compelling interest test, *id.* § 2000bb(b)(1), RFRA

therefore reinstated the legal framework's parameters as well. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)) ("Congress legislates against the backdrop of existing law."). RFRA thus adopted the term "substantial burden" from the Court's prior construction of the *Sherbert* framework. It is therefore not just *Smith* (or Justice O'Connor's concurrence), but the entirety of the Court's pre-RFRA jurisprudence, that provides the contours of substantial burden.

I also have some reservations about Judge Collins's broad categorization of the Supreme Court's opinion in *Terry Williams*. That theory allows us to infer the meaning of a word or phrase when "'broader debate and the specific statements' of the Justices in a particular decision concern 'precisely the issue' that Congress later addresses in a statute that borrows the Justices' terminology." Collins Maj. at 41– 42 (quoting *Terry Williams*, 529 U.S. at 411–12). There is good reason to be cautious of an overapplication of this theory. The Supreme Court has not relied on it in the 23 years since *Terry Williams*—and we never have previously. Part of why *Terry Williams* has not been relied on more may be the Supreme Court's own limitation: "It is not unusual for Congress to codify earlier precedent in the habeas context." 529 U.S. at 380 n.11. That same principle has not been established in the First Amendment context to date.

Given these concerns, this theory should be used sparingly. But it is an appropriate application when considering a unique context like habeas in *Terry Williams* and an equally unique statute like RFRA where Congress explicitly adopted a term from

multiple cases to codify that legal framework into law. *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a 'compelling governmental interest.'"). Thus, despite the lack of explicit definition, the body of case law from which "substantial burden" springs forecloses Apache Stronghold's RFRA claim here. A contrary conclusion would wrongfully ignore the textualist roots of "substantial burden."

The ultimate question is whether RFRA overrules *Lyng*. As explained above, the stronger case is that *Lyng* remained part of the "substantial burden" analysis.[8] The Supreme Court has been clear: "'If a precedent of this Court has direct application in a case,' . . . a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023) (citing *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). "This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Id.*

A commendable critique of *Lyng* might be that its holding lacks in originalist or textualist support. As *Smith* has been deeply criticized for its lack of original or textual grounding, the same may be said about *Lyng*, which *Smith* cites repeatedly. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1888 (2021) (Alito, J.,

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[8] It has been argued that because RFRA applies to all federal government action, 42 U.S.C. § 2000bb-3, it thus overrules *Lyng*. But RFRA also instructs courts to look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). *Lyng* is such a prior federal court ruling.

concurring) (*Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption."). Justice Alito concludes that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*." *Id.* at 1896. Under that definition, perhaps it is time for the Supreme Court to revisit *Lyng*. But that is a task for a different Court on a different day.

At any rate, *Lyng* remains the law. There, the Supreme Court held that the government action at issue was not a substantial burden because the First Amendment "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 485 U.S. at 448. And because the land transfer here concerns the government's management and alienation of its own land, which is no doubt part of its internal affairs, *Lyng* directly applies to any statutory application of "substantial burden" under RFRA as well. With no compelling evidence to support a finding that *Lyng* was overruled when Congress enacted RFRA, for the same reasons that Apache Stronghold's claim fails under the First Amendment, it fails under RFRA too.

VII

RFRA is a unique statute. While the dissent raises a plausible textual interpretation of "substantial burden," I ultimately disagree. In adopting RFRA, Congress used a specific term—"substantial burden"—

which should reasonably be read to reject *Smith* but incorporate prior Supreme Court construction of that term. While we lack a precise definition, we are given guideposts. And *Lyng* is one of those.

The phrase "substantial burden" does not exist in a vacuum. Rather, decades of Supreme Court precedent establish that only certain forms of substantial burdens are cognizable as that term is used to apply the Free Exercise Clause. And when the government seeks to manage its internal affairs and operate on its own land, no such cognizable burden exists under RFRA. Congress then codified this standard and its associated boundaries in RFRA. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim here.

VANDYKE, Circuit Judge, concurring:

I agree with the majority that our decision in this case is controlled by *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). I write separately to elaborate on why the alleged "burden" in this case is not cognizable under the Religious Freedom Restoration Act (RFRA) and to explain why reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination. Occupying the background of the majority opinion is a reality central to the resolution of this case: there is no textual, historical, or precedential support for the notion that a government's refusal to use its own property to enable or subsidize religious practice is a cognizable burden under either the Free Exercise Clause or RFRA. Even assuming it's theoretically possible to reconceptualize Uncle Sam's parsimony as a "burden" on religious exercise, such stinginess in the allocation of the government's own property isn't the sort of burden our religious freedom guarantees were ever meant to address. And because the government action here did not constitute a cognizable burden, any reliance on the substantiality of the impact of the government's decision on the plaintiffs in this case is misguided.

I.

Enacted in response to one of the most criticized Supreme Court decisions in history,[1] RFRA was a laudable attempt to broadly restore religious liberty.

[1] *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

But like any rights-endorsing statute, no matter its scope, RFRA has its limits. A cognizable RFRA claim arises only when (1) the government (2) substantially (3) burdens (4) religious exercise. 42 U.S.C. § 2000bb-1(a). Apache Stronghold claims that the government will burden the Apaches' religious exercise—specifically, their use of Oak Flat to worship and conduct ceremonies—by transferring ownership of the government's property to Resolution Copper.

Because it is undisputed that the Apaches' desire to use Oak Flat to worship and conduct ceremonies qualifies as religious exercise, the only issue before our court is whether the transfer is an instance of the government burdening the Apaches' religious exercise as that action has long been understood under RFRA and the Free Exercise Clause. After considering the logic underlying RFRA, and then reviewing the proper Free Exercise Clause and RFRA frameworks, it becomes apparent that the government does not burden religious exercise by refusing to ensure the government's own property remains available to enable it.

A. A commonsense reading of RFRA does not suggest the government burdens religion by refusing to use its property to enable religious activity.

Notwithstanding the volume of ink spilt today by our en banc court across multiple opinions, it's safe to say that we all agree on at least one thing: RFRA provides a claim for some—but not *all*—burdens that a person may experience in relation to his or her religious exercise. For starters, the burden must have been imposed by a particular entity— namely, the government. And related to that, when the

government acts (or fails to act), not all of its actions (or inactions) that may have some incidental effect on an individual's religious exercise are deemed to "burden" that person's religious exercise within the meaning of our guarantees of religious freedom.[2]

This is confirmed by both common sense and the ordinary meaning of the verb "burden," as a few illustrations will show. Imagine, for example, that a Muslim believes he must complete a religious pilgrimage to Mecca during his lifetime. But he lacks the money to do so. If his sister has enough money to pay for the trip but refuses to give it to him, no one would seriously claim that the sister "burdened" her brother's religious exercise by refusing to give him her money to enable his exercise. Sure, there is a sense in which the brother faces a burden on his religious exercise: he doesn't have something he needs to enable it. But few if any would say his sister caused that burden by refusing to give him her money.

If our example were changed slightly so that the brother asked the government instead of his sister for the money, the result would be unchanged. Characterizing the government's unwillingness to give its resources to our disadvantaged Muslim friend as a government-imposed burden on his religious exercise would be no less strange than in our first example.

That is the key to this case. Much has been said about the substantiality of the burden the Apaches

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[2] Indeed, Apache Stronghold's able counsel acknowledged at oral argument that not every government action that might be characterized as a "burden" is cognizable under RFRA, including when the government refuses to sell its land to a private party to build a church on the property.

will experience when the government's Oak Flat property is traded and eventually destroyed. It is certainly true that the effect is substantial. But its substantiality is irrelevant in this case. Even assuming one could counterintuitively characterize the government's unwillingness to give someone its property as a "burden," such a burden is not the type of government-imposed burden that is cognizable under RFRA or the Free Exercise Clause. Few people today would characterize the government withholding its own property as the government imposing a burden. And there is no reason to think that such a peculiar conception of a government-imposed burden had any more purchase at the time of the nation's founding, at the time of the Fourteenth Amendment's ratification, or at the time of RFRA's enactment. In short, Apache Stronghold's RFRA claim fails because the government's use of its own property simply does not impose on the Apaches' religious exercise the type of "burden" that either RFRA or the Free Exercise Clause contemplate.

B. Under the Free Exercise Clause, the government does not burden religious exercise by managing its own property.

The Free Exercise Clause comes into play when the government "prohibit[s]" the "free exercise" of religion, U.S. Const. amend. I, which courts have long interpreted as doing something that burdens such free exercise. Because this constitutional right "is written in terms of what the government cannot do to the individual, *not* in terms of what the individual can exact from the government," the Supreme Court has recognized that government actions involving the government's use of its own resources do not impose a

First Amendment burden on a person's religious exercise, even when such government actions may indirectly—and possibly even substantially—affect religious exercise. *Lyng*, 485 U.S. at 450–51 (emphasis added) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Since well before *Smith*, it has been commonly understood that the government does not impose a burden when it merely refuses to subsidize a religious exercise. *See, e.g.*, *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.").

The understanding that a refusal to subsidize does not burden religious exercise is obviously not limited to just the government's money. A Catholic priest can no more demand that the government provide him with communion wine than he can demand that the government provide him with money to buy that wine. An elder of the Church of Jesus Christ of Latter-Day Saints can't insist that the government give him either a bicycle or the cash to buy one. Nor can a pastor require that the government provide him a church on government land so that he can better serve his flock. As in our initial Mecca example, the government has not "burdened" anyone's religious exercise in any of these examples by withholding its own resources.

Of course, every level of government in our nation distributes a variety of government benefits to a variety of recipients. And when the government does that, it cannot do so in a way that *discriminates* against or between religions. In *Sherbert*, for example, a state government provided unemployment benefits to workers who required Sunday off to practice their faith, but not to those whose religion required them to take Saturday off. 374 U.S. at 399–400, 406. The Supreme Court correctly concluded that the Free Exercise Clause disallows such discrimination between or against religions in the provision of government benefits. *Id.* at 404. The Court explained that such differential treatment of religious adherents in the allocation of government benefits imposes the type of "burden" on religious liberty that the Free Exercise Clause was meant to protect against. *Id.* Indeed, it "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* This is because "to condition the availability of benefits upon [a religious observer's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. Thus, *Sherbert* and its progeny make clear that once the government chooses to provide government benefits, it cannot do so in a discriminatory fashion that effectively coerces potential recipients into abandoning their constitutional right to freely exercise their religion.

But of course, nowhere did *Sherbert* (or any case since) conclude that the government had to provide unemployment benefits to anyone in the first instance; it simply concluded that if the government chose to do so, it couldn't religiously discriminate. *See, e.g.*,

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 467 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand."). I'm not aware of any case applying *Sherbert*'s anti-discrimination principle that holds the government must either start providing or continue providing some government benefit— again, those cases simply stand for the reasonable proposition that *if* the government is doling out benefits, it must not discriminate against religion in the process of doing so.

Unsurprisingly, the Supreme Court has also made clear that the Free Exercise Clause protects against the government burdening religious exercise by directly imposing requirements on people that are at odds with their religious beliefs. The Supreme Court addressed this situation in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Wisconsin had attempted to make school attendance mandatory until the age of 16. *Id.* at 207. This compulsory attendance law was "undeniably at odds with fundamental tenets of [Amish] religious beliefs" and presented the Amish with a classic dilemma: exercising their religious beliefs would lead to criminal sanctions, but compliance with the law would violate their beliefs. *Id.* at 218. *Yoder* and many cases since then stand for the straightforward proposition that, when the government says, "you must do X," and your religion says, "you must *not* do X," then the government's demand has burdened your religious exercise.

Both the *Yoder* type of burden and *Sherbert* type of burden, while different, converge under a single concept: government coercion. *Yoder* involved the

most direct form of coercion: violate your religious scruples or be punished. *Sherbert*'s coercion is less direct but not necessarily less coercive: violate your religious scruples or be denied an otherwise available government benefit. Both the *Yoder* and *Sherbert* types of government coercion are conceptually quite different from a theoretical third type: the government simply refusing to give someone its property so that he can use it to exercise his religion.[3] This third type of government action is different in kind from the first two. In no way is the government coercively inducing or requiring people to violate their religious beliefs. Instead, any coercion works in the opposite direction: people are demanding that the courts make the government enable or subsidize their religious beliefs

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[3] It is important to distinguish between a *Sherbert*-type burden and this third potential type of claim. Both involve the government withholding its property, but in *Sherbert* the government is already giving its property to some religious adherents, while discriminatorily withholding its property from others of a different religion. Thus, in a *Sherbert* case, the baseline condition is, so to speak, that the government is already providing its property to some (but not all) religious adherents. In contrast, the baseline condition in a case like this one is that the government is not giving its property to anyone, and the religious claimants nonetheless insist that the government must uniquely provide them with government property to enable their religious exercise. Apache Stronghold has not tried to make a *Sherbert*-type religious discrimination claim in this case, presumably because the government isn't discriminatorily "giving" its land to anyone but is instead trading the government-owned Oak Flat for other land owned by the mining company. In other words, the government is effectively selling Oak Flat to the mining company, and Apache Stronghold hasn't claimed any discriminatory action on the part of the government in, say, rejecting an equivalent competing offer from Apache Stronghold.

by uniquely providing them with government property.

While an able lawyer can certainly characterize this third type of claim as a "burden," it has been well understood since before *Smith* that the Free Exercise Clause does not cover any such government decisions, regardless of the label. This is most unmistakably demonstrated by *Lyng*. There, the federal government had permitted the building of a road and the harvesting of timber on publicly owned land. *Lyng*, 485 U.S. at 441–42. Some Native American tribes argued that this would burden their religious practice on the government's land. *Id.* at 447. But as the Court explained, the project did not burden religious exercise within the meaning of the Free Exercise Clause. *Id.* at 452. Notwithstanding that the claimed effects from the roadbuilding project could be "severe" and "virtually destroy the … Indians' ability to practice their religion," those effects did not give rise to a cognizable burden. *Id.* at 447, 450–51.

The reason the Indian tribes lacked a Free Exercise Clause claim in *Lyng* was because, despite the "devastating" incidental effect that the government's management of its own land would have on their religious exercise, *id.* at 451, the tribes would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying [them] … benefits," *id.* at 449. As *Lyng* made clear, the "Free Exercise Clause affords an individual protection from certain forms of governmental *compulsion*; it does not afford an individual a right to dictate the conduct of the Government's internal" affairs, particularly the government's management of its own property. *Id.* at

448 (emphasis added) (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)).

Nothing since *Lyng* has cast into question the straightforward understanding that the Free Exercise Clause does not require the government to let you use its property—including its real property—to exercise your religion. Our court, sitting en banc fifteen years ago, reviewed these same cases and reached the same conclusion. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068–73 (9th Cir. 2008) (en banc).[4] Regardless of how you label it, the government's nondiscriminatory use of its own property has never been understood to impose a constitutionally cognizable burden on someone's religious freedom—even when such governmental decisions incidentally have "devastating" and "severe adverse effects on the practice of [a] religion." *Lyng*, 485 U.S. at 447, 451.

C. RFRA adopted the ordinary meaning of "burden" as that term had been uniformly understood in Free Exercise Clause cases.

Echoing decades of Free Exercise precedent, RFRA prohibits the government from burdening a person's religious exercise. 42 U.S.C. § 2000bb-1(a). As is typical in many statutes, RFRA defined some but not all terms that determine whether a person has a cognizable RFRA claim. For example, RFRA tells us that a person's "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* at §§ 2000bb-2(4), 2000cc-5(7)(A). Since this is a clear departure from how religious exercise had been

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[4] Our court reached the right result in *Navajo Nation*, although I might quibble with some of its rationale.

understood under the First Amendment,[5] it made sense for Congress to provide that definition. But tellingly, RFRA does not define what it means for the government to "burden" religious exercise. The obvious reason for that, given the context of RFRA's enactment and its clear textual departures from the First Amendment in other regards, is that RFRA meant "burden" in the way it had been commonly understood in the Free Exercise Clause context. Indeed, the Supreme Court has acknowledged as much. *See Tanzin v. Tanvir*, 592 U.S. 43, 46–48 (2020) (citing Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012)).

In pre-RFRA First Amendment caselaw, it was well understood that the government burdens religious exercise when it acts in a coercive manner, and that the government's decisions about how it uses its own property are not coercive unless they discriminate (as in *Sherbert*). During and immediately after RFRA's enactment, everyone understood that RFRA carried forward this ordinary understanding of what it means to burden religious exercise. Post-RFRA caselaw only further confirmed that RFRA adopted the ordinary meaning of how the government may impose a

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[5] Prior to being amended by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. (RLUIPA), RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Under this standard, courts had required the burdened religious exercise to be "central to" or "compelled by" the religion. *See, e.g.*, *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 345 (1987); *see also Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997).

burden—and specifically, as relevant to this case, that the government's use of its own property burdens religious exercise only when it is allocated in a discriminatory manner. Here, there is no claim that the government has used its resources in a discriminatory manner, and the government therefore has not burdened the Apaches' religious exercise within the meaning of RFRA.

i. The ordinary understanding of RFRA does not support the claim that the government burdens religious exercise by using its own resources in a nondiscriminatory manner.

If RFRA's plain text doesn't make it obvious enough that RFRA did not depart from the ordinary meaning of "burden" under the Free Exercise Clause, the discussion surrounding the passage of RFRA further confirms that the government does not burden religious exercise by using its own resources in a nondiscriminatory manner.

When Congress enacted RFRA, it was well understood that a burden is imposed by the government's use of its own resources *only* when the use of such resources discriminates against or between religions. Readily accessible examples of this widespread understanding are provided by congressional statements explicitly maintaining that RFRA "does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103– 111, at 9 (1993); *see also* 139 Cong. Rec. 26193 (1993) (remarks of Sen. Hatch) (explaining that *Lyng* and *Bowen* are unaffected by

RFRA).[6] Leading religious liberty scholars shared a similar understanding of RFRA's effect, observing immediately after its enactment that, under RFRA, a "cognizable burden" does not exist when the government uses its resources in a nondiscriminatory manner that has only an indirect effect on religion. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev.

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[6] Judge R. Nelson mildly chastises me for engaging in supposed fainthearted textualism by citing the congressional record. I agree with both him and Justice Scalia, whom he quotes, that "[e]ven if the members of each house wish to do so, they cannot assign responsibility or making law—or the details of law—to one of their number, or to one of their committees." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 386 (2012). But as should be sufficiently clear from context, I am not citing to the views of specific legislators for the purpose of conclusively determining what RFRA means. Nor am I (as charged) preferencing legislative history just because it happens to support my understanding of RFRA. Instead, I cite such statements as further evidence of my point—with which I believe Judge Nelson agrees—that at the time of RFRA's enactment, *nobody* would have understood the government's decision about what to do with its own land to be a cognizable burden under RFRA. Individual legislators are no more able to authoritatively speculate about how a law will apply in a certain case than anyone else. That goes for legal academics, too—who I also cite. "The interpretation of the laws is," after all, "the proper and peculiar province of the courts," not Congress or the academy or anyone else. Alexander Hamilton, Federalist No. 78. My point is only to demonstrate the unanimity of understanding about what did and did not constitute a burden on religious exercise at the time of RFRA's passage, which matters here because RFRA's text indicates that it should be understood by reference to the state of Free Exercise jurisprudence before *Smith*.

209, 228–30 (1994) (footnotes omitted).[7] No burden exists because citizens simply "may not demand that the Government join in their chosen religious practices" by providing the resources for such practices. *Id.* (quoting *Lyng*, 485 U.S. at 448). Everyone understood that, under RFRA, the government retains its right to use its resources according to its own preferences.[8] It does not have the

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[7] *See also* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. Rev. 331, 345 (1994) (noting that pre-RFRA courts declined to extend First Amendment protection to "challenges to government control of non-Indian land" and later explaining that, "[s]ince RFRA mandates that strict scrutiny be used only if a burden is first found, Indian free exercise claims will likely be resolved in the very same manner as before"); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171, 202 (1995) (explaining that the "developing case law" on "substantial burden" under RFRA suggests that "religious exercise is burdened only by the combination of legal coercion and religious duty"); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 73 & n.172 (1995) (noting that although "RFRA repudiates *Smith*, … it appears to leave the internal operations cases," such as *Lyng* and *Bowen*, "unaffected").

[8] I of course agree with Judge Nelson that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I respectfully disagree with his insistence that the uncontradicted view of a "slew of law professors" and legislators "has no bearing" on the proper interpretation of RFRA. I presume that Judge Nelson and I agree that it is the original *public* meaning of the text that controls our analysis, not some hidden or idiosyncratic meaning devised by judges. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any

obligation to enable religious practice by donating its own property.

ii. Cases interpreting RLUIPA are not inconsistent with this well-established understanding of RFRA.

Understandably seeking to distance themselves from the settled understanding that the government does not burden religious exercise through the mere use of its resources in a nondiscriminatory manner, Apache Stronghold and the dissent focus heavily on caselaw interpreting a different statute, RLUIPA, to argue that the government will burden the Apaches' religious exercise because the Apaches won't be able to access Oak Flat once it is physically destroyed. In

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curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."). Part of the endeavor of surmising the original public meaning is understanding what the *public* would have originally understood the legislative enactment to mean, including the part of the public that was elected to Congress. If, for example, every law professor, every Congressman, and every other literate person in the United States were on record opining that a particular statute meant "X," I would hope good originalists could count that as some useful evidence that its original public meaning was indeed "X," not "Y." *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1757 (Alito, J., concurring) ("As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. … And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law."). That is all I mean by referencing legislative statements above—it is part of my proof that *everyone* who knew anything about RFRA when it was enacted understood it as not requiring holy handouts of the government's own property.

doing so, they improperly divorce the RLUIPA cases from the comprehensive and individualized coercive context inherent in *every single* RLUIPA case, implicitly endorsing that the Apaches are effectively prisoners in this country and therefore indistinguishable from the actual prisoners who bring claims under RLUIPA. Applying that obviously controversial assumption—and making no attempt to show that this assumption was widely shared when RFRA was enacted in 1993—the dissent relies heavily on what has been deemed a substantial burden on religious exercise in the prison context.

I agree with the dissent that the *substantiality* of a burden can be measured the same way under both RLUIPA and RFRA. But whether a burden is cognizable in the first instance has always been a context-dependent inquiry. And what constitutes a cognizable burden in the prison context— surely the most comprehensively coercive setting in America today—obviously may be very different from what constitutes a "burden" under RFRA. That is why, for example, a Jewish prisoner has a right under RLUIPA to require the government to provide him with kosher meals, whereas a Jewish man outside of prison has no right to insist that the government deliver him free kosher food.[9]

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[9] The other category of cases addressed by RLUIPA—land-use regulations, or "zoning"—is equally comprehensively coercive. Every zoning case involves the government telling someone what he can or can't do with his own land. So when the government tells someone he can't build a church on his own land, for example, that is just as coercive as forbidding someone from buying communion wine with his own money. As such, RLUIPA

The dissent's need to resort to RLUIPA prison cases to justify its preferred outcome in this case is very telling. In prisons, the "government exerts a degree of control *unparalleled* in civilian society." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added). It controls every aspect of an inmate's life and renders him fully dependent on the government by stripping him of his ability to provide for his own needs. *Brown v. Plata*, 563 U.S. 493, 510 (2011). It is certainly true that in RLUIPA cases, courts have concluded that the government must provide resources to prisoners for their religious exercise. But that's for the same reason they require the government to provide prisoners with basic sustenance like food and clothing, *id.*, or medical care, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), or protection from other inmates, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)—because the government has coercively "stripped them of virtually every means of" providing for themselves, *id.* In a very real sense, the prisoner depends on the grace of the government for all his needs and in all his activities. This degree of direct and immediate coercion is, again, "*unparalleled*

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land-use cases, like cases in the prison context, usually don't involve hard questions about whether the government's regulation actually causes a burden on religious exercise. The coercive burden is obvious, inevitably making the litigated question whether the burden is *substantial*. *See, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988–92 (9th Cir. 2006) (discussing whether the regulation was "oppressive to a significantly great extent" (cleaned up)); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (citing *Guru Nanak*, 456 F.3d at 987) ("[O]ur practice is to examine the particular burden imposed by the implementation of the relevant zoning code on the claimant's religious exercise and determine, on the facts of each case, whether that burden is 'substantial.'").

in civilian society." *Cutter*, 544 U.S. at 720 (emphasis added).

As a result, in the vast majority of RLUIPA cases there is no need to explicitly analyze whether the government's action burdens religious exercise—it's a given. The only question is substantiality. And that may also be true for *some* RFRA cases. But it is not true for all of them, and certainly not this one. This case presents the opposite situation encountered in most RLUIPA cases. The substantiality of the effect on the Apaches' religious exercise is obvious; it is the legal cognizability of any burden that is at issue. Thus, the dissent's extensive reliance on inapt RLUIPA cases analyzing the substantiality of an undisputed burden is badly misplaced.

Ultimately, the dissent cannot rely on RLUIPA prison cases without also showing that the Apaches are identically situated vis-à-vis the government as the prisoners in those cases. The dissent makes no attempt to do so, and more importantly makes no attempt to show that this was the common understanding when RFRA was enacted. Absent such a showing, the only justification for the dissent's extensive reliance on inapt RLUIPA jurisprudence to defend its result in this case is an implicit recognition that it can't find justification in RFRA and the Free Exercise Clause. As discussed, all the RFRA and Free Exercise Clause cases support the common understanding that, unless you're the government's prisoner (literally, not metaphorically), the government's nondiscriminatory use of its own property is not the type of action that gives rise to a cognizable burden on religious exercise.

D. The government's swap of Oak Flat for other property does not burden the Apaches' religious exercise under RFRA.

This case is not meaningfully different from *Lyng* or *Navajo Nation*. In all three cases, the government wanted to do something with its own land. In all three cases, what the government planned to do would substantially affect how the tribes wanted to use the government's land for their own religious exercise. In *Lyng* and *Navajo Nation*, courts rejected the First Amendment and RFRA claims because, notwithstanding the "devastating effects" on religious exercise resulting from the government's planned use of its land, the Free Exercise Clause and RFRA simply do not recognize such burdens resulting from the government's nondiscriminatory use of its own property. This case is no different, but the dissent would have this court reach the opposite result. In doing so, it would for the first time characterize something as a "burden" under RFRA that has never before been considered a cognizable burden. To do so would be an obvious rewriting of statutory law—a job for Congress, not the courts.

II.

Reconceiving the government's nondiscriminatory use of its own property as a cognizable burden under RFRA would not only require a judicial rewrite of the statute; it would turn the statute on its head, requiring instead of reducing religious discrimination. Because the government's resources are not infinite, the expansion of RFRA advocated by Apache Stronghold and the dissent would inevitably require the government to discriminate between competing religious claimants. While no doubt some such

claims—including those made by Apache Stronghold in this case—would be sympathetic, there is no way to resolve this case in the Apaches' favor without endorsing a rule that would one day soon force the government to pick religious winners and losers. So even if this court did require the government to effectively hand over Oak Flat as a religious offering to the Apaches, only *some* religions would benefit from the precedent created by such a decision.[10]

Eventually, lines limiting the court-enforced distribution of the government's largesse would need to be drawn. And because, as explained above, the dissent's novel approach has no basis in the text or original understanding of RFRA, any judicially created distinctions limiting the extent of the resulting religious entitlement would similarly lack any statutory justification. Worse, such distinctions would necessarily discriminate between religions, offering government property to some and not others and turning RFRA into a tragic parody of itself. One need

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[10] In Part I of this opinion, I have endeavored to explain why I think the dissent's proposed interpretation of RFRA is wrong as a legal matter. And now, in Part II, I explain why that view is also wrongheaded. Judge Nelson misunderstands this approach, confusing the *reasons* I agree with the majority's interpretation of RFRA (Part I) with the *warnings* I make about religious discrimination that would inevitably result if the dissent's rewrite of RFRA was adopted (Part II). But to be clear, I agree with Judge Nelson that "[t]he dissenters are not wrong … because under their view 'only *some* religions would benefit from the precedent created by such a decision.'" The *reason* the dissenters are *wrong* is because they advance a view of RFRA that has no basis in its original public meaning. My point here is that in addition to being the legally wrong interpretation, the dissenters' judicial revision of RFRA would also undermine the equal protection of religion that RFRA was enacted to protect.

look no further than the dissent itself to see early indications of the kind of discriminatory distinctions that might flow from this atextual understanding of RFRA.

A. The dissent would establish a discriminatory preference in favor or older religions and against newer ones.

Not far into the dissent, the reader encounters the first such distinction: religious practices with a lengthy historical pedigree apparently deserve more protection than newly established ones. Parroting Apache Stronghold's repeated emphasis that the Apaches have worshipped at Oak Flat "since time immemorial," the dissent heavily implies the Apaches should be treated preferentially because their religious exercise is a long-established practice.[11]

The trouble with emphasizing the lengthy history of the Apaches' religious practice at Oak Flat is that it is entirely irrelevant to our analysis under RFRA and the Free Exercise Clause. Our religious liberty protections "apply to all citizens alike," *Lyng*, 485 U.S. at 452, and with equal force to a religion founded yesterday as to one with roots deep in prehistory. How long a person has practiced a religion, or how old that religion is, should be "immaterial to our determination that … free exercise rights have been burdened; the salient inquiry under" both RFRA and the Free Exercise Clause "is the burden involved." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136,

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[11] The dissent is not alone in emphasizing the ancient nature of the Apaches' religious practice. Both the panel and motion-stage dissents did so also. *See, e.g.*, *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting).

144 (1987). It is bad enough that Apache Stronghold's counsel made this discriminatory argument. Our court has thankfully refused to make things worse by imbuing it with the force of law.[12]

Of course, the suggestion that long-established religious practices should receive favorable treatment under RFRA is made only lightly. The dissent stops short of a full-throated defense of such a rule. Instead, it contents itself to repeatedly emphasize the longstanding nature of the Apaches' religious practice and leaves the legal significance of that fact to implication. Making the argument explicitly would lay its blatantly discriminatory character bare, but subtle though it may be, the dissent unmistakably lays the groundwork for a discriminatory limiting principle

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[12] It's not hard to see how invidious this argument is when you consider a sincere religious observer whose *newer* religion requires the ceremonial use of Oak Flat, just like the Apaches. The government's action of trading Oak Flat for other land would have *exactly* the same effect on both the observer of a newer religion and an Apache: neither would be able to use Oak Flat for religious ceremonies. But accepting the dissent's implicit premise that the "time-immemorial" nature of the Apaches' religious practice at Oak Flat is legally significant could lead to a different result in each of the two cases: the transfer of Oak Flat *would* burden the Apaches' religious exercise, but the same transfer might *not* burden a similarly situated practitioner of the newer religion simply because the person (or, more precisely, the person's predecessors) had not used the land before or for long enough. And what about a religion of intermediate age—say, a hundred years or so? How long is "long enough" to warrant protection under RFRA? By introducing the age of a religion and the length of religious practice as variables relevant to the analysis, the dissent offers an arbitrary and discriminatory distinction between observers of newer religions and long-established ones—a distinction that has no basis in RFRA.

that (need it be said?) could never be supported under either the Free Exercise Clause or RFRA.

B. The dissent's interpretation of RFRA also discriminates by providing more protection against burdens accompanied by significant physical or environmental impacts.

Both the dissent and Apache Stronghold also take care to emphasize the extent of the physical destruction associated with the transfer of Oak Flat. The import of such argument is clear: as with age, the dissent and the Apaches would also establish a discriminatory preference in favor of protecting burdens on religious exercise with a significant physical or environmental component when compared to burdens associated with less physical manifestations. But doing so would be double error, both because such a rule wrongly implies that a practitioner's religious harm under RFRA claim is somehow predicated on the physical attributes of the intrusion, and because it invites courts to measure the comparative significance of religious harms in physical terms, a behavior strictly prohibited in our jurisprudence. Ultimately, this distinction too is contrary to both the text of RFRA and the background precedent that informed its understanding, and if adopted, it would likewise perpetuate religious discrimination.

i. Attempting to distinguish *Lyng* and *Navajo Nation* by focusing on the extent of the physical impact reads a discriminatory preference for land-based religious practices into RFRA.

The biggest hurdle faced by the dissent and the Apaches is that this case is strikingly similar to both the Supreme Court's decision in *Lyng* and our court's en banc decision in *Navajo Nation*. To get around these cases, which doom its claims, Apache Stronghold attempts to distinguish them by emphasizing the physical differences between the government's actions in those cases and this one. *Navajo Nation* and *Lyng* are different, they contend, because "neither … involved physical destruction of a sacred site." The dissent employs similar logic, distinguishing *Lyng* on the basis that the transfer will result in the "utter destruction" of Oak Flat, which "will prevent the Western Apaches from visiting Oak Flat for eternity." Not only does this argument fail to provide a suitable basis to distinguish *Lyng* and *Navajo Nation*, but it also introduces another arbitrary and discriminatory limitation on the scope of RFRA's protection.

In *Navajo Nation*, the government allowed a mountain sacred to multiple Indian tribes to be showered daily with 1.5 million gallons of poopy water that, according to those tribes, would desecrate the mountain, render it impure, and destroy their ability to perform certain religious ceremonies. 535 F.3d at 1062–63; *id.* at 1081 (Fletcher, J., dissenting). So both *Navajo Nation* and this case present precisely the same impact on religious exercise from government land-use decisions: elimination of the ability to perform religious ceremonies. The dissent here, however, distinguishes *Navajo Nation* by asserting that "nothing 'with religious significance … would be *physically* affected'" by the government's decision to spray recycled wastewater containing human waste onto a sacred mountain (emphasis added). But that downplays the spiritual significance of the

government's action in *Navajo Nation* and ignores the court's later reasoning in the same opinion that "[e]ven were we to assume … that the government action in this case w[ould] 'virtually destroy the … Indians' ability to practice their religion,'" the result would not have changed. *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451).

The dissent similarly distinguishes and downplays the government's land-use decisions in *Lyng*—notwithstanding their "severe" and "devastating effects on traditional Indian religious practices"—by highlighting the limited *physical* effects of the government's actions in *Lyng*. In the face of *Lyng* and *Navajo Nation*, it nevertheless continues to rely on the extent of the physical impact that will result from the government's decision to transfer Oak Flat.

There is little doubt that the government's decision to transfer Oak Flat will have consequences for the physical environment in and around that area, but as much as some may wish otherwise, this is not an environmental case. This is a case about religious injury, and the measure of that injury is the harm to religious exercise. *That* harm is precisely the same here as it was in *Lyng* and *Navajo Nation*: the complete inability of Native Americans to conduct certain religious ceremonies because of government decisions about how it uses government land.

The desire to distinguish *Lyng and Navajo Nation* by emphasizing the physical impact of the challenged government decision is certainly understandable from an environmentalist's perspective, but doing so would result in an unfortunate perversion of RFRA. The view advocated by Apache Stronghold and endorsed by the dissent threatens to turn RFRA into a statute that

arbitrarily gives greater protection to burdens on religious exercise that are more physical in nature, while downplaying equally significant burdens on other forms of religious exercise simply because they don't similarly affect the physical environment. Such an approach privileges forms of religious exercise that preserve the physical environment at the expense of other religious exercise that might arguably lack similar positive environmental externalities. Again, it is understandable why this might be an attractive rewrite of RFRA for some modern judges—one could say that environmentalism is the favored religion du jour[13]—it just has no basis whatsoever in RFRA's text or original meaning.

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[13] *See* Joel Garreau, *Environmentalism as Religion*, The New Atlantis, Summer 2010, at 61 ("For some individuals and societies, the role of religion seems increasingly to be filled by environmentalism."); Freeman Dyson, *The Question of Global Warming*, The New York Review of Books (June 12, 2008), https://www.nybooks.com/articles/2008/06/12/the-question-of-globalwarming/ ("There is a worldwide secular religion which we may call environmentalism …. Environmentalism has replaced socialism as the leading secular religion."); Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 Case W. Res. L. Rev. 51, 51 (2004) ("Environmentalism is a type of modern religion.… Indeed, many leading environmentalists have characterized their own efforts in religious terms."); Andrew Sullivan, *Green Faith*, The Atlantic (March 28, 2007), https://www.theatlantic.com/daily-dish/archive/2007/03/green-faith/229789/; Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 Env't L. 309, 323–42 (2009).

ii. A rule that distinguishes religious harms by their physical measurability finds no support in either the text of RFRA or the body of caselaw supporting it.

The physical impact of the government's actions has no basis in the text of RFRA, and it is just as foreign to the pre-*Smith* understanding of the Free Exercise Clause that informed RFRA. But it is not simply the case that the dissent's approach finds no support in RFRA's text or caselaw; it has already been affirmatively rejected. Focusing on the physical destruction of Oak Flat resurrects an argument that the Supreme Court rejected outright in *Lyng*.

In *Lyng*, the government sought to build a road that would result in the physical destruction of wilderness conditions necessary for the plaintiffs' religious exercise, including "privacy, silence, and an undisturbed natural setting." 485 U.S. at 442. The Court recognized that "too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible," meaning the "projects at issue … could have devastating effects on traditional Indian religious practices." *Id.* at 451. The Court nevertheless explained that the incidental religious effect of such government action on native tribal religious activity—"devastating" though it might be—could not "meaningfully be distinguished from the use of a Social Security number" in *Bowen v. Roy*, in which a religious practitioner sincerely believed that merely issuing a Social Security number (which had the slightest of physical components) to a child would rob the child of her spirit. *Id.* at 449, 456. "In both cases,

the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Id.* at 449. Thus, notwithstanding the significantly different *physical* effects of the government action in each case, the *religious* harms suffered were indistinguishable for purposes of determining whether a burden existed. *Id.* at 449–50. The presence or absence of the burden on religious exercise turns not on the degree of any physical impact from the government's activity, as urged by Apache Stronghold and the dissent, but on the asserted harm to religious exercise, as explained in *Lyng* and *Bowen*.

iii. Analyzing burdens on religious exercise with reference to their associated physical impacts is inherently discriminatory.

Text and caselaw aside, it is also inequitable to let the physical consequences of a government action determine whether religious exercise has been burdened because religions differ in what might burden their exercise. Some religions place more emphasis on the material world, while others are more spiritually directed. Some center their devotion on historic rites held in set-apart, holy places, while others are not as ceremonially or geographically constrained. And of course, many faiths incorporate degrees of some or all of these defining characteristics into their religious practice. The dissent's misguided emphasis on the environmental consequences of the government's action preferences some of these religious aspects over others, and if it were afforded legal significance, it would ensure that RFRA would be applied discriminatorily going forward. Religions that

experience a substantial burden to their exercise due to government action that also has a substantial physical manifestation would be treated favorably.

Inversely, religions affected by government actions with less physical impact would be sent to the back of the bus. But our religious liberty protections were designed to extend to *all* religions, not just to those that may suffer a tangibly "objective" and "measurable" burden (whatever that might mean) evaluated in physical terms. A test that relies on the physical effects of government action could significantly reduce protection for religions that do not rely on tangible relics, material artifacts, or other paraphernalia. Such a test would threaten to overtly discriminate against and overwhelmingly under-protect religions less tied to the material world.

C. The dissent encourages discrimination by creating a baseless distinction between the government's real property and its other property.

The dissent relatedly appears to infer that there's something legally special about the religious use of government-owned *real* property that makes it materially distinguishable from other forms of government resources. But again, this distinction bears no connection to anything in RFRA itself, and it too would invite future discrimination between religious groups.

As a legal matter, limiting the dissent's preferred rule that the government must give out its resources for religious exercise to religions that use particular real property in the government's control is clearly disconnected from RFRA's text. The practice of

essentially every religion is resource constrained, and nothing in the statutory text supports distinguishing between the types of resources that religious observers need to conduct their religious exercises. Some need land, some need vehicles, some need cash (or Venmo). Regardless of what they need in a particular instance to exercise their religion, one commonality among religious observers is that they are often limited in what religious activities they can engage in based on the resources they have available to them. And if the government owns the resources they need, they face the exact same problem— regardless of whether it's land or legal tender, the government's refusal to contribute its stuff is hindering their religious exercise.

Grafting onto RFRA a special rule favoring religions that happen to require land would clearly discriminate against other religions. What makes real property special, particularly under RFRA? Is needing specific real property to conduct a ceremony different under RFRA from needing a bike to proselytize? Or needing a sweat lodge made from certain trees under government control? There is no logical or textual basis in RFRA for the dissent's suggestion that land is somehow special. While certain tracts of government-owned land are religiously special for many Native Americans, other government property may be (or become) religiously special for other religions. Under the dissent's approach, the latter would be treated worse than the former without any textual basis for the difference in treatment.

The dissent tries to limit the discriminatory impact of the rule it offers by limiting it to circumstances where the government has unique control over access

to religious resources. But that's no limitation at all. The government has unique control over *all* its resources. Every dollar bill in circulation was at one point owned and "uniquely controlled" by the government—after all, the government alone prints legal tender. So if a religious observer sincerely believes he needs a government resource to exercise his religion, including cash, the dissent's "unique control" principle offers no practical limitation on what resources the government may need to give the religious observer. Arbitrarily carving out government favors for a religion that requires specific *real* property would invite discrimination against religions with different property needs.[14]

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[14] So to recap: I not only think it would badly misinterpret RFRA to revise it the way the dissent does (Part I above), but I also think it would be a bad idea that would necessarily force the government to discriminatorily pick religious winners and losers in the distribution of its largesse (this Part II). Judge Nelson does not dispute my prediction that it would result in discrimination, but instead disputes my premise that such discrimination would be odious to the promise of religious liberty contained in both RFRA and the Constitution's religion clauses.

That surprises me. Since long before *Smith* was decided, it has been a bedrock principle of American religious liberty law that the government "cannot prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). With that time-honored principle in mind, I'm not sure what Judge Nelson is suggesting in his three hypotheticals. I would think it is beyond dispute that the government cannot discriminate by allowing a devout Muslim prisoner to grow a beard for religious reasons while disallowing the same or a similar religious exception for devout Jewish or Native American prisoners. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Sprouse v. Ryan*, 346 F. Supp. 3d 1347 (D. Ariz. 2017). Is Judge Nelson seriously contending we could

D. The dissent further encourages discrimination by reading a reparations theory into RFRA.

Ultimately, none of the distinctions either explicitly or implicitly relied on by the dissent to rationalize its rewrite of RFRA have any basis in its text or original meaning. So what might better explain the result the dissent would prefer this court to reach? It appears that, buttressed by the argument of academics who appeared as amici in this case, what the dissent is really advocating for is what might best be called a reparations version of RFRA. *See* Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

Under this "reconceptualized" and "alternative" theory of RFRA, Native Americans have a special historical and religious need for government-owned land because that land once belonged to them. As the academics explain, because the ancestors of Native Americans were mistreated and their land was taken, RFRA (and other laws) should be re-read to give

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require a religious zoning exemption for a Catholic cathedral to build a 100-foot steeple, yet deny a mosque across the street the same exemption to build a 100-foot minaret? And does anyone seriously believe that a school-choice program that gave voucher money to Catholic schools but not Lutheran schools would pass constitutional muster?

It has taken too long for the Supreme Court to recognize that discrimination against religion vis-à-vis supposedly "secular" counterparts is constitutionally problematic. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004). But there has always been widespread acceptance that discrimination *between* religions is repugnant to the Constitution.

current tribal members "unique" access to federal land. *Id.* at 1297–1303. Whatever the merits of these academic arguments, this court rightly declined to rewrite RFRA in service to them. If Native Americans are going to get unique protection of their religious exercise, they need to obtain it from Congress, not ask the courts to pretend they already got it from Congress.

i. Amici's reparations theory of RFRA has no basis in RFRA.

For starters, the academic argument motivating the dissent's approach has no basis in the text or original meaning of RFRA, nor does it pretend to. The scholars pushing their theory openly acknowledge that courts have historically interpreted RFRA and the Free Exercise Clause to the contrary, *id.* at 1297, and that their approach requires courts to "recontextualize the way in which the law … view[s] coercion"—and thus what constitutes a burden—under RFRA, *id.* at 1302. Boiled down, theirs is a reparations theory of religious liberty for Native Americans, and Native Americans alone. Obviously, the reader will search RFRA in vain for any intergenerational theory of reparations, for Native Americans or otherwise. There is simply nothing in the text to that effect, and unsurprisingly, *nobody* at the time of RFRA's enactment thought it was providing some type of reparations benefit.

To overcome RFRA's obvious textual silence, these scholars try to draw an analogy from religious accommodations in inherently coercive contexts—namely, prisons. If this sounds familiar, that's because it's the same analogy suggested by the dissent, which asserts that the transfer of Oak Flat

"prevents the Apaches from practicing their religious beliefs … just as would an outright ban or religious worship … in prison." They correctly observe that the reason religious inmates are entitled to receive government property in prison to practice their religions under RLUIPA is because of the inherently coercive environment of prison. *Id.* at 1333. Just as prisons are under exclusive government control, the argument goes, many sites sacred to Native Americans are under exclusive government control, and therefore the government should more proactively give its property to indigenous persons to offset the coercion suffered by their ancestors when the government took their land in the first place. *Id.* at 1339–43.

It's an interesting academic theory, and not one entirely devoid of moral force. But as already noted, nothing shows that Congress was attempting to do *anything* reparations related when it passed RFRA. Even assuming the coercive removal of Native Americans from their lands can be analogized in some way to the coercion experienced by prison inmates, direct and immediate coercion is entirely different from ancestral coercion. The religious liberty of an inmate is directly and immediately implicated by the extreme version of coercion the government has imposed *on that inmate*. In contrast, the "reconceptualized" version of coercion relied on by the scholars' attempted rewrite of RFRA is the governmental coercion of the *ancestors* of present-day Native Americans. This reparations-based theory is not entirely different from saying the Fourth Amendment should be applied specially to modern-day African Americans because of the lingering effects of slavery. Again, regardless of whether the theory has any merit, the idea that RFRA meant this when it was

enacted in 1993 is entirely unfounded. RFRA was enacted to protect religious freedoms from current and future interference, not to turn back the clock and hunt for past burdens for which future religious devotees might be remunerated.

ii. To avoid discrimination, a reparations theory of RFRA would entitle a wide variety of religions to government handouts.

But that isn't the only problem with a reparations theory of RFRA. Even assuming that religious reparations for ancestral coercion were somehow legitimate, what is the limiting principle? Should every religious person who can plausibly claim ancestral discrimination be entitled to religious reparations? RFRA is supposed to be generally applicable to protect all religions, so surely if reparations for government-sanctioned ancestral coercion of Native Americans are available under RFRA, they should also be available to others. Native Americans are not the only recipients of past government-imposed or government-allowed mistreatment arguably affecting their modern-day religious exercise. Indeed, if the dissent's reparations theory of RFRA were ever adopted, one could expect swaths of religious claimants to line up for government benefits, each carrying the historical pedigree of discrimination against their respective religious tradition in tow.

Baptists in colonial Virginia were horsewhipped and their ministers were imprisoned when the Church

of England enjoyed a monopoly there.[15] Catholics were deprived of their political and civil rights at various times in all thirteen colonies,[16] antebellum mobs burned down their churches and occasionally massacred them,[17] and efforts to ratify a constitutional amendment designed to clamp down on their parochial schools—the "Blaine Amendment of 1870"— gained widespread traction after the Civil War.[18] Mormons were violently expelled from

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[15] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421–23 (1990).

[16] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 42 (1985).

[17] *E.g.*, Sydney E. Ahlstrom, *A Religious History of the American People* 561 (2d ed. 2004) (describing anti-Catholic riots in Boston), 563 (describing riots in Philadelphia and New York), 1090 (In the United States, "Catholics were subjected to disabilities, intolerance, and violence from the earliest times."); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 451 (2005); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1118–20 (1995) (describing a massacre of Catholics in Kentucky).

[18] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) ("The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have similarly shameful pedigree.")); *see* Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896*, at 317–21, *in* 7 Oxford Hist. of the United States (David M. Kennedy ed. 2017). *See generally* John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301–05 (2001).

Missouri in 1838,[19] denied the right to vote in Idaho in the 1880s,[20] and had their settlements in Utah undercut by the federal government in favor of Native Americans.[21] The first Jews to arrive in the colonies were nearly expelled because of their religion,[22] Ulysses S. Grant's notorious "General Orders No. 11" expelled Jews from defeated Confederate territories,[23] and "anti-Semitism began to grow virulent as soon as the Jewish immigration rate started to rise during the 1880s."[24] And of course, one could surely argue that some African Americans today continue to experience the lingering effects of slavery and segregation as resource constraints on the uninhibited exercise of their religion.[25] Black churches were sporadically

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[19] *See, e.g.*, Marie H. Nelson, *Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History*, 21 Legal Stud. F. 353, 358–73 (1997).

[20] *Davis v. Beason*, 133 U.S. 333, 345–48 (1890), *overruled by Romer v. Evans*, 517 U.S. 620, 634 (1996).

[21] *See Uintah Ute Indians of Utah v. United States,* 28 Fed. Cl. 768, 772-72 (1993).

[22] Eli Faber, *America's Earliest Jewish Settlers, 1654–1820*, at 25, *in* The Columbia Hist. of Jews and Judaism in Am. (Marc Lee Raphael ed. 2008).

[23] *See, e.g.*, Eric Muller, *All the Themes but One*, 66 U. Chi. L. Rev. 1395, 1420–24 (1999).

[24] Ahlstrom, *supra*, at 973–74, 1090.

[25] *See, e.g.*, *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759–60 (7th Cir. 2006); *Cato v. United States*, 70 F.3d 1103, 1105– 06, 1109–11 (9th Cir. 1995); *see also* Margaret Russell, *Cleansing Moments and Retrospective Justice*, 101 Mich. L. Rev. 1225, 1240 (2003).

suppressed by Southern states before the Civil War,[26] Bull Connor arrested congregants by the busload as they left the safety of the sanctuary to march for equal rights in the streets,[27] and some of the church buildings they left behind were bombed in their absence.[28]

History is replete with examples of the mistreatment of groups of people by other groups, and this nation's history is unfortunately not exempt. Given this reality, it's unclear why the reparations theory of RFRA offered by the dissent would stop with Native Americans and not extend to Baptists, Catholics, Mormons, Jews, and descendants of slaves, to name but a few possible groups.

Regardless of the philosophical arguments for and against reparations, RFRA was not designed to create reparations for *any* aggrieved religious group. There is zero legal or textual basis for reading such a program into RFRA. If reparations are ever to come from any source, it must be from Congress, not the courts. And until Congress enacts religious

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[26] Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* 45 (2003).

[27] Taylor Branch, *Pillar of Fire: America During the King Years 1963– 65* 77 (1998).

[28] *Id.* at 137–38; *see also Church Fires in the Southeast: Hearing Before the H. Comm. on the Judiciary*, 104th Cong. 9–13 (1996) (statement of Donald L. Payne, Representative in Congress from the State of New Jersey, summarizing church burning incidents under criminal investigation in 1995–1996 in the Southeast states). *See generally* S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 Calif. L. Rev. 471 (2008).

reparations for Native Americans, courts should studiously avoid inventing such remedies under the auspices of RFRA, a statute designed to protect religious liberty for *all*. RFRA does not play favorites, and neither should we. For these reasons, I wholeheartedly agree with the majority's refusal to rewrite RFRA to include an affirmative mandate to discriminate.

MURGUIA, Chief Judge, dissenting, with whom GOULD, BERZON, and MENDOZA, Circuit Judges, join, and LEE, Circuit Judge, joins as to all but Part II.H:

We are asked to decide whether the utter destruction of *Chí'chil Biłdagoteel*, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to bb-4. Under any ordinary understanding of the English language, the answer must be yes. This conclusion comports with the First Amendment's protection against government conduct prohibiting the free exercise of religion, because the destruction of the Apaches' sacred site will prevent worshipers from ever again exercising their religion. *See* U.S. Const. amend. I.

Our decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), wrongly defined "substantial burden" as a narrow term of art and foreclosed any relief. Although a majority of this en banc court rejects *Navajo Nation*'s reasoning, *see* Nelson Op. at 125; Collins Op. at 47 (no mention of *Navajo Nation* while recognizing that in

certain instances "substantial burden" under RFRA can be read by its plain meaning), a different majority concludes that the Apaches' RFRA claim fails under *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Relying on *Lyng*, Judge Collins' majority opinion ("the majority") holds that the destruction of a sacred site cannot be described as a substantial burden no matter how devastating the impact on religious exercise, erroneously concluding that preventing a religious practice is neither prohibitory nor coercive. In so doing, the majority misreads RFRA, Supreme Court precedent, and our own case law. And rather than using the rare opportunity of sitting en banc to provide clarity, the majority leaves litigants in the dark as to what "substantial burden" means. I respectfully dissent.

I. Background

In a rider to a must-pass defense spending bill, Congress directed the Secretary of Agriculture to transfer 2,422 acres of federal land to Resolution Copper Mining, a foreign-owned limited liability company, to build an underground copper mine. The copper ore is located beneath *Chí'chil Biłdagoteel*, also known as Oak Flat, a sacred place where Western Apache people have worshiped and conducted ceremonies since time immemorial.[1] Once the land transfer occurs, Resolution Copper will mine the ore through a panel caving process, causing the land to subside and eventually creating a crater nearly two

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[1] Western Apache generally refers to the Apaches living in modern day Arizona, including ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache.

miles wide and a thousand feet deep. It is undisputed that this subsidence will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise at their sacred site.

The land transfer, however, is subject to RFRA. Congress enacted RFRA to protect the right to engage in religious practice without substantial government interference, which "the framers of the Constitution" understood "as an unalienable right." 42 U.S.C. § 2000bb(a)(1). Thus, under RFRA, the federal government must provide a "compelling" justification pursued by the least restrictive means for any action that "substantially burden[s]" sincere religious exercise. *Id.* § 2000bb-1(b). Apache Stronghold, an Arizona nonprofit organization founded by a former Chairman of the San Carlos Apache Tribe to preserve Indigenous sacred sites, sued to enjoin the land transfer, arguing that, among other things, it violates RFRA. The district court, relying on our decision in *Navajo Nation*, declined to preliminarily enjoin the transfer, concluding that the destruction of Oak Flat did not amount to a substantial burden on the Apaches' religious exercise. The district court therefore did not determine whether the government had provided sufficient justification for the land transfer.

Because the land transfer will prevent Apache worshippers from engaging in sincere religious exercise at their sacred site, I would hold that Apache Stronghold is likely to succeed in establishing that the government has imposed a "substantial burden" on the Apaches' religious exercise. Such a holding stems from the Supreme Court's jurisprudence before and

after the enactment of RFRA, as well as our own case law, which have long recognized that preventing people from engaging in religious exercise impermissibly burdens that exercise. And such a decision reflects the government's unique control of access to Oak Flat, a degree of control that is rare outside the prison and land-use context. I would therefore reverse the district court's order concluding that there is no substantial burden, vacate the rest of the order, and remand to the district court to determine whether the government can demonstrate that the substantial burden posed by the land transfer is justified under subsection 2000bb-1(b).

A. Oak Flat and the Land Transfer

The Western Apache believe that their ancestral landscape is imbued with *diyah*, or spiritual power. This is especially true for *Chí'chil Biłdagoteel*, which means "Emory Oak Extends on a Level" or "Flat with Acorn Trees" or more simply "Oak Flat," a 6.7-square-mile sacred site located primarily in the Tonto National Forest. Oak Flat is situated between *Ga'an Bikoh* (Devil's Canyon), a canyon east of Oak Flat, and *Dibecho Nadil* (Apache Leap), the edge of a plateau west of Oak Flat.

Oak Flat, Devil's Canyon, and Apache Leap comprise a hallowed area where the Apaches believe that the *Ga'an*— the "guardians" and "messengers" between *Usen*, the Creator, and people in the physical world—dwell. *Usen* created the *Ga'an* as "the buffer between heaven and earth" and created specific "blessed places" for the *Ga'an* to reside. The *Ga'an* are "the very foundation of [Apache] religion," and they protect and guide the Apache people. The Apaches

describe the *Ga'an* as their "creators, [their] saints, [their] saviors, [and their] holy spirits."

Through *Usen* and the *Ga'an*, the Apaches believe that everything has life, including air, water, plants, animals, and *Nahagosan*—Mother Earth herself. The Apaches strive to remain "intertwined with the earth, with the mother" so they can "communicate with what [is] spiritual, from the wind to the trees to the earth to what [is] underneath." Because of the importance of remaining connected to the land, the Apaches view Oak Flat as a "direct corridor" to their Creator's spirit and as the place where the *Ga'an* "live and breathe." Oak Flat is thus "uniquely endowed with holiness and medicine," and neither "the powers resident there, nor [the Apaches'] religious activities . . . can be 'relocated.'"

The *Ga'an* come "to ceremonies to impart well-being to" the Apaches "to heal, and to help the people stay on the correct path." Oak Flat thus serves as a sacred ceremonial ground, and these ceremonies cannot take place "anywhere else." For instance, young Apache women have a coming-of-age ceremony, known as a "Sunrise Ceremony," in which each young woman will "connect her soul and her spirit to the mountain, to Oak Flat." Similarly, "young boys that are coming into manhood" have a sweat lodge ceremony at Oak Flat. There, the Apaches also conduct a Holy Grounds Ceremony, which is a "blessing and a healing ceremony . . . for people who are sick, have ailments[,] or seek guidance." The Apaches gather "sacred medicine plants, animals, and minerals essential to [these] ceremonies" from Oak Flat, and they use "the sacred spring waters that flow[] from the earth with healing powers" that are

not present elsewhere. "Because the land embodies the spirit of the Creator," if the land is desecrated, then the "spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, [Oak Flat] is like a dead carcass." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021).

The Apaches have held Oak Flat sacred since long before the United States government and its people ventured west of the Rio Grande. The Apaches, however, were dispossessed from their ancestral land during the nineteenth century, when miners and settlers moved west and clashed repeatedly with the local Apaches. To make peace, various Apache leaders signed the Treaty of Santa Fe in 1852, wherein the United States government promised the Apaches that it would "designate, settle, and adjust their territorial boundaries" and "pass and execute" laws "conducive to the prosperity and happiness of" their people. Despite the treaty, conflict continued as more settlers, miners, and United States soldiers entered the Apaches' ancestral land, resulting in several massacres of the Apaches by soldiers and civilians. By the late 1870s, the United States government forcibly removed the Apaches from their ancestral homelands and onto reservations, so that today, the Apaches no longer live on lands encompassing their sacred places. Nonetheless, the Apaches "remain connected to their spirituality" and "the earth," and they continue to come to Oak Flat to worship, conduct ceremonies, sing and pray, and gather sacred plants. *Apache Stronghold*, 519 F. Supp. 3d at 603–04.

In the twentieth century, the United States government took steps to protect Oak Flat from mining activity. In 1955, President Eisenhower

reserved 760 acres of Oak Flat for "public purposes" to protect it from mineral exploration or other mining-related activities. 20 Fed. Reg. 7319, 7336–37 (Oct. 1, 1955). President Nixon renewed that protection in 1971. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). That approach changed in 1995, after miners discovered a large copper deposit 7,000 feet beneath Oak Flat. The following decades saw several congressional attempts to transfer Oak Flat to Resolution Copper. Those efforts reached fruition in 2014, when Congress passed the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014) ("NDAA"). The NDAA included a rider that stripped Oak Flat's mining protections and "authorized and directed" the Secretary of Agriculture to convey 2,422 acres of federal land, including Oak Flat, to Resolution Copper in exchange for 5,344 acres of Arizona land currently owned by the company. *See id.* § 3003, 128 Stat. 3292 (codified at 16 U.S.C. § 539p) (the "Land Transfer Act").[2] Congress's stated purpose for authorizing the exchange is to "carry out mineral exploration activities under" Oak Flat. 16 U.S.C. § 539p(c)(6)(A)(i).

Under the Land Transfer Act, the Secretary of Agriculture must prepare an environmental impact statement ("EIS") before the land transfer may take

[2] The 2,422-acre tract is known as the "Oak Flat Federal Parcel," and includes the 760-acre section of land originally protected by President Eisenhower in 1955 (known as the "Oak Flat Withdrawal Area") as well as additional National Forest Service lands near Oak Flat. The copper deposit sits primarily beneath the Oak Flat Withdrawal Area.

place. *See id.* § 539p(c)(9)(B).[3] This EIS will "be used as the basis for all" federal government decisions "significantly affecting the quality of the human environment," including permitting necessary for any development of the transferred land. *Id.* The EIS must "assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under [the Land Transfer Act] on the cultural and archeological resources that may be located on [that] land" and "identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C). Within sixty days of the Final EIS's publication, and regardless of its contents, "the Secretary shall convey" the land to Resolution Copper. *Id.* § 539p(c)(10).

In January 2021, the Forest Service, a division of the Department of Agriculture, issued an EIS, which has since been withdrawn. In that EIS, the Forest Service concluded that the land transfer would remove Oak Flat from the Forest Service's jurisdiction, making the Forest Service unable to "regulate" the mining activity under applicable environmental laws. The Forest Service found that the mine would be "one of the largest" and "deepest" "copper mines in the United States," with an estimated 1,970 billion metric tons of copper situated 4,500 to 7,000 feet beneath Oak Flat. Resolution Copper will use an underground mining technique known as panel caving that carves a network of tunnels below the ore. As the ore is removed, the land

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[3] The Land Transfer Act is subject to several other conditions not at issue here. *See, e.g.*, 16 U.S.C. § 539p(c)(2)(A), (B).

above the ore "moves downward or 'subsides.'" This "subsidence zone" or crater will reach between 800 and 1,115 feet deep and nearly two miles wide. The crater would start to appear within six years of active mining. The crater and related mining activity will have a lasting impact on the land of approximately eleven square miles. The Forest Service "assessed alternative mining techniques in an effort to prevent subsidence, but alternative methods were considered unreasonable."

As a result of the crater, the Forest Service determined that "access to Oak Flat and the subsidence zone will be curtailed once it is no longer safe for visitors." The Forest Service therefore concluded that the mine would cause "immediate, permanent, and large in scale" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources."[4] Oak Flat would "be permanently affected," and tribal members would irreversibly lose access to the area for "religious purposes," thus resulting in "an indescribable hardship to [Indigenous] peoples." "[T]he impacts of the Resolution Copper [mine] . . . are substantial and irreversible due to the changes that would occur at Oak Flat." The Forest Service also found that there are no mitigation measures that could "replace or replicate the historic properties that would be destroyed by project construction. . . .

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[4] Removing the ore will also create roughly one-and-a-half billion tons of waste that will need to be stored "in perpetuity" at a site close to Oak Flat. The Forest Service determined that development of the storage facility will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials."

Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated."

In March 2021, the Department of Agriculture ordered the Forest Service to rescind the EIS. The Department explained that the government needed "additional time" to "fully understand concerns raised by Tribes and the public" and to "ensure the agency's compliance with federal law." While counsel for the government informed the en banc panel at oral argument in March 2023 that the environmental analysis would be completed and the EIS republished by the summer, the Forest Service has not yet issued a revised Final EIS.

B. Procedural History

Apache Stronghold filed this action several days before the government issued the now-withdrawn EIS.[5] As relevant on appeal, Apache Stronghold

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[5] Besides this case, there are two other pending cases seeking to prevent the land transfer. In January 2021, the San Carlos Apache Tribe sued the Forest Service to stop the land transfer under RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe, and moved to vacate the now withdrawn EIS as deficient under the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), the Land Transfer Act, and the National Historic Preservation Act. *See San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 21-cv-0068 (D. Ariz.). Also in January 2021, a coalition of environmental and tribal groups sued the Forest Service to enjoin the land transfer and vacate the EIS as deficient under the APA, NEPA, the Land Transfer Act, the Forest Service Organic Act, the Federal Land Policy and Management Act, and other statutory grounds. *See Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, No. 2:21-cv-0122-DLR (D. Ariz.). Resolution Copper intervened in both cases, and the Defendants moved to consolidate all three cases. The district court in this case denied that motion, concluding that "there is

alleges that the Land Transfer Act violates RFRA, the First Amendment's Free Exercise Clause, and trust duties created by the 1852 Treaty of Santa Fe. Two days after filing its complaint, Apache Stronghold filed a motion for a temporary restraining order and for a preliminary injunction to prevent the government from transferring the land to Resolution Copper. The district court denied the temporary restraining order, reasoning that Apache Stronghold could not show immediate and irreparable injury. *Apache Stronghold*, 519 F. Supp. 3d at 597.

The district court then held a hearing and took evidence before denying Apache Stronghold's motion for a preliminary injunction. *Id.* at 611. The district court found that Apache Stronghold was unlikely to succeed on the merits of its RFRA, Free Exercise Clause, and breach of trust claims. *See id.* at 598–609. As to the RFRA claim, the district court concluded that although the "Government's mining plans on Oak [Flat] will have a devastating effect on the Apache people's religious practices," there was no "substantial burden" under this circuit's limited definition of that term. *Id.* at 605–08 (citing *Navajo Nation*, 535 F.3d at 1063–72). The district court therefore did not

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minimal overlap in controlling questions of law between the pending cases" given the different legal theories advanced by the three plaintiffs.

The parties agreed to stay both cases after the Forest Service withdrew its original EIS. *See San Carlos Apache Tribe*, No. 21-cv-0068 (D. Ariz. Mar. 15, 2021); *Ariz. Mining Reform Coal.*, No. 21-cv-0122 (D. Ariz. Mar. 15, 2021). Those cases remain stayed, and the parties have filed regular joint status reports. The government has stated that it will give the defendants sixty days' notice prior to filing an updated Final EIS. As of now, that notice has not been given.

determine whether the government could establish a compelling interest to justify its actions, nor did the district court analyze the other preliminary injunction factors under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *See Apache Stronghold*, 519 F. Supp. 3d at 611. Apache Stronghold appealed, and moved for an injunction pending appeal.

After the district court denied Apache Stronghold's preliminary injunction motion, the Forest Service withdrew the Final EIS. The three-judge motions panel that considered Apache Stronghold's motion for an injunction pending appeal therefore concluded that Apache Stronghold had failed to show that it needed immediate relief to "avoid irreparable harm," because the Forest Service expected to take "months" to complete its revised environmental review and the land transfer would not occur until then. *Apache Stronghold v. United States*, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *2 (9th Cir. March 5, 2021) ("Injunction Order"). Accordingly, the divided motions panel denied Apache Stronghold's motion. *Id.* In dissent, Judge Bumatay stated that he would have granted the motion and held that the land transfer violated RFRA because "the complete destruction of the land . . . . is an obvious substantial burden on [the Apaches'] religious exercise, and one that the Government has not attempted to justify." *Id.* at *5 (Bumatay, J., dissenting).

On the merits, a divided three-judge panel affirmed the district court's order. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). We granted

rehearing en banc. *Apache Stronghold v. United States*, 56 F.4th 636 (9th Cir. 2022).[6]

II. Discussion

In *Winter*, the Supreme Court emphasized that injunctive relief, whether temporary or permanent, is an "extraordinary remedy never awarded as of right." 555 U.S. at 24. A party seeking a preliminary injunction must show that: (1) it is "likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [its] favor"; and (4) "an injunction is in the public interest." *Id.* at 20. "Where, as here, the government opposes a preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021).

The district court concluded that Apache Stronghold could not establish a likelihood of success on any of its three claims, so it denied the motion for a preliminary injunction. *See Apache Stronghold*, 519 F. Supp. 3d at 598–609. Because I conclude that *Navajo Nation*'s reasoning is incorrect and because I would hold that preventing a person from engaging in sincere religious exercise is a substantial burden under RFRA, I would reverse and remand. I would therefore consider neither the other two claims nor the remaining *Winter* factors. Finally, I conclude that RFRA applies to the Land Transfer Act. Because a

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[6] After oral argument, Resolution Copper intervened in this case before the district court, as well as before this court, for the limited purpose of participating in potential future litigation before the Supreme Court.

majority of judges have voted to affirm, I respectfully dissent.

A. RFRA and the Religious Land Use and Institutionalized Persons Act

In RFRA, Congress crafted a statutory right to the free exercise of religion broader than the corresponding constitutional right delineated by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the First Amendment tolerates neutral, generally applicable laws even when those laws burden or prohibit religious acts. *Id.* at 885–90. The Supreme Court explained that so long as the government's burden on religious exercise, even if substantial, was not the "object of" a law, "the First Amendment has not been offended" and the government need not demonstrate a narrowly tailored, compelling governmental interest to justify it. *Id.* at 878–79; *see also id.* at 886 n.3 ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.").

In response, in 1993, Congress enacted RFRA. Congress disagreed with the Supreme Court's decision in *Smith* to "virtually eliminate[] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Instead, Congress found that "the framers of the Constitution[] recogniz[ed the] free exercise of religion as an unalienable right," and that governments, therefore, "should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Congress further

determined that "the compelling interest test"—*i.e.*, strict scrutiny—"is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5); *see Gonzales v. O Centro Espírita Beneficente Uniaõ do Vegetal*, 546 U.S. 418, 430 (2006). Congress then stated that RFRA's two "purposes" were (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened," and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). RFRA therefore goes "far beyond what . . . is constitutionally required" under the Free Exercise Clause, and thus "provide[s] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014); *see Ramirez v. Collier*, 595 U.S. 411, 424 (2022).

Four years later, however, the Supreme Court struck down the portion of RFRA regulating state and local governments, concluding that Congress had exceeded its power under § 5 of the Fourteenth Amendment to regulate states. *City of Boerne v. Flores*, 521 U.S. 507, 511, 536 (1997). To repair RFRA's constitutional defect, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. §§ 2000cc to cc-5, "which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Recognizing their history and overlapping purposes, the Supreme Court has characterized RLUIPA and RFRA as "sister

statute[s]" that "impose[] the same general test," distinguished only in that they apply to different "categor[ies] of governmental actions." *Hobby Lobby*, 573 U.S. at 695, 730. In contrast to RFRA's more general application to all federal government action, including federal prisons and federal land-use regulations by the District of Columbia or U.S. territories, *see* 42 U.S.C. §§ 2000bb-1, 2000bb-3, RLUIPA governs only state land use regulations, *see id.* § 2000cc, and religious exercise by institutionalized persons, typically in the state prison context, *see id.* § 2000cc-1. RLUIPA otherwise generally "mirrors RFRA." *Holt*, 574 U.S. at 357–58; *compare* 42 U.S.C. § 2000cc-1(a) (providing that a "substantial burden" in the state prison context must be justified by a compelling governmental interest pursued through the least restrictive means); *with id.* § 2000bb-1(b) (same test for federal government action).

B. Defining "Substantial Burden"

i. Plain Meaning

With that background in mind, I turn to Apache Stronghold's claim that the government will violate RFRA by transferring Oak Flat to Resolution Copper, which will result in the destruction of the Apaches' place of worship. Under RFRA, the federal government may not "substantially burden a person's exercise of religion . . . except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). Subsection (b) provides that the "Government may substantially burden a person's exercise of religion only if it 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." *Id.* § 2000bb-1(b).

Thus, to proceed with its RFRA claim, Apache Stronghold must show that (i) its sincere religious exercise is (ii) subject to a substantial burden imposed by the government. If Apache Stronghold makes that showing, the government must then justify that burden by demonstrating that (iii) it has a compelling interest that (iv) it is pursuing through the least restrictive means.

As to the Apaches' religious exercise, the district court found, and the government does not dispute, that the Apaches have a sincere religious belief in worshipping and conducting ceremonies at Oak Flat. *See Apache Stronghold*, 519 F. Supp. 3d at 603; *see also* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (defining the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief").[7] Because the government concedes that "it is undisputed that RFRA applies to federal land-management statutes and their implementation," on appeal, we must determine whether the transfer and resulting destruction of Oak Flat constitutes a substantial burden on the Apaches' religious exercise.

To define "substantial burden," I begin with RFRA's text. *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020); *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Because RFRA does not define "substantial burden," I "turn to

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[7] RFRA appropriately does not permit courts to judge the significance or "centrality" of a particular belief or practice, given that courts are not the proper arbiters of religious doctrine. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Courts can only inquire into the sincerity of the professed religiosity. *See Hobby Lobby*, 573 U.S. at 696, 717 n.28; *cf. Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

the phrase's plain meaning at the time of enactment." *Tanzin*, 592 U.S. at 48; *see also FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011). Indeed, when grappling with RFRA's undefined terms, the Supreme Court has done just that. *Tanzin*, 592 U.S. at 45– 49 (looking to RFRA's plain meaning, using dictionaries, to conclude that "appropriate relief" encompasses claims for money damages against government officials in their individual capacities).

At the time of RFRA's passage, a "burden" was defined as "[s]omething oppressive" or "anything that imposes either a restrictive or onerous load" on an activity. *Burden*, *Black's Law Dictionary* (6th ed. 1990); Webster's Third New International Dictionary 298 (1986) (defining burden as "something that weighs down [or] oppresses"). A burden is "substantial" if it is "[o]f ample or considerable amount, quantity, or dimensions." *Substantial*, *Oxford English Dictionary* 66–67 (2d ed. 1989). And "substantial" does not mean complete or total. *Substantial*, *Black's Law Dictionary* (6th ed. 1990) (defining "substantial" as something "considerable"; not "nominal"). In light of the plain meaning of substantial burden, therefore, RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. *Accord* Injunction Order, 2021 U.S. App. LEXIS 6562, at *8–9 (Bumatay, J., dissenting).

ii. *Navajo Nation*'s Flawed Reasoning

Our decision in *Navajo Nation*, relied upon by the district court, rejected a plain meaning reading of "substantial burden." There, Native American tribes and their members sought to enjoin the use of artificial snow, made from recycled wastewater, on a public mountain sacred to their religion. *Navajo Nation*, 535 F.3d at 1062–63. This court concluded that using artificial snow was not a substantial burden under RFRA, because "the sole effect of the artificial snow is on the Plaintiffs' *subjective* spiritual experience." *Id.* at 1063, 1070 (emphasis added). Aside from holding that subjective interference with religious exercise is not a substantial burden under RFRA, *Navajo Nation* also concluded that because Congress "incorporated" *Sherbert* and *Yoder* into RFRA, the only two categories of burden that could constitute a "substantial burden" are the specific types of burdens at issue in those cases. 535 F.3d at 1069–70; *see also id.* at 1063. *Navajo Nation* therefore held:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Id. at 1069–70. This is erroneous for six reasons.

First, *Navajo Nation* made too much of the fact that RFRA explicitly mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose. *See* 535 F.3d at 1074–75. Reading "substantial burden" by its plain language is fully consistent with RFRA's statements of purpose. Congress explained that RFRA's two "purposes" are (1) "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*[,] *and* to guarantee its application in *all* cases where free exercise of religion is substantially burdened," *and* (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b) (emphasis added) (citations omitted). Section 2000bb(b) thus links *Sherbert* and *Yoder* to the "compelling interest test," *not* to the "substantial burden" inquiry. *See* 42 U.S.C. § 2000bb(b) (not mentioning *Sherbert* or *Yoder* in RFRA's second purpose). Consonant with the statute's purposes, the Supreme Court has recognized that "RFRA expressly adopted the *compelling interest* test 'as set forth in *Sherbert* and *Yoder*.'" *Gonzales*, 546 U.S. at 431 (quoting 42 U.S.C. § 2000bb(b)(1) (emphasis added) (citations omitted)). "In each of those cases, [the] Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.*

In other words, when enacting RFRA, Congress was focused on governments' *justifications* for burdens on religious exercise created by generally applicable laws—the requirement present in *Sherbert* and *Yoder* that *Smith* eliminated—not the definition of substantial burden. Justice O'Connor, concurring

only in the judgment in *Smith*, made this point when she critiqued the *Smith* majority for dropping the "*Sherbert* compelling interest test" and argued that "[r]ecent cases have instead affirmed that [*compelling interest*] *test* as a fundamental part of our First Amendment doctrine. The cases cited by the [majority] signal no retreat from our consistent adherence to the *compelling interest test*." *Smith*, 494 U.S. at 898, 900 (O'Connor, J., concurring in the judgment) (emphasis added) (cleaned up). Justice O'Connor notably did not describe the test as the "*Sherbert* substantial burden test," because her disagreement with the *Smith* majority was not with the meaning of substantial burden but with the *level of scrutiny*. And the *Smith* majority never defined substantial burden because it concluded the *Sherbert* test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See id.* at 884–85.

Second, neither *Sherbert* nor *Yoder* contains the term "substantial burden." It would therefore be surprising for Congress to invoke an interpretation of a purported term of art by referencing two cases, neither of which uses the term. *See Sherbert*, 374 U.S. at 406 ("substantial infringement"); *Yoder*, 406 U.S. at 220 ("unduly burdens"). *Navajo Nation*'s argument that "substantial burden" is a term of art from the Supreme Court's pre-RFRA First Amendment jurisprudence makes little sense given that neither case includes that term. 535 F.3d at 1074. Indeed, the Supreme Court did not commonly or consistently use the term "substantial burden."

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for example, decided just months before Congress enacted RFRA, the Court explained that "[a]

law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," without using the term "substantial burden." 508 U.S. 520, 546 (1993). If "substantial burden" truly was a term of art, then one would expect consistent usage. *See Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2445 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

In looking to the term's plain meaning, I do not ignore the significance of RFRA mentioning *Sherbert* and *Yoder* by name. But rather than implausibly reading "substantial burden" as a term of art shackled to *Sherbert* and *Yoder*, I rely on those cases—along with other "Federal court rulings," 42 U.S.C. § 2000bb(a)(5)—to properly situate "substantial burden" within RFRA. *See infra* § II(D). And it would unreasonably contort the English language to read "substantial burden" to exclude the utter destruction of sacred sites. "Because common sense rebels" at the majority's interpretation of RFRA, "we should not adopt that interpretation unless the statutory language compels us to conclude that Congress intended such a startling result." *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000) (Canby, J., dissenting).

Third, *Navajo Nation* (and the majority here) proceeds as if RFRA's coverage is identical to that of the Free Exercise Clause, frozen in time at the moment of the statute's enactment. But Congress amended RFRA in 2000 and repealed RFRA's previous definition of the "exercise of religion" as "the exercise

of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5 (1993). As the Supreme Court explained: "[t]hat amendment deleted the prior reference to the First Amendment," and it is unclear "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Hobby Lobby*, 573 U.S. at 714. Congress also broadened the definition of "religious exercise" in two ways: it eliminated any requirement that a religious exercise be "compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc5(7)(A), and it specified that "religious exercise" includes "[t]he use, building, or conversion of real property for the purpose of religious exercise," 42 U.S.C. § 2000cc-5(7)(B). The term "substantial burden" must therefore be construed in light of Congress's express direction that RFRA applies to the use of property for religious purposes. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (explaining that statutory construction "is a holistic endeavor," so "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law" (quotation marks omitted) (cleaned up)). That Congress amended RFRA to expressly include religious use of property reinforces my conclusion that the denial of religious exercise at a sacred site is a substantial burden on religious exercise, contrary to the holding of *Navajo Nation*.

Fourth, considering this amendment to RFRA, and after *Navajo Nation*, the Supreme Court has rejected the notion that RFRA "merely restored [its] pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715–16. Instead, the Court explained that "the amendment of RFRA through RLUIPA surely dispels

any doubt" that Congress did not intend "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Id.* at 714; *see also id.* at 706 n.18 (explaining that there is "no reason to believe" that RFRA "was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases"). I therefore rely on pre-*Smith* cases for guidance only.

Fifth, and relatedly, as discussed in the next section, *Navajo Nation*'s choice to confine "substantial burden" to a term of art cannot stand in the face of the Supreme Court's directive that RFRA and RLUIPA impose "the same standard." *Holt*, 574 U.S. at 356–58 (quoting *Gonzales*, 546 U.S. at 436); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (noting that courts do not "ordinarily imbue statutory terms with a specialized . . . meaning when Congress has not itself invoked" one).

Finally, instead of just answering the question before it, *Navajo Nation*'s decision to define substantial burden as a narrow term of art swept too broadly. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) ("A broad holding . . . might have implications for future cases that cannot be predicted."). This case asks whether the utter destruction of a sacred site is a substantial burden. That is a fundamentally different question than the one *Navajo Nation* considered, because there, plaintiffs still had "*virtually unlimited access* to the mountain" to "continue to pray, conduct their religious ceremonies, and collect plants for religious use." *Navajo Nation*, 535 F.3d at 1063 (emphasis added); *see id.* (noting that nothing "with religious significance, or religious ceremonies . . . would be physically affected"). Because the *Navajo*

Nation majority went to great lengths to emphasize that "no places of worship [were] made inaccessible," *id.*, *Navajo Nation* should not have adopted a rule that extends to cases where places of worship will be obliterated. And by adopting such a broad holding, it erred.

Accordingly, I would revise *Navajo Nation*'s definition of "substantial burden" to the extent that it defined that phrase as a term of art limited to the kinds of burdens at issue in *Sherbert* and *Yoder*. Rather, as discussed *infra* § II(D), the kinds of burdens challenged in *Sherbert* and *Yoder* are examples *sufficiently* demonstrating a substantial burden, not those *necessary* to do so.[8]

C. RFRA and RLUIPA Are Interpreted Uniformly

RLUIPA, RFRA's sister statute, supports my conclusion to define substantial burden by its plain meaning. RLUIPA's "substantial burden" test largely mirrors RFRA's test, and like RFRA, it does not define "substantial burden." *See* 42 U.S.C. §§ 2000cc, 2000cc-1, 2000cc-5(4)(A). So, as we did in *San Jose Christian College v. City of Morgan Hill*, I look to RLUIPA's plain meaning to interpret "a 'substantial burden' on 'religious exercise'" in the land-use context as "a significantly great restriction or onus upon such exercise." 360 F.3d 1024, 1034 (9th Cir. 2004); *id.* ("When a statute does not define a term, a court should

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[8] As reflected in the first paragraph of the per curiam opinion, a majority of this court has overruled *Navajo Nation*'s narrow test for a "substantial burden" under RFRA. I echo Judge Nelson's clear refutation of any suggestion to the contrary. *See* Nelson Op. at 130–33.

construe that term in accordance with its ordinary, contemporary, common meaning." (quotation marks omitted)). Since then, we have relied on this plain meaning definition of substantial burden in other RLUIPA cases. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 988–89 (9th Cir. 2006); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011).[9]

That "substantial burden" has the same meaning under both RFRA and RLUIPA is a logical application of statutory construction for several reasons. First, it is significant that these two Title 42 statutes use the same "substantial burden" and "compelling interest" language. *See United States v. Nishiie*, 996 F.3d 1013, 1026 (9th Cir. 2021) ("When Congress uses the same language in two statutes having similar purposes," this Court starts with the "presum[ption] that Congress intended that text to have the same meaning in both statutes." (quotation marks omitted) (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172–73 (2012) (presumption of consistent usage). The term "religious exercise" also has an identical definition in the two statutes. *See* 42 U.S.C. §§ 2000bb-2(4),

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[9] Dictionaries contemporaneous with the enactments of RFRA and RLUIPA define "substantial" synonymously as either a "considerable" or a "significant" amount. To the extent there is any semantic difference, I conclude that the meaning of "substantial" is the same under both statutes, particularly given that RLUIPA was meant to restore part of RFRA's original reach. *See Holt*, 574 U.S. at 357–58 (RLUIPA "mirrors RFRA"); *Gonzales*, 546 U.S. at 436 (RLUIPA allows incarcerated people "to seek religious accommodations pursuant to the same standard as set forth in RFRA.").

2000cc-5(7)(A). The two sister statutes differ only in what categories of government action they control: RFRA applies to all federal action, including federal prisons and land-use restrictions, whereas RLUIPA governs state government land-use regulations and state prisons. Diverging definitions for identical terms in the two statutes would allow federal prisons to burden religious rights more heavily than state prisons, or vice versa, which is implausible given the statutes' history and purpose. *See Gonzales*, 546 U.S. at 436; *Holt*, 574 U.S. at 356–58 (explaining that the two statutes impose "the same standard"); *Cutter*, 544 U.S. at 716–17 ("To secure redress for [incarcerated persons] who encountered undue barriers to their religious observances, Congress carried over from RFRA [to RLUIPA] the 'compelling governmental interest'/'least restrictive means' standard."); *see also Austin v. U.S. Navy Seals 1–26*, 142 S. Ct. 1301, 1307 (2022) (Alito, J., dissenting) (explaining that RLUIPA "essentially requires prisons to comply with the RFRA standard").

Second, the Supreme Court has cross-referenced the two statutes for support. *See, e.g.*, *Holt*, 574 U.S. at 356–57 (a RLUIPA case invoking RFRA cases); *Hobby Lobby*, 573 U.S. at 695, 729 n.37 (a RFRA case invoking RLUIPA cases).

Third, at least seven other circuits agree with my conclusion that the two statutes' "substantial burden" standards are one and the same. *See, e.g.*, *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) ("[T]he two statutes are analogous for purposes of the substantial burden test."); *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003) (RLUIPA "reinstate[d] RFRA's protection against government burdens" and

"mirror[s]" its provisions); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 n.64 (5th Cir. 2010) ("same 'substantial burden' question"); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) ("same understanding"); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) ("same definition"); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 n.13 (10th Cir. 2013) ("interpreted uniformly"), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682; *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144 n.23 (11th Cir. 2016) ("same substantial burden analysis"); *see also Sabir v. Williams*, 52 F.4th 51, 60 & n.5 (2d Cir. 2022) (applying RLUIPA's substantial burden precedent to a RFRA claim); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 587 (6th Cir. 2018) (relying on *Holt*, a RLUIPA case, to define substantial burden in a RFRA case), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

The great weight of authority thus buttresses my conclusion that RFRA and RLUIPA employ the same substantial burden test defined by its plain meaning.

D. Preventing a Person from Engaging in Religious Exercise Is an Example of a Substantial Burden

I next consider which government actions amount to a substantial burden on religious exercise. Keeping in mind that RFRA did not "merely restore[the Supreme] Court's pre-*Smith* decisions in ossified form," *Hobby Lobby*, 573 U.S. at 715, the Supreme Court's pre-*Smith* Free Exercise jurisprudence, as well as our own case law, provide at least three clear examples of a substantial burden on religious exercise:

where the government (1) forces a religious adherent to choose between sincere religious exercise and receiving government benefits; (2) threatens a religious adherent with civil or criminal sanctions for engaging in sincere religious exercise; or (3) prevents a person from engaging in sincere religious exercise.

i. Pre-*Smith* Free Exercise Jurisprudence

I begin with *Sherbert* and *Yoder*, the two pre-*Smith* cases that RFRA mentions by name. *See* 42 U.S.C. § 2000bb(b)(1). In *Sherbert*, a state employer fired a Seventh-day Adventist because she refused to work on Saturdays, her faith's day of rest. 374 U.S. at 399. The state denied the plaintiff's claim for unemployment compensation benefits, finding that she had failed to accept work without good cause. *Id.* at 399–401. The Supreme Court held that the state's denial of unemployment compensation to the plaintiff because she was exercising her faith imposed a "substantial infringement" under the Free Exercise Clause. *Id.* at 403–04, 406. Such a condition unconstitutionally forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Having determined that there was a "substantial infringement" on religious exercise, the Court then "consider[ed] whether some compelling state interest enforced in the eligibility provisions of the [state] statute justifie[d] the substantial infringement of [her] First Amendment right," and held that the state's concern about protecting against "fraudulent [unemployment] claims" was insufficiently compelling. *Id.* at 406–09.

In *Yoder*, a state prosecuted members of the Amish faith for violating a state law that required children to attend school until the age of sixteen. 406 U.S. at 207–08. The defendants sincerely believed that their children's attendance in high school was "contrary to the Amish religion and way of life." *Id.* at 209. The Supreme Court reversed the convictions, holding that the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" their exercise of religion in violation of the Free Exercise Clause. *Id.* at 207, 220. According to the Court, the state law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. As to the state's interest underlying its truancy law, the Court explained that a general interest in compulsory education was insufficiently compelling. *Id.* at 221.

But pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions). Beyond these two cases, the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: preventing a religious adherent from engaging in religious exercise. In *Cruz v. Beto*, for example, a prison denied a Buddhist access to the prison chapel and prohibited him from corresponding with his religious advisor. 405 U.S. 319, 322 (1972) (per curiam). The Court reversed the dismissal of the complaint and held that, taking the allegations as true, the prison had violated the Free Exercise Clause. *Id.*

And in *O'Lone v. Estate of Shabazz*, prison officials "prevented Muslims . . . from attending Jumu'ah," an Islamic congregational service held on Friday afternoons. 482 U.S. 342, 347 (1987). The plaintiffs sued, "alleging that the prison policies unconstitutionally denied them their Free Exercise rights under the First Amendment." *Id.* The Supreme Court recognized that preventing Muslims from engaging in religious exercise gave rise to a cognizable Free Exercise Clause claim. But, at the time, before RFRA and RLUIPA, prison officials were only required to show that a policy that burdened religious exercise was "reasonable." *Id.* at 350. So the Court concluded that preventing Muslims from attending religious services was "justified by concerns of institutional order and security." *Id.*; *see id.* at 351–52 (concluding that, although there were "no alternative means of attending Jumu'ah," the prison policy of preventing religious exercise was reasonable because "alternative means of exercising the [First Amendment] right" remained open as the plaintiffs were "not deprived of all forms of religious exercise" such as daily prayer).

In dissent, Justice Brennan agreed that preventing an adherent from engaging in religious practices was sufficient to demonstrate a Free Exercise claim, but disagreed with the majority's reasonableness standard:

> The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali*, [which requires the

> government to demonstrate a compelling interest] and would find their proffered justifications wanting.
>
> The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose.

Id. at 359 (Brennan, J., dissenting). RFRA and RLUIPA later essentially codified Justice Brennan's dissent, eliminating the reasonableness test for evaluating prison policies and instead requiring federal and state prison policies that substantially burden religious exercise to be justified by a compelling interest furthered by the least restrictive means. *See* 42 U.S.C. § 2000cc-1(a); *id.* § 2000bb-1(b).[10]

RFRA also instructs that courts look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). Like the Supreme Court, our own cases prior to *Smith*

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[10] Other pre-*Smith* examples falling outside the *Sherbert*/*Yoder* framework are Free Exercise Clause challenges to government autopsies. *See Tanzin*, 592 U.S. at 51 (noting that autopsies are among the cases in which RFRA grants effective relief) (citing *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) (autopsy of son that violated Hmong beliefs), *opinion withdrawn in light of Smith*, 750 F. Supp. 558 (D.R.I. 1990)); *see also City of Boerne*, 521 U.S. at 547 (O'Connor, J., concurring in part) (discussing *Yang* as an example of why *Smith* was wrongly decided in the context of RFRA); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1893 & n.26 (2021) (Alito, J., concurring in judgment) (discussing the import of *Yang* in the lead up to Congress enacting RFRA and stating that "*Smith*'s impact was quickly felt, and Congress was inundated with reports of the decision's consequences" (citing 139 Cong. Rec. 9681 (1993))).

recognized that preventing a person from engaging in religious exercise implicates the Free Exercise Clause. For instance, in *Graham v. Commissioner of Internal Revenue*, we required a religious adherent, there a taxpayer, to show that the government action "burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion *or by preventing* him or her from engaging in conduct or having a religious experience." 822 F.2d 844, 850–51 (9th Cir. 1987) (emphasis added), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680 (1989).

The same is true in other cases. *See, e.g.*, *McElyea v. Babbitt*, 833 F.2d 196, 197–99 (9th Cir. 1987) (citing *O'Lone* and recognizing a Free Exercise Clause claim where a prison had no weekly Jewish services and the plaintiff alleged that prison officials "prevented him from practicing his religion"); *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (assuming that denial of access to a sweat lodge was a viable Free Exercise Clause claim, but upholding the prison policy under the *O'Lone*, pre-RFRA, reasonableness test); *cf. Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997) (holding, in a Free Exercise Clause case decided post-*City of Boerne* and pre-RLUIPA, that "[i]n order to establish a free exercise violation, [a plaintiff] must show the defendants burdened the practice of his religion, by preventing him from engaging in [religious exercise], without [proper] justification" (footnote omitted)).

ii. This Circuit's Precedents Recognize Preventing Religious Exercise Is a Substantial Burden

Given this legal backdrop, it is unsurprising that in our first RFRA case in 1995, we relied on pre-*Smith* Free Exercise Clause cases to define substantial burden to include preventing a person from engaging in religious exercise. In *Bryant v. Gomez*, we held that to show a "substantial burden" under RFRA,

> the religious adherent has the obligation to prove that a governmental action burdens the adherent's practice of his or her religion by preventing him or her from engaging in conduct or having a religious experience . . . . This interference must be more than an inconvenience.

46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (cleaned up) (quoting *Graham*, 822 F.2d at 850–51).[11]

The majority makes no effort to explain why we should not adhere to *Bryant*'s formulation of

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[11] In *Bryant*, we rejected the plaintiff's RFRA claim because "full Pentecostal services" were not "mandated by his faith." 46 F.3d at 949 (stating that religious exercise must be one that "the faith mandates" or "a tenet or belief that is central to religious doctrine"). However, as discussed *supra* § II(B)(ii), in 2000, Congress expanded the statutory protection for religious exercise by amending RFRA and RLUIPA's definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). So to the extent that *Bryant* and other cases discussed below applied a narrower definition of "religious exercise" that required it to be central to or mandated by a person's faith, Congress has abrogated them. Similarly, RFRA and RLUIPA's definition of "exercise of religion" is broader than *O'Lone* and *Freeman*'s definition under the Free Exercise Clause. Otherwise, *Bryant*'s discussion of substantial burden remains good law.

substantial burden. Nor does it distinguish our subsequent pre-*Navajo Nation* RFRA cases in which we consistently invoked the concept of preventing a person from engaging in religious conduct as a substantial burden in various contexts, including ones outside of the two RLUIPA contexts. For example, in a case considering a university's mandatory student registration fee that, in part, covered abortion services, we "look[ed] to our decisions prior to *Smith*," including a Free Exercise Clause challenge by a taxpayer, to define substantial burden to include "preventing [a person] from engaging in conduct or having a religious experience." *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) (quoting *Graham*, 822 F.2d. at 850–51, and discussing *Bryant*); *see also Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Bryant*'s substantial burden standard in a copyright case and concluding that the unauthorized use of intellectual property of religious texts was not a substantial burden under RFRA); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (citing *Bryant*'s standard and finding no substantial burden because an incarcerated person was not "prevented" from "engaging in any [religious] practices" when the prison confiscated a religious text not central to his practice).[12]

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[12] The Seventh, Eighth, and Tenth Circuits have followed *Bryant*'s interpretation of a substantial burden under RFRA. *See Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (expressly drawing on *Bryant*); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citing *Bryant*).

Similarly, before and since *Navajo Nation*, we have routinely recognized that preventing religious exercise qualifies as a substantial burden under RLUIPA, which applies the "same standard" as RFRA, *Holt*, 574 U.S. at 356– 57. *See Johnson v. Baker*, 23 F.4th 1209, 1215–16 (9th Cir. 2022) (recognizing that prohibiting plaintiff from possessing scented prayer oil in his cell substantially burdened his religious exercise); *Foursquare Gospel*, 673 F.3d at 1061, 1066–70 (recognizing that preventing the plaintiff from building a place of worship could constitute a substantial burden); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise"—*i.e.*, a "policy of prohibiting [a person] from attending group religious worship services"—"is a substantial burden on that religious exercise."); *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d at 981–82 (holding that a county "imposed a substantial burden" on a Sikh organization's "religious exercise" by denying applications from the group for a conditional use permit to build a temple); *cf. United States v. Antoine*, 318 F.3d 919, 923–24 (9th Cir. 2003) (assuming that "raz[ing]" a "house of worship" to build a freeway would be a substantial burden).[13]

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[13] Several other circuits also recognize that denying access to or preventing religious exercise qualifies as a substantial burden under RLUIPA. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004); *cf. C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Notably, the Tenth Circuit referenced this

E. The Land Transfer Act Substantially Burdens the Exercise of Religion

The foregoing firmly establishes that where the government prevents a person from engaging in religious exercise, the government has substantially burdened the exercise of religion. The plain meaning of RFRA clearly reaches such instances. The Free Exercise Clause cases prior to *Smith* so recognized. *O'Lone*, 482 U.S. at 347–52; *Graham*, 822 F.2d at 850–51. We held as much in our first RFRA case. *See Bryant*, 46 F.3d at 949. And, as Judge Bumatay pointed out in his dissent from the order declining to enjoin the land transfer pending appeal, this understanding is consistent with RLUIPA. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9 (Bumatay, J., dissenting) ("[A]s then-Judge Gorsuch wrote [in a RLUIPA case], a substantial burden exists when the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014))).

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circuit's definition of a substantial burden when defining it to include preventing religious exercise. *See Werner*, 49 F.3d at 1480 (citing *Bryant*); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1313 (10th Cir. 2010) (citing *Werner*).

And in a recent RLUIPA case, the Supreme Court stayed the execution of an incarcerated person who requested that "his long-time pastor be allowed to pray with him and lay hands on him while he is being executed." *Ramirez*, 595 U.S. at 416; *see id.* at 426, 433 (holding that the state's refusal to permit audible prayer or religious touch, denying him access to his religious rites, "substantially burdens his exercise of religion," because "he will be unable to engage in protected religious exercise in the final moments of his life").

I now turn to whether Apache Stronghold is likely to succeed in showing that the transfer and eventual destruction of Oak Flat constitutes a substantial burden on the Western Apaches' religious exercise. The district court heard extensive testimony about the impact of the land transfer and mine. The district court found:

> Because the land embodies the spirit of the Creator, "without any of that, specifically those plants, because they have that same spirit, that same spirit at Oak Flat, that spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, it is like a dead carcass." If the mining activity continues, Naelyn Pike testified, "then we are dead inside. We can't call ourselves Apaches." Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood. . . . [T]he land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship.

Apache Stronghold, 519 F. Supp. 3d at 604, 606 (citations omitted).

As discussed *supra* § I(A), the Forest Service, in its now withdrawn EIS, similarly documented the extensive, irreversible, and devastating impact of the mine's construction, and how the mining activity would prevent Apache worshipers from engaging in religious exercise at their religious sites. The crater

will start to appear within six years of active mining, and the Forest Service concluded that the mining activity will cause "immediate" and "permanent" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources." In addition, once the government publishes its Final EIS, regardless of its contents, "the Secretary *shall* convey" the land to Resolution Copper within sixty days. 16 U.S.C. § 539p(c)(10) (emphasis added). So once the land transfer occurs, Oak Flat will be private property no longer subject to RFRA and other federal protections.

In other words, the land transfer will result in a crater that will subsume Oak Flat. The impact of the mining activity on sacred sites will be immediate and irreversible. All that will be left is a massive hole and rubble, making the site unsuitable for religious exercise. Religious worship will be impossible, and the Apaches will be prevented from ever again worshipping at Oak Flat. As I have concluded, where the government prevents a religious adherent from engaging in religious exercise, the government has restricted the exercise of religion to a considerable amount. I would therefore hold that Apache Stronghold is likely to succeed in establishing that transferring Oak Flat to Resolution Copper will amount to a substantial burden under RFRA. *See* 42 U.S.C. § 2000bb-1(a). Because the district court did not determine whether the government could justify that burden by demonstrating a compelling interest pursued through the least restrictive means, I would remand for the district court to make that determination in the first instance. *See id.* § 2000bb-1(b).

F. *Lyng* Is Consistent with My Analysis

i. *Lyng* and Prohibitions on Free Exercise

The majority concludes that the destruction of a sacred site cannot be a substantial burden but cites no authority squarely supporting that proposition. Indeed, the majority fails to cite even one case foreclosing a RFRA claim where the government completely prevents a person from engaging in religious exercise. Confusingly, the majority agrees with me that then-Judge Gorsuch correctly held in *Yellowbear* "that 'prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief' qualifies as prohibiting free exercise." Collins Op. at 29 (quoting *Yellowbear*, 741 F.3d at 55). And the majority concedes that it is undisputed that the Land Transfer Act will categorically prevent the Apaches from participating in any worship at Oak Flat because their religious site will be obliterated. *See* Collins Op. at 19. If the majority agrees with *Yellowbear*'s formulation—which mirrors the one I have laid out above in § II(D) (explaining that preventing religious exercise is an example of a substantial burden)— and agrees that the Apaches will be prevented from worshiping at Oak Flat, Apache Stronghold's claim cannot fail. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9–10 (Bumatay, J., dissenting) (relying on *Yellowbear* to conclude that the destruction of Oak Flat is a substantial burden). And yet, the majority says that it does.

Rather than acknowledge this inconsistency, the majority relies entirely on a pre-RFRA Free Exercise Clause case: *Lyng v. Northwest Indian Cemetery*

Protective Association, 485 U.S. 439 (1988). But *Lyng* cannot bear the weight the majority places on it.

The Supreme Court in *Lyng* did not analyze whether there was a substantial burden under the Free Exercise Clause. The case is therefore not inconsistent with my RFRA analysis and cannot foreclose Apache Stronghold's statutory claim, which rests on the "substantial burden" concept.

In its retelling of *Lyng*, the majority omits crucial facts. The *Lyng* plaintiffs challenged the federal government's proposal to permit timber harvesting and build a road through part of a national forest that "ha[d] traditionally been used for religious purposes by members of three American Indian tribes." 485 U.S. at 441–42. The proposed road "avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Id.* at 443. Unlike here—a fact that the majority entirely disregards—"[n]o sites where specific rituals t[ook] place were to be disturbed." *Id.* at 454. The *Lyng* plaintiffs continued to have full access to their sacred sites to engage in religious exercise, and there were "one-half mile protective zones around all the religious sites," insulating them from any logging activity. *See id.* at 441–43. However, because the road and logging activity would generally disturb the "privacy," "silence," "spiritual development," and the subjective enjoyment of those sacred sites, the plaintiffs brought a Free Exercise Clause challenge. *Id.* at 442, 444, 454 (citing the record to note that "successful use of the area is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed

natural setting" (cleaned up)); *see id.* at 462 (Brennan, J., dissenting) (quoting the record to highlight that "silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site").

Assuming that the noise and general disturbance from logging would "have severe adverse effects" on the individuals' subjective religious experience, the Supreme Court held that the government's actions did not trigger the compelling interest test under the Free Exercise Clause. *Id.* at 447, 450–51. Relying on *Bowen v. Roy*, 476 U.S. 693 (1986), the Court concluded that the *Lyng* plaintiffs' subjective spiritual harm from the loss of silence and privacy was "incidental" to the government's "internal" affairs. *Lyng*, 485 U.S. at 448, 451. In *Roy*, the Supreme Court had rejected a religious objection to the use of Social Security numbers as a numerical identifier that, according to the plaintiffs' religious beliefs, would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. The *Roy* Court held that the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699.

Applying *Roy*, the *Lyng* Court explained that the plaintiffs' allegations of spiritual harm "cannot meaningfully be distinguished from the use of a Social Security number in *Roy*":

> Similarly, in this case, it is said that disruption of the natural environment caused by the . . . road will diminish the sacredness of the area in question and

> create distractions that will interfere with "training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power."

485 U.S. at 448–49 (quoting the record). The Court construed the harm in both cases as "subjective" and so refused to decide whether the spiritual harm in *Roy* was "significantly greater" than the *Lyng* plaintiffs' harm. *Id.* at 449.[14]

Lyng emphasized that the "crucial word in the constitutional text [of the Free Exercise Clause] is '*prohibit*': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* at 451 (emphasis

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[14] In rejecting the plaintiffs' challenge, the Supreme Court did not minimize the impact that the road building and logging activity would have on the plaintiffs' "personal spiritual development." *Lyng*, 485 U.S. at 451. The Court, however, did not wish to weigh the magnitude of the subjective spiritual harm. *Id.* at 449, 451. So it explained that the noise and invasion of privacy caused by roadbuilding and logging had only an "*incidental*" constitutional effect under the Free Exercise Clause because the government was not "outright prohibit[ing]" religious exercise, "indirect[ly] coerc[ing]" an individual to act contrary to their religious belief, or "penal[izing]" religious practice. *Id.* at 450–51 (citing U.S. Const. amend. I; *Sherbert*, 374 U.S. at 404).

This discussion also highlights that Free Exercise Clause claims are not limited to the circumstances presented in *Sherbert* and *Yoder* but include the broader concept of "prohibitions." *Id.* at 450; U.S. Const. amend. I.

added) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). The Court therefore concluded its analysis by reiterating that "[t]he Constitution does not permit [the] government to discriminate against religions that treat particular physical sites as sacred, and a law *prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions*." *Id.* at 453 (emphasis added).

The majority argues that, as in *Lyng*, the land transfer here is not "a situation in which the Government ha[s] 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 27 (quoting *Lyng*, 485 U.S. at 453). The majority is mistaken on two fronts. First, the Land Transfer Act is *exactly* that kind of "prohibitory" law. It is undisputed and indisputable that once implemented, the Act will prevent the Western Apaches from visiting Oak Flat for eternity. The majority concedes this point, but then goes on to argue that where government action only "frustrates or inhibits" religious exercise, the government does not violate RFRA. But Apache Stronghold does not argue that the destruction of Oak Flat merely "frustrates" their ability to worship there; they argue—and the district court found—that worship there will be "impossible," and their spiritual practice will be eviscerated. *See Apache Stronghold*, 519 F. Supp. 3d at 604 ("Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood."); *id.* at 606 ("[T]he land in this case will be all but destroyed to install a large underground mine, and

Oak Flat will no longer be accessible as a place of worship."). So, contrary to the majority, this case does not ask us to determine at what point "frustrating" religious exercise qualifies as a substantial burden;[15] instead, we are confronted only with the utter erasure of a religious practice. In other words, the burden here is categorical and thus undisputedly "synonymous with 'prohibit.'" Collins Op. at 29.

Second, that the Land Transfer Act does not specially "discriminate" against the Western Apaches by name—*i.e.*, that the Act is neutral and generally applicable to all who would visit Oak Flat—is irrelevant because, when enacting RFRA, Congress eliminated *Smith*'s neutrality test. *See* 42 U.S.C. § 2000bb(a)(2) ("Congress finds that . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."). *All that matters under RFRA*, as opposed to the Free Exercise Clause, is whether the

[15] *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion) (no infringement where a law merely "operates so as to make the practice of [the individual's] religious beliefs more expensive"); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306 (6th Cir. 1983) (similar); *Goehring*, 94 F.3d at 1299; *Worldwide Church of God*, 227 F.3d at 1121; *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008) ("We are skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA."); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (no infringement where government action "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed"); *Abdulhaseeb*, 600 F.3d at 1316 ("[W]e do not intend to imply that every infringement on a religious exercise will constitute a substantial burden.").

government has "substantially burden[ed]" sincere religious exercise. *Id.* § 2000bb-1(a). The majority thus misunderstands Congress's purpose in enshrining a broad right to religious liberty by eliminating *Smith*'s neutrality requirement.

The majority argues that such a reading of RFRA is too "broad." But a clear-cut conclusion that making religious exercise impossible is a "substantial burden" can hardly be called broad, especially when it adheres closely to both RFRA's text and the Supreme Court's precedent. The majority also contends that claims like Apache Stronghold's would subject the government to "religious servitude." Yet the majority proceeds as if, once a religious adherent has satisfied the substantial burden test, the outcome is a foregone conclusion. However, Congress explicitly identified the compelling interest test as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

At this stage, Apache Stronghold has only proven that there is a substantial burden. On remand, the government could demonstrate that transferring Oak Flat is justified by a compelling interest pursued through the least restrictive means.[16] *See Thomas v.*

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[16] The compelling interest test has not proven fatal to the government. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 44–45 & n.66 (2020–21) (noting that "the compelling-interest standard has not come close to producing the 'anarchy' of which *Smith* warned" and finding that "free-exercise claims, including RFRA claims, were the least likely to invalidate the government action" (citing Adam Winkler, *Fatal in Theory and Strict in Fact:*

Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *see also Gonzales*, 546 U.S. at 430, 436 (rejecting the government's "slippery slope" argument under RFRA, and noting that *Sherbert* did so under the Free Exercise Clause); *cf. Cutter*, 544 U.S. at 722 (stating that the Supreme Court had "no cause to believe" that the compelling interest test "would not be applied in an appropriately balanced way"). So although *Lyng* did not specifically address government action that prevented religious exercise, contrary to the majority's assertions, *Lyng*'s discussion of "discrimination" by "prohibiting" access to a sacred site confirms that the Land Transfer Act creates a substantial burden.

An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 857–58, 861 (2006))).

And if the majority were correct that my reading of RFRA would subject the government to "religious servitude," then we would necessarily have seen that concern play out in circuits that have long employed a broader reading of "substantial burden." Neither the government nor the majority provide evidence that other circuits are inundated with such claims, and I have found no evidence hinting at that possibility. *Cf. Yellowbear*, 741 F.3d at 62 (Gorsuch, J.) (rejecting slippery slope argument). In addition, before *Smith*, the government was not yoked to religious deference—as the majority and the government fears it would be—even though the Supreme Court had read the Free Exercise Clause to cover claims about preventing religious exercise.

ii. *Lyng*'s Post-RFRA Limits

Moreover, to the degree *Lyng*'s Free Exercise ruling is in any tension with my understanding of RFRA, those aspects of *Lyng* were not carried forward into RFRA. *Smith* makes that much evident, as it treats *Lyng* as declining to apply the compelling interest test to a neutral law of general applicability, and RFRA displaced that standard for governmental decisions governed by RFRA.

Smith held that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities 'could have devastating effects on traditional Indian religious practices.'" *Smith*, 494 U.S. at 883 (quoting *Lyng*, 485 U.S. at 451). Per *Smith*, *Lyng* stood for the proposition that the compelling interest test is "inapplicable" to "across-the-board" neutral laws. *Smith*, 494 U.S. at 884– 85. In declining to apply the compelling interest test, *Smith* relied on *Lyng* for the point that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Smith*, 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451). *Smith* then concluded that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3.

In so holding, *Smith* emphatically rejected Justice O'Connor's concurrence suggesting that *Lyng* created

an exception for Free Exercise challenges to the government's conduct of its internal affairs. 494 U.S. at 885 n.2.[17]

The *Smith* majority first acknowledged that "Justice O'Connor seeks to distinguish *Lyng* and *Roy* on the ground that those cases involved the government's conduct of 'its own internal affairs.'" *Id.* (citations omitted). *Smith* then considered Justice O'Connor's position that challenges to the government's conduct of its internal affairs are "different because, as Justice Douglas said in *Sherbert*, 'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* (internal quotation marks and citation omitted). "But," said the *Smith* majority in refuting the internal affairs proposition, "that quote obviously envisioned that what 'the government cannot do to the individual' includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs . . . in such fashion as to harm the individual's religious interests." *Id.* "Moreover," *Smith* continued, "*it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, Lyng, supra.*" *Id.* (emphasis added).[18]

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[17] Judge Nelson's concurring opinion so recognizes.

[18] As the *Smith* majority alluded to, it is hard to see how an exception permitting the government to substantially burden

Smith treated *Lyng* as reflecting not any special exception for challenges to the government's internal affairs, but as concerning the type of neutral and generally applicable laws not subject to the compelling interest test under *Smith*. *Id.* at 884–85 (citing *Lyng,* 485 U.S. at 451). *Smith*'s understanding of *Lyng* remains controlling. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) ("*Smith* . . . drew support for the neutral and generally applicable standard from cases involving internal government affairs." (citing *Lyng*, 485 U.S. at 439)).

Accordingly, *Lyng* was not about measuring the extent of burdens sufficient to trigger the compelling interest test. Nor was *Lyng*, as the majority and concurring opinions posit, a case concerning the borders of the Free Exercise Clause or a special carve-out category of government actions that were not covered by *Smith*. Instead, *Lyng* reflected the principle, further developed in *Smith* and rejected in RFRA, that the compelling interest test was categorically inapplicable to neutral and generally applicable laws. *See Smith*, 494 U.S. at 884–85; *Fulton*, 141 S. Ct. at 1878.

Smith's controlling interpretation of *Lyng* thus makes clear that (1) *Lyng* turned on the categorical inapplicability of the compelling interest test to the Free Exercise challenge in that case; and (2) the reason the compelling interest test was inapplicable in *Lyng* was that "the test [is] inapplicable to such challenges" to generally applicable laws. *Smith*, 494

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religious exercise when "manag[ing] its internal affairs," Nelson Op. at 144, would not encompass most government action and indeed swallow RFRA whole.

U.S. at 885. RFRA's rejection of *Smith*'s rule—that the compelling interest test is inapplicable to neutral and generally applicable laws—means that *Lyng* likewise does not control in RFRA cases.

The majority's flawed response to this point is that *Lyng* did not involve a neutral or generally applicable law. Collins Op. at 31–32. But that proposition is wrong. Indeed, elsewhere in its opinion, the majority asserts, accurately, that *Lyng* did not involve "a situation in which the Government had 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 27 (quoting *Lyng*, 485 U.S. at 453). A law that "does not 'discriminate' against religious adherents," like the policy in *Lyng*, is a neutral one for purposes of Free Exercise doctrine. *See Church of the Lukumi Babalu Aye,* 508 U.S. at 533 (explaining that a "law is not neutral" if "the object of a law is to infringe upon or restrict practices because of their religious motivation" (citing *Smith*, 494 U.S. at 878–89)). The plan to build the road at issue in *Lyng* was indisputably neutral in this sense, as it would affect equally all who preferred leaving the wilderness untouched— environmentalists, for example, or ranchers.

Nor is the majority correct that the policy challenged in *Lyng* was not generally applicable. In *Lyng*, the Forest Service proposed building a road connecting two towns and permitting timber harvesting in the same area; the road would be open to all, and there was no suggestion that the purpose of the Forest Service's plan was to discriminate against Native American tribes. Indeed, the Forest Service

took steps to mitigate the impact on tribes by "select[ing] a route that avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Lyng*, 485 U.S. at 443. While the litigation in *Lyng* was pending in the court of appeals, Congress enacted the California Wilderness Act, which designated portions of the forest as a protected wilderness area but excluded the proposed route. *Id.* at 444. While the choice of the route in the Act was made with knowledge of the tribes' religious interest in it, there was no indication that it was made because of, rather than in disregard of, that interest, and the impact of the choice remained generally applicable and neutral.[19]

In short, the plan to construct a road and harvest timber in *Lyng* was generally applicable and "'neutral' toward religion" in the sense that its purpose was not to "interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Therefore *Lyng*, a Free Exercise Clause case that rejected the compelling interest test for neutral laws of general applicability, does not answer the question of whether, under RFRA, preventing a person from engaging in religious exercise by denying them access to a sacred site is a substantial burden.

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[19] Moreover, even if the majority were correct as to the impact of the California Wilderness Act, that would be beside the point. *Lyng* involved a challenge to the Forest Service's plan to construct the road and harvest timber, not to the California Wilderness Act. *See Lyng*, 485 U.S. at 448; Collins Op. at 24 (acknowledging that the California Wilderness Act was not enacted until the litigation in *Lyng* "was pending on appeal in this court").

iii. *Terry Williams* Is Inapplicable Here

There is another, related problem with the majority's treatment of *Lyng*. Relying on *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("*Terry Williams*"), the majority erroneously proceeds as if Congress must be understood to have adopted the term "substantial burden" as interpreted in Justice O'Connor's concurrence in *Smith*, and so excepted cases similar to *Lyng* from that concept.

Terry Williams explained that "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision." 529 U.S. at 411. Where "[t]he separate opinions" in a prior Supreme Court case "concerned the very issue addressed" in a subsequently enacted statute, the prior case can "confirm what [the statutory] language already makes clear." *Id.* at 411–12. But the majority opinion's premises for applying *Terry Williams* here are flawed.

First, the majority here is wrong that *Smith* "concerned the very issue" of what constitutes a cognizable substantial burden. The majority opinion asserts that "in superseding *Smith*, RFRA uses the phrase 'substantially burden,' *id.* § 2000b-1(a), (b)," so "[t]he inference is overwhelming that Congress thereby 'adopt[ed]' the 'meaning given [that] certain term in that decision.'" Collins Op. at 43 (quoting *Terry Williams*, 529 U.S. at 411). From that premise, the majority concludes that "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* places on what counts as a governmental

imposition of a substantial burden on religious exercise."

But as Judge Nelson's concurring opinion appears to acknowledge, neither *Lyng* nor the *Smith* majority interpreted the term "substantial burden." Nelson Op. at 135. *Lyng* simply refused to apply the compelling interest test. *See* 485 U.S. at 450–51 (explaining that *Sherbert* and *Yoder* "cannot imply that incidental effects of government programs," without outright prohibition, coercion, or penalty, "require government to bring forward a compelling justification"); *see also Smith*, 494 U.S. at 883. Thus, Judge Nelson writes that *Lyng* is not

> part of any "old soil" that was used to define "substantial burden," Bea Dissent at 75. Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of "substantial burden" "carried over into the soil" of RFRA.

Nelson Op. at 136 (citation omitted).

Likewise, *Smith* was about categorically excepting neutral and generally applicable laws from the compelling interest test, rather than about defining the term "substantial burden." *See* 494 U.S. at 884–85; *see also supra* § II(F)(ii) (discussing Justice O'Connor's *Smith* concurrence and explaining that the *Smith* majority did not apply the compelling interest test). Although Justice O'Connor's concurring opinion took the position that the denial of unemployment benefits based on religious drug use constituted a substantial burden, she did not rely on *Lyng* in her

discussion of that term. *See Smith*, 494 U.S. at 897–98 (O'Connor, J., concurring in the judgment). Moreover, the *Smith* majority never reached the question of what types of burdens would be required to satisfy the first step of the *Sherbert* test. Instead, it concluded that the test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See Smith*, 494 U.S. at 884–85. So there was no "vigorous debate" in *Smith* on the meaning of the term substantial burden, contrary to the majority's representation.

Furthermore, *Terry Williams* involved a situation in which Congress did "not mention a prior decision of this Court by name in a statute's text." 529 U.S. at 411. That is not the circumstance here. Instead, RFRA explicitly identified which portion of *Smith* Congress sought to address. Congress declared that "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4) (citation omitted). Congress's view, by contrast, was that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2). Consequently, although the majority opinion points to RFRA's citation to *Smith* as reinforcing its holding, the appropriate conclusion is the opposite: Congress was specific about the aspect of *Smith* that it intended to address—the rule that neutral and generally applicable laws are not subject to the compelling interest test. Congress could not have, by expressly citing *Smith* in the course of negating its exception for neutral and generally applicable laws, intended to incorporate the "meaning given a certain term," *Terry*

Williams, 529 U.S. at 411, when that term simply was not at issue in *Smith*.

The upshot is that RFRA's text does not support the majority's conclusion that Congress intended a special exception for certain types of government actions. Rather, RFRA is explicit that:

- Religious exercise includes the use of real property for the purpose of religious exercise. 42 U.S.C. § 2000bb-2(4); *Id.* § 2000cc-5(7)(B).
- Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion" *except when* the compelling interest test is satisfied. *Id.* § 2000bb-1(a), (b). No other exceptions are provided.
- Government "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." *Id.* § 2000bb-2(1).
- RFRA "applies to all *Federal law*, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a) (emphasis added)
- "Nothing in" RFRA "shall be construed to authorize any government to burden any religious belief." *Id.* § 2000bb-3(c). Here, Congress used the term "burden" rather than "substantial burden."
- "[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious

> liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5).

Given these congressional directives, unlike in *Terry Williams*, this is not a case in which reference to *Smith* can "confirm what" RFRA's statutory "language already makes clear." *Terry Williams*, 529 U.S. at 411–12. Rather, for the reasons I have surveyed, what RFRA's language makes clear is that there is a "substantial burden" when individuals are prevented from practicing their religion by governmental action; if *Lyng* indicates otherwise (which I do not believe), that implication of *Lyng* does not survive RFRA.

G. This En Banc Panel Fails to Clarify Our Law

"As an en banc court, we have a responsibility to bring clarity to our law." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 532 (9th Cir. 2012) (en banc) (Kozinski, C.J., concurring in part). Notably, although the divided three judge panel rejected Apache Stronghold's RFRA claim largely under *Navajo Nation*, the majority makes no mention of that case. Instead, litigants are forced to piece together from a composite of opinions that a majority of judges on this en banc panel rejects *Navajo Nation*'s reasoning.

Furthermore, the majority opinion creates confusion as to how to define "substantial burden." Although RFRA's text simply provides that the federal government may not "substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), the majority skips the test entirely and asks only whether litigants bring a "cognizable" claim. As I have discussed, *see supra* § II(E), preventing religious adherents from worshipping at a sacred site is inherently prohibitory. For the majority, only once a

litigant has shown that the government action is cognizably "prohibitory" can a court ask whether there is a "substantial burden." At that point, the majority finds it "adequate[ ]" to apply a dictionary definition of "substantial burden" in the context of zoning and confinement under *both* RFRA and RLUIPA, but not in other RFRA contexts. Collins Op. at 47. But this answer is not helpful. Under the majority's approach, dictionaries can supply the meaning of substantial burden in RFRA cases about zoning and confinement, but dictionaries appear to be irrelevant when a person challenges a different type of government action—as Apache Stronghold does here. Either the meaning of "substantial burden" is the same under RFRA and RLUIPA, or the definition under RFRA is case dependent. It cannot be both.

And the majority provides no authority for this sort of distinction. Nor could it. If the meaning of "substantial burden" turned on the type of case, several Supreme Court Free Exercise Clause cases would have lacked any discussion of substantial burden or compelling interest. *See, e.g.*, *Hernandez*, 490 U.S. at 684–85, 699 (discussing substantial burden and concluding the government had a compelling justification in a Free Exercise Clause challenge to the Internal Revenue Service's refusal to recognize payments made by Scientologists to churches as tax deductible charitable contributions).

The majority's shapeshifting definition of substantial burden also finds no support in RFRA's and RLUIPA's text. RLUIPA's land-use provision states that "[n]o government shall *impose or implement a land use regulation* in a manner that imposes a substantial burden on the religious exercise

of a person." 42 U.S.C. § 2000cc(a)(1) (emphasis added). And the institutionalized persons provision likewise states that "[n]o government shall *impose* a substantial burden on the religious exercise of a person residing in or confined to an institution." *Id.* § 2000cc-1(a) (emphasis added). The majority argues that RLUIPA incorporates or "bake[s] in" the Free Exercise Clause's "prohibition" requirement. But RLUIPA's text does not use the word "prohibit," so it is hard to see how RLUIPA incorporates the Free Exercise Clause in a way that RFRA does not. *Compare id.*, *with* § 2000bb1(a) ("Government shall not substantially burden a person's exercise of religion.").

Nor does the majority meaningfully distinguish the coercion inherent in land-use cases from the coercion here. For instance, the majority contends that in the land-use context, the Free Exercise Clause's "prohibition" requirement is inherent. Collins Op. at 47. But if a city precludes the building of a church on a parcel zoned for single-family dwellings, the city is not conditioning a benefit on forgoing religious exercise nor is it penalizing religious exercise. So how is the city's zoning law "inherently . . . coercive" in a way that the Land Transfer Act and the destruction of Oak Flat is not? The majority offers little guidance to litigants wondering what governmental actions are sufficiently "coercive" to allow for a substantial burden analysis.

Indeed, contrary to what the majority says, Apache Stronghold's RFRA claim "inherently involve[s] coercive restrictions." Collins Op. at 47. As Judge Berzon noted in her panel dissent, Native American sacred sites—like the contexts of land-use and

confinement—are unique in that "the government controls access to religious locations and resources." *Apache Stronghold*, 38 F.4th at 776 (Berzon, J., dissenting) (citing Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)). In each of these contexts the government has control over religious sites and resources, and religious adherents must "practice their religion in contexts in which voluntary choice is *not* the baseline." *Id.* As with the Western Apaches here, Native American religions are typically land-based, so many traditional Native American religious sites are located exclusively on federal land. Therefore, unlike most nonincarcerated Americans, Native Americans are "at the mercy of government permission to access sacred sites." *Id.* (quoting Barclay & Steele, *supra*, at 1301); *see also* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 33, 58 (2020–21) (arguing that the government "took control over the tribes' ability to practice their traditions fully—in somewhat the same way that prisons control [incarcerated persons'] ability to practice their faith"). The Land Transfer Act thus prevents the Apaches from practicing their religion at Oak Flat, substantially burdening their religious exercise, just as would an outright ban of religious worship, meetings, or diet in prison, or a zoning law precluding a religious group from building a mosque, church, or synagogue. In other words, the government's control over access to Oak Flat is coercive, and few other religious adherents are situated similarly to the Apache such that they need the government's permission to worship.

H. RFRA Applies to the Land Transfer Act

For the first time in its Brief in Opposition to Rehearing En Banc, the government urges this court to affirm on the alternative ground that, under the legislative anti-entrenchment principle, RFRA cannot apply to the Land Transfer Act. Because the government did not raise that argument before the district court, and did not develop it on appeal, I would normally consider such eleventh-hour arguments waived. *See Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962). However, the issue is purely legal, and the government could and likely would raise the argument to the district court on remand. *See Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). So for the sake of judicial efficiency, I address it now.

RFRA applies to "all Federal" statutes enacted after RFRA's adoption "unless such [later-enacted] law explicitly excludes such application by reference." 42 U.S.C. § 2000bb-3(b). The government argues that § 2000bb-3(b) holds no force whatsoever and instead maintains the Land Transfer Act supersedes RFRA because "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). Generally, under the legislative anti-entrenchment doctrine, a prior Congressional enactment "may be repealed, amended, or disregarded by the legislature which enacted it, and is not binding upon any subsequent legislature." *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996) (cleaned up).

The Supreme Court has held, however, that "RFRA operates as a kind of super statute" because it applies to all federal statutes and thus "displac[es] the normal operation of other federal laws." *Bostock*, 140 S. Ct. at

1754. In two RFRA cases, the Supreme Court accordingly determined that RFRA was controlling even though it conflicted with later-enacted federal law. *See Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (applying RFRA to the Affordable Care Act ("ACA"), a later-enacted statute, because the "ACA does not explicitly exempt RFRA"); *Hobby Lobby*, 573 U.S. at 719 n.30 (rejecting an implied repeal argument for the same reason). And as the Seventh and Eleventh Circuits have recognized, RFRA is consistent with the anti-entrenchment principle because "the statute does not apply to a subsequently enacted law if it 'explicitly excludes such application by reference to'" RFRA. *Korte*, 735 F.3d at 672–73 (cleaned up) (quoting 42 U.S.C. § 2000bb-3(b)); *accord Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995). In other words, because a majority of Congress can preclude the application of RFRA to any subsequently-enacted statute, Congress "remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012).[20] RFRA does not therefore limit the authority of future Congresses and so does not violate the anti-entrenchment principle. *See Little Sisters of the Poor*, 140 S. Ct. at 2383 (RFRA "permits Congress to exclude

[20] Neither Judge Bea's concurrence nor the government explain why we should depart from *Korte* and *Cheffer* and create a circuit split. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("[W]e decline to create a circuit split unless there is a compelling reason to do so.").

statutes from RFRA's protections." (citing 42 U.S.C. § 2000bb-3(b))).

I note that RFRA's express exemption provision is no different from the one contained in the Administrative Procedure Act ("APA"), which the Supreme Court considered in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). The question in *Marcello* was whether the Immigration and Nationality Act ("INA") satisfied the APA's requirement that any exemptions from its procedures be "express[ ]," such that the APA was inapplicable to deportation proceedings. 349 U.S. at 305–10. The INA section at issue provided that "[t]he procedure (herein prescribed) shall be the *sole and exclusive procedure* for determining the deportability of an alien under this section." *Marcello*, 349 U.S. at 309 (emphasis added) (quotation marks omitted). The Supreme Court explained that this textual provision was a "clear and categorical direction" that the INA "was meant to exclude the application of the" APA. *Id.*

In other words, the Supreme Court held that the INA did not need to explicitly mention the APA or use a "magical password[ ]" to supersede the APA's express repeal provision. *Id.* at 309–10. The INA's express inclusion of a "notwithstanding" clause—*i.e.*, "notwithstanding the provisions of any other law"—was sufficient. *Id.* Consistent with *Marcello*, we have recognized the inclusion of a "notwithstanding" clause as "a method—akin to an express reference to the superseded statute—by which Congress can demonstrate that it intended to partially repeal an [earlier] Act." *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) (en banc) (cleaned up).

In short, for a statute to exempt itself from RFRA, a simple majority of Congress need only exempt that later enacted statute from RFRA under 42 U.S.C. § 2000bb-3(b), either by referencing RFRA specifically *or* by including some variation of a "notwithstanding any other law" provision under *Marcello*. *See Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 747 (9th Cir. 2000), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Such a requirement does not require a "magical password" to supersede RFRA, nor does it violate the legislative anti-entrenchment principle. *Marcello*, 349 U.S. at 309–10; *see Korte*, 735 F.3d at 672–73.

Here, the Land Transfer Act cannot escape RFRA's reach. It neither explicitly exempts itself from RFRA, nor does it contain a "notwithstanding any other law" provision of any kind. *See* 16 U.S.C. § 539p. At the same time, had Congress wanted to exempt the Land Transfer Act from RFRA, it knew how to do so. The Land Transfer Act includes a specific exemption from another statute—the Federal Land Policy and Management Act of 1976—reinforcing that Congress could have, but did not, enact a similar exemption from RFRA. *See* 16 U.S.C. § 539p(c)(5)(B)(ii) ("The Secretary may accept a payment in excess of 25 percent of the total value of the land or interests conveyed, *notwithstanding section 206(b) of the Federal Land Policy and Management Act of 1976* (43 U.S.C. 1716(b))." (emphasis added)). If Congress meant to exempt the Land Transfer Act from RFRA, Congress could and would have done so explicitly. Accordingly, RFRA applies to the Land Transfer Act.

III. Conclusion

The majority tragically errs in rejecting Apache Stronghold's RFRA claim solely under *Lyng*. *Lyng* does not answer the question here, where we are faced with government action that will result in a massive hole obliterating Oak Flat and categorically preventing the Western Apaches from ever again communing with *Usen* and the *Ga'an*, the very foundation of the Apache religion. The effect will be immediate and irreversible. Under RFRA, preventing religious adherents from engaging in sincere religious exercise undeniably constitutes a "substantial[] burden." 42 U.S.C. § 2000bb-1(a). RFRA's plain text encompasses such claims, and the Supreme Court's and our jurisprudence have long so recognized.

I would therefore hold that, at this stage, Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and I would remand for the district court to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. 42 U.S.C. § 2000bb-1(b). Because the majority holds the opposite, I respectfully dissent.

LEE, Circuit Judge, dissenting:

Chief Judge Murguia's excellent dissent lays out why *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), incorrectly defined "substantial burden" as a narrow term of art. Simply put, the complete obliteration of the land—which the Western Apache consider sacred and where they have worshipped and conducted ceremonies for at least a millennium—obviously imposes a substantial burden on the Apache's religious exercise.

I join Chief Judge Murguia's dissent except for Section II.H. I do not believe we should address the merits of the government's last-minute argument that the Religious Freedom Restoration Act cannot apply to the Land Transfer Act. The government did not bother raising this difficult question before the district court or on appeal. Rather, the government advanced this argument for the first time in its brief opposing rehearing en banc, and now asks the en banc panel to rule in its favor on this newly developed argument. The government infrequently shows any grace when people miss deadlines or do not follow its rules. *Cf. Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."). I would not show any leniency to the government and would consider this argument waived.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APACHE STRONGHOLD, a 501(c)(3) nonprofit organization, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA; THOMAS J. VILSACK, Secretary, U.S. Department of Agriculture (USDA); RANDY MOORE, Chief, USDA Forest Service; NEIL BOSWORTH, Supervisor, USDA Forest Service, Tonto National Forest; TOM TORRES, Acting Supervisor, USDA Forest Service, Tonto National Forest, *Defendants-Appellees*, RESOLUTION COPPER MINING, LLC, *Intervenor*.	No. 21-15295 D.C. No. 2:21-cv-00050-SPL OPINION

Appeal from the United States District
Court for the District of Arizona

Steven Paul Logan, District Judge, Presiding

Argued and Submitted En Banc March 21, 2023
Pasadena, California

Filed March 1, 2024

Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Marsha S. Berzon, Carlos T. Bea, Mark J. Bennett, Ryan D. Nelson, Daniel P. Collins, Kenneth K. Lee, Danielle J. Forrest, Lawrence VanDyke and Salvador Mendoza, Jr., Circuit Judges.

Per Curiam Opinion; Opinion by Judge Collins;
Partial Concurrence and Partial Dissent
by Judge Bea;
Concurrence by Judge R. Nelson;
Concurrence by Judge VanDyke;
Dissent by Chief Judge Murguia;
Dissent by Judge Lee

SUMMARY*

Religious Freedom Restoration Act / Free Exercise Clause

The en banc court affirmed the district court's order denying Apache Stronghold's motion for a preliminary injunction against the federal government's transfer of Oak Flat—federally owned land within the Tonto National Forest—to a private company, Resolution Copper.

Oak Flat is a site of great spiritual value to the Western Apache Indians and also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute—the Land Transfer Act—directed the federal government to transfer the land to Resolution Copper, which would then mine the ore.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches.

The per curiam opinion provides an overview of the votes of the en banc court:

- A majority of the en banc court (Chief Judge Murguia, and Judges Gould, Berzon, R. Nelson, Lee and Mendoza) concluded that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and RFRA are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overruled the narrow definition of substantial burden under RFRA in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).
- A different majority of the en banc court (Judges Bea, Bennett, R. Nelson, Collins, Forrest, and VanDyke) concluded that (1) RFRA subsumed, rather than overrode, the outer limits that *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), placed on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it

has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." Apache Stronghold's claims under the Free Exercise Clause and RFRA failed under these *Lyng*-based standards and the claims based on the 1852 treaty failed for separate reasons.

In his opinion for the court, Judge Collins, joined by Judges Bea, Bennett, R. Nelson, Forrest, and VanDyke, held that Apache Stronghold was unlikely to succeed on the merits on any of its three claims before the court, and consequently was not entitled to preliminary injunctive relief.

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Copper would violate the Free Exercise Clause failed under the Supreme Court's controlling decision in *Lyng* because the project challenged here is indistinguishable from that in *Lyng*. As in *Lyng*, the government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their religious beliefs," but it would have no "tendency to coerce" them "into acting contrary to their religious beliefs." Also, as in *Lyng*, the challenged transfer of Oak Flat for mining operations did not discriminate against Apache Stronghold's members, did not penalize them, or deny them an "equal share of the rights, benefits, and privileges enjoyed by other citizens."

- Apache Stronghold's claim that the transfer of Oak Flat to Resolution Cooper would violate RFRA failed for the same reasons because what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*.
- Apache Stronghold's claim that the 1852 Treaty of Sante Fe created an enforceable trust obligation that would be violated by the transfer of Oak Flat failed because the government's statutory obligation to transfer Oak Flat abrogated any contrary treaty obligation.

Concurring in part and dissenting in part, Judge Bea, joined by Judge Forrest except for footnote 1 and by Judge Bennett with respect to Part II, dissented from paragraph one of the per curiam opinion's purported overruling of *Navajo Nation* because a majority of the panel already affirmed the district court, under the different rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA. He concurred in full with Judge Collins's majority opinion, and wrote separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA.

Concurring, Judge R. Nelson stated that en banc review was warranted to correct the faulty legal test (not outcome) in *Navajo Nation.* He explained that since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition *Navajo Nation* gave it under RFRA, and a majority of the en banc court now rejects the narrow construction of "substantial

burden" in *Navajo Nation*. While the dissent raises a plausible textual interpretation of "substantial burden" under RFRA, Judge R. Nelson ultimately disagrees with it. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim.

Concurring, Judge VanDyke agreed with the majority that this decision is controlled by *Lyng*, and wrote separately to elaborate on why the alleged "burden" in this case is not cognizable under RFRA and to explain why reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination.

Dissenting, Chief Judge Murguia, joined by Judges Gould, Berzon, and Mendoza, and by Judge Lee as to all but Part II.H, wrote that the utter destruction of Oak Flat, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under RFRA. *Navajo Nation* wrongly defined "substantial burden" as a narrow term of art and foreclosed relief. In light of the plain meaning of "substantial burden," RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. Chief Judge Murguia would hold that Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and would remand for the district court

to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. Finally, Chief Judge Murguia rejected the government's eleventh-hour argument that RFRA does not apply to the Land Transfer Act.

Dissenting, Judge Lee joined all of Chief Judge Murguia's dissent except for Section II.H because the government waived the argument that RFRA cannot apply to the Land Transfer Act.

COUNSEL

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OPINION

PER CURIAM:

A majority of the en banc court (Chief Judge MURGUIA and Judges GOULD, BERZON, R. NELSON, LEE, and MENDOZA) concludes that (1) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., are interpreted uniformly; and (2) preventing access to religious exercise is an example of substantial burden. A majority of the en banc court therefore overrules *Navajo Nation v. U.S. Forest Service* to the extent that it defined a "substantial burden" under RFRA as "imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." 535 F.3d 1058 (9th Cir. 2008) (emphasis added).

A different majority (Judges BEA, BENNETT, R. NELSON, COLLINS, FORREST, and VANDYKE) concludes that (1) RFRA subsumes, rather than overrides, the outer limits that the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), places on what counts as a governmental imposition of a substantial burden on religious exercise; and (2) under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal

share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. The same majority holds that Apache Stronghold's claims under the Free Exercise Clause and RFRA fail under these *Lyng*-based standards and that the claims based on the 1852 Treaty fail for separate reasons.

We therefore AFFIRM the district court's order denying the motion for a preliminary injunction.

COLLINS, Circuit Judge, delivered the following opinion for the court, in which BEA, BENNETT, R. NELSON, FORREST, and VANDYKE, Circuit Judges, join:

Oak Flat, an area located on federally owned land within Tonto National Forest, is a site of great spiritual value to the Western Apache Indians, who believe that it is indispensable to their religious worship. But Oak Flat also sits atop the world's third-largest deposit of copper ore. To take advantage of that deposit, Congress by statute directed the federal Government to transfer the land to a private company, Resolution Copper, which would then mine the ore. Apache Stronghold, an organization that represents the interests of certain members of the San Carlos Apache Tribe, sued the Government, seeking an injunction against the land transfer on the ground that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and an 1852 treaty between the United States and the Apaches. The district court denied Apache Stronghold's request for a preliminary injunction on the ground that Apache Stronghold had not shown a likelihood of success on the merits. *See Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 598 (D. Ariz. 2021). We affirm.

I

A

Apache Stronghold is an Arizona nonprofit corporation "based in the Western Apache lands of the San Carlos Apache Tribe." It describes itself as "connecting Apaches and other Native and non-Native

allies from all over the world." Its declared mission is "to battle continued colonization, defend Holy sites and freedom of religion, and . . . build[] a better community through neighborhood programs and civic engagement." The San Carlos Apache Tribe of the San Carlos Reservation is a federally recognized Indian tribe located on the San Carlos Reservation, roughly 100 miles east of Phoenix.

Apache Stronghold's members engage in traditional Western Apache religious practices. Among the locations that are central to their religion is a place called "Chí'chil Biłdagoteel," which in English means "Emory Oak Extends on a Level." That accounts for the site's more common name, which is "Oak Flat." According to Apache Stronghold's expert witness, Western Apache religious practices at Oak Flat date back at least a millennium. The Western Apache believe that Oak Flat is a "sacred place" that serves as a "direct corridor" to "speak to [their] creator." Specifically, they believe that Oak Flat is the site where one of the "Ga'an"—spirit messengers between the Western Apache and their Creator—"has made its imprint, its spirit." The Western Apache believe that the Ga'an, and the Western Apaches' interaction with the Ga'an, constitute "a crucial part" of their "personal being," and that Oak Flat thus provides them "a unique way . . . to communicate" with their Creator.

Members of the tribe report that they "cannot have this spiritual connection with the land anywhere else on Earth." Oak Flat is "the only area" with these unique features, making it "crucial" to Western Apache religious life. As one example, members of the tribe stated that certain Western Apache religious

practices must occur at Oak Flat and cannot take place anywhere else. And even among those religious practices that need not necessarily occur at Oak Flat, some trace their origins to practices that were first begun there. One such practice is the "Sunrise Ceremony," a rite of passage for Western Apache girls to recognize "the gift of life and the bearing of children to the female." The Western Apache believe that "the place the ceremony takes place is the life thread forever connecting the place and the girls who have their ceremony there." One member testified that "the most important part about" the Sunrise Ceremony "is that everything that we are able to use for the ceremony comes from Chí'chil Biłdagoteel, Oak Flat." Accordingly, in Western Apache religious belief, harms to Oak Flat work a corresponding spiritual harm to those who performed their Sunrise Ceremonies there, damaging their "life and their connection to their rebirth."

B

In addition to being a sacred site for the Western Apache, Oak Flat is also a place of considerable economic significance. Located near the "Copper Triangle," Oak Flat sits atop the third-largest known copper deposit in the world. Roughly 4,500 to 7,000 feet beneath Oak Flat is an ore deposit containing approximately two billion tons of "copper resource." The U.S. Forest Service estimates that, if mined, this deposit could yield around "40 billion pounds of copper." For that reason, there has long been considerable interest among mining companies in gaining access to the Oak Flat deposit.

Believing the copper beneath Oak Flat to be a significant asset, various members of Arizona's

congressional delegation drafted legislation to compel the Government to transfer Oak Flat and its surroundings to Resolution Copper, a private mining company. Such legislation was introduced in each Congress from 2005 through 2014.[1] Although these bills were the subject of numerous hearings and other congressional action over the years,[2] these legislative

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[1] *See*, *e.g.*, *Southeast Arizona Land Exchange and Conservation Act of 2005*, H.R. 2618, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2005*, S. 1122, 109th Cong. (2005); *Southeast Arizona Land Exchange and Conservation Act of 2006*, H.R. 6373, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2006*, S. 2466, 109th Cong. (2006); *Southeast Arizona Land Exchange and Conservation Act of 2007*, H.R. 3301, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2007*, S. 1862, 110th Cong. (2007); *Southeast Arizona Land Exchange and Conservation Act of 2008*, S. 3157, 110th Cong. (2008); *Southeast Arizona Land Exchange and Conservation Act of 2009*, H.R. 2509, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2009*, S. 409, 111th Cong. (2009); *Southeast Arizona Land Exchange and Conservation Act of 2011*, H.R. 1904, 112th Cong. (2011); *Southeast Arizona Land Exchange and Conservation Act of 2013*, H.R. 687, 113th Cong. (2013); *Southeast Arizona Land Exchange and Conservation Act of 2013*, S. 339, 113th Cong. (2013).

[2] A House subcommittee held a hearing on H.R. 3301 in the 110th Congress, but no further action was taken on that bill. *See H.R. 3301, Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 110-52 (Nov. 1, 2007). In the 111th Congress, a Senate subcommittee held a hearing on S. 409 on June 17, 2009, and that bill was subsequently reported on March 2, 2010 to the Senate floor, where no further action was taken. *See Public Lands and Forests Bills: Hearing Before the Subcomm. on Pub. Lands & Forests of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 111-65 (June 17, 2009); S. REP. NO. 111-129 (March 2, 2010). In the 112th

efforts did not bear fruit until late 2014, when Congress passed, and the President signed, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("NDAA"). *See* Pub. L. No. 113-291, 128 Stat. 3292 (2014). Included as § 3003 of the NDAA was a version of the previously oft-proposed "Southeast Arizona Land Exchange and Conservation Act."[3] *Id.* § 3003, 128 Stat. at 3732–41 (classified to § 539p of the unenacted title 16 of the United States Code).

Congress, H.R. 1904 was considered at a June 14, 2011 House subcommittee hearing, reported out of committee on October 14, 2011, and passed by the full House on October 26, 2011. *See H.R. 473, et al.: Hearing Before the Subcomm. on Nat'l Parks, Forests, & Pub. Lands of the H. Comm. on Nat. Res.*, SERIAL NO. 112-40 (June 14, 2011); H.R. REP. NO. 112-246 (Oct. 14, 2011); 157 CONG. REC. H7090–110 (Oct. 26, 2011). A Senate committee then held a hearing on H.R. 1904 on Feb. 9, 2012. *See Resolution Copper: Hearing Before the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 112-486 (Feb. 9, 2012). In 2013, both House and Senate subcommittees held further hearings in the 113th Congress on the respective versions of the legislation, and the House bill was reported to the House floor on July 22, 2013. *See Oversight Hearing Titled "America's Mineral Resources: Creating Mining and Manufacturing Jobs and Securing America": Hearing on H.R. 1063, et al., Before the Subcomm. on Energy & Mineral Res. of the H. Comm. on Nat. Res.*, SERIAL NO. 113-7 (March 21, 2013); *Current Public Lands, Forests, and Mining Bills: Hearing Before the Subcomm. on Pub. Lands, Forests, & Mining of the S. Comm. on Energy & Nat. Res.*, S. HRG. NO. 113-342 (November 20, 2013); H.R. REP. NO. 113-167 (July 22, 2013).

[3] Apache Stronghold derides § 3003 as a "midnight" rider attached to a "must-pass" bill, but that characterization ignores the extensive hearings and congressional consideration given to the land transfer proposal over the previous seven years. *See supra* note 2.

Section 3003's declared purpose is "to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). To that end, it directs that "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper" in certain "non-Federal land," then "the Secretary [of Agriculture] is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land." *Id.* § 539p(c)(1). The referenced "Federal land" consists of "approximately 2,422 acres of land located in Pinal County, Arizona," including Oak Flat and the surrounding area. *Id.* § 539p(b)(2); *see* U.S. Forest Service, Resolution Copper Project & Land Exchange, Map of Land Exchange Parcels, (2015), https://www.resolutionmineeis.us/documents/usfsresolution-land-exchange-parcels-2016 [https://perma.cc/JEC7-GUC4].

The land exchange is subject to certain conditions. For example, title to the land the Government would receive from Resolution Copper must be in a form that is acceptable to the Secretaries of Agriculture and the Interior, and must conform to the Department of Justice's "title approval standards." 16 U.S.C. § 539p(c)(2)(A), (B). The federal and non-federal land must be independently appraised, *id.* § 539p(c)(4), and the value of the exchanged land equalized as set forth in the statute, *id.* § 539p(c)(5). Other provisions of § 3003 provide direction concerning ancillary matters related to the exchange. *E.g.*, *id.* § 539p(i).

In recognition of the Western Apaches' religious beliefs, Congress incorporated an accommodation provision into § 3003. That provision directs the

Secretary of Agriculture to "engage in government-to-government consultation with affected Indian tribes" to address concerns "related to the land exchange." 16 U.S.C. § 539p(c)(3)(A). Further, the statute obligates the Secretary to work with Resolution Copper to address those concerns and to mitigate any possible "adverse effects on the affected Indian tribes." *Id.* § 539p(c)(3)(B). The statute also requires Resolution Copper to keep Oak Flat accessible to the public for as long as safely possible, *id.* § 539p(i)(3), and Congress explicitly set aside another religiously significant area, Apache Leap, in order to "preserve [its] natural character" and "allow for traditional uses of the area." *Id.* § 539p(g)(2).

Lastly, Congress expressly stated that the land exchange would generally be governed by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Thus, § 3003 requires that an environmental impact statement ("EIS") be prepared under NEPA prior to the Secretary executing the land exchange. 16 U.S.C. § 539p(c)(9)(B). Congress supplemented the ordinary NEPA requirements for such statements and required that the EIS for the land transfer also "assess the effects of the mining" on "cultural and archaeological resources" in the area and "identify measures . . . to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C). The EIS was then to form "the basis for all decisions under Federal law related to the proposed mine," such as "the granting of any permits, rights-of-way," and construction approvals. *Id.* § 539p(c)(9)(B).

The statute commands that the land transfer take place "[n]ot later than 60 days after" the publication of the EIS. 16 U.S.C. § 539p(c)(10). Nowhere in § 3003

does Congress confer on the Government discretion to halt the transfer. The statute mandates that the Government secure an appraisal of the land, *id.* § 539p(c)(4)(A); that it prepare the EIS, *id.* § 539p(c)(9)(B); and that it then transfer the land, *id.* § 539p(c)(10). Although Resolution Copper could theoretically prevent the transfer by refusing "to convey to the United States all right, title, and interest . . . in and to the non-Federal land," *id.* § 539p(c)(1), no corresponding authority exists for the Government.

Once the land transfer takes place, Resolution Copper plans to extract the ore by using "panel caving," a technique that entails digging a "network of shafts and tunnels below the ore body." Resolution Copper will then detonate explosives to fracture the ore, which will "move[] downward" as a result. That, in turn, will cause the ground above to begin to collapse inward. Over the next 41 years, Resolution Copper will remove progressively more ore from below Oak Flat, causing the surface geography to become increasingly distorted. The resulting subsidence will create a large surface crater, which the Forest Service estimates will span approximately 1.8 miles in diameter and involve a depression between 800 and 1,115 feet deep.

This collapse will not occur immediately upon transfer of the land. Even once Resolution Copper begins construction on the mine, it will be as much as six years before the mining facilities will be operational. And during that time, Resolution Copper is required by the terms of § 3003 to keep Oak Flat accessible to "members of the public, including Indian tribes, to the maximum extent practicable, consistent

with health and safety requirements." 16 U.S.C. § 539p(i)(3). Even so, the Government conceded at argument that "the access will end before subsidence occurs, because it wouldn't be safe to have people accessing the land when it could subside." Once the mine is operational, the Forest Service estimates that it will produce ore for at least 40 years before closure and reclamation activities commence to decommission the mine.

C

On January 4, 2021, the Forest Service announced that the EIS for the land transfer would be published in 11 days, on January 15. That publication would trigger the 60-day window for the federal Government to transfer title to the land. 16 U.S.C. § 539p(c)(10). Seeking to halt the transfer, Apache Stronghold sued the federal Government and its relevant officials on January 12, requesting declaratory relief, "a permanent injunction prohibiting" the "Land Exchange Mandate," and ancillary fees and costs. Three days later, on January 15, the Government released the EIS as planned.

Apache Stronghold asserted several different claims in support of its prayer for relief. First, it alleged that the Government provided too little advance notice of the publication of the EIS, thereby infringing Apache Stronghold's members' rights under the Due Process Clause and under the Petition Clause of the First Amendment. Next, Apache Stronghold alleged that the land transfer would violate its members' rights under the 1852 Treaty of Sante Fe. As this treaty-based claim has been described by Apache Stronghold in this court, the 1852 treaty assertedly imposed fiduciary trust obligations on the Government

to "protect the traditional uses of ancestral lands," even if the Government "has formal title to the land." The transfer would allegedly violate the treaty—and this corresponding federal trust obligation—because it would "allow total destruction" of the property and prevent the Western Apache from conducting their traditional religious practices.

Apache Stronghold also argued that the transfer would violate its members' rights under the Free Exercise Clause of the First Amendment and under RFRA. With respect to its Free Exercise Clause claim, Apache Stronghold argued that § 3003 was not a neutral law of general applicability and was therefore subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And, according to Apache Stronghold, the transfer was neither in support of a compelling governmental interest nor narrowly tailored to accomplish such an interest. As to RFRA, Apache Stronghold argued that the land exchange "chills, burdens, inhibits, and destroys" the religious exercise of its members, thus substantially burdening their exercise of religion in violation of RFRA. As with the Free Exercise Clause claim, Apache Stronghold's RFRA claim asserted that the transfer was not narrowly tailored to accomplish a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b). Lastly, Apache Stronghold alleged that the federal Government intentionally discriminated against its members on account of their religion in violation of the Free Exercise Clause.

Two days after filing suit, Apache Stronghold moved for a temporary restraining order ("TRO") and preliminary injunction. Specifically, Apache

Stronghold sought an order "preventing Defendants from publishing a Final Environmental Impact Statement . . . and from conveying the parcel(s) of land containing Oak Flat."

On January 14, 2021, the district court denied Apache Stronghold's motion for a TRO. After conducting an evidentiary hearing on February 3, the district court denied the preliminary injunction motion on February 12. Because the district court concluded that Apache Stronghold had not demonstrated "a likelihood of success on, or serious questions going to, the merits" of its claims, the district court did not consider the remaining preliminary injunction factors. *See Apache Stronghold*, 519 F. Supp. 3d at 598, 611. Apache Stronghold timely appealed.

On March 1, 2021, during the pendency of this appeal, the Government withdrew its EIS for the land transfer and mine. It explained that "additional time is necessary to fully understand concerns raised by Tribes" and to "ensure[] the agency's compliance with federal law." To date, the Government has provided the court no concrete estimate of when the EIS will be issued, except to pledge that it is not awaiting the decision in this case and to state that it will provide the court and Apache Stronghold at least 60 days' notice prior to issuing the EIS.

II

We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review the district court's refusal to issue a preliminary injunction for abuse of discretion. *See AK Futures LLC v. Boyd Street Distro, LLC*, 35 F.4th 682, 688 (9th Cir. 2022). We review the district court's

"underlying legal conclusions *de novo*" and its "factual findings for clear error." *Id*.

To show that it is entitled to a preliminary injunction, Apache Stronghold "must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The first factor—likelihood of success on the merits—is "the most important," and "when a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citations and internal quotation marks omitted). In this court, Apache Stronghold only challenges the district court's likelihood-of-success determination with respect to its claims under the Free Exercise Clause, RFRA, and the 1852 treaty. Because, as we shall explain, Apache Stronghold has no likelihood of success on any of those three claims, we have no occasion to address the remaining *Winter* factors.

III

Apache Stronghold asserts that the transfer of Oak Flat from the Government to Resolution Copper would "violate the Free Exercise Clause." This claim fails under the Supreme Court's controlling decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

A

The dispute in *Lyng* arose from the Government's long-running effort to build a road connecting the

northwest California towns of Gasquet and Orleans (the "G-O road"). 485 U.S. at 442. One of the final components of that project involved the construction of "a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest," a section that had "historically been used for religious purposes by Yurok, Karok, and Tolowa Indians." *Id.* As part of its preparation of a final environmental impact statement concerning the completion of the road through Chimney Rock, the Forest Service "commissioned a study of the American Indian cultural and religious sites in the area." *Id.* That study recommended against completion of the road, because "any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'" *Id.* (citation omitted). The Forest Service nonetheless decided to proceed with the construction of the road. *Id.* at 443. "At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest." *Id.*

The Forest Service's actions were promptly challenged in a federal lawsuit brought by "an Indian organization, individual Indians," the State of California, and others. *Lyng*, 485 U.S. at 443. The district court permanently enjoined both the timber management plan and the construction of the remaining section of the road, holding that these actions would infringe the rights of tribal members under the Free Exercise Clause as well as violate other provisions of federal law. *Id.* at 443–44. While the case was pending on appeal in this court, Congress intervened by enacting the California Wilderness Act

of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (1984). *See Lyng*, 485 U.S. at 444. That statute designated much of the land governed by the Forest Service's timber management plan as protected wilderness, thereby barring "commercial activities such as timber harvesting." *Id.* However, the Act specifically "exempt[ed] a narrow strip of land, coinciding with the Forest Service's proposed route for the remaining segment of the G-O road, from the wilderness designation." *Id.* This was done precisely "to enable the completion of the Gasquet-Orleans Road project if the responsible authorities so decide." *Id.* (quoting S. REP. NO. 98-582, at 29 (1984)). A panel of this court subsequently vacated the district court's injunction to the extent that it had been mooted by the wilderness designations in the California Wilderness Act, but otherwise largely affirmed the district court. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 698 (9th Cir. 1986); *see also Lyng*, 485 U.S. at 444-45.

The Supreme Court reversed. In addressing the Free Exercise Clause issue, which was a necessary component of the relief granted by the district court, the Court began by acknowledging that "[i]t is undisputed that the Indian [plaintiffs'] beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion." *Lyng*, 485 U.S. at 447. As the Court explained, it was undisputed that the "projects at issue in this case could have devastating effects on traditional Indian religious practices," and the Court therefore accepted the premise that "the G-O road will virtually destroy the Indians' ability to practice their religion." *Id.* at 451 (simplified); *see also id.* (acknowledging that the threat to the Indian plaintiffs'

"religious practices is extremely grave"). Despite these acknowledged severe impacts, the Court nonetheless held that the Government was *not* required to demonstrate a "compelling need" or otherwise to satisfy strict scrutiny. *Id.* at 447. That was true, the Court held, because the plaintiffs would not "be coerced by the Government's action into violating their religious beliefs," nor would that action "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449.

The Court held that the case was, in that respect, comparable to *Bowen v. Roy*, 476 U.S. 693 (1986), in which the Court rejected a Free Exercise challenge to a federal statute "that required the States to use Social Security numbers in administering certain welfare programs." *Lyng*, 485 U.S. at 448–49. The plaintiffs in *Roy* contended that the governmental assignment of a "numerical identifier" would seriously impede their ability to practice their religion by "rob[bing] the spirit of their daughter and prevent[ing] her from attaining greater spiritual power." *Id.* at 448 (simplified) (quoting *Roy*, 476 U.S. at 696). Although the result would be a significant interference with the *Roy* plaintiffs' religious beliefs, the *Roy* Court held that the challenged governmental action—the state and federal governments' "internal" use of a Social Security number—nonetheless did not implicate the Free Exercise Clause. *Id.* As the Court explained, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* (quoting *Roy*, 476 U.S. at 699). "The Free Exercise Clause affords an individual protection from certain forms of

governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* (quoting *Roy*, 476 U.S. at 700).

The *Lyng* Court acknowledged that "[i]t is true that this Court has repeatedly held that *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." 485 U.S. at 450 (emphasis added). Such indirect coercion or penalties would include a denial of program benefits "based solely" on the claimant's religious beliefs and practices, as well as any other denial of "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449–50. But the Court held that the Free Exercise Clause's protection against government conduct "prohibiting" the free exercise of religion, *see* U.S. CONST. amend. I, does not protect against the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450; *see also id.* at 451 (noting that the "crucial word in the constitutional text is 'prohibit'").

In light of these principles, the Court concluded, the claim in *Lyng* could not "meaningfully be distinguished" from that in *Roy*. *Lyng*, 485 U.S. at 449. Although the resulting effects on the religious practices of the Indian plaintiffs would "virtually destroy" their "ability to practice their religion," those religious impacts nonetheless did not implicate the Free Exercise Clause because the governmental actions that caused them had "no tendency to coerce individuals into acting contrary to their religious

beliefs." *Id.* at 450–51. Nor was this a situation in which the Government had "discriminate[d]" against the plaintiffs, as might be the case if Congress had passed "a law prohibiting the Indian [plaintiffs] from visiting the Chimney Rock area." *Id.* at 453. According to the Court, the Indian plaintiffs sought, not "an equal share of the rights, benefits, and privileges enjoyed by other citizens," but rather a "religious servitude" that would "divest the Government of its right to use what is, after all, *its* land." *Id.* at 449, 452–53.

The project challenged here is indistinguishable from that in *Lyng*. Here, just as in *Lyng*, the Government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," but it would have "no tendency to coerce" them "into acting contrary to their religious beliefs." 485 U.S. at 449–50. And just as with the land use decisions at issue in *Lyng*, the challenged transfer of Oak Flat for mining operations does not "discriminate" against Apache Stronghold's members, "penalize" them, or deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449, 453. Under *Lyng*, Apache Stronghold seeks, not freedom from governmental action "prohibiting the free exercise" of religion, *see* U.S. CONST. amend. I, but rather a "religious servitude" that would uniquely confer on tribal members "*de facto* beneficial ownership of [a] rather spacious tract[ ] of public property." *Lyng*, 485 U.S. at 452–53. Under *Lyng*, Apache Stronghold's Free Exercise Clause claim must be rejected.

B

Apache Stronghold's various arguments for distinguishing *Lyng* are all without merit.

First, Apache Stronghold argues that *Lyng* is distinguishable because, in that case, the virtual destruction of the "Indians' ability to practice their religion" was accomplished *without* actually destroying any "sites where specific rituals take place." 485 U.S. at 451, 454. According to Apache Stronghold, *Lyng*'s holding is limited to cases involving only interference with "subjective" spiritual experiences and therefore does not apply to a case, such as this one, involving "physical destruction of a sacred site." Although the dissent does not directly address the merits of Apache Stronghold's Free Exercise Clause claim, *see* Dissent at 192, the dissent's discussion of *Lyng* (undertaken in the context of analyzing RFRA) seeks to distinguish the case on the comparable ground that the project at issue there would not have precluded *physical access* to the relevant sacred sites, *see* Dissent at 215-21. These efforts to distinguish *Lyng* are refuted by *Lyng* itself.

In *Lyng*, the State of California argued that *Roy* was distinguishable on the ground that it involved only interference with the plaintiffs' "religious tenets from a *subjective* point of view," whereas *Lyng* involved a "proposed road [that] will '*physically destroy* the environmental conditions and the privacy without which the religious practices cannot be conducted.'" 485 U.S. at 449 (simplified) (emphasis added). The Court rejected this proffered subjective/physical distinction, expressly holding that there was no permissible basis to "say that the one form of incidental interference with an individual's spiritual

activities should be subjected to a different constitutional analysis than the other." *Id.* at 449-50. This holding requires rejection of Apache Stronghold's analogous proffered distinction between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises.

The dissent contends that "*Lyng* did not specifically address government action that *prevented* religious exercise," and that it therefore does not apply to a case, such as this one, in which the Government's actions will physically destroy the site and thereby literally prevent its future use for religious purposes. *See* Dissent at 223-24 (emphasis added). This effort to distinguish *Lyng* also fails, because, once again, it ultimately relies on too expansive a notion of what counts as "prohibiting" the free exercise of religion. We readily agree that "prevent" can often be synonymous with "prohibit," *see Prohibit*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1981 ed.) ("WEBSTER'S THIRD") ("to prevent from doing or accomplishing something"), and in that sense it is true that "prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief" qualifies as prohibiting free exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (citing, *inter alia*, *Lyng*, 485 U.S. at 450); *see also Graham v. Comm'r*, 822 F.2d 844, 850–51 (9th Cir. 1987). But "prevent" also can have the broader sense of "frustrate," "keep from happening," or "hinder," which is how the dissent uses the term here. *See Prevent*, WEBSTER'S THIRD, *supra*, at 1798. *Lyng* squarely rejected *that* broader notion of "prohibiting the free exercise" of religion:

> The dissent begins by asserting that the "constitutional guarantee we interpret today . . . is directed against any form of government action that *frustrates or inhibits* religious practice." The Constitution, however, says no such thing. Rather, it states: "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."

485 U.S. at 456 (emphasis altered) (citations omitted).

Thus, contrary to what the dissent posits, it is not enough under *Lyng* to show that the Government's management of its own land and internal affairs will have the practical consequence of "preventing" a religious exercise. Indeed, *Lyng* explicitly rejected that broader notion of "prohibiting" religious exercise, concluding that it was foreclosed by *Roy*:

> . . . *Bowen v. Roy* rejected a First Amendment challenge to Government activities that the religious objectors sincerely believed would "'rob the spirit' of [their] daughter and *prevent* her from attaining greater spiritual power." The dissent now offers to distinguish that case by saying that the Government was acting there "in a purely internal manner," whereas land-use decisions "are likely to have substantial external effects." Whatever the source or meaning of the dissent's distinction, it has no basis in *Roy*. Robbing the spirit of a child, and *preventing* her from attaining greater spiritual power, is both a "substantial external effect" and one that is remarkably similar to the injury

> claimed by [the plaintiffs] in the case before us today. The dissent's reading of *Roy* would effectively overrule that decision, without providing any compelling justification for doing so.

Lyng, 485 U.S. at 456 (emphasis added) (citations and further quotation marks omitted).

Second, Apache Stronghold argues that *Lyng* is distinguishable because it involved application of a neutral and generally applicable law, inasmuch as "the road in *Lyng* was carried out pursuant to the California Wilderness Act of 1984." By contrast, according to Apache Stronghold, this case involves legislative action directed at "one 'particular property,'" which is the antithesis of a "generally applicable" law. The dissent also endorses this ground for distinguishing *Lyng*, arguing that *Lyng* merely stands for the "proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws." *See* Dissent at 224 (citation omitted). Once again, *Lyng* itself refutes this ground for attempting to distinguish that decision.

As *Lyng* itself makes clear, the California Wilderness Act was *not* a neutral and generally appliable law in the sense that Apache Stronghold posits, because it contained an express exemption for the "narrow strip of land" that exactly "coincid[ed] with the Forest Service's proposed route for the remaining segment of the G-O road." 485 U.S. at 444. Thus, contrary to what Apache Stronghold claims, the relevant provisions of the statute at issue in *Lyng* likewise involved legislative action directed at "one 'particular property.'" Indeed, it was precisely this feature of the challenged actions in *Lyng* that the

plaintiffs there sought to invoke as a ground for distinguishing *Roy*: whereas *Roy* involved the "mechanical" application of a general program requirement for the welfare program at issue, *Lyng* involved "a case-by-case substantive determination as to how a particular unit of land will be managed." 485 U.S. at 449. In rejecting this effort to distinguish *Roy*, the *Lyng* Court did not dispute that such a distinction existed as a factual matter between the two cases. Instead, the Court held that the distinction simply provided no grounds for distinguishing *Roy*. *Id.* at 449–50. That was true, the Court explained, because the central ingredient of a Free Exercise Claim—some "tendency to coerce individuals into acting contrary to their religious beliefs"—was absent in both cases. *Id.* at 450.[4]

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[4] The dissent nonetheless insists that the Forest Service's plan and the special legislative carve-out in *Lyng*—both of which were tailored for the specific property at issue—were "generally applicable" because "there was no indication" that they were "made *because of*, rather than in disregard of," the religious interest in that particular property. *See* Dissent at 227–28 (emphasis added). This contention fails, because it mixes up the distinct issues of whether a particular law is "neutral" and whether it is "generally applicable." Even if the plan and legislation at issue in *Lyng* were "neutral" in the limited sense that it was not their "object . . . to infringe upon or restrict practices *because* of their religious motivation," *Church of the Lukumi*, 508 U.S. at 533 (emphasis added), they were plainly not "generally applicable" as that phrase is currently understood, given that they were directed at one particular property. *See, e.g.*, *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) ("In this case, while the zoning scheme itself may be facially neutral and generally applicable, the *individualized assessment* that the City made to determine that the Church's rezoning and CUP request should be denied is not." (emphasis added)).

The dissent claims that, even if the *Lyng* decision did not view itself as resting on a rule about neutral and generally applicable laws, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and other post-*Smith* decisions have read it that way. *See* Dissent at 224–26. That is not correct. All that the Court has stated is that *Smith* and its progeny "*drew support* for [*Smith*'s] neutral and generally applicable standard from cases involving internal government affairs," such as *Lyng*. *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021) (emphasis added). Thus, in *Smith*, the Court stated that its core holding—*i.e.*, that strict scrutiny does not apply to neutral laws of general applicability—was supported by *Lyng*'s broader observation that the boundaries of the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451). But the Court has not said, and could not have said, that *Lyng* was *itself* a case involving a neutral and generally applicable law. As we have set forth, *Lyng* involved a situation in which, *after* religious objections had been raised to the G-O road and the road's construction had been enjoined, Congress proceeded to adopt an explicit statutory gerrymander for the precise parcel at issue. *See supra* at 23–24. That manifestly would *not* fit the Court's current understanding of a case involving a neutral and generally applicable law. *See*, *e.g.*, *Church of the Lukumi*, 508 U.S. at 542 (emphasizing that "categories of selection" in legislative drafting "are of paramount concern when a law has the incidental effect of burdening religious practice"). The holding of *Lyng* therefore does not rest

on the premise that the laws at issue there were neutral and generally applicable.

The dissent also points to *Lyng*'s observation that, because the "Constitution does not permit government to *discriminate* against religions that treat particular physical sites as sacred," a "law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added); *see also* Dissent at 220. According to the dissent, "the Land Transfer Act is *exactly* that kind of 'prohibitory' law." *See* Dissent at 220. That contention is refuted by the fact that, under the statute, any post-transfer prohibitions that Resolution Copper may impose on public access to Oak Flat would be nondiscriminatory. *See* 16 U.S.C. § 539p(i)(3) (stating that, "[a]s a condition of conveyance," Resolution Copper must "provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable . . . until such time as the operation of the mine precludes continued public access for safety reasons"). To the extent that the dissent instead reads *Lyng* as endorsing the broader notion that the Free Exercise Clause would be violated by a *nondiscriminatory* law that will ultimately have the effect of precluding public access to a particular parcel of land, that view cannot be squared with *Lyng*'s explicit rejection of such a broad concept of "prohibiting." Indeed, under the dissent's expansive view, any transfer of Government land *without* a condition guaranteeing access to a sacred site on that parcel would amount to a prohibition on free exercise. *Lyng*, however, explicitly rejects the view that the Free Exercise Clause requires any such "religious servitude" on Government land, which would confer

"*de facto* beneficial ownership of some rather spacious tracts of public property." 485 U.S. at 452-53.

In sum, *Lyng* stands for the proposition that a disposition of government real property is not subject to strict scrutiny when it has "no tendency to coerce individuals into acting contrary to their religious beliefs," does not "discriminate" against religious adherents, does not "penalize" them, and does not deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449-50, 453. In such circumstances, the essential ingredient of "prohibiting" the free exercise of religion is absent, and the Free Exercise Clause is not violated. And because *Lyng*'s application of that rule in the context of that case cannot meaningfully be distinguished in this case, Apache Stronghold has no likelihood of success on its Free Exercise claim.

IV

Apache Stronghold also contends that the sale of Oak Flat to Resolution Copper would violate its members' rights under RFRA. Congress enacted RFRA in 1993 "in direct response" to *Smith*'s narrow construction of the Free Exercise Clause, *see City of Boerne v. Flores*, 521 U.S. 507, 512 (1997), and Congress did so precisely "in order to provide greater protection for religious exercise than is available" under the Free Exercise Clause as construed in *Smith*, *see Holt v. Hobbs*, 574 U.S. 352, 357 (2015). The question here is whether the broader protection afforded by RFRA has the practical effect of displacing, by statute, the pre-*Smith* decision in *Lyng*. The answer to that question is no.

A

In order to understand what RFRA enacts, it is important to begin with the decision that RFRA sought to supersede, namely, *Employment Division v. Smith*.

Smith involved a denial of unemployment benefits to two Oregon workers who "were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both [were] members." 494 U.S. at 874. The claimants appealed that denial of benefits to the Oregon Court of Appeals, which held that the denial violated the Free Exercise Clause. *Id*. On the State's further appeal, the Oregon Supreme Court agreed. *Id*. at 875. The U.S. Supreme Court granted certiorari, but it initially held only that, "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 485 U.S. 660, 670 (1988). The Court therefore remanded the case to the Oregon Supreme Court to address "whether [the plaintiffs'] sacramental use of peyote was in fact proscribed by Oregon's controlled substance law." *Smith*, 494 U.S. at 875. On remand, the Oregon Supreme Court answered that question in the affirmative and otherwise "reaffirmed its previous ruling" in the plaintiffs' favor. *Id*. at 876. The U.S. Supreme Court again granted review. *Id*. Thus, although *Smith* had started out as an unemployment compensation case, it returned to the

Supreme Court as squarely presenting the question of whether Oregon's *criminal prohibition* on all use of peyote violated the Free Exercise Clause. *Id.* Accordingly, unlike *Lyng*, *Smith* presented no threshold question as to whether the challenged Oregon law actually "prohibit[ed]" the claimants' religious exercise. *See* U.S. CONST. amend I.

A sharply divided Court held that there was no violation of the Free Exercise Clause. Justice Scalia's majority opinion for five Justices acknowledged what it described as "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. The Court noted that it had applied the *Sherbert* test in three cases to "invalidate[] state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Id.* The Court also observed that, in several other decisions, the Court "purported to apply the *Sherbert* test in contexts other than that," but that it had "always found the test satisfied." *Id.* Citing specifically to (among other decisions) *Roy* and *Lyng*, the Court further noted that, "[i]n recent years [the Court] ha[s] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id.* The Court then held that, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a *generally applicable* criminal law." *Id.* at 884 (emphasis added). Reviewing its caselaw more broadly, the Court held that its decisions had "consistently held that the right of free exercise does

not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (citation omitted). Citing *Lyng*, the Court held that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id*. at 885 (quoting *Lyng*, 485 U.S. at 451).

The Court's holding that the *Sherbert* test does not apply to neutral and generally applicable prohibitions drew the sharp disagreement of four Justices, in a separate opinion written by Justice O'Connor.[5] According to Justice O'Connor, the Court's caselaw has "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). Citing the unemployment compensation case of *Thomas v. Review Board of the Indiana*

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[5] Because Justice O'Connor ultimately concurred in the judgment even under the *Sherbert* test, her separate opinion was technically styled as a concurrence in the judgment. *See Smith*, 494 U.S. at 891–907. The other three Justices who joined Justice O'Connor's criticism of the majority's abandonment of the *Sherbert* test did not agree that the Oregon law survived that test, and they therefore only partially joined her concurrence and also filed a separate dissent. *See id.* at 907-21 (Blackmun, J., dissenting).

Employment Security Division, 450 U.S. 707 (1981), Justice O'Connor elaborated on her understanding of what it meant for government to impose a substantial burden on religious exercise:

> [T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As [the Court] explained in *Thomas*:
>
>> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U.S., at 717–718.

Smith, 494 U.S. at 897 (O'Connor, J., concurring in the judgment). Thus, Justice O'Connor concluded, "[t]he *Sherbert* compelling interest test applies" to both "cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct." *Id*. at 898. In either type of case, Justice O'Connor concluded, it did not matter whether the law was a

"neutral" or "generally applicable" one. *Id.* at 898–900. The Court's precedents, she explained, reflected a "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 892.

B

Congress promptly sought to supersede, by statute, *Smith*'s holding that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause." *Holt*, 574 U.S. at 356–57. As stated expressly in § 2 of RFRA, Congress's primary purpose in enacting the Act was to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). That stated purpose was based on RFRA's express finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(1).

Section 3(a) of RFRA establishes the general rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). In its current form, that prohibition extends to any "branch, department, agency, instrumentality, [or] official (or other person acting under color of law) of the United States" or of the District of Columbia, the Commonwealth of Puerto Rico, or the United States' territories and possessions. *Id.* § 2000bb-2(1), (2). The sole exception to this general rule is contained in § 3(b), which states:

> Government may substantially burden a person's exercise of religion only if it 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.

Id. § 2000bb-1(b). The net effect is that the government may substantially burden a person's exercise of religion if and only if the government's action can survive "strict scrutiny." *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430 (2006).

Congress also made clear its intent that RFRA operate as a framework statute, "displacing the normal operation of other federal laws." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020). Specifically, § 6 of RFRA provides that the Act "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" the date of RFRA's enactment. 42 U.S.C. § 2000bb-3(a). Congress further provided that "[f]ederal statutory law adopted after [RFRA's enactment] is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." *Id.* § 2000bb-3(b).

RFRA does not define what it means to "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb1(a), (b). But "Congress legislates against the backdrop of existing law," *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013), and the meaning

of that phrase is clearly elucidated by considering the body of law discussed in the "separate opinions" in *Smith*, which "concerned the very issue addressed" by Congress in § 3 of RFRA. *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 411 (2000).[6]

As *Terry Williams* explained, in the unusual situation in which the "broader debate and the specific statements" of the Justices in a particular decision "concern[ ] precisely the issue" that Congress later addresses in a statute that borrows the Justices' terminology, Congress should be understood to have "adopt[ed]" the relevant "meaning given a certain term in that decision." 529 U.S. at 411–12. Thus, in construing the standards of review applicable in deciding habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *Terry Williams* turned to "[t]he separate opinions" in *Wright v. West*, 505 U.S. 277 (1992), which concerned that "very issue." 529 U.S. at 411. As *Terry Williams* recounted, the respective opinions of Justice Thomas and Justice O'Connor in *Wright* vigorously debated whether habeas review should be deferential, with Justice O'Connor concluding that a federal court should review de novo whether the state court's resolution of the federal issue was "correct," and Justice Thomas concluding that a federal court should "simply" inquire as to whether the state decision was "reasonable." *Id*. at 410–11. In addressing the issue of

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[6] We refer to this case as "*Terry Williams*" because, in an extraordinary coincidence, the Supreme Court on the very same day decided another case named "*Williams v. Taylor*" (in which the petitioner was Michael Williams). *See* 529 U.S. 420 (2000); *see also Shinn v. Martinez Ramirez*, 596 U.S. 366, 381 (2022) (similarly referring to the other case as "*Michael Williams*").

the appropriate standards of review in AEDPA's amendments to the habeas statute, *see* 28 U.S.C. § 2254, "Congress specifically used the word 'unreasonable,'" thereby confirming that it had effectively adopted Justice Thomas's position and rejected Justice O'Connor's. *See Terry Williams*, 529 U.S. at 411.

RFRA presents exactly the sort of distinctive situation in which the principles discussed in *Terry Williams* are applicable. *Terry Williams* invoked those principles with respect to AEDPA even though the Court conceded that there was "no indication in § 2254(d)(1) itself that Congress was '*directly* influenced' by Justice Thomas' opinion in *Wright*." 529 U.S. at 411 (emphasis added). As the Court explained, "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision." *Id*. But where, as with RFRA, Congress *does* specifically "mention a prior decision of this Court by name in a statute's text," *id*., the inference is all the more inescapable that, when Congress borrows the Justices' same phrasing, it does so against the backdrop of how those terms were understood in the relevant opinions accompanying that decision. Here, RFRA was enacted against the backdrop of the vigorous debate between Justice Scalia and Justice O'Connor in *Smith*; both of their opinions used variations of the phrase "substantially burden" in describing the pre-*Smith* framework for evaluating Free Exercise Clause claims[7]; RFRA's text states that

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[7] *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that *substantially burden* a religious

its purpose is to supersede, by statute, the decision in "Employment Division v. Smith, 494 U.S. 872 (1990)," *see* 42 U.S.C. § 2000bb(a)(4); and, in superseding *Smith*, RFRA uses the phrase "substantially burden," *id.* § 2000b-1(a), (b). The inference is overwhelming that Congress thereby "adopt[ed]" the "meaning given [that] certain term in that decision." *Terry Williams*, 529 U.S. at 411. Consequently, RFRA unmistakably sought to enshrine, by statute, the basic principles reflected in the framework for applying the Free Exercise Clause that is described in those opinions, and that framework clearly includes *Lyng*.

Thus, for example, Justice O'Connor's separate opinion in *Smith* confirms that the "substantial burden" rule established in the Court's caselaw is consistent with, and does not abrogate, the Court's decision in *Lyng* (which she wrote). As Justice O'Connor explained in her separate opinion in *Smith*, *Lyng* did *not* "signal" a "retreat from [the Court's] consistent adherence to the compelling interest test" in evaluating governmental action prohibiting the free exercise of religion; instead, it reflected the underlying limits in the governmental conduct *reached* by the Free Exercise Clause. *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment). She argued that, like *Roy*, *Lyng* involved the Government's "conduct [of] its own internal affairs" in a way that did

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practice must be justified by a compelling governmental interest." (emphasis added)); *id.* at 894 (O'Connor, J., concurring in the judgment) (stating that, under the Court's existing caselaw, the government is required "to justify any *substantial burden* on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest" (emphasis added)).

not implicate the Free Exercise Clause's rule about "what the government cannot *do* to the individual." *Id.* (emphasis added) (citation omitted). That view is consistent with *Lyng*, which—as we have exhaustively explained earlier—rests on the premise that the Government's actions there, although substantially destructive of the Indians' religious interests, did not involve "*prohibiting* the free exercise" of religion within the meaning of the Free Exercise Clause. *See supra* at 24–27.

Moreover, Justice O'Connor's *Smith* concurrence contained a detailed explication of what counts as a cognizable burden under the Court's then-existing caselaw, and it closely dovetails with *Lyng*. As she explained, such burdens may be "imposed directly through laws that *prohibit or compel* specific practices"; they may be imposed "indirectly through laws that, in effect, make *abandonment* of one's own religion or conformity to the religious beliefs of others the *price* of an equal place in the civil community"; or they may involve benefit conditions that "put[ ] [] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs." *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) (emphasis added) (citation omitted).

Likewise, nothing in Justice Scalia's majority opinion in *Smith* suggested that the Court thought that *Lyng* was inconsistent with the substantial burden test. Instead, in the course of arguing for a broader jettisoning of *Sherbert*'s compelling interest test, the *Smith* majority simply cited *Lyng* as an instance in which that strict scrutiny test had not been applied. *See Smith*, 494 U.S. at 883. As noted earlier, the *Smith* majority also argued that its broader

position drew support from *Lyng*'s general observation that the limitations imposed by the Free Exercise Clause "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," *id.* at 885 (quoting *Lyng*, 485 U.S. at 451), but that likewise reflects no criticism of *Lyng*'s holding about the scope of "prohibiting" under the Free Exercise Clause.

Indeed, the only debate that Justice Scalia and Justice O'Connor had concerning *Lyng* related to the majority's use of this latter comment to bolster its broader rule about neutral laws of general applicability. Justice O'Connor objected that the majority took that comment out of *Lyng*'s specific context, which involved only the Government's conduct of its "internal affairs" and therefore did not implicate the Free Exercise Clause's rule about "what the government cannot do to the individual." *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (citation omitted). The Court responded that there was no basis for limiting the cited principle in the way that Justice O'Connor posited. *Lyng*'s observation should apply more broadly, the Court explained, because "it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, *supra*, or its administration of welfare programs, *Roy*, *supra*." *Id.* at 885 n.2. This debate about whether and how to *extend* an observation made in *Lyng* reflects no criticism of *Lyng*'s ultimate holding.

Accordingly, both Justice O'Connor's concurrence and the majority opinion in *Smith* strongly confirm that,

under the then-existing framework of Free Exercise Clause jurisprudence, the proposition that the government must justify, by strict scrutiny, any "substantial burden" on religious exercise is one that subsumes, rather than overrides, *Lyng*'s holding about the scope of government action that is reached by the constitutional phrase "prohibiting the free exercise thereof." U.S. CONST. amend. I. As a decision about the scope of the term "prohibiting," *Lyng* defines the outer bounds of what counts as a *cognizable* substantial burden imposed by the government. That is plainly how Justice O'Connor viewed *Lyng* in *Smith*, and the *Smith* majority did not disagree. When Congress copied the "substantial burden" phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise. *See Terry Williams*, 529 U.S. at 411–12; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction.").

C

The dissent's exclusive reliance on its composite understanding of the dictionary definitions of "substantial" and "burden," *see* Dissent at 196, contravenes the interpretive principles discussed in *Terry Williams*, as well as the crucial context supplied by *Smith* and *Lyng*. As a result, the dissent's construction of the phrase elides the crucial ingredient that *Lyng* reflects, which is that the phrase

"substantial burden" must ultimately be bounded by what counts as within the domain of the phrase "*prohibiting* the free exercise thereof." U.S. CONST. amend. I (emphasis added).

It is no answer to say, as the dissent does, that we have applied that dictionary definition in construing the meaning of the identical term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* Dissent at 203–05. The dissent overlooks the fact that RLUIPA expressly applies only to "substantial burdens" in two specific contexts—namely, "impos[ing] or implement[ing] a land use regulation," 42 U.S.C. § 2000cc(a)(1), and restrictions on "a person residing in or confined to an institution" affiliated with a government, *id.* § 2000cc-1(a). *See id.* § 1997; *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). Because both of these specific contexts inherently involve coercive restrictions, they do *not* raise a similar *Lyng*-type issue about the bounds of what counts as "prohibiting" religious exercise. In RLUIPA's two specific contexts, where that crucial element is already baked in, the dictionary definitions of "substantial" and "burden" will adequately flesh out the concept of "substantial burden" *against* that backdrop. The same is true under RFRA, once it is recognized that RFRA preserves *Lyng*'s understanding of what counts as "prohibiting" the free exercise of religion. But the same is *not* true if, with respect to RFRA, the critical context supplied by *Smith* and *Lyng* is overlooked. That would yield a very *different* concept of "substantial burden" under RFRA, one that (unlike RLUIPA) is shorn of any requirement to show that the governmental action has a "tendency to coerce individuals into acting contrary to their religious beliefs," "discriminate[s]" against

religious adherents, "penalize[s]" them, or denies them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449–50, 453. Nothing in RFRA indicates that Congress intended to eliminate this crucial element or to abrogate *Lyng*.

The dissent's contrary conclusion that RFRA *does* supersede *Lyng* rests on the premise that *Lyng* was based on a *Smith*-style holding about neutral and generally applicable rules. *See* Dissent at 224–28. For the reasons that we have already explained, that premise is patently incorrect. The law at issue in *Lyng* was manifestly *not* generally applicable, and nothing in *Lyng* rests upon, or endorses, the broad rule later adopted in *Smith*. *See supra* at 24–25, 31–33. Indeed, the most that the *Smith* majority claimed was that one particular statement in *Lyng* should be *extended* in a way that would support differential treatment of neutral laws of general applicability. *See Smith*, 494 U.S. at 885.

The dissent is also wrong in asserting that a 2000 amendment to RFRA—enacted as part of RLUIPA—demonstrates Congress's intent that RFRA *not* be tied to the constitutional understanding of what counts as "prohibiting" the free exercise of religion. *See* Dissent at 200–01. Prior to RLUIPA, RFRA defined the specific term "exercise of religion" to "mean[] the exercise of religion under the First Amendment to the Constitution." *See* Pub. L. No. 103-141 § 5(4), 107 Stat. 1488, 1489 (1993). However, a circuit split developed as to whether, as a result, RFRA's protections were limited to only those practices that are "central" to, or "mandated" by, a person's faith. *Compare Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (adopting

those limitations) *with Mack v. O'Leary*, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (noting the circuit split and rejecting *Bryant*), *vacated on other grounds*, 522 U.S. 801 (1997). Congress, of course, cannot statutorily change the scope of the Free Exercise Clause as construed by the courts, but it could effectively abrogate decisions such as *Bryant* by decoupling RFRA's definition of "exercise of religion" from the Free Exercise Clause and then giving it a broader meaning for purposes of RFRA. That is exactly what Congress did in RLUIPA. In § 7(a)(3) of RLUIPA, Congress rewrote the definition of "exercise of religion" in RFRA to mean "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc5]." *See* Pub. L. No. 106-274, § 7(a)(3), 114 Stat. 803, 806 (2000). Section 8 of RLUIPA, in turn, defines "religious exercise" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and further provides that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." *See* 42 U.S.C. § 2000cc-5(7)(A)–(B). But in thus decoupling the definition of what *activities* count as the "exercise of religion" from the Free Exercise Clause," Congress did not alter the phrase "substantial burden," nor did it suggest that *that* phrase should be understood as somehow being decoupled from any notion of what counts as "prohibiting" the free exercise of religion under pre-*Smith* caselaw.[8]

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[8] To the extent that the dissent insinuates that the amended RFRA's borrowing of RLUIPA's definition of religious exercise

The dissent further errs in contending that our construction of "substantial burden" here disregards the Supreme Court's rejection of the view that "RFRA merely restored th[e] Court's pre-*Smith* decisions in ossified form." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 715–16 (2014); *see also* Dissent at 201. The proposition the Court rejected in *Hobby Lobby* was that RFRA protected only the particular collection of practices that happened to have been "specifically addressed in [the Court's] pre-*Smith* decisions," much like AEDPA requires a showing of "'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 714 (quoting 28 U.S.C. § 2254(d)(1)). That "absurd" view, the Court explained, would mean that "resident noncitizen[s]" would not be protected by RFRA, given that there was no "pre-*Smith* case in which th[e] Court entertained a free-exercise claim brought by a resident noncitizen." *Id.* at 715–16. *Hobby Lobby* thus does not stand for the quite different—and erroneous—proposition that RFRA is somehow exempt from the settled rule that "Congress legislates against the backdrop of existing law." *McQuiggin*, 569 U.S. at 398 n.3. Indeed, even the dissent concedes that RFRA must be construed in light of "the Supreme Court's pre-*Smith* Free Exercise jurisprudence." *See* Dissent at 205–06; *see also id.* at 210 (noting that we have previously "relied on pre-

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has the effect of abrogating *Lyng*, *see* Dissent at 200–01, that is quite wrong. The dissent has not cited any authority—and we are aware of none—that would support the extraordinary proposition that RFRA and RLUIPA purport to grant freestanding rights to obtain otherwise unavailable access to the real property of *others* for religious use. Put simply, neither statute purports to grant persons a "religious servitude" over the property of others. *Lyng*, 485 U.S. at 452.

Smith Free Exercise Clause cases to define substantial burden").

* * *

Accordingly, RFRA's understanding of what counts as "substantially burden[ing] a person's exercise of religion" must be understood as subsuming, rather than abrogating, the holding of *Lyng*. That holding therefore governs Apache Stronghold's RFRA claim as well, and that claim therefore fails for the same reasons discussed earlier. *See supra* at 27.

V

Finally, Apache Stronghold also argues that an 1852 treaty of "perpetual peace and amity" between the "Apache Nation of Indians" and the United States, *see* TREATY WITH THE APACHES, July 1, 1852, art. 2, 10 Stat. 979 (1853), created an enforceable trust obligation that would be violated by the transfer of Oak Flat. That trust obligation, Apache Stronghold argues, stems from Article 9 of the treaty, which provides, in relevant part, that

> Relying confidently upon the justice and the liberality of the [federal] government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's [*sic*] that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Id., art. 9; *see also id.*, art. 11 (stating that "the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians"). Specifically, Apache Stronghold argues that the Government's treaty obligation to "pass and execute . . . such laws as may be deemed conducive to the prosperity and happiness'" of the Apaches should be "construed to obligate the United States to preserve traditional Apache religious practices on their historic homeland." Thus construed, Apache Stronghold contends, the Government's obligations under the treaty override any power or obligation to transfer Oak Flat under § 3003. This contention fails. Even assuming *arguendo* that Apache Stronghold's interpretation of the Government's treaty obligations is correct, the Government's statutory obligation to transfer Oak Flat under § 3003 clearly abrogates any contrary treaty obligation, not the other way around.[9]

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[9] Although Apache Stronghold has adequately shown that its members face an imminent threatened injury in fact that is fairly traceable to the alleged treaty violation, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014), the district court concluded that allowing its members to assert what it deemed to be the *tribe's* treaty rights violated the "prudential requirement that a plaintiff 'cannot rest his claim to relief on the legal rights or interests of third parties.'" *Apache Stronghold*, 519 F. Supp. 3d at 598 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Because the parties' dispute over this "prudential" requirement does not involve our subject matter jurisdiction, we are not required to resolve it before addressing the merits of the treaty issue. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (finding that the relevant plaintiffs had Article III standing and then rejecting a claim on the merits after assuming *arguendo* that "prudential, *jus tertii* standing" was met); *cf.*

"Congress has the power to abrogate Indians' treaty rights," but Congress generally must "clearly express its intent to do so." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). To the extent that Apache Stronghold is correct in contending that the Government has a treaty-based trust obligation to *retain* Oak Flat for the benefit of the tribe and its members, § 3003 clearly and manifestly abrogates any such obligation. Section 3003 was passed to accomplish a single goal: to "authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). The entirety of the statute is built around that ultimate objective. There are various preparatory requirements, like consultations and report generation, *e.g.*, *id.* § 539p(c)(3), (c)(4), (c)(6)(A), (c)(9), and post-transfer rules about land disposition and management, *id.* § 539p(d)(2), (e), (g), (h), but they all lead up to the transfer of Oak Flat. Indeed, § 3003 unambiguously states that, upon completion of the preparatory steps, "if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, *the Secretary is* authorized and *directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land*." *Id.* § 539p(c)(1) (emphasis added). Section 3003's clear direction that, after consultation with the tribe, the transfer *shall* occur simply cannot co-exist with Apache Stronghold's claim that the treaty requires

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Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–28 (2014) (clarifying that "'prudential standing' is a misnomer" and must be distinguished from the jurisdictional requirements of Article III (citation omitted)).

that it shall *not* occur. Section 3003 plainly abrogates any tribal treaty rights that would otherwise preclude the transfer. *See Bourland*, 508 U.S. at 687.

VI

For the foregoing reasons, Apache Stronghold is unlikely to succeed on the merits of any of the three claims before this court. It consequently cannot show that it is entitled to preliminary injunctive relief, and we need not consider the remaining *Winter* factors. *See Garcia*, 786 F.3d at 740. The district court's order denying Apache Stronghold's motion for a preliminary injunction is therefore affirmed.

AFFIRMED.

BEA, Circuit Judge, dissenting in part and concurring in part, with whom Circuit Judge FORREST joins except for footnote one; Circuit Judge BENNETT joins with respect to Part II:

I.

I dissent from paragraph one of the per curiam opinion, which announces that the term "substantial burden" as used in RFRA and RLUIPA "are interpreted uniformly," declares that *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), is overruled as a result of this interpretation of uniformity between RFRA and RLUIPA, and volunteers, in place of that 15-year precedent, a new test for when a government action imposes a "substantial burden" under RFRA that broadly asks whether the government conduct "prevent[s] access to religious exercise." We also did not apply this test to arrive at the ultimate decision of this Court, and this test does not address any "issue [that is] germane to the *eventual resolution* of th[is] case." *United States v. Johnson*, 256 F.3d 895, 914–16 (9th Cir. 2001) (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.) (emphasis added). That is because a majority of this panel has already *affirmed*, under the *completely different* rationale in Judge Collins's majority opinion, the district court's finding that the transfer of Oak Flat will impose no substantial burden under RFRA.[1]

[1] The statements in paragraph one of the per curiam can be characterized only as dicta that address "question[s] . . . not essential to the decision" reached in this case. *Judicial Dictum*, Black's Law Dictionary (11th ed. 2019); *see* Bryan A. Garner et

II.

I concur in full with Judge Collins's majority opinion. I agree that RFRA's term "substantial burden" does not include the governmental action at issue here "because the plaintiffs would not 'be coerced by the Government's action into violating their religious beliefs,' nor would that action 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by

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al., *The Law of Judicial Precedent* 46–47 (1st ed. 2016). Our decision today—the *only* decision that resolves this controversy—is that the transfer of Oak Flat will impose no "substantial burden" on Apache Stronghold's religious exercise under RFRA. To state the obvious, it is unnecessary to overrule *Navajo Nation* to reach that outcome because *Navajo Nation* directly supports our holding. *See, e.g.*, *infra* Part II.C.

Nor do I think the separate majority's pronouncements in paragraph one of the per curiam opinion deserve binding weight in future cases even under our "well-reasoned" dicta rule. *See Johnson*, 256 F.3d at 914–16 (separate opinion of Kozinski, J., Trott, T.G. Nelson, Silverman, JJ.), *adopted as the law of the circuit in Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003). No majority of this panel has filed a separate opinion setting forth the rationale behind paragraph one of the per curiam opinion. Neither Chief Judge Murguia's dissent nor Judge R. Nelson's concurrence reflect the rationale *of this Court* that would support overruling *Navajo Nation*. We have, in other words, two sentences of dicta in the opening of a majority per curiam opinion—which purport to effect a seismic shift in our RFRA jurisprudence—but no guiding rationale that explains this sea change in our law. This cannot be the scenario that *Johnson*'s "well-reasoned" dicta rule was meant for. When we held in *Johnson* that a panel's ruling on an issue, though "[un]necessary in . . . a strict logical sense," can become the law of this circuit so long as the panel "decide[s] [it] after careful analysis," the "analysis" we had in mind was the analysis "in a published opinion" *of the court*, *id.* at 914; *see id.* at 909 n.1, not the separate rationales of a fractured majority expressed in different writings.

other citizens.'" And I agree that Congress "adopted the limits that *Lyng* places on what counts as a governmental imposition of a substantial burden on religious exercise" when Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. ("RFRA"). Further, I agree that RFRA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"), are applied in contexts so distinguishable from one another as to make RLUIPA cases entirely unhelpful when interpreting RFRA.

I write separately to provide additional reasons in support of the conclusion that Apache Stronghold cannot obtain relief under RFRA. First, I will discuss the further textual and contextual evidence that the term "substantial burden," as used in RFRA, has the same limited meaning it had in federal court cases decided prior to RFRA's enactment. Second, I will discuss how RFRA and RLUIPA, in addition to having distinguishable applications, also have distinguishable texts, such that RLUIPA cases ought not to be used to interpret RFRA for this additional reason. Third, I will discuss the serious practical problems that would arise with the test proposed by Chief Judge Murguia in her lead dissent. Last, I will discuss how, even were RFRA to provide the Apache a viable claim for relief, RFRA's application in this case would nonetheless be abrogated by Congress's express direction in the Land Exchange Act that the land exchange be consummated.

FACTUAL BACKGROUND

Congress passed the Land Exchange Act in 2015. The Land Exchange Act authorizes and directs the exchange of land between the United States

Government and two foreign mining companies (known collectively as "Resolution Copper"). 16 U.S.C. § 539p. The 2,422-acre parcel of Arizona land that Congress has expressly authorized and directed the Secretary of the Interior to convey to Resolution Copper is located within the Tonto National Forest and includes a sacred Apache ceremonial ground called Chí'chil Biłdagoteel—known in English as "Oak Flat."

On January 12, 2021, Apache Stronghold, a nonprofit organization with members who belong to Western Apache tribes, filed suit seeking to prevent the land exchange and ensure that its members would forever have a right to access Oak Flat. Two days later, Apache Stronghold filed a Motion for Temporary Restraining Order and Preliminary Injunction. The district court held a hearing on the motion on February 3, 2021, and denied it nine days later. The district court found "that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021). The district court also found that the Apache believed that "Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood." *Id.* at 604. This finding is undisputed.

Apache Stronghold appealed, and on June 24, 2022, a three-judge panel of this court affirmed the denial of the preliminary injunction. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). The panel opinion relied on our en banc decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069–70

(9th Cir. 2008) (en banc), to decide the RFRA claim. 38 F.4th at 753.

On November 17, 2022, upon a vote of a majority of the non-recused active judges, the court sua sponte ordered that this case be reheard en banc.

LEGAL BACKGROUND

A. Pre-RFRA Jurisprudence

Before the 1993 enactment of RFRA, in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court had laid out a strict scrutiny test for certain governmental actions that interfered with the constitutional right of free exercise of religion as set forth in the First Amendment. Under that strict scrutiny test, the government cannot impose a substantial burden on the exercise of a religious adherent's sincerely held religious beliefs unless that burden is outweighed by a compelling governmental interest. *Sherbert*, 374 U.S. at 403–06.[2]

In *Sherbert*, the plaintiff was fired from her job for refusing to work on Saturday, the Sabbath day of her faith. The Court held that the state's denial of unemployment benefits to the plaintiff substantially burdened her religious exercise by forcing her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

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[2] When we assess claims that the government has infringed on the free exercise of religion, we use the terms "strict scrutiny" and "the compelling interest test" to refer to the same test. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77, 1881 (2021).

In *Yoder*, members of the Old Order Amish religion appealed their convictions under a law that required them to send their children to school until the age of sixteen—a violation of the tenets of the Amish religion, which prohibit the schooling of children beyond the eighth grade. The Court held that the state's schooling mandate, as applied to three Amish children who had completed the eighth grade but who had not yet reached the age of sixteen, caused a substantial burden because it "affirmatively compel[led] [the Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

The Supreme Court's analysis of burdens in *Sherbert* and *Yoder* represented a fundamental inquiry: whether the governmental action *coerces* the individual religious adherent to violate or abandon his sincere religious beliefs. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) ("[T]he forfeiture of unemployment benefits for choosing [to engage in religious conduct] brings unlawful coercion to bear on the employee's choice." (citing *Sherbert*, 374 U.S. at 404)); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality) ("Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs."); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion."); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

The Supreme Court specifically addressed the application of *Sherbert*'s and *Yoder*'s tests to the Government's excavation and reconfiguration of the government's own land in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the United States Forest Service wanted to build a road through an area "significant as an integral and indispens[a]ble part of Indian religious conceptualization and practice." *Id.* at 442. The road was to be built on Forest Service land, generally available to the public—Indians included. A study by the Forest Service found that the construction of the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* The Indians filed suit, seeking to enjoin the construction of the road.

The Supreme Court held that the construction of the road did not burden the Indians' religious practices in a way that would require the government to meet the compelling interest test—not because the religious practices were unaffected, but because the construction of the road did not "coerce[ ]" the Indians "into violating their religious beliefs," as in *Yoder*, nor "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," as in *Sherbert*. *Id.* at 449. In other words, it was irrelevant that "the Indians' spiritual practices would become ineffectual" or made "more difficult" because there was "no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450. Thus, the burden suffered by the Indians was qualitatively different than the burden required to be proven to obtain relief under *Sherbert* and *Yoder*. Even accepting that the road-

building project "could have devastating effects on traditional Indian religious practices" or even "virtually destroy the Indians' ability to practice their religion," *id.* at 451, the project did not put the Indians to the choice between violating or abandoning their religious tenets and losing vested benefits or incurring a governmental penalty. Because there was no personal coercion, the new road did not substantially burden the Indians' constitutional right to the free exercise of their religion. *Id.* at 447.[3]

The lead dissent argues, however, that *Smith* interpreted "*Lyng* [as] stand[ing] for the proposition that the compelling interest test is 'inapplicable' to 'across-the-board' neutral laws" because *Smith* quoted from *Lyng* when it established that rule. We addressed and rejected this same argument fifteen years ago. *See Navajo Nation*, 535 F.3d at 1072–73. The fact that *Smith* divined some support for its rule from the *Lyng*'s language does not mean that *Lyng* was the case that established the rule that "neutral, generally applicable laws" are exempt from the *Sherbert* and

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[3] In dicta, the Supreme Court in *Lyng* mentioned that "a law prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions." *Id.* at 453. The Supreme Court gave no indication as to what "different . . . constitutional questions" would be raised under such circumstances, what analysis the Court would use to answer those questions, or what answers the Court would reach. We do not give any weight to "an unconsidered statement" found in Supreme Court dicta, *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1131–32 (9th Cir. 2010), *aff'd*, 565 U.S. 207 (2012), and this language in *Lyng* does not establish that the term "substantial burden" has any greater or different meaning than used in the remainder of the opinion in *Lyng* and in other pre-RFRA cases.

Yoder test.[4] That case was *Smith*. And Congress cited *Smith*, not *Lyng*, as the case that "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *See* 42 U.S.C. § 2000bb(a)(4).[5]

Smith, if anything, construed *Lyng* as one of several examples where the Court declined to apply the compelling interest test because the government action in that case was not coercive, making the burden it imposed on religious practice not "substantial[ ]" within the meaning of *Sherbert*. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402–03). *Smith* explained that the government action in *Sherbert* "substantially burden[ed] . . . religious practice" because it coerced a religious adherent into violating her beliefs by "condition[ing] the availability of [unemployment] benefits upon [her] willingness to work under conditions forbidden by h[er] religion." *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03). But the Court had "never invalidated any governmental action on the basis of the *Sherbert* test" outside the unemployment benefit context because none of the challenged state actions in those cases

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[4] I agree in full with Judge Collins's explanation as to *why* the law at issue in *Lyng* was not neutral or generally applicable. Simply put, an Act of Congress that deals with a specific stretch of road in Northern California is not, by definition, a "neutral law of general application."

[5] RFRA also explicitly endorsed "the compelling interest test as set forth *in prior Federal court rulings*"—that is, the test used in federal court rulings prior to *Smith*. 42 U.S.C. § 2000bb(a)(5) (emphasis added). *Lyng* was handed down two years prior to *Smith*. Thus, *Lyng* was one of the "prior Federal court rulings" which Congress explicitly wanted to restore.

were coercive. *Smith*, 494 U.S. at 883. Whether it was the "military dress regulations [in *Goldman v. Weinberger*] that forbade the wearing of yarmulkes," the state "prison's refusal [in *O'Lone v. Estate of Shabazz*] to excuse inmates from work requirements to attend worship services," the federal statute in *Bown v. Roy* "that required [Social Security] benefit applicants . . . to [obtain and] provide their Social Security numbers," or the "devastating effects on . . . religious practices" caused by the "Government's logging and road construction activities on [sacred] lands" in *Lyng*—these activities, at most, interfered with religious exercise *as an incident* to the operation of governmental affairs. *Smith*, 494 U.S. at 883–84 (internal citations and quotations omitted). They did not entice religious adherents into violating the tenets of their faith in exchange for government benefits, as the government had done in *Sherbert*. *See id.*

Pre-RFRA cases applying (or refusing to apply) *Sherbert*'s compelling interest test only confirm what *Smith* later observed: that coercion is the *sine qua non* for what constitutes a "substantial[] burden" under *Sherbert*. *Id.* at 883. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a religious adherent was fired for refusing to participate in the production of armaments, and the state denied him unemployment benefits. Although *Thomas* was a relatively easy application of *Sherbert*, the Supreme Court took the occasion to reiterate that only personal coercion qualifies as a substantial burden under the Free Exercise Clause: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure

on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717–18. The Supreme Court held that a substantial burden was placed on the religious adherent and granted relief under the Free Exercise Clause. *Id.* at 720.

In *Bowen v. Roy*, 476 U.S. 693 (1986)—one of the examples that *Smith* identified as not involving a substantial burden, *see Smith*, 494 U.S. at 883—an Indian religious adherent challenged the Government's internal use of a Social Security number to identify the religious adherent's daughter, *Bowen*, 476 U.S. at 699. The religious adherent testified that the Government's use of a Social Security number would "rob" his daughter of "her spirit." *Id.* at 697. The Supreme Court explained how the use of the Social Security number was not a substantial burden by drawing a distinction between burdens that coerce the religious adherent to violate or abandon his sincere religious beliefs and those that do not:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices . . . .

Id. at 699–700. In other words, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700. The Supreme Court concluded that the use of the Social

Security number did not create a substantial burden, even though it might "rob" the "spirit" of the adherent's daughter, because "in no sense d[id] it affirmatively compel [the adherents], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they f[ound] objectionable for religious reasons." *Id.* at 703. The Supreme Court thus denied relief under the Free Exercise Clause. *Id.* at 712.

Only a few years before RFRA, the Supreme Court decided *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), in which the Court held that a generally applicable tax does not impose a "constitutionally significant burden on [the religious adherent's] religious practices or beliefs." *Id.* at 392. In explaining why the tax did not impose a substantial burden, the Supreme Court reasoned that "in no sense has the State 'conditioned receipt of an important benefit upon conduct proscribed by a religious faith, or denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 391–92 (alterations adopted) (quoting *Hobbie*, 480 U.S. at 141).

In sum, pre-RFRA jurisprudence set forth very clear guidelines as to what *type* of burden is "substantial" enough to require the government to demonstrate a compelling interest: government action that coerces a religious adherent to violate or abandon the tenets of his religion—by threatening, for example, the denial of a governmental benefit to which the person is otherwise entitled or the imposition of a penalty based on the religious adherent's choice to act

in accordance with the protected tenets of his religion. Whether one might think the phrase "substantial burden" admits a broader definition, the Supreme Court did not. It was with this clear jurisprudential history that RFRA adopted "substantial burden" as a statutory term.[6]

The lead dissent disagrees, arguing that "pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions)." Instead, the dissent argues that "the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: *preventing a religious adherent from engaging in religious exercise*." The dissent cites two cases to support this theory.

First, the dissent cites *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam). In *Cruz*, Texas state prison officials barred a Buddhist prisoner from using a prison chapel, which was available to prisoners who were members of other religious sects. *Id.* at 319.

[6] The Supreme Court's jurisprudence prior to *Smith* used the term "burden" or "undu[e] burden," and did not specifically use the term "substantial burden"—though our own pre-*Smith* jurisprudence certainly did. *See Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984). The use of the term "substantial burden" did not appear in Supreme Court case law until *Smith* itself. *See* 485 U.S. at 883. Nonetheless, *Smith*'s use of the term "substantial burden," as well as our own use of that term in pre-*Smith* jurisprudence, invoked the entire line of cases, beginning with *Sherbert* and *Yoder*, in which the Court had identified the kinds of burdens on religious adherents which the government must justify with a compelling interest.

Prison officials had also facilitated distribution of religious materials of non-Buddhist faiths. *Id.* at 319–20. But when the prisoner shared Buddhist religious material with other prisoners, prison officials retaliated by placing the prisoner in solitary confinement and on a diet of bread and water for two weeks, without access to newspapers, magazines, or other sources of news. *Id.* at 319. Further, the prison officials prohibited the prisoner from corresponding with his religious advisor, even though prison officials facilitated correspondence with religious advisors for prisoners of other faiths. *Id.*

The Buddhist prisoner sued the prison officials under 42 U.S.C. § 1983 for violating his rights to the free exercise of his religion under the First and Fourteenth Amendments. The district court denied relief under the theory that a prisoner's exercise of religion should be left "to the sound discretion of prison administrators," and held that "disciplinary and security reasons . . . may prevent the 'equality' of exercise of religious practices in prison," and thus ruled that prisoners do not enjoy a right to the free exercise of religion under the First and Fourteenth Amendments. *Id.* at 321. The Fifth Circuit affirmed.

The Supreme Court reversed in a five-page, per curiam opinion. The Court held that prisoners enjoy the right to the free exercise of religion and held that the allegations in the prisoner's complaint were sufficient to state a claim under the First and Fourteenth Amendments. *Id.* at 322. When the Court analyzed the prisoner's complaint, the Court did not discuss which of the prison officials' actions—the denial of access to the chapel, a religious advisor, and news sources, or the placement of the prisoner in

solitary confinement and on a diet of bread and water for two weeks—constituted a qualifying burden for First Amendment purposes. The Court never held that the denial of access to the prison chapel was a sufficient burden on its own or that the burdens discussed in *Sherbert* and *Yoder* were merely two examples of a broader inquiry. The Court never even cited *Sherbert* or *Yoder*.

It was unnecessary for the Court to conduct a detailed analysis of the burden on the religious adherent in *Cruz*: the religious adherent's complaint easily stated enough facts to allege a plausible Free Exercise Clause violation under *Sherbert* or *Yoder*. The religious adherent in *Cruz* alleged that prison officials denied access to governmental benefits that were generally available to similarly situated prisoners of other religions. The denial of those benefits plainly qualified as a cognizable burden under *Sherbert*, 374 U.S. at 404.[7] Further, he alleged that the prison officials placed the prisoner in solitary confinement and on a diet of bread and water for two weeks as punishment for his distribution of religious materials. Those penalties easily qualified as burdens under *Yoder*, 406 U.S. at 218. Nowhere in the Court's decision is there any mention of a First Amendment right to access and use governmental property for exercise of a religious rite.

Second, the dissent cites *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *O'Lone*, prison

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[7] Moreover, these denials likely qualified as violations of the Equal Protection Clause of the Fourteenth Amendment, which the prisoner had also invoked as a basis for relief. *See Cruz*, 405 U.S. at 320 n.1.

officials in a New Jersey state prison forced some Muslim prisoners to work outside the prison during workdays, which included Friday afternoons, the Muslim holy day. *Id.* at 345–47. The Muslim prisoners filed suit to challenge the prison regulation because the regulations prevented the prisoners from attending a religious service, which their faith commanded them to perform on Friday afternoons. *Id.* at 345. The Supreme Court analyzed the claim not with *Sherbert* and *Yoder*'s compelling interest framework, but with a "reasonableness" test that the Court had used at that time for Free Exercise claims arising in the prison context. *Id.* at 349. The Court held that the prison regulations were reasonable. *Id.* at 351–53.

O'Lone is clearly inapplicable. The Court barely mentioned that the Muslim plaintiffs were barred from attending their religious event and never analyzed whether that bar constituted a qualifying burden under the First Amendment. There was no discussion whether the bar might have constituted or been backed by the denial of a vested governmental benefit or the imposition of a penalty. The Court, of course, did not need to address the issue whether the burden was a qualifying burden because the Court ruled against the prisoners on the grounds that the prison regulations were "reasonable." Even had the court provided some guidance on whether the denial of access to a religious site was a qualifying burden in *O'Lone*, it would have been inapplicable in the present case because RFRA adopted *Sherbert* and *Yoder*'s compelling interest framework, not the now-abandoned "reasonableness" framework in use in prisoner cases at the time of *O'Lone*.

The mere fact that the governmental actions in *Cruz* and *O'Lone* had caused, as one of their effects, what one could describe as the prevention or denial of access to a location for sincere religious exercise, does not mean that the Supreme Court recognized that such an effect constitutes a "substantial burden" for purposes of the *Sherbert* test. That simply was not a finding in either case.

B. *Smith*, RFRA, and RLUIPA

In 1990, the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, two individuals were fired from their jobs at a private drug rehabilitation organization because they ingested peyote at a ceremony of the Native American Church. *Id*. at 874. An Oregon agency denied both individuals unemployment compensation because the agency determined that the individuals had been discharged for work-related misconduct. *Id*. Oregon courts reversed, holding that *Sherbert* and *Yoder* prohibited the denial of unemployment benefits to the religious adherent on the basis of his participation in religious conduct. *Id*. at 874–76. The Supreme Court, however, disagreed, holding that *Sherbert* and *Yoder*'s substantial burden test does not prevent a state from enacting and enforcing "neutral, generally applicable laws" such as Oregon's criminal law prohibition against the use of peyote. *Id*. at 878–82.

Congress responded to *Smith* in 1993 by enacting RFRA. Congress disagreed with *Smith*'s exempting "neutral, generally applicable laws" from the reach of *Sherbert* and *Yoder*, saying that *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws

neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress required that "the compelling interest test as set forth in prior Federal court rulings" apply no matter whether the challenged law was one of neutral, general applicability. 42 U.S.C. § 2000bb(a)(5). RFRA then pointedly and specifically cited two Supreme Court cases; RFRA explained that Congress's intent was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

Against this backdrop, Congress provided the following statutory language: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 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)(1)–(2).

In 1997, the Supreme Court curtailed the scope of RFRA. In *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional as applied to the actions and laws of state governments because Congress had exceeded the authority delegated to it in the Fourteenth Amendment to the Constitution. 521 U.S. 507 (1997). When Congress passed RFRA, Congress invoked its authority under the Fourteenth Amendment to extend the reach of RFRA to regulate state actions and lawmaking. *Id.* at 516; *see also* U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). In *City of Boerne*, the

Supreme Court held that Congress's reliance on the Fourteenth Amendment as a basis for regulating state actions and lawmaking was misplaced because the Fourteenth Amendment permits Congress to enforce only existing constitutional rights, not to define new constitutional rights. *Id.* at 536. And because the Supreme Court had held in *Smith* that the Free Exercise Clause of the First Amendment did not provide any right to be exempt from a neutral law of general applicability, the rights protected in RFRA went beyond the rights protected under the First Amendment and therefore exceeded Congress's power to regulate the state and local actions under the Fourteenth Amendment. *Id.* at 534–35.

In 2000, in response to *City of Boerne*, Congress passed a new, different, and narrower statute: RLUIPA. RLUIPA's application and text differs from RFRA's in many important and decisive ways, discussed further below. Most significantly, RLUIPA makes no mention of *Sherbert* or *Yoder* or any other case and does not purport to restore any test "set forth in prior federal court rulings."

C. *Navajo Nation*

In 2008, we took *Navajo Nation v. United States Forest Service* en banc to resolve disagreement over what kinds of burdens qualify as "substantial burdens" on the exercise of religion under RFRA. 535 F.3d 1058 (9th Cir. 2008) (en banc). In *Navajo Nation*, a coalition of Indian tribes and environmentalist organizations filed a lawsuit seeking to prohibit the United States Forest Service from approving planned upgrades to a ski resort located on federal property. *Id.* at 1062. The Indian plaintiffs, who considered the whole mountain at issue to be a sacred place in their

religion, contended that the planned use of artificial snow made from recycled wastewater containing microscopic amounts of human fecal matter would spiritually contaminate the entire mountain. *Id.* at 1062–63. The Indian plaintiffs claimed that the use of recycled wastewater would cause:

> (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.

Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1039 (9th Cir. 2007) (vacated panel opinion). The panel opinion held that the planned use of recycled wastewater would create a substantial burden on the Indians' religious practices, and the panel granted relief under RFRA. *See id.* at 1042–43.

In reversing the panel decision, our en banc decision noted that RFRA used "substantial burden" as "a term of art chosen by Congress to be defined by reference to Supreme Court precedent." *Navajo Nation*, 535 F.3d at 1063. While RFRA did not include a definition of "substantial burden" among its several definitions, *see* 42 U.S.C. § 2000bb-2, the en banc panel reasoned that "[w]here a statute does not expressly define a term of settled meaning, 'courts interpreting the statute must infer, unless the statute otherwise

dictates, that Congress means to incorporate the established meaning of that term.'" *Id.* at 1074 (alterations adopted) (quoting *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

The en banc panel therefore applied the *Sherbert* and *Yoder* framework and concluded that the planned use of recycled wastewater to make artificial snow did not coerce the religious adherents to violate the tenets of their religion and therefore did not qualify as a "substantial burden." *Id.* at 1078. Despite the fact that the use of recycled wastewater might destroy "an entire way of life," the en banc panel concluded that a substantial burden was not present because the use of recycled wastewater did "not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*," nor did it "coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*." *Id.* at 1070.

Since our decision in *Navajo Nation*, a majority of circuits have followed suit, defining the term "substantial burden" as including only government actions which coerce individual religious adherents to violate or abandon their sincere religious beliefs.[8]

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[8] *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 818 (Nov. 9, 2020); *Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014) (per curiam); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 (3d Cir. 2017); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100 (4th Cir. 2013); *U.S. Navy Seals 126 v. Biden*, 27 F.4th 336, 350 (5th Cir. 2022); *New Doe Child #1 v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008).

DISCUSSION

A. The Textual and Contextual Evidence Compels the Conclusion That Congress Intended "Substantial Burden" to Be Defined by Its Case-Based, Technical Definition, Rather Than Its Dictionary Definition.

"Words are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (emphasis added). When a statute addresses a subject already addressed in jurisprudence, "ordinary *legal* meaning is to be expected, which often differs from common meaning."

Four circuits have used a definition of "substantial burden" that includes both governmental actions that coerce religious adherents to violate or abandon their sincere religious beliefs and governmental actions that prevent the religious adherent from participating in religiously motivated conduct. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). The dissent cites to these circuits as support for its proposed test. But these four circuits failed to provide any statutory, textual, or historical reason for expanding the definition of "substantial burden." "An authority derives its persuasive power from its ability to convince others to go along with it." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 509 (9th Cir. 2018) (quoting Bryan A. Garner, et al., *The Law of Judicial Precedent* 170 (2016)), *rev'd in part and vacated in part on other grounds*, 140 S. Ct. 1891 (2020); *see also* Chad Flanders, Toward A Theory of Persuasive Authority, 62 Okla. L. Rev. 55, 65 (2009) ("[T]he force of persuasive authority is the unforced force of the better argument."). Decisions from other circuits made without any analysis are not valuable as persuasive authorities.

Id. at 73 (emphasis added). "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)) (alteration adopted); *see also Twitter, Inc., v. Taamneh*, 143 S. Ct. 1206, 1218 (2023); *Sekhar v. United States*, 570 U.S. 729, 733 (2013).

"If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction." Scalia & Garner at 322. Of course, "[t]he clearest application" of this canon occurs when the legislature codifies a test previously expressed in judicial cases. *Id.*; *see also United States v. Hansen*, 143 S. Ct. 1932, 1942 (2023) ("[W]hen Congress 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).[9]

When the full context is considered—the discussion in pre-*Smith* jurisprudence of which governmental actions generate cognizable burdens, the agreement between the majority and concurrence in *Smith* that

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[9] The lead dissent cites *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020), to support the proposition that dictionary definitions should be used to define RFRA's terms. In *Tanzin*, the Supreme Court used a dictionary to define the term "appropriate relief" under RFRA because no party argued that the term had taken on a technical meaning. The fact that one term in a statute does or does not have a technical meaning has no effect on the interpretation of other terms in the statute.

only those governmental actions that coerce the religious adherent to violate or abandon his religious tenets are cognizable burdens, the use of the term "substantial burden" by both the majority and concurrence in *Smith* to describe such burdens, the fact that RFRA cited to *Smith*, and the fact that RFRA adopted the term "substantial burden" without modification and without noting any disapproval of the limited scope given to that term by the majority and concurrence in *Smith*—it is clear that Congress employed the term "substantial burden" in RFRA not for its dictionary definition but for the technical definition given to that term by *Smith* and prior federal court rulings.

This view is confirmed by two pieces of textual evidence in the body of RFRA itself: RFRA's statement of purpose and RFRA's dual citation to *Sherbert* and *Yoder*.

1. *RFRA states that its purpose is to "restore" the free exercise of religion test "as set forth in prior federal court rulings."*

When Congress expressly states a purpose for a statute, [10] that statement of purpose "is 'an appropriate guide' to the 'meaning of the statute's operative provisions.'" *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (quoting Scalia & Garner at 218) (alteration adopted). "Purpose sheds light . . . on

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[10] My discussion here references Congress's statements of purpose explicitly laid out in the text of 42 U.S.C. § 2000bb, not any purpose which might be divined from the legislative history of the statute, such as the records of the Congressional committee reports or debates.

deciding which of various textually permissible meanings should be adopted." Scalia & Garner at 57.

Congress's expressed desire to "restore" the free exercise of religion test "as set forth in prior federal court rulings" is a strong indication that Congress meant to have the term "substantial burden" in RFRA mean the same thing the term had meant "in prior federal court rulings." 42 U.S.C. § 2000bb(a)(5).

The lead dissent argues that this analysis prioritizes RFRA's statement of purpose over RFRA's operative language. Not so. As the dissent acknowledges, "RFRA does not define 'substantial burden.'" Thus, there is no such "operative language" in the statute to be overridden and the statement of purpose is "an appropriate guide" to clarify the undefined term. *Gundy*, 139 S. Ct. at 2127.

2. *RFRA directly cites and incorporates* Sherbert *and* Yoder *as setting forth Congress's desired test.*

RFRA's direct citation to *Sherbert* and *Yoder*—and lack of citation to any other pre-*Smith* case—cannot be overstated for purposes of properly interpreting RFRA. Congress rarely chooses to cite and incorporate directly *a* judicial case into the body of a statute. When it does so, courts interpreting that statute always give the case citation and its incorporation dispositive or at least highly persuasive effect.[11]

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[11] *See Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1191–94 (9th Cir. 2018) (giving dispositive weight to 12 U.S.C. § 25b's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2d Cir. 2022) (same); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194,

But even more impressive is that in *no* statute other than RFRA has Congress *ever* cited more than one case in setting a single statutory test. Bearing in mind the canon of statutory interpretation against surplusage—which teaches us that neither citation "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence," Scalia & Garner at 174—we must ask why Congress saw the need to cite *both Sherbert and Yoder*.

Sherbert and *Yoder* both held that no government action can burden an individual's free exercise of

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1197 (11th Cir. 2011) (same); *United States v. Alabama*, 691 F.3d 1269, 1297 (11th Cir. 2012) (giving dispositive weight to 8 U.S.C. § 1643's citation to *Plyler v. Doe*, 457 U.S. 202 (1982)); *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 405 (6th Cir. 2001) (giving dispositive weight to 15 U.S.C. § 6701's citation to *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996)); *Nat'l Treasury Emps. Union v. United States*, 950 F.2d 1562, 1568 (Fed. Cir. 1991) (giving dispositive weight to 19 U.S.C. § 1451's citation to *United States v. Myers*, 320 U.S. 561, 566 (1944)); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 287 (9th Cir. 1987) (using *Arizona v. California*, 376 U.S. 340 (1964), to define the Government's duties under 43 U.S.C. § 1524 because § 1524 cites *Arizona*); *United States v. Bell*, 761 F.3d 900, 913 n.6 (8th Cir. 2014) (holding that 22 U.S.C. § 7101's citation to and *rejection* of the narrow scope of *United States v. Kozminski*, 487 U.S. 931 (1988), means that the scope of § 7101 must at least include the scope of *Kozminski*); *United States v. Calimlim*, 538 F.3d 706, 714 (7th Cir. 2008) (same); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (same), *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101 (2005); *see also Taamneh*, 143 S. Ct. at 1218 (using *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), to define aiding and abetting under 18 U.S.C. § 2333 because Congress cited *Halberstam* in the findings section of the Justice Against Sponsors of Terrorism Act, which amended § 2333).

religion without using means narrowly tailored to a compelling governmental interest. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 213–15. If that was all the law that Congress wanted to "restore," 42 U.S.C. § 2000bb(b)(1), then citation to *either Sherbert* or *Yoder* would have been adequate. Yet Congress, legislating in response to *Smith*, nonetheless felt the need to cite *both Sherbert and Yoder*.

The material difference between *Sherbert* and *Yoder* was in the *kind* of coercive burden the Supreme Court recognized as substantial in each case. In *Sherbert*, the Court recognized that the denial of governmental benefits to which the claimant was otherwise entitled because of her choice to engage in religiously motivated conduct can be a substantial burden; in *Yoder*, the Supreme Court recognized that the imposition of a governmental penalty because of the religious adherent's participation in religiously motivated conduct can have the same coercive effect. *Sherbert*, 374 U.S. at 403–04; *Yoder*, 406 U.S. at 218. Because Congress cited both *Sherbert* and *Yoder*, those two cases and the two types of coercion they recognized provide the lens through which courts interpret RFRA's "substantial burden."[12]

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[12] The dissent and Judge R. Nelson argue that RFRA's statement of purpose referred to the "compelling interest" portion of *Sherbert* and *Yoder*, but not the definition of "substantial burden." The definition of "substantial burden" used in pre-RFRA jurisprudence was a core predicate part of the test that RFRA, in its own words, sought to "restore." 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."); *see also Tanzin*, 592 U.S. at 45 ("RFRA sought to . . . restore the

We must then ask why Congress cited *only Sherbert* and *Yoder*. The canon of statutory interpretation *expressio unius est exclusio alterius* teaches us that "[t]he expression of one thing implies the exclusion of others." Scalia & Garner at 107. Thus, by citing *only Sherbert* and *Yoder*, Congress did more than merely endorse the two types of coercive burdens recognized in those cases as determinative of the scope of the term "substantial burden." Congress could have just as easily cited *Cruz* or *O'Lone* as additional examples of cases where the burden at issue was "substantial," but it did not. Congress therefore implied that any other kinds of burdens on religious exercise are excluded from the meaning of "substantial burden" in RFRA. *See United States v. Giordano*, 416 U.S. 505, 514 (1974) (a statute's listing of two individuals authorized to enforce the statute implied that others were not authorized to enforce the statute).

Nor does RFRA's choice of words suggest that Congress cited *Sherbert* and *Yoder* as mere *examples* of the pre-*Smith* test. We should not read into a statute a phrase that "Congress knows exactly how to adopt . . . when it wishes," but which Congress has not adopted in the statute at issue. *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1942 (2022); *see also Astrue*

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pre-*Smith* 'compelling interest test' . . . .'") (quoting 42 U.S.C. § 2000bb(1)–(2)). *Smith* itself defined the test as follows: "Under the *Sherbert* test, governmental actions *that substantially burden* a religious practice must be justified by a compelling governmental interest." 494 U.S. at 883 (emphasis added). It is impossible to "restore" the compelling interest test without restoring the original definition of its essential predicate, the "substantial burden."

v. Ratliff, 560 U.S. 586, 595 (2010). There are several phrases Congress has, and could have again, employed to communicate that *Sherbert* and *Yoder* should be treated as mere examples of substantial burdens. *See, e.g.*, 8 U.S.C. § 1368 ("for example"); 15 U.S.C. § 769 ("to include"); 34 U.S.C. § 12621 ("such as"). But Congress used none of these phrases. The lead dissent offers no rationale nor cites any authority for its suggestion that *Yoder* and *Sherbert* were mere "examples" of substantial burdens.

These canons of statutory interpretation reinforce the conclusion that RFRA codified only a limited definition of "substantial burden": "substantial burden" means personal coercion, limited to the threatened denial of a vested benefit or the threatened imposition of a penalty because of the religious adherent's participation in protected religious conduct, as set forth in *Sherbert* and *Yoder*.

3. Hobby Lobby *did not remove or alter the technical definition of "substantial burden" adopted by Congress.*

The lead dissent cites *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 714–15 (2014), for the proposition that RFRA "goes 'far beyond what is constitutionally required' under the Free Exercise Clause" and thus "*Navajo Nation* made too much of the fact that RFRA explicitly mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose."

The dissent's citation to *Hobby Lobby* is an unfortunate example of "snippet analysis": the use of selected words in a case as the basis for an argument, without mention of the case's actual issues, reasoning, and holding, or to what those words actually referred

to in that case. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . [T]heir possible bearing on all other cases is seldom completely investigated." (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.))).

The *Hobby Lobby* decision lends no support to the dissent's proposed expansion of the definition of "substantial burden." At issue in *Hobby Lobby* was a governmental mandate that required employers to provide insurance coverage to employees for certain forms of contraception. *Id.* at 689–90. The government threatened penalties against the employers if they did not comply with the mandate. The employers sued to enjoin the imposition of such penalties, invoking RFRA. The question presented to the Supreme Court was whether corporations, such as Hobby Lobby, enjoy protection under RFRA even though pre-RFRA jurisprudence had been applied only to protect the right to free exercise of religion of natural persons. The Supreme Court held that RFRA applies to a broad category of plaintiffs, including plaintiffs who do not necessarily "f[a]ll within a category of plaintiffs one of whom had brought a free-exercise claim that [the Supreme] Court entertained in the years before *Smith*." *Id.* at 716. The Supreme Court therefore held that certain corporations may bring suit under RFRA.

Hobby Lobby emphasized that RFRA is not limited to the factual incidences of pre-RFRA jurisprudence as to *who* can sue the federal government under RFRA. But neither *Hobby Lobby* nor RFRA went "far beyond" pre-RFRA First Amendment cases as to *what* could be

sued on: what constituted an actionable "substantial burden." *Hobby Lobby* never rejected the *test* used by pre-RFRA jurisprudence, including the portion of the test at issue here: the definition of "substantial burden." Nothing about *Hobby Lobby* can be read to suggest that "substantial burden" is anything but a term of art or that it extends past the definitions provided in *Sherbert* and *Yoder*. To the contrary, *Hobby Lobby* held that a substantial burden was present in that case *by using* the pre-RFRA test. *See id.* at 726 (holding that regulation at issue created a "substantial burden" under RFRA because the governmental action threatened penalties against religiously adherent employers who refused to provide contraceptive care as part of their heath provision plans, and therefore involved "coercion"). Thus, the snippet of *Hobby Lobby*'s language quoted by the dissent dealt with the expansion of the list of *who* could sue under RFRA. It did not expand the list of what constitutes a "substantial burden," or which government actions can be halted. As to *what* constituted a "substantial burden," *Hobby Lobby* simply followed *Yoder* and pre-RFRA Supreme Court decisions.[13]

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[13] The dissent also cites 42 U.S.C. § 2000bb-3(c). Section 2000bb-3, enacted as part of RFRA, is entitled "Applicability." Subsection (c) says: "Nothing in [RFRA] shall be construed to authorize any government to burden any religious belief." 42 U.S.C. § 2000bb-3(c). This statutory language is unhelpful for two reasons. First, this kind of statutory language merely acts as a failsafe provision, included to prevent any unintended consequences of the operative language of the statute. Here, the language ensures that RFRA's terms are not somehow construed to *expand* the government's ability to burden religion. The

B. The Textual Differences Between RFRA and RLUIPA Make RLUIPA Cases Inapposite in the RFRA Context.

Rather than utilize straightforward methods of statutory interpretation based on the language of RFRA, as explained above, the lead dissent gets to its proposed definition of burden" by way of a different statute: RLUIPA. The dissent argues that the term "substantial burden" "has the same meaning under both RFRA and RLUIPA." And because, "under RLUIPA," "denying access to or preventing religious exercise qualifies as a substantial burden," the lead dissent's conclusion then follows: "transferring Oak Flat to Resolution Copper will amount to a substantial burden under RFRA."

This reasoning is erroneous for two reasons. First, as explained by the majority, RFRA and RLUIPA apply in contexts so distinguishable as to make any

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language is unhelpful for determining what the rest of the statute in fact prohibits. We have reached the same conclusion when interpreting similar language in other statutes. *See Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994); *Cath. Soc. Servs., Inc. v. Thornburgh*, 956 F.2d 914, 923 (9th Cir. 1992), *vacated on other grounds sub nom. Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43 (1993).

But second, even if the statute said what the dissent claims—that the government "may not burden any religious belief"—that language would nevertheless be unhelpful because we would still be required to determine what kinds of government actions qualify as "burdens" and whether the term "burden" is used in a technical sense. Nothing about this statutory language states or implies that RFRA's use of the term "substantial burden" is anything but a reference to a term of art or that Congress intended to expand the kinds of burdens that qualify under RFRA beyond those identified in *Sherbert* and *Yoder*.

discussion of burdens in RLUIPA cases entirely unhelpful when interpreting RFRA. But second, RLUIPA cases are unhelpful for interpreting RFRA because the text of RLUIPA, especially its land use provision, uses language that implies a broader test.

What the dissent refers to as "RLUIPA" in fact encompasses two different statutory provisions. RLUIPA's first operative provision governs state land-use and zoning regulations. 42 U.S.C. § 2000cc(a)(1). Its second operative provision governs state regulation of institutionalized persons. 42 U.S.C. § 2000cc-1(a). No party argues that RLUIPA applies to this case. The Land Exchange Act is not a state land-use law. The members of Apache Stronghold are not institutionalized persons. Yet, Apache Stronghold and the dissent argue that somehow the similarities between RFRA and the two provisions of RLUIPA should make all RLUIPA precedent binding when we interpret RFRA.

RLUIPA's two operative provisions are somewhat similar to RFRA, but they are not identical. The dissent argues that RFRA and RLUIPA are "distinguished only in that they apply to different categories of governmental actions." [14] However,

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[14] The dissent cites Hobby Lobby for this proposition. The Court in Hobby Lobby remarked in a passing comment that RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions." 573 U.S. at 695. Remember: Hobby Lobby was exclusively a federal law action; no state, state land-use regulation, or state prisoner was involved; hence, RLUIPA was inapplicable. The Court never analyzed the differences between RFRA and RLUIPA and never held that RFRA and RLUIPA are distinguished only in that they apply to different categories of governmental actions. In any event, that

several other distinctions must be drawn between RFRA and RLUIPA, especially RLUIPA's land-use provision. First, RFRA cites and incorporates *Sherbert* and *Yoder*, but no provision in RLUIPA mentions either case, nor indeed any case. Second, RFRA restores a test "set forth in prior Federal court rulings," but no provision in RLUIPA invokes any "prior Federal court rulings" as a framework for its test. Third, RFRA must be construed using normal tools of statutory interpretation, including the presumption that Congress intended to incorporate the settled meaning of a term of art, but RLUIPA must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by" its terms. 42 U.S.C. § 2000cc-3(g).

For RLUIPA's land-use provision in particular, the distinctions from the text of RFRA are dramatic: RFRA requires the government to provide a compelling interest to justify substantial burdens on any *person*'s religious exercise, but RLUIPA's land-use provision requires a compelling interest to justify substantial burdens on the religious exercise of any *person, religious assembly, or religious institution*. *See* 42 U.S.C. § 2000cc(a)(1). And RLUIPA's land-use provision contains multiple commands specifically seeking to eliminate "land use regulations" that

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Hobby Lobby stated in the abstract that RLUIPA and RFRA "impose[ ] the same general test" (i.e., that the Government may not "substantially burden" a person's "religious exercise" unless it is "in furtherance of a compelling government interest" and does so by the "least restrictive means") is hardly a full-throated endorsement of the notion that the discrete test for determining when Government action imposes "substantial burden" is the same between the statutes.

substantially burden "[t]he use, building, or conversion of real property" for religious purposes, but RFRA contains no analogous language. *See* 42 U.S.C. § 2000cc(b)(1), (b)(2), (b)(3).

Even accepting that the institutionalized-persons portion of RLUIPA imposes the same standard as RFRA in some ways, *see Holt v. Hobbs*, 574 U.S. 352, 358 (2015), that comparison does not require any change to our interpretation of RFRA. Under RLUIPA's institutionalized persons provision, the Supreme Court has assessed the question whether the government action has created a "substantial burden" by assessing whether the government action coerces the religious adherent to violate or abandon his sincere religious beliefs. *E.g.*, *id.* at 361 ("If petitioner contravenes [the prison grooming] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.").[15] Thus, the fact that the Supreme Court has implied a connection between RFRA and RLUIPA's institutionalized-persons provision serves only to reaffirm the result we reached in *Navajo Nation*.

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[15] The dissent cites *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), for the proposition that a prison official's denial of an inmate's access to the inmate's pastor during the inmate's execution is a substantial burden. The Supreme Court made no such holding in *Ramirez*. The Supreme Court merely noted that there was no dispute on the "substantial burden" prong and moved on with the analysis. The Supreme Court never discussed whether a threat of governmental sanctions might have backed the prison official's decision or whether the denial of affirmative approval for the minister's presence might count as the denial of a vested governmental benefit.

RLUIPA's land-use provision, however, clearly requires a different standard. *See Navajo Nation*, 535 F.3d at 1077. *Sherbert*'s and *Yoder*'s personal coercion test cannot provide the full test for "substantial burden" under RLUIPA's land-use provision because the land-use provision does not protect merely persons, nor does it protect merely the "exercise of religion" as that term is understood in Free Exercise Clause jurisprudence. Instead, the land-use portion of RLUIPA targets a far broader kind of burden: regulations that have any substantial effect on a religious assembly's or institution's use, building, or conversion of real property owned by that religious assembly or institution.

When addressing claims under the land-use provision of RLUIPA, we have thus naturally taken a broader view of the phrase "substantial burden"—though we have honored the presumption of consistent usage by analogizing the burden of the land-use regulations to the burden of personal coercion set forth in *Sherbert* and *Yoder*. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (comparing the burden of the land-use regulation to the laws struck down by the Supreme Court under the Free Exercise Clause as having a "tendency to coerce individuals into acting contrary to their religious beliefs").

The Supreme Court has never held that RFRA and the land-use provision of RLUIPA must be interpreted using the same standard, nor has the Supreme Court ever cited a RLUIPA land-use case as setting the standard for a claim brought under RFRA. Passing comments by the Supreme Court which might suggest some connection between RFRA and the

institutionalized-persons portion of RLUIPA do not mean that the Supreme Court meant to overrule its clear pre-RFRA jurisprudence. Nor do such comments suggest the Supreme Court intended to establish a legal rule that yoked the definition of "substantial burden" under RFRA to the analysis conducted under the textually distinguishable land-use portion of RLUIPA.

Application of normal tools of statutory interpretation to RFRA—the statute actually before us—provides a clear result: the term "substantial burden" is a term of art and is limited to those burdens identified in *Sherbert* and *Yoder*. [16] When the law provides such a clear result under RFRA, it is unnecessary to divine what the Supreme Court might do under RLUIPA.

William of Ockham's razor teaches that when one is faced with two competing ideas, the simplest explanation is generally the best. *See United States v.*

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[16] Judge R. Nelson argues that "substantial burden" is not a term of art because pre-RFRA cases used it "not as [a phrase with a precise] definition" but as a shorthand way for describing a "legal framework" or test. But terms of art often *are* words that describe legal tests and standards. *See, e.g.*, *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, 60–61 (1942) ("[T]he phrase 'fair and equitable' had become a term of art, [and] Congress used it in the sense in which it had been used by the courts in reorganization cases, and that whether a plan *met the test of* fairness and equity long established by judicial decision was . . . a question to be answered . . . by the court as a matter of law."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1300 (9th Cir. 1982) ("[']Substitutability in production,['] while a more technical term of art, is another way of describing the analysis required by the first *Tampa Electric* test.")

Newhoff, 627 F.3d 1163, 1166 (9th Cir. 2010). "Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The dissent's circuitous route through RLUIPA to define a term for which RFRA already provides a clear definition is unnecessary and contrary to these principles of statutory interpretation.

C. The Lead Dissent Understates the Sea Change That Its Proposed Definition of "Substantial Burden" Would Cause.

For the entire history of our nation's Free Exercise jurisprudence, we have focused our analysis on "what the government cannot do to the individual, not . . . what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). Yet the lead dissent would violate this simple principle by holding that RFRA empowers any individual to exact what is in effect a government easement that entitles his access and use of that land, so long as that is what his sincere beliefs require. In so holding, my colleagues purport to overrule the very type of claim that the Supreme Court unambiguously rejected in *Lyng*. *Id.* at 452 (rejecting that the First Amendment's Free Exercise Clause entitled the religious adherent to a "religious servitude" on federal land).[17]

If the dissent's reading of RFRA were accepted, such easements would be granted to sincere religious

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[17] Easements are a subset of servitudes. *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014).

adherents for access to and use of vast expanses of federal land[18]—perhaps even *all* federal land. *See Lyng*, 485 U.S. at 475 (Brennan, J., dissenting) ("Because of their perceptions of and relationship with the natural world, Native Americans consider *all land* sacred." (emphasis added)). Even sensitive federal facilities such as military installations could be encumbered by such easements.

To obtain such an easement of access and use, the only determinative issue would be whether the religious adherent sincerely believes that such access to federal land is important to him for his religious exercise. Binding precedent forbids us from evaluating whether the religious adherent's professed need to

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[18] *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1066 n.7 (9th Cir. 2008) (en banc) ("In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. The district court also found the Navajo and the Hualapai Plaintiffs consider the entire Colorado River to be sacred. New sacred areas are continuously being recognized by the Plaintiffs."). One religious adherent has testified that the "entire state of Washington and Oregon" is "very sacred" to him. Excerpts of Record at 716, *Slockish v. U.S. Dep't of Transp.*, 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (No. 21-35220), ECF No. 18-5. Another has claimed as sacred an area "extending 100 miles to the east and 100 miles to the west of the Colorado River from Spirit Mountain [in Nevada] in the north to the Gulf of California in the south"—some 40,000 square miles. Excerpts of Record at 27, *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 603 F. App'x 651 (9th Cir. 2015) (No. 13-56799), ECF No. 12-3.

access federal land is true to his religion's tenets. *Id.* at 449–50 (majority op.). Equally out of bounds is whether the access to federal land is necessary or central to the religion. *See Hobby Lobby*, 573 U.S. at 696. Were the religious adherent to say that access—at all times of the day and on all days of the year—was necessary for his religion, it would not be "for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

So there is no limiting principle to the dissent's proposal of defining "substantial burden" to include all government actions "prevent[ing] or den[ying] access to sincere religious exercise."[19] The result of each case would turn on the sole issue of the litigant's religious sincerity. And when assessing that sincerity, the district court would not be permitted to ask whether the religious adherent's profession of faith is "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714. In addition, if the religious adherent only recently began to profess his beliefs, that would be generally irrelevant because, after all, it is possible that his beliefs were simply "late in crystallizing." *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (quoting *Ehlert v. United States*, 402 U.S. 99, 103 (1971)); *see also Hobbie*, 480 U.S. at 144 ("The timing of [the plaintiff]'s conversion is immaterial."). With so many traditional indicators of testing sincerity off the table, a district court might be required to grant a religious easement to nearly any religious adherents

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[19] The Supreme Court cautions us not to adopt a test that has "no real limiting principle." *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 n.11 (2020); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021); *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013).

who brought a land-based RFRA claim. It is difficult to conceive of a sincerely held claim that would be rejected. Even our appellate review of the district court's sincerity determination would be limited because we would be required to affirm unless the sincerity determination was wholly "without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

This low bar the dissent would set to obtain such religious easements contrasts sharply with the burden that the government would be required to meet to forestall or extinguish the easement: the compelling interest test. This test requires the government "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest." *City of Boerne*, 521 U.S. at 509. Our relatively brief review of plaintiffs' claims under the dissent's proposed test would be followed by a searching and detailed inquiry of the government's motivations and methods. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). And, of course, it would not be enough for the government merely to assert a broad interest in the security of a particular piece of land: the government must justify the application of its exclusionary policies to each individual religious adherent who seeks access. *See Hobby Lobby*, 573 U.S. at 726. Courts would be required to "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. The government would be forced to face "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 509, just to keep trespassers, albeit

devout trespassers, off its land and out of its installations and buildings.

The dissent's proposed expansion of the definition of "substantial burden" is also not limited to this new easement right. The dissent argues that "substantial burden" is not a term of art, and should be defined as any "government action that 'oppresses' or 'restricts' 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' to a 'considerable amount,'" without any objective criteria or limiting principle as to what constitutes either "substantial" in "substantial burden" or "considerable" in "considerable amount." Where *Sherbert* and *Yoder* provide two clear qualitative burdens that meet the definition of "substantial burden," the dissent would insert more—and argues that *Sherbert*'s and *Yoder*'s qualitative burdens are merely illustrative "examples" of burdens that would meet its objectively standardless, *quantitative* definition of "substantial burden" (i.e., "considerable amount"). No part of the dissent's test would prevent a panel in a future case from recognizing an additional "example," or would prevent a panel from simply turning to the dissent's dictionary definition of "substantial burden" and ignoring the "examples" altogether.

In future cases, we would be asked to determine whether religious exercises are "oppresse[d] or restrict[ed] . . . to a considerable *amount*," and we would thus be forced to conduct a quantitative, rather than qualitative, analysis. In other words, we would have to assess *how much* the government action interferes with the religious practice—i.e., an examination of the *effects* of the government action—rather than *in what way* the government action

interferes with the religious practice—i.e., an examination of the *kind* of government action at issue. This quantitative approach would be inconsistent with Supreme Court precedent, as explained above, but it also would be very difficult for a court to administer.

So long as "substantial burden" is defined by reference to the character of the governmental action, rather than the particular effect it has on the claimant, the test is not difficult to administer: we simply ask whether the government action involves coercion in the form of denying the religious adherent a vested benefit or imposing a penalty on the religious adherent because of his participation in religiously motivated conduct. But for a court to determine whether a religious practice has been "oppresse[d] or restrict[ed] . . . to a considerable amount," the court would be required to assess the importance of the particular religious practice to the religious adherent and to the religious adherent's religion, and assess the extent to which the practice is impaired by the relevant governmental action—inquiries that not only stray far from our expertise but also enter areas into which the Supreme Court has repeatedly told us courts cannot venture.[20] *See Lyng*, 485 U.S. at 449–50 ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability

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[20] A "substantial burden" on economic activity, for example, can be measured in dollars and cents. *See, e.g.*, *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023). But our precedent has yet to recognize a spiritual "currency" or other quantitative way to measure a governmental action's impact on religion.

to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other." (citation omitted)); *id.* at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."); *Hobbie*, 480 U.S. at 144 n.9 (citing *United States v. Ballard*, 322 U.S. 78, 87 (1944)) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (Gorsuch, J.) ("[W]e also lack any license to decide the relative value of a particular exercise to a religion. That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions—but also favoritism for religions found to possess a greater number of 'central' and 'compelled' tenets.").

To convince the reader that its proposed test is "narrow," the dissent attempts to distinguish between the facts of this case and the facts of *Navajo Nation* and *Lyng* on the grounds that the Indians in *Navajo Nation* and *Lyng* suffered only "subjective" burdens, whereas the Indians here will suffer an objective

burden through the loss of access to the land. However, the government actions in both *Navajo Nation* and *Lyng* undoubtedly meet the dissent's proposed test. In both cases, the Government "prevent[ed] [the religious adherents] from engaging in sincere religious exercise." In *Lyng*, the excavation and construction of the road caused "the Indians' spiritual practices [to] become ineffectual." 485 U.S. at 450. In *Navajo Nation*, the use of recycled wastewater caused "the inability to perform" certain religious ceremonies and destroyed "an entire way of life." 479 F.3d at 1039.

The ability to perform a ceremony gutted of all religious meaning cannot be equated to the ability to perform the full religious ceremony. Access to an area stripped of spiritual significance—the mountain in *Navajo Nation*, the land near the road in *Lyng*—is not the same as access to an extant shrine for the religious adherent who wishes to use the land as a shrine.[21] The "sincere religious exercises" in *Navajo Nation* and *Lyng* were not only "prevent[ed] or denie[d]," they were completely destroyed, even if the lands themselves were not destroyed.

In any event, the dissent's discussion of what might count as the "prevent[ion] or deni[al of] access to

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[21] For instance, at the corner of Fillmore and Fell Streets in San Francisco, California, stands a building once known as Sacred Heart Catholic Church. Today, the building has been de-consecrated and converted into a roller-skate discotheque. *See* Amanda Font, *Wanna Try Roller-Skating in San Francisco? Better Head to Church*, KQED (Sept. 22, 2022), https://www.kqed.org/news/11924576/wanna-try-rollerskating-in-san-francisco-better-head-to-church. Can a Catholic register as a parishioner at this roller disco—or expect to observe the Stations of the Cross therein during Holy Week?

sincere religious exercise" is frankly irrelevant in light of the fact that such prevention or denial of access would be merely one "example" of a substantial burden under the dissent's proposed test. The real question under the dissent's proposed test would be whether the governmental action "oppresses or restricts" the religious exercise "to a considerable amount." Under that test, the government actions in *Navajo Nation* and *Lyng* would easily qualify as "substantial burdens"—results that would directly contradict our precedent and the Supreme Court's precedent, respectively.

The dissent, in sum, favors the plaintiffs in this case over the plaintiffs in *Lyng* and *Navajo Nation* simply because the plaintiffs in this case will lose an aspect of their religious practice that one can see and hear, whereas the plaintiffs in *Lyng* and *Navajo Nation* lost an intangible aspect of their religious practices. In short, the dissent would distinguish and prioritize the tangible aspects of religious activity over the intangible. This distinction finds no support in our precedent. *Cf. Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("[T]he Federal Government . . . can[not] pass laws which aid one religion . . . or prefer one religion over another.").

D. Even Were Apache Stronghold's Claim Cognizable Under RFRA, the Land Exchange Act Mandates That the Land Exchange Occur.[22]

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[22] Judge Lee contends that the Government forfeited this argument when it failed to raise it below. However, "in adjudicating a claim or issue pending before us, we have the

Most claims under RFRA challenge a regulatory or discretionary decision of a federal agency. However, the claim in this case seeks to stop a federal action mandated by an Act of Congress. The Land Exchange Act states that the Secretary of Agriculture is "authorized and *directed* to convey" more than two thousand acres of land, including Oak Flat, to Resolution Copper if three main conditions are met. 16 U.S.C. § 539p(c)(1) (emphasis added).

The three conditions are simple: (1) the Secretary must "engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange," and then "consult with Resolution Copper and seek to find mutually acceptable measures to (i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper under this section," 16 U.S.C. § 539p(c)(3); (2) the Secretary must ensure that the land exchanged is of equal value, 16 U.S.C. § 539p(c)(5); and (3) the Secretary must ensure that the land exchange complies with the National Environmental Policy Act of 1969, 16 U.S.C. § 539p(c)(9).

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authority to identify and apply the correct legal standard, whether argued by the parties or not." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). When a statute is invoked by the parties, we can inquire, even *sua sponte*, whether the statute has been expressly or impliedly repealed. *See generally U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993).

Congress knew the adverse effects that the Land Exchange Act would have upon the Indian tribes with respect to the planned excavation of the Oak Flat area. Wendsler Nosie, Sr., Chairman of the San Carlos Apache Tribe and leader of Apache Stronghold, testified before the House Natural Resources Committee, Subcommittee on National Parks, Forests, and Public Lands, in a hearing on the Land Exchange Act. Nosie testified that "[t]he lands to be acquired and mined . . . are sacred and holy places." *Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing on H.R. 3301 before the H. Comm. on Nat. Res., Subcomm. on Nat'l. Parks, Forests, and Pub. Lands.*, 110th Cong. 18 (2007). Nosie explained that Apache Leap is "sacred and consecrated ground for our People" because "seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom." *Id.* at 19. He testified that "Oak Flat and nearby Devils Canyon are also holy, sacred, and consecrated grounds" that should not be transferred. *Id.* at 21–22.

Ultimately, Congress struck a compromise. The Land Exchange Act directed the Forest Service to transfer the Oak Flat parcel to Resolution Copper, 16 U.S.C. § 539p(c)(10), but also required Resolution Copper to surrender all rights it held to mine under Apache Leap, 16 U.S.C. § 539p(g)(3). The Act directs the Forest Service to preserve Apache Leap "for traditional uses of the area by Native American people." 16 U.S.C. § 539p(g)(1), (2)(B).

The question is whether Congress's careful compromise in the Land Exchange Act can be undone by Apache Stronghold's invocation of a prior Act of

Congress—namely, RFRA. The dissent argues that "[i]f Congress meant to exempt the Land Transfer Act from RFRA, Congress could and would have done so explicitly." The dissent therefore argues that "RFRA applies to the Land Transfer Act." But one Congress cannot prohibit a future Congress from using one of the most commonplace tools of lawmaking—the implied repeal. *See Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). And while a statute's anti-implied-repeal provision should be given some interpretive weight, the dissent's proposed test would turn RFRA's anti-implied-repeal provision into an impenetrable fortress—in direct contradiction to multiple Supreme Court cases.

1. *RFRA's Anti-Implied-Repeal Provision*

RFRA states that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). The Land Exchange Act, in turn, is silent on the applicability of RFRA.

Such statutory language purporting to restrict the ability of later Congresses to repeal an act of an earlier Congress by implication cannot bar all implied repeals. *See Great N. Ry. Co.*, 208 U.S. at 465 ("As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.").

In *Dorsey v. United States*, 567 U.S. 260 (2012), for example, the Supreme Court invalidated a statute which purported to authorize criminal prosecutions

under any later-repealed criminal statute that was in force at the time of the crime unless the repealing statute "expressly provide[d]" that such prosecutions would be barred.[23] The Court held:

> statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly *or by implication* as it chooses.

Id. at 274 (emphasis added) (citations omitted). Thus, a statutory provision that requires future Congresses to use express language to exempt an enactment from the earlier statute's terms is not constitutional.

However, that is not to say that the anti-implied-repeal language has no effect whatsoever. In *Dorsey*, the Court said that the anti-implied-repeal provision created "an important background principle of interpretation" and that the provision required courts, before finding an implied repeal in the face of an anti-implied-repeal provision, "to assure themselves that ordinary interpretive considerations point clearly in that direction." *Id.* at 274–75; *see also Marcello v.*

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[23] *See* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.").

Bonds, 349 U.S. 302, 310 (1955) (giving significant weight to an anti-implied-repeal provision). The Supreme Court "has described the necessary indicia of congressional intent by the terms 'necessary implication,' 'clear implication,' and 'fair implication,' phrases it has used interchangeably." *Dorsey*, 567 U.S. at 274. And in two cases, the Supreme Court has given some weight to RFRA's anti-implied-repeal provision. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020); *Hobby Lobby*, 573 U.S. at 719 n.30.[24]

But the dissent's proposed method of interpreting anti-implied-repeal provisions is incompatible with the Supreme Court's method. The Supreme Court has held that one Congress cannot force a future Congress "to employ magical passwords in order to effectuate an exemption" from a statute. *Marcello*, 349 U.S. at 310. Yet the dissent argues that the Land Exchange Act should be required to employ one of two passwords to avoid the reach of RFRA: either an explicit reference to RFRA or "some variation of a 'notwithstanding any other law' provision." The Supreme Court has held that implied repeals must remain available to future Congresses. *See Dorsey*, 567 U.S. at 274; *Great N. Ry. Co.*, 208 U.S. at 465. But the dissent argues that an

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[24] Of course, even without an anti-implied-repeal provision, a party seeking to prove implied repeal carries a weighty burden. "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas*, 296 U.S. at 503).

implied repeal, as traditionally understood, is impossible because the Land Exchange Act must include an "explicit[ ]" exemption to avoid the reach of RFRA. The dissent's approach affords far too much power to RFRA's anti-implied-repeal provision.

2. *Whether the Land Exchange Act Can Be Reconciled with RFRA*

The irreconcilability question must be read in the context of the relief sought by Apache Stronghold. As is relevant to Apache Stronghold's RFRA claim, Apache Stronghold's complaint sought a declaration that *the land exchange* between the United States and Resolution Copper "violate[s] the Religious Freedom Restoration Act." The complaint prayed that the district court "[i]ssue a permanent injunction *prohibiting* [*the land exchange*]." Apache Stronghold's motion for a temporary restraining order and preliminary injunction filed in the district court sought "to preserve the status quo by preventing Defendants from publishing a Final Environmental Impact Statement ('FEIS') on the 'Southeast Arizona Land Exchange and Resolution Copper Mine Project' *and from conveying the parcel(s) of land containing Oak Flat*." Similarly, Apache Stronghold's motion for injunction pending appeal sought an injunction against "*the transfer* and destruction *of Oak Flat*."

The Land Exchange Act grants some authority to the Secretary to "minimize the adverse effects on the affected Indian tribes" and to ensure that the land exchange complies with the National Environmental Policy Act of 1969. 16 U.S.C. § 539p(c)(3)(B)(ii), (c)(9). But the plain text of the Land Exchange Act requires that the land exchange, including the exchange of Oak Flat, *must* occur if the preconditions are met. In fact,

Apache Stronghold's complaint refers to the land exchange as "The Land Exchange *Mandate*" and recognizes that "Section 3003 of the [Land Exchange Act] *mandates* that the [land exchange] *shall be done*."

Apache Stronghold claims that the Government should be enjoined from transferring the land to Resolution Copper pursuant to RFRA. But that is the one thing that the Land Exchange Act clearly requires. If RFRA did provide a legal basis for Apache Stronghold's claim, RFRA would be in "irreconcilable conflict" with the Land Exchange Act. *See Branch*, 538 U.S. at 273.

That is not to say that all potential RFRA claims would be irreconcilable with the Land Exchange Act. Instead of seeking to block the entire land exchange, a plaintiff might, for example, claim that the conditions imposed upon Resolution Copper in the FEIS should be modified to provide greater accommodation for the religious practices of the Indians.

But that is not the claim advanced by Apache Stronghold, and adopted by the dissent, in this case.[25] The claim here is that the land exchange should be stopped altogether. And that relief is directly in conflict with the Land Exchange Act. *See* 16 U.S.C. § 539p(c)(1). Because the RFRA claim advanced by Apache Stronghold is irreconcilable with the terms of the Land Exchange Act, the Land Exchange Act necessarily requires that the claim be rejected. *See Dorsey*, 567 U.S. at 274.

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[25] Indeed, such a claim would likely fail on ripeness grounds because the terms of the final FEIS are not yet known.

CONCLUSION

Pre-RFRA jurisprudence demonstrates that only governmental actions which coerce religious adherents to violate or abandon their religious tenets can constitute "substantial burdens" on the free exercise of religion. *See Hobbie*, 480 U.S. at 144; *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249; *Schempp*, 374 U.S. at 223; *Lyng*, 485 U.S. at 450; *Bowen*, 476 U.S. at 703. For coercion to affect a religious adherent personally, the coercion must involve either the denial of a vested benefit to the religious adherent or the imposition of a penalty on the religious adherent because of the religious adherent's participation in religiously motivated conduct. *See Hobbie*, 480 U.S. at 144; *Lyng*, 485 U.S. at 449; *Bowen*, 476 U.S. at 703; *Thomas*, 450 U.S. at 717–18; *Jimmy Swaggart*, 493 U.S. at 391–92.

RFRA incorporated this settled definition of the term, and RFRA made this incorporation explicit when it stated that its purpose was to "restore" the free exercise of religion test "as set forth in prior federal court rulings," and when it directly cited *Sherbert* and *Yoder*. The text of the statute and pre-RFRA jurisprudence command that the definition of "substantial burden" be limited to those burdens recognized in *Sherbert* and *Yoder*.

Our en banc decision in *Navajo Nation* correctly interpreted RFRA, and our limited definition of "substantial burden" has served as a workable test for fifteen years.[26]

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[26] Principles of *stare decisis* caution us not to overrule our precedent lightly. *See United States v. Heredia*, 483 F.3d 913, 918

The proposed copper mine would not force the Apache to choose between violating or abandoning their sincere religious beliefs and receiving a governmental penalty or losing a governmental benefit. Without any such coercion, there is no substantial burden. Thus, the Apache's claim under RFRA must fail.

Moreover, even were the Apache's claim cognizable under RFRA, the language of the Land Exchange Act is clearly irreconcilable with the Apache's claim for relief under RFRA. In such cases of direct conflict, the later statute—the Land Exchange Act—must be given effect over the earlier statute—RFRA.

For these reasons, in addition to those expressed in Judge Collins's majority opinion, I agree that the judgment of the district court must be affirmed, and I dissent from the per curium's purported overruling of *Navajo Nation*.

(9th Cir. 2007) (en banc). These principles have a heightened effect in matters of statutory interpretation because the losing parties in such cases can seek relief in the halls of Congress. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

R. NELSON, Circuit Judge, concurring:

In my view, en banc review was warranted to correct our faulty legal test (not the outcome) in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Generally, we adopt the same definition of a term—like "substantial burden" here—when that term is used in similar statutes. For that reason, RFRA and RLUIPA apply the same legal definition of "substantial burden." Since *Navajo Nation* was decided, it has become clear that "substantial burden" means more in RLUIPA than the narrow definition we gave it under RFRA. Today, a majority of the panel rejects the narrow construction of "substantial burden" in *Navajo Nation*. *See* Per Curiam at 10–11; Murguia Dissent at 180, 202 n.8. Six judges adopt a new test to define "substantial burden" going forward for both RFRA and RLUIPA. *See* Per Curiam at 10–11. A government act imposes a "substantial burden" on religious exercise if it (1) "requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief," (2) "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief," or (3) "places considerable pressure on the plaintiff to violate a sincerely held religious belief." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *see also Bryant v. Gomez,* 46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (citing *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987)) (holding that the "substantial burden" test is met when a religious adherent proves that a government action "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th

Cir. 2000); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996); *see also* Per Curiam at 10–11.

Even Judge Collins's majority, which I join, adopts a new test without relying on *Navajo Nation*. As explained more fully in section V, the strained interpretation of "substantial burden" announced in *Navajo Nation* is not sustainable. In the last 15 years, the Supreme Court and virtually all the lower courts have recognized that "substantial burden" holds the same definitional meaning in RFRA and RLUIPA. While the terms may apply in different contexts that arise under the statutes, the definitions are the same.

But the question remains—can RFRA be used to protect a religious practice exercised on government property? This case raises the prevent prong of RFRA's "substantial burden" definition announced by our court today. As Chief Judge Murguia's dissent notes, the ordinary meaning of "substantial burden" suggests that in selling the land, the government is preventing the Apache's participation by restricting their access to the land. *See* Murguia Dissent at 195–96. That much is true. But that conclusion conflicts with the Supreme Court's direction in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Under *Lyng*, a "substantial burden" analysis does not apply to the internal affairs of the government. I therefore reach a different conclusion from the same beginning premise as the dissenters.

Preventing access to religious exercise generally constitutes a substantial burden on religion. But the parameters of "substantial burden" are not unconstrained. We cannot ignore RFRA's statutory context. The Supreme Court has distinguished the boundaries of cognizable burdens under the Free

Exercise Clause. Through decades of case law, the Court formulated a test that examined whether there was a cognizable, substantial burden on religious exercise justified by a compelling government interest. In RFRA, Congress then applied the Court's terminology, essentially codifying both the test and those parameters. Neither the Court nor Congress has defined "substantial burden." But in *Lyng*, the Court held that the government's use and alienation of its own land is not a substantial burden. And the Court repeated that principle even more broadly: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699 (1986)) (internal citation omitted).

This case thus turns on whether Congress's codification of "substantial burden" in RFRA overruled *Lyng*'s application of substantial burden under the First Amendment. I am reluctant to conclude that a Supreme Court opinion is implicitly reversed by Congress when Congress specifically adopts a term used in the Court's prior opinions. I therefore conclude that Congress through RFRA did not reverse the Supreme Court's holding in *Lyng*. As such, I join Judge Collins's majority to affirm the district court's denial of injunctive relief.

I

The National Defense Authorization Act for Fiscal Year 2015 (NDAA) includes a section known as the Southeast Arizona Land Exchange and Conservation Act (Land Exchange). The Land Exchange requires the conveyance of federal land, including a parcel known as Oak Flat, to Resolution Copper, a foreign mining

company. *See* 16 U.S.C. § 539p. Resolution Copper intends to construct a large copper mine on Oak Flat. Once the transfer is complete, Oak Flat, as it is now known, by all accounts will eventually be destroyed by the mining activity. The planned mining technique will leave a two-mile-wide crater hundreds of feet deep and will affect about eleven square miles. The mining will thus permanently alter Oak Flat beyond recognition, destroying the Apache's "cultural landscapes" and barring all access to that land for religious or other purposes. Additionally, spiritually significant objects, like Emory Oak, that play a key role in Apache ceremonies will be destroyed.

Congress acknowledged the impact that the Land Exchange would have on the Apache's religious practice. It included several provisions in the NDAA to balance this concern. The Land Exchange requires the Secretary to engage in "government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange." *Id*. § 539p(c)(3)(A). Additionally, after consulting the tribes, the Secretary shall consult Resolution Cooper to "address the concerns of the affected Indian tribes" and "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." *Id.* § 539p(c)(3)(B).

Noticeably, despite the undisputedly significant impact that would befall Apache religious practice, Congress did not exempt the Land Exchange from RFRA. *See* Murguia Dissent § II.H. Perhaps Congress declined to do so because it believed that under preexisting Supreme Court precedent, including *Lyng*, no substantial burden was implicated and RFRA did

not apply. This case thus requires us to answer whether RFRA imposes additional strictures on the land transfer.

II

The Constitution provides Congress with plenary power over Indian affairs. *See United States v. Lara*, 541 U.S. 193, 200–01 (2004); U.S. Const. art. I, § 8. Congress addressed religious liberty for Native Americans in the American Indian Religious Freedom Act of 1978 (AIRFA), declaring that it

> shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996.

In accordance with AIFRA, President Clinton signed Executive Order No. 13007, 61 Fed. Reg. 26,771 (1996). Like the Land Exchange, it requires agencies to, as practicable, "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." *Id.* § 1. But that same Order meant "only to improve the internal management of the executive branch" and did not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable

at law or equity by any party against the United States, its agencies, officers, or any person." *Id.* § 4.

AIFRA does not confer "so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights" and is merely a policy statement. *Lyng*, 485 U.S. at 455. This paradox fuels the criticism that "despite its assertion of sweeping plenary power over Indian affairs, the federal government has done little of consequence to protect the ability of tribes to access and preserve sacred sites." Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1297 (2021).

We would be daft to ignore that, historically, the relationship between the American government and native tribes has not been a pristine example of intergovernmental relations. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("[I]t's equally clear that Congress has since broken more than a few of its promises to the Tribe[s]."). Although this reality is regrettable, we are bound to enforce only those statutory rights prescribed by Congress.

Apache Stronghold asserts that Congress has protected native access to government land for religious practices in RFRA, and that the statute prevents the government from transferring Oak Flat to Resolution Copper. I do not agree. We apply the law as Congress wrote it and as the Supreme Court has interpreted it. Examination of the Supreme Court's pre-RFRA jurisprudence illuminates why RFRA does not provide Apache Stronghold the right it seeks.

III

A

RFRA does not appear in our legal system from the ether. It is a legislative response to the culmination of decades of caselaw interpreting the Free Exercise Clause. So I begin with the Free Exercise Clause.

Religious liberty and the concept of free exercise are grounded in the bedrock of our founding and the structure of our system of government. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). At the founding, various state constitutions recognized a right to free exercise of religious beliefs. Even before ratification of the First Amendment in 1791, many state constitutions reflected the sentiment that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." N.C. Const. art. XIX (Dec. 18, 1776), *reprinted in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2787, 2788 (Francis Newton Thorpe ed., 1909); *see also* Nathan S. Chapman, *Disentangling Conscience and Religion*, Ill. L. Rev. 1457, 1466 n.44 (2013) (listing state constitutional provisions). In Virginia, for instance, Thomas Jefferson drafted a 1779 bill establishing religious freedom that no one "shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion . . . ." *A*

Bill for Establishing Religious Freedom (June 12, 1779), *reprinted in* 5 Founders' Constitution.

Virginia's view was echoed on the national level, too. Of the newly established American government, George Washington said: "All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." *Letter to The Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), The Papers of George Washington, Presidential Series, vol. 6, 1 July 1790–30 Nov. 1790, ed. Mark A. Mastromarino. Charlottesville: University Press of Virginia, 1996, pp. 284–86. Washington echoed this same sentiment to other religious groups: "[t]he liberty enjoyed by the People of these States, of worshipping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights." *From George Washington to the Society of Quakers* (Oct. 13, 1789), The Papers of George Washington, Presidential Series, vol. 4, 8 Sept. 1789–15 Jan. 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 265–69. Washington conveyed this same sentiment to various religious groups, including Roman Catholics, Presbyterians, the Moravian Society for Gospel, and others. *See George Washington to Religious Organizations*, https://www.mountvernon.org/george-washington/religion/george-washington-to-religious-organizations/. From the founding, free exercise of religion was intended to apply to all faiths. Native American religious practice is no exception. Their religious practice is honored and respected the

same as any other religious practice or belief.[1] But their right to practice religion, like all religious practice protected by the Free Exercise Clause and our legal system, must track the law.

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[1] The criticism that accommodating the Native American religious practices here "would inevitably require the government to discriminate between competing religious claimants," VanDyke Concurrence at 162, is misguided. I disagree with my dissenting colleagues' conclusion in this case because Apache Stronghold's RFRA claim does not raise a cognizable substantial burden under *Lyng*. The dissenters are not wrong, however, because under their view "only *some* religions would benefit from the precedent created by such a decision." *Id.* Almost any recognition of a substantial burden on religious practice would be subject to the same criticism. Our court has issued opinions more hostile to religion than any other court in the country. *See, e.g.*, *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 76 F.4th 962, 968 (9th Cir. 2023); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021), *reversed* 597 U.S. 507 (2022); *Tandom v. Newsom*, 992 F.3d 916 (9th Cir. 2021), *disapproved* 593 U.S. 61 (2021); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. Appx. 460 (9th Cir. 2019), *reversed* 140 S. Ct. 2049 (2020); *Freedom from Religion Found., Inc. v. Chino Valley Uni. Sch. Dist. Bd. of Educ.*, 896 F.3d 1132 (9th Cir. 2018). But if courts were to deny religious claims based on how the decision may benefit one religion over another, we would pit religious interests against each other and undermine religious liberty far more than any position previously taken by our court. Would we deny a Muslim from growing a reasonable beard in prison because other religious prisoners would not get the same benefit? Or would we deny allowing a church to build a 100-foot spire because other religions do not have a similar religious belief? Or would we deny a religious school a voucher because some other religions do not operate schools? Such considerations by the courts would be grossly inconsistent with religious liberty. *Cf.* VanDyke Concurrence II.B.iii & II.C.

Even the Founders recognized that religious exercise in a pluralistic society was bound to conflict with government structure. From the beginning, the Founders attempted to reconcile these competing views by distinguishing the freedom to believe from the freedom to act. As to religious freedom, Jefferson said that "the legislative powers of government reach actions only, and not opinions." *The Works*, vol. 8 (Correspondence 1793-1798). G. P. Putnam's Sons, 1905. Jefferson was not alone. Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice of the United States, wrote: "But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion." Connecticut Courant, Dec. 17, 1787, *reprinted in* 1 Stokes, Church and State in the United States, 535. The question is, what are those cases?

B

The First Amendment right to free exercise of religion is not absolute. The Supreme Court has long formulated a legal framework balancing the interests of religious free exercise against the competing demands of government. For example, the government cannot restrict an individual's religious opinion but may restrict individual religious action when the government has a sufficient interest. *See Reynolds v. United States*, 98 U.S. 145, 166 (1878) (While government laws "cannot interfere with mere religious belief and opinions, they may with practices.").

The right to belief is distinct from the right to act and the latter is not free from government restrictions. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (citing *Cantwell v. State of Connecticut*, 310 U.S. 296,

303–04, 306 (1940)) ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."). Abraham Braunfeld, an Orthodox Jew, owned a retail store, but state law prohibited him from opening on Sunday, and his faith, from working on Saturday. *See id.* at 601. He challenged the law as a violation of the religious liberty clauses, claiming economic concerns required his store to be open six days a week. *See id.* at 602.

Braunfeld reflects the early development of the "substantial burden/compelling interest" test that would later be expanded by the Supreme Court and codified by Congress in RFRA. The Court noted: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* at 606.

The Supreme Court later clarified the government interest analysis. In *Sherbert v. Verner*, a Seventh-day Adventist was terminated from her job and rejected alternative employment because she would not work on Saturday, her Sabbath. 374 U.S. 398, 399 (1963). South Carolina law barred her unemployment benefits because she declined an alternate suitable employment offer. *See id.* at 401.

The Court held that South Carolina's law was unconstitutional because the burden on Sherbert's exercise acted as a fine imposed against her worship and was not justified by a compelling state interest. *See id.* at 403 ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a

‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))). The Court first examined whether Sherbert’s claim fell within the class of cognizable Free Exercise claims. *See id.* at 402–03. Because it was cognizable, the Court then examined whether Sherbert suffered a burden to her religious practice and whether a compelling state interest justified that “substantial infringement on [Sherbert’s] First Amendment right.” *Id.* at 403–06.

A decade later, the Court reiterated that in some cases the government can regulate “religiously grounded conduct.” *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972). The Court did not use the phrase “substantial burden” but invoked the same theory: Wisconsin could not require religious parents to send their children to school until age 16 because “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” *Id.* at 215, 220.

The Court returned to the idea of a “substantial burden” another decade later. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). It held that, while compulsion regarding religious exercise could be incidental, “the infringement upon free exercise is nonetheless substantial.” *Id.* at 718. Because Thomas quit his job due to his religious convictions against producing military weapons, the denial of unemployment benefits was an unconstitutional burden. *See id.* But the Court also stated that “[t]he mere fact that the petitioner’s religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The

state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* (citing *Yoder*, 406 U.S. at 215). The Court's citation to *Yoder* confirms that the substantial burden/compelling interest framework was consistent even in cases that did not mention it by name.

The Court continued to make clear that its balancing framework did not guarantee relief for all religious burdens, even if those incognizable burdens were substantial in the ordinary sense. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry."). The Court held that "[n]ot all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* (internal citations omitted). The Court did not analyze how substantial the burden of the tax law was on Amish beliefs when it analyzed whether the burden was cognizable. *See id.* at 257. The Court instead couched its holding on the government's "very high" interest in managing the social security system. *Id.* at 259. And the government's compelling interest in preserving the social security program outweighed the burden on religious exercise. *See id.* at 261.

The Court followed up in *Bowen v. Roy*, in which Native American parents challenged the constitutionality of requiring a social security number for their child to receive federal food stamps and related benefits. 476 U.S. 693 (1986). The parents believed that a social security number would "rob the

spirit." *Id.* at 696. In rejecting the religious challenge, the Court echoed that "[n]ot all burdens on religion are unconstitutional." *Id.* at 702.

The Court again noted that the First Amendment does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699 (emphasis omitted). Instead, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* The Court in *Bowen* did not analyze whether there was a "substantial burden" on any religious practice; it determined that the claim itself was not cognizable. *Id.* at 700 ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.").

Two years later, the Court decided *Lyng*, the most factually relevant case here. In *Lyng*, Native American tribes challenged the construction of a road connecting two towns. 485 U.S. at 442–43. The proposed six-mile paved road would affect sacred area used for religious purposes and rituals by Yurok, Karok, and Tolowa Indians. *See id.* A study commissioned by the U.S. Forest Service concluded that constructing the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*

The Court declined to interpret the Free Exercise Clause as permitting a significant burden on religious practice to weigh as equally, or even overrule, the

government's use of its land. *See id.* at 452. Indeed, it echoed that the Constitution "does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Id.* at 452.

Lyng's analytical framework was not new. The Court started by assessing whether the harms alleged were cognizable under the First Amendment, holding that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land." *Id.* at 452–53.

And the Court acknowledged that the burden on religion was substantial because "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." *Id.* at 451. No doubt a "devastating" impact that would foreclose religious practice is substantial in the ordinary sense. *See* Substantial, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Of real worth and importance; of considerable value; valuable."). But, like in several prior cases, the Court determined that even the potential foreclosure of the religious practice did not render the tribes' religious claim cognizable under the First Amendment. *See Lyng*, 485 U.S. at 451–53. *Lyng* held that the Free Exercise Clause does not encompass claims relating to government management of its land. *See id.* And the Court stated *Lyng*'s holding even more broadly: The "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of

particular citizens." *Id.* at 448 (citing *Bowen*, 476 U.S. at 693) (internal citation omitted).

Cases following *Lyng* but pre-*Smith* invoked the Court's preexisting framework, but notably use the phrase "substantial burden." This represents no new test but articulates the test the Court had formulated all along: "Our cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). Within this framework, the Court separated cognizable substantial burdens from the incognizable. In so doing, it was not applying a uniform or literal dictionary construction of "substantial." It was defining the applicable constitutional framework.

In the pre-*Smith* cases, the Supreme Court used different variations to articulate the "substantial burden" standard. *See Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty" with "an overriding governmental interest."); *Thomas*, 450 U.S. at 717–18 ("[T]he infringement . . . is nonetheless substantial."); *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 406 (assessing whether a compelling state interest justified a "substantial infringement of appellant's First Amendment right"). But there is no indication

these were different tests; they are consistent applications of the same legal standard over several decades.

Employment Division v. Smith, 494 U.S. 872 (1990), is no exception. The Court again made clear that the Free Exercise Clause recognizes only certain cognizable substantial burdens. And "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* at 883 (citing *Sherbert*, 374 U.S. at 402–03; *Hernandez*, 490 U.S. at 699). Although Justice Scalia's majority opinion held that the *Sherbert* test does not apply to neutral, generally appliable laws, it did not overrule *Lyng*. *Smith*, 494 U.S. at 883; *see also* Collins Maj. at 45–46. Therefore, *Lyng* is within the very pre-*Smith* framework reinvigorated by RFRA.

IV

RFRA was a direct rejection of *Smith*'s holding that all generally applicable laws that incidentally burden religious practice present no First Amendment claim. *See Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015). RFRA codified the compelling interest test as set forth by *Yoder* and *Sherbert*. *See id.* As discussed above, under RFRA, a government's "substantial burden" on the exercise of religious practice must be justified by a compelling interest narrowly tailored to accomplish that interest. 42 U.S.C. § 2000bb-1(b). RFRA's text reflects the Supreme Court's pre-*Smith* jurisprudence: "[G]overnments should not substantially burden religious exercise without compelling justification," and "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and

competing prior governmental interests." *Id.* § 2000bb-(a)(3), (5). Additionally, RFRA's purpose was "to restore the compelling interest test." *Id.* § (b)(1). RFRA expressly draws this restored test from the Court's free exercise caselaw, discussed above.

Like the several cases to predate it, RFRA does not define "substantial burden," except "as set forth in prior Federal court rulings." *Id.* § (a)(5). But RFRA's religious protections are plainly robust. RFRA applies to all federal law, statutory or otherwise, whether adopted before or after RFRA's enactment. *Id.* § 2000bb-3(a).

Shortly after RFRA was passed, the Court held that it only applied to the Federal Government. *See City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Congress then doubled down on its codified protections for religious exercise. *See* The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq. RLUIPA amended RFRA's definition of free exercise, both broadening it to include the use of real property for religious purposes and ensuring that RFRA and RLUIPA share the same definition. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014). RLUIPA echoes the same command as RFRA that no government shall impose a "substantial burden" on religious exercise unless the government demonstrates that such an imposition "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[2] *Id.* § 2000cc(a)(1).

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[2] Chief Judge Murguia contends that RLUIPA's amendment to RFRA's definition of "substantial burden" signals that *Lyng*

As the court today holds, RFRA and RLUIPA apply the same test—that is clear from the text of both statutes and from the Supreme Court's discussion of them.[3] *See* Per Curiam at 11; Murguia Dissent at 202 n.8. RFRA and RLUIPA are "sister statute[s]" enacted "in order to provide very broad protection for religious liberty," and RLUIPA protects religious accommodations "pursuant to the same standard as set forth in RFRA." *Holt*, 574 U.S. at 356, 358 (internal citations omitted). Although I agree with Chief Judge Murguia that RFRA and RLUIPA are interpreted uniformly, I cannot join her in assigning "substantial burden" its dictionary definition meaning. *See* Murguia Dissent at 195–96. "[W]e do not follow statutory canons of construction with their focus on 'textual precision' when interpreting judicial opinions." *Upper Skagit Indian Tribe v. Sauk-Suiattle*

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does not apply to this case. *See* Murguia Dissent at 200–01. Even though the Supreme Court has noted that RLUIPA removed mention of the First Amendment and the Court has questioned "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," *Hobby Lobby*, 573 U.S. at 714, this is not the same as finding pre-*Smith* constructions of "substantial burden" inapplicable to its meaning. *See* Murguia Dissent at 200–01. While pre-*Smith* cases do not define "substantial burden," this does not foreclose a holding that certain categories of cases do not apply to the "substantial burden" analysis.

[3] The Supreme Court in *Hobby Lobby* also disavowed differing constructions of another phrase used in both statutes. "[T]he phrase 'exercise of religion,' as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means 'religious exercis[e] as defined in [RLUIPA].' . . . It necessarily follows that the 'exercise of religion' under RFRA must be given the same broad meaning that applies under RLUIPA." 573 U.S. at 695 at n.5.

Indian Tribe, 66 F.4th 766, 770 (9th Cir. 2023) (quoting *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000)); *see also Parker v. Cnty. of Riverside*, 78 F.4th 1109 (9th Cir. 2023) (R. Nelson, J., concurring). Although "substantial burden" is in RFRA, Congress adopted "substantial burden" in RFRA from "prior Federal Court rulings," 42 U.S.C. § 2000bb-(a)(5). Thus, we do not use the ordinary meaning of "substantial burden," but the context given in those prior judicial opinions.

Interpreting "substantial burden" in RFRA and RLUIPA consistently also follows rules of construction. Our notion of "*in pari materia*," stemming from the related-statutes canon states that statutes concerning the same topic are to be interpreted together, as though they were one law. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). To conclude otherwise would depart from the presumption of consistent usage—which has special force where, as here, there is a recognized "connection" between "the cited statute" and "the statute under consideration." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 172–73. Because RFRA and RLUIPA both restrict governments' ability to impose "substantial burdens" on religion, there is no reason to define the same term differently. *See id.*

Although RFRA and RLUIPA share the same definition, neither defines "substantial burden." And the need to discern that definition is central to this appeal.

V

Before *Navajo Nation*, our court consistently invoked pre-*Smith* Free Exercise Clause cases and held that a "substantial burden" under RFRA includes preventing an individual from engaging in religious practice. *See, e.g.*, *Goehring*, 94 F.3d at 1299 (quoting *Graham*, 822 F.2d at 850–51) ("substantial burden" test met when government "prevent[ed] him or her from engaging in conduct or having a religious experience which the faith mandates"); *Bryant*, 46 F.3d at 949 (citing *Graham*, 822 F.2d. at 850–51); *see also Worldwide Church of God*, 227 F.3d at 1121; *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996).

We then held that a substantial burden under RFRA "is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1070 (emphasis added). A majority of the panel reverses this narrow holding of *Navajo Nation* today—specifically the limitation to "only" the specific circumstances of *Sherbert* and *Yoder*. *See* Per Curiam at 11; Murguia Dissent at 202 n.8. Not only has the Supreme Court foreclosed the definition applied in *Navajo Nation*, but almost every circuit has declined to adopt such a narrow construction of "substantial burden." "Substantial burden" is not limited to the burdens that were at issue in *Sherbert* and *Yoder*. *See* Per Curiam at 11; Murguia Dissent at 202. While I conclude that *Navajo Nation* was wrong for some overlapping and differing reasons than Chief Judge Murguia in her dissent, a majority of the panel

rejects that test, thus controlling this question in future cases in this court.

A

The Supreme Court disavowed the narrow definition applied by the majority in *Navajo Nation* and asserted by Judge Bea here. *See* Bea Dissent at 87–88. The Supreme Court said: "Even if RFRA simply restored the status quo ante, there is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

The Supreme Court, however, has left lower courts to tackle the underlying definitional question; it has never defined a "substantial burden" in post-*Smith* cases, either. In *Burwell*, the Court had "little trouble concluding" that the contraceptive mandate, which permitted millions of dollars in fines, constituted a substantial burden on the exercise of petitioner's religious beliefs. *Id.* at 719–20, 726. And in *Holt*, the Court found that a prison grooming policy constituted a substantial burden because petitioner was required to shave his beard in serious violation of his religious beliefs or face discipline. *See* 574 U.S. at 361–62.

Here, both *Burwell* and *Holt* involved instances of coercion akin to *Yoder*. *See* Bea Dissent at 82–83. While true, the Court did not limit its definition of substantial burden to *Yoder* or to any additional pre-*Smith* cases. *Burwell*, 573 U.S. at 706 n.18.

Most of our sister circuits have heeded the Supreme Court's words. Many have analyzed "substantial burden" in the presence of coercion like in *Sherbert* and *Yoder*. Still, none have expressly limited the definition of substantial burden only to that universe.

Contra Bea Dissent at 73 n.8. And aside from whether "substantial burden" under RFRA is the same as under RLUIPA, many of our sister circuits have rejected the notion that a substantial burden must fall only under *Sherbert* or *Yoder*, and no other scenario.

To begin with, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have treated RFRA and RLUIPA as analogous statutes and define "substantial burden" the same.[4] This underscores that RFRA and RLUIPA share the same definition of

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[4] *See, e.g.*, *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) (citing *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007)) ("although *Klem* examined the definition of 'substantial burden' in the context of RLUIPA, the two statutes [RFRA and RLUIPA] are analogous for purposes of the substantial burden test"); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350 (5th Cir. 2022) (citing *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), a RLUIPA case, to define "substantial burden" in a RFRA case); *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 588, (6th Cir. 2018) (citing *Haight v. Thompson*, 763 F.3d 554, 565–66 (6th Cir. 2018), a RLUIPA case, to define "substantial burden" in a RFRA case); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) (citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a RLUIPA case, to define "substantial burden" in a RFRA case); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682 (describing RLUIPA as "a statute that adopts RFRA's 'substantial burden' standard"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237 (11th Cir. 2004) ("RLUIPA revives RFRA's substantial burden test"); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) ("several factors cause us to conclude that Congress intended that the language of the act [RLUIPA] is to be applied just as it was under RFRA"). None of these cases reference *Sherbert* or *Yoder*, let alone limit the definition of "substantial burden" to them.

"substantial burden" and that *Navajo Nation* should be overruled on that issue.

It is not correct, *see* Bea Dissent at 73, that the majority of circuits have followed *Navajo Nation* and these circuits limit "substantial burden" to *Sherbert* and *Yoder*. Without question, all courts apply the coercion and benefit tests identified in *Navajo Nation*. But no other court expressly limits RFRA to only those scenarios. The D.C. Circuit, for example, held that a substantial burden exists when the government leverages

> "substantial pressure on an adherent to modify his behavior and to violate his beliefs," as in *Sherbert*, where the denial of unemployment benefits to a Sabbatarian who could not find suitable non-Saturday employment forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (first quoting *Thomas*, 450 U.S. at 718; and *Sherbert*, 374 U.S. at 404). The First Circuit applied a similar definition and cited *Navajo Nation* favorably. *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020) ("[C]ase law counsels that a substantial burden on one's exercise of religion exists '[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate

his beliefs.'") (citing *Navajo Nation*, 535 F.3d at 1069–70). And while the Second Circuit recognizes *Sherbert* and *Yoder* as examples of substantial burden, it does not limit the definition to only those cases. *See Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

Indeed, several other circuits adopt a test inconsistent with *Navajo Nation* but consistent with our approach today. The Eighth Circuit, for example, has held that a "substantial burden"

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunity to engage in those activities that are fundamental to a person's religion.

United States v. Ali, 682 F.3d 705, 709–10 (8th Cir. 2012) (citing *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)). There is no way to square the Eighth Circuit's definition of "substantial burden" with *Navajo Nation*.

The Seventh Circuit has also held that RFRA and RLUIPA adopt the same meaning of "substantial burden": "[A] law, regulation, or other governmental command substantially burdens religious exercise if it 'bears direct, primary, and fundamental responsibility for rendering a religious exercise . . . effectively impracticable.'" *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013). The Seventh Circuit definition of "substantial burden" is more expansive than just *Sherbert* and *Yoder*.

The Tenth Circuit has similarly held that a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *Yellowbear*, 741 F.3d at 55. This is plainly contrary to our prior holding in *Navajo Nation*. And it is the legal test the majority adopts today to govern future RFRA cases.

A survey of the caselaw from our sister circuits is clear. Our definition of substantial burden as articulated in *Navajo Nation* has not been adopted by any court since it was announced 15 years ago. "Substantial burden" is not limited only to coercion or denial of a government benefit as articulated under *Sherbert* and *Yoder*. The narrow interpretation of "substantial burden" from *Navajo Nation* misses a crucial nuance: what satisfies a condition does not automatically set its parameters in stone. The Supreme Court's opinions in *Holt* and *Burwell*, and the holdings by virtually all other circuits, supports our holding today. *Navajo Nation*'s express limitation on the RFRA definition of "substantial burden" is properly overruled and no longer good law.

B

The majority's holding overruling *Navajo Nation*'s legal test of "substantial burden" is a fully binding holding of the court. Judge Bea claims that the first paragraph of the per curiam opinion is dicta and not

well-reasoned. *See* Bea Dissent at 54 n.1. He is wrong on both counts.

First, the holding is not dicta. To the contrary, when we "confront[] an issue germane to the eventual resolution of the case, and resolve[] it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004)). Judge Bea quotes that language (Bea Dissent at 54 n.1), but conveniently omits the relevant phrase: "regardless of whether doing so is necessary in some strict logical sense." He does not get to dictate what reasoning is necessary to the ultimate conclusion in the case; nor does that matter under *McAdory*. I voted to take this case en banc to correct the wrong legal test of "substantial burden" in *Navajo Nation*. The issue was central to the parties' arguments and fully briefed before the district court, the three-judge panel, and the en banc panel.

Judge Bea would resolve this case on narrower grounds. But had a majority of the panel been willing to uphold the legal test for "substantial burden" in *Navajo Nation*, this case could have been resolved on those narrower grounds. That position, however, failed to garner a majority; it failed to garner even a plurality. And rejecting the prior *Navajo Nation* legal test was important to the legal analysis of a majority of the judges on the panel in deciding this case. Indeed, without a majority of the court rejecting *Navajo Nation*'s legal test, this case could have been resolved simply by applying *Navajo Nation* as the panel opinion did, rather than on the narrower basis adopted in

Judge Collins's majority opinion. To be clear, Judge Collins's opinion would not have garnered a majority vote of the panel had *Navajo Nation* not been overruled. So it was important to address that question.

Moreover, defining "substantial burden" in a case that asks precisely whether the government imposed a substantial burden can hardly be viewed as so tangential to the case to be dicta in any meaningful sense. Nor can a majority's rejection of a primary argument raised by the parties before resolving the case on other grounds be considered dicta. It is clearly "germane" under our precedent. We do that every day in our opinions. Judge Bea's expansive view of dicta would have far-reaching consequences for potentially hundreds of our opinions if future panels were allowed to parse what issues were germane to support a particular result–and reject all other reasoning as dicta.

Second, the holding is well reasoned. I explain why *Navajo Nation* applied the wrong legal definition of "substantial burden." *See supra* § V.A. And Chief Judge Murguia explains why *Navajo Nation* was wrong, joined by four other judges. *See* Murguia Dissent § II.A-C. True, some of the reasoning differs. But much of it overlaps. For example, I agree with Chief Judge Murguia's reasoning that RFRA and RLUIPA both apply the same legal test. *See* Murguia Dissent § II.A (192–94); *see also id.* at 204 (quoting *Holt*, 574 U.S. at 356–57, and citing *Gonzales v. O Centro Espírita Beneficente Uniaõ do Vegetal*, 546 U.S. 418, 436 (2006); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019)). I also agree with her reasoning that *Navajo Nation* adopted a narrow

reading of ‘substantial burden.’ *See id.* at 201–02. And my analysis that no other circuit has adopted the “substantial burden” test in *Navajo Nation* largely tracks with her similar reasoning. *See id.* § II.C (204–05).

Judge Bea’s contention that the first paragraph of the per curiam opinion is not well reasoned ignores the dozens of pages of reasoning provided in my concurrence and Chief Judge Murguia’s opinion. “Only ‘statements made in passing, without analysis, are not binding precedent.’” *City of Los Angeles v. Barr*, 941 F.3d 931, 943 n.15 (9th Cir. 2019) (quoting *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007)). The first paragraph of the per curiam opinion was neither made in passing nor without analysis. If anything, the holdings in the first paragraph of the per curiam opinion are “too well reasoned.” No reasonable reader (though perhaps aided by a strong dose of caffeine) can walk away after reading the various opinions without a plain understanding of how forcefully a majority of this panel believes that *Navajo Nation*’s legal definition of “substantial burden” was wrongly decided and must be overruled to resolve this case; and the reasoning behind that conclusion. Judge Bea is free to dissent from that view. But he cannot bind future panels. No future panel of this court (except a future en banc panel) may adopt Judge Bea’s dissenting view.

VI

Even in overruling this aspect of *Navajo Nation*, our inquiry is not complete. We still must decide this case. We unanimously hold that Apache Stronghold has no First Amendment claim under *Lyng*. *See* Collins Maj. at 35; Murguia Dissent at 216–24. Apache

Stronghold's claim under RFRA, however, is much closer. The question remains—what constitutes a substantial burden and has that standard been met here? I agree with Judge Collins's majority opinion that the burden here does not satisfy the "substantial burden" applied under RFRA.

Two main theories emerge from the majority and concurrences. The majority holds that because Congress "copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." Collins Maj. at 46. I agree, but for additional reasons. I disagree, however, with the separate theory that "substantial burden" is a term of art with a specific definition.[5] *See* Bea Dissent at 88. While RFRA relies on the prior Supreme Court

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[5] "Terms of art are words having specific, precise meanings in a given specialty." Terms of Art, Gerner's DICTIONARY OF LEGAL USAGE (3d ed. 2011); *see also* Term of Art, BLACK'S LAW DICTIONARY (11th ed. 2019) (same). Judge Bea attacks this position, noting that "legal tests and standards" can "often" be a "term of art." Bea Dissent at 88 n.16. His sole example, however, is the term "fair and equitable" which the Supreme Court described as a term of art 80 years ago. But "fair and equitable" had become a term of art because of the precise and consistent definition attached to it over time. If 200 plus pages in six separate opinions in this case prove anything, it is that the definition of "substantial burden" has not been defined with the precision necessary to be a well-defined term of art. The Supreme Court had not defined "substantial burden" prior to Congress adopting RFRA. And other federal courts had not adopted a consistent definition of the term either. Our definition of "substantial burden" today, *see* Per Curiam at 10–11, is consistent with the definition adopted by other federal courts and may well constitute a term of art going forward.

analytical framework of "substantial burden," that term was never defined as a term of art.

A

It is a longstanding principle that "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citations and internal quotation marks omitted). The question is what "old soil" regarding "substantial burden" was grafted into RFRA. As explained above, "substantial burden" was not defined by the Supreme Court before the adoption of RFRA. "Substantial burden" or related phrasing was used by the Court not as a definition that could be transplanted, but as a legal framework to apply the Free Exercise Clause. And a legal framework differs from a precise definition.

Judge Bea asserts that we must look only to pre-RFRA cases to define "substantial burden," because the term was taken by Congress, without modification, from the Supreme Court's pre-RFRA First Amendment jurisprudence; because RFRA states that its goal is to restore the test used by pre-RFRA federal court rulings; and because RFRA directly cites two Supreme Court decisions—*Sherbert* and *Yoder*—as determinative of the scope of the term "substantial burden." *See* Bea Dissent at 76–83. But even taking these three assertions to their logical conclusions, this does not cabin "substantial burden" to *Sherbert* and *Yoder*.

1

As outlined above, "substantial burden" was used in several pre-*Smith* and pre-RFRA cases and

referenced a prior analytical approach. *See supra* § III.B; *Jimmy Swaggart Ministries*, 493 U.S. at 384–85; *Hernandez*, 490 U.S. at 699. Congress adopted "substantial burden" from those "prior Federal court rulings." 42 U.S.C. § 2000bb-(a)(5). None of those cases define "substantial burden." But Congress, in adopting RFRA, expressly incorporated the contours and limitations of the "substantial burden" framework into RFRA.

This aligns with how the Supreme Court described its own Free Exercise Clause jurisprudence. For example, the Court in *Sherbert* held that the government may not compel affirmation of a belief or penalize groups for holding certain views. 374 U.S. at 402. Same with *Bowen*: Free Exercise violation arises when "compulsion of certain activity with religious significance was involved." 476 U.S. at 704. These holdings describe categories of claims protected by the First Amendment, but do not define "substantial burden" itself. There is again no definition of "substantial burden." Thus, the legal context here reveals no technical definition or term of art.

2

Judge Bea next asserts that there is no evidence that Congress intended to expand or alter the definition of "substantial burden" in pre-RFRA cases.[6] *See* Bea Dissent at 82. But this again assumes, incorrectly, that there ever was a precise definition. True, RFRA's use of "substantial burden" strongly

[6] The Supreme Court seems to reject that premise: "[T]here is no reason to believe . . . that [RFRA] was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell*, 573 U.S. at 706 n.18.

supports the conclusion that Congress was satisfied with that portion of the test as set forth in prior federal court rulings. But that does not mean that the terms were defined as a term of art. *Cf.* Bea Dissent at 88.

Indeed, our sister circuits do not speak of "substantial burden" as a term of art. *See, e.g.*, *Mack*, 839 F.3d at 286; *U.S. Navy Seals 1-26*, 27 F.4th at 336; *New Doe Child #1*, 891 F.3d at 578; *Korte*, 735 F.3d at 654; *Hobby Lobby*, 723 F.3d at 1114; *Midrash*, 366 F.3d at 1214; *Murphy*, 372 F.3d at 979. And for good reason: There is no definition by which they could do so. So while *Lyng* forecloses Apache Stronghold's RFRA claim here, *see* Collins Maj. at 35, that is not because *Lyng* is part of any "old soil" that was used to define "substantial burden," Bea Dissent at 75. Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of "substantial burden" "carried over into the soil" of RFRA. *Taggart*, 139 S. Ct. at 1801 (emphasis added).

3

Judge Bea's approach, which purports to be one grounded in the statute's text, also violates fundamental principles of textualism. *See* Bea Dissent at 74–89. His application of the soil theory disregards a textual analysis of half of RFRA's statutory language. The words of a governing text are of paramount concern. We must analyze those words in their full context and not focus exclusively on particular provisions. *See* Textualism, BLACK'S LAW DICTIONARY (11th ed. 2019).

Here, Judge Bea stresses that RFRA directly cites *Sherbert* and *Yoder*. *See* Bea Dissent at 77–81. But this only addresses half of the relevant textual inquiry. Section 2000bb states that a purpose of RFRA is "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." The rest of § 2000bb, however, reads "*and* to guarantee its application in all cases where free exercise of religion is substantially burdened; *and* (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(1)–(2) (emphasis added).

Congress explicitly codified the test formulated in *Sherbert* and *Yoder*. But it did far more than that. It also extended RFRA's reach to include any other substantial burdens (consistent with the Supreme Court's application) on religious practice. Congress employs not one but two uses of "and." *Id.* And Judge Bea ignores them both. We cannot ignore statutory language like that. If Judge Bea were correct, Congress would not need to have included language guaranteeing RFRA's application in *all* cases in which there is a substantial burden. This is true even considering that Congress referenced *Sherbert* and *Yoder* to the exclusion of other cases, *see* Bea Dissent at 79–80, and that Congress declined to use phrases like "for example" to indicate that *Sherbert* and *Yoder* were mere examples of substantial burdens, *id*. at 80. The entire text of the subsection does not start and end with *Sherbert* and *Yoder*—it extends further to all substantial burdens. We cannot read Congress's words out of existence. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167,

174 (2001)) ("We are 'reluctant to treat statutory terms as surplusage in any setting' . . . .").

Not only should we not read the statutory text out of existence, we also ought not read words *into* RFRA that are not there. That certain members of Congress made statements about RFRA's scope as Congress debated its enactment does not provide any reliable evidence of RFRA's meaning. *See* VanDyke Concurrence at 155–56. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). The use of such legislative history has been properly criticized as being "neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States . . . ." *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); *see also Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1146 (9th Cir. 2022) (R. Nelson, J., concurring). And that remains true even though one of the comments came from Senator Hatch who sponsored and championed RFRA. Particularly when legislative history supports our textual interpretation of a statute, we must even more vigilantly guard against encroaching on fundamental statutory principles of construction.[7] Therefore, our

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[7] Whether RFRA's sponsor or a slew of law professors agree with our reading of prior federal law has no bearing here where the statutory text makes clear that RFRA did not overrule *Lyng*. Had these commentators instead suggested that RFRA overruled *Lyng*, that would have similarly been irrelevant. Relying on those subjective views undermines the longstanding understanding that, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

assessment of substantial burden and of any implication of pre-RFRA cases, namely *Lyng*, must come from analysis grounded in the text. And because "substantial burden" is not a term of art with a specific definition, the soil theory is inapplicable.

B

I ultimately agree with Judge Collins's majority opinion, which relies on a more compelling theory in this case than the soil theory. *See Medina Tovar v. Zuchowski*, 982 F.3d 631, 644 (9th Cir. 2020) (en banc) (Callahan, J., dissenting) ("In the battle of competing aphorisms I think that 'context matters' prevails over the interpretive canon 'bringing the old soil with it.'"). Judge Collins essentially invokes a different understanding of the Canon of Prior Construction. *See* Collins Maj. at 41–42 (citing *Williams v. Taylor (Terry Williams)*, 529 U.S. 362 (2000)). This familiar canon is one of context: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 322.

But construction is different than definition. *Compare* Construction, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act or process of interpreting or explaining the meaning of a writing") *with* Definition, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute"). Here, the Supreme Court has not defined "substantial burden." Even so, the Court has construed the term. We apply that context to this

case. *Lyng* is an authoritative construction that the substantial burden test codified in RFRA is inapplicable to certain challenges, including one in which the government manages its own land. True, the *Smith* majority rejected that the application of the *Sherbert* test strictly turned on "the government's conduct of 'its own internal affairs.'" 494 U.S. at 885 n.2 (citing *Lyng*, 485 U.S. at 439). But this was to justify *Smith*'s rule of general applicability, which was expressly overruled in RFRA. RFRA, however, does not address, nor overrule *Lyng*.

This said, I do not read RFRA as enshrining just Justice O'Connor's view in her *Smith* concurrence. *Cf.* Collins Maj. at 46. Justice O'Connor's articulation of *Sherbert*'s compelling interest test in her *Smith* concurrence was not her mere opinion, nor was it "her" test—it was the test established by decades of judicial precedent. Thus, in overruling *Smith*, Congress codified this preexisting framework in RFRA. And it follows that because RFRA's stated purpose was to reject *Smith*, § 2000bb(a), and its effect was to codify the compelling interest test, *id.* § 2000bb(b)(1), RFRA therefore reinstated the legal framework's parameters as well. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)) ("Congress legislates against the backdrop of existing law."). RFRA thus adopted the term "substantial burden" from the Court's prior construction of the *Sherbert* framework. It is therefore not just *Smith* (or Justice O'Connor's concurrence), but the entirety of the Court's pre-RFRA jurisprudence, that provides the contours of substantial burden.

I also have some reservations about Judge Collins's broad categorization of the Supreme Court's opinion in *Terry Williams*. That theory allows us to infer the meaning of a word or phrase when "'broader debate and the specific statements' of the Justices in a particular decision concern 'precisely the issue' that Congress later addresses in a statute that borrows the Justices' terminology." Collins Maj. at 41–42 (quoting *Terry Williams*, 529 U.S. at 411–12). There is good reason to be cautious of an overapplication of this theory. The Supreme Court has not relied on it in the 23 years since *Terry Williams*—and we never have previously. Part of why *Terry Williams* has not been relied on more may be the Supreme Court's own limitation: "It is not unusual for Congress to codify earlier precedent in the habeas context." 529 U.S. at 380 n.11. That same principle has not been established in the First Amendment context to date.

Given these concerns, this theory should be used sparingly. But it is an appropriate application when considering a unique context like habeas in *Terry Williams* and an equally unique statute like RFRA where Congress explicitly adopted a term from multiple cases to codify that legal framework into law. *See Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a 'compelling governmental interest.'"). Thus, despite the lack of explicit definition, the body of case law from which "substantial burden" springs forecloses Apache Stronghold's RFRA claim here. A contrary conclusion would wrongfully ignore the textualist roots of "substantial burden."

The ultimate question is whether RFRA overrules *Lyng*. As explained above, the stronger case is that *Lyng* remained part of the "substantial burden" analysis.[8] The Supreme Court has been clear: "'If a precedent of this Court has direct application in a case,' . . . a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023) (citing *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). "This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" *Id.*

A commendable critique of *Lyng* might be that its holding lacks in originalist or textualist support. As *Smith* has been deeply criticized for its lack of original or textual grounding, the same may be said about *Lyng*, which *Smith* cites repeatedly. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1888 (2021) (Alito, J., concurring) (*Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption."). Justice Alito concludes that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*." *Id.* at 1896. Under that definition,

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[8] It has been argued that because RFRA applies to all federal government action, 42 U.S.C. § 2000bb-3, it thus overrules *Lyng*. But RFRA also instructs courts to look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). *Lyng* is such a prior federal court ruling.

perhaps it is time for the Supreme Court to revisit *Lyng*. But that is a task for a different Court on a different day.

At any rate, *Lyng* remains the law. There, the Supreme Court held that the government action at issue was not a substantial burden because the First Amendment "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 485 U.S. at 448. And because the land transfer here concerns the government's management and alienation of its own land, which is no doubt part of its internal affairs, *Lyng* directly applies to any statutory application of "substantial burden" under RFRA as well. With no compelling evidence to support a finding that *Lyng* was overruled when Congress enacted RFRA, for the same reasons that Apache Stronghold's claim fails under the First Amendment, it fails under RFRA too.

VII

RFRA is a unique statute. While the dissent raises a plausible textual interpretation of "substantial burden," I ultimately disagree. In adopting RFRA, Congress used a specific term—"substantial burden"—which should reasonably be read to reject *Smith* but incorporate prior Supreme Court construction of that term. While we lack a precise definition, we are given guideposts. And *Lyng* is one of those.

The phrase "substantial burden" does not exist in a vacuum. Rather, decades of Supreme Court precedent establish that only certain forms of substantial burdens are cognizable as that term is used to apply the Free Exercise Clause. And when the government

seeks to manage its internal affairs and operate on its own land, no such cognizable burden exists under RFRA. Congress then codified this standard and its associated boundaries in RFRA. Because RFRA does not overrule the Supreme Court's binding precedent in *Lyng*, Apache Stronghold has no viable RFRA claim here.

VANDYKE, Circuit Judge, concurring:

I agree with the majority that our decision in this case is controlled by *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). I write separately to elaborate on why the alleged "burden" in this case is not cognizable under the Religious Freedom Restoration Act (RFRA) and to explain why reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination. Occupying the background of the majority opinion is a reality central to the resolution of this case: there is no textual, historical, or precedential support for the notion that a government's refusal to use its own property to enable or subsidize religious practice is a cognizable burden under either the Free Exercise Clause or RFRA. Even assuming it's theoretically possible to reconceptualize Uncle Sam's parsimony as a "burden" on religious exercise, such stinginess in the allocation of the government's own property isn't the sort of burden our religious freedom guarantees were ever meant to address. And because the government action here did not constitute a cognizable burden, any reliance on the substantiality of the impact of the government's decision on the plaintiffs in this case is misguided.

I.

Enacted in response to one of the most criticized Supreme Court decisions in history,[1] RFRA was a laudable attempt to broadly restore religious liberty.

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[1] *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

But like any rights-endorsing statute, no matter its scope, RFRA has its limits. A cognizable RFRA claim arises only when (1) the government (2) substantially (3) burdens (4) religious exercise. 42 U.S.C. § 2000bb-1(a). Apache Stronghold claims that the government will burden the Apaches' religious exercise—specifically, their use of Oak Flat to worship and conduct ceremonies—by transferring ownership of the government's property to Resolution Copper.

Because it is undisputed that the Apaches' desire to use Oak Flat to worship and conduct ceremonies qualifies as religious exercise, the only issue before our court is whether the transfer is an instance of the government burdening the Apaches' religious exercise as that action has long been understood under RFRA and the Free Exercise Clause. After considering the logic underlying RFRA, and then reviewing the proper Free Exercise Clause and RFRA frameworks, it becomes apparent that the government does not burden religious exercise by refusing to ensure the government's own property remains available to enable it.

A. A commonsense reading of RFRA does not suggest the government burdens religion by refusing to use its property to enable religious activity.

Notwithstanding the volume of ink spilt today by our en banc court across multiple opinions, it's safe to say that we all agree on at least one thing: RFRA provides a claim for some—but not *all*—burdens that a person may experience in relation to his or her religious exercise. For starters, the burden must have been imposed by a particular entity—namely, the government. And related to that, when the

government acts (or fails to act), not all of its actions (or inactions) that may have some incidental effect on an individual's religious exercise are deemed to "burden" that person's religious exercise within the meaning of our guarantees of religious freedom.[2]

This is confirmed by both common sense and the ordinary meaning of the verb "burden," as a few illustrations will show. Imagine, for example, that a Muslim believes he must complete a religious pilgrimage to Mecca during his lifetime. But he lacks the money to do so. If his sister has enough money to pay for the trip but refuses to give it to him, no one would seriously claim that the sister "burdened" her brother's religious exercise by refusing to give him her money to enable his exercise. Sure, there is a sense in which the brother faces a burden on his religious exercise: he doesn't have something he needs to enable it. But few if any would say his sister caused that burden by refusing to give him her money.

If our example were changed slightly so that the brother asked the government instead of his sister for the money, the result would be unchanged. Characterizing the government's unwillingness to give its resources to our disadvantaged Muslim friend as a government-imposed burden on his religious exercise would be no less strange than in our first example.

That is the key to this case. Much has been said about the substantiality of the burden the Apaches

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[2] Indeed, Apache Stronghold's able counsel acknowledged at oral argument that not every government action that might be characterized as a "burden" is cognizable under RFRA, including when the government refuses to sell its land to a private party to build a church on the property.

will experience when the government's Oak Flat property is traded and eventually destroyed. It is certainly true that the effect is substantial. But its substantiality is irrelevant in this case. Even assuming one could counterintuitively characterize the government's unwillingness to give someone its property as a "burden," such a burden is not the type of government imposed burden that is cognizable under RFRA or the Free Exercise Clause. Few people today would characterize the government withholding its own property as the government imposing a burden. And there is no reason to think that such a peculiar conception of a government-imposed burden had any more purchase at the time of the nation's founding, at the time of the Fourteenth Amendment's ratification, or at the time of RFRA's enactment. In short, Apache Stronghold's RFRA claim fails because the government's use of its own property simply does not impose on the Apaches' religious exercise the type of "burden" that either RFRA or the Free Exercise Clause contemplate.

B. Under the Free Exercise Clause, the government does not burden religious exercise by managing its own property.

The Free Exercise Clause comes into play when the government "prohibit[s]" the "free exercise" of religion, U.S. Const. amend. I, which courts have long interpreted as doing something that burdens such free exercise. Because this constitutional right "is written in terms of what the government cannot do to the individual, *not* in terms of what the individual can exact from the government," the Supreme Court has recognized that government actions involving the government's use of its own resources do not impose a

First Amendment burden on a person's religious exercise, even when such government actions may indirectly—and possibly even substantially—affect religious exercise. *Lyng*, 485 U.S. at 450–51 (emphasis added) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Since well before *Smith*, it has been commonly understood that the government does not impose a burden when it merely refuses to subsidize a religious exercise. *See, e.g.*, *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.").

The understanding that a refusal to subsidize does not burden religious exercise is obviously not limited to just the government's money. A Catholic priest can no more demand that the government provide him with communion wine than he can demand that the government provide him with money to buy that wine. An elder of the Church of Jesus Christ of Latter-Day Saints can't insist that the government give him either a bicycle or the cash to buy one. Nor can a pastor require that the government provide him a church on government land so that he can better serve his flock. As in our initial Mecca example, the government has not "burdened" anyone's religious exercise in any of these examples by withholding its own resources.

Of course, every level of government in our nation distributes a variety of government benefits to a variety of recipients. And when the government does that, it cannot do so in a way that *discriminates* against or between religions. In *Sherbert*, for example, a state government provided unemployment benefits to workers who required Sunday off to practice their faith, but not to those whose religion required them to take Saturday off. 374 U.S. at 399–400, 406. The Supreme Court correctly concluded that the Free Exercise Clause disallows such discrimination between or against religions in the provision of government benefits. *Id.* at 404. The Court explained that such differential treatment of religious adherents in the allocation of government benefits imposes the type of "burden" on religious liberty that the Free Exercise Clause was meant to protect against. *Id.* Indeed, it "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* This is because "to condition the availability of benefits upon [a religious observer's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. Thus, *Sherbert* and its progeny make clear that once the government chooses to provide government benefits, it cannot do so in a discriminatory fashion that effectively coerces potential recipients into abandoning their constitutional right to freely exercise their religion.

But of course, nowhere did *Sherbert* (or any case since) conclude that the government had to provide unemployment benefits to anyone in the first instance; it simply concluded that if the government chose to do so, it couldn't religiously discriminate. *See, e.g.*, *Trinity*

Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 467 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand."). I'm not aware of any case applying *Sherbert*'s anti-discrimination principle that holds the government must either start providing or continue providing some government benefit—again, those cases simply stand for the reasonable proposition that *if* the government is doling out benefits, it must not discriminate against religion in the process of doing so.

Unsurprisingly, the Supreme Court has also made clear that the Free Exercise Clause protects against the government burdening religious exercise by directly imposing requirements on people that are at odds with their religious beliefs. The Supreme Court addressed this situation in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Wisconsin had attempted to make school attendance mandatory until the age of 16. *Id.* at 207. This compulsory attendance law was "undeniably at odds with fundamental tenets of [Amish] religious beliefs" and presented the Amish with a classic dilemma: exercising their religious beliefs would lead to criminal sanctions, but compliance with the law would violate their beliefs. *Id.* at 218. *Yoder* and many cases since then stand for the straightforward proposition that, when the government says, "you must do X," and your religion says, "you must *not* do X," then the government's demand has burdened your religious exercise.

Both the *Yoder* type of burden and *Sherbert* type of burden, while different, converge under a single concept: government coercion. *Yoder* involved the most

direct form of coercion: violate your religious scruples or be punished. *Sherbert*'s coercion is less direct but not necessarily less coercive: violate your religious scruples or be denied an otherwise available government benefit. Both the *Yoder* and *Sherbert* types of government coercion are conceptually quite different from a theoretical third type: the government simply refusing to give someone its property so that he can use it to exercise his religion.[3] This third type of government action is different in kind from the first two. In no way is the government coercively inducing or requiring people to violate their religious beliefs. Instead, any coercion works in the opposite direction: people are demanding that the courts make the government enable or subsidize their religious beliefs

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[3] It is important to distinguish between a *Sherbert*-type burden and this third potential type of claim. Both involve the government withholding its property, but in *Sherbert* the government is already giving its property to some religious adherents, while discriminatorily withholding its property from others of a different religion. Thus, in a *Sherbert* case, the baseline condition is, so to speak, that the government is already providing its property to some (but not all) religious adherents. In contrast, the baseline condition in a case like this one is that the government is not giving its property to anyone, and the religious claimants nonetheless insist that the government must uniquely provide them with government property to enable their religious exercise. Apache Stronghold has not tried to make a *Sherbert*-type religious discrimination claim in this case, presumably because the government isn't discriminatorily "giving" its land to anyone but is instead trading the government-owned Oak Flat for other land owned by the mining company. In other words, the government is effectively selling Oak Flat to the mining company, and Apache Stronghold hasn't claimed any discriminatory action on the part of the government in, say, rejecting an equivalent competing offer from Apache Stronghold.

by uniquely providing them with government property.

While an able lawyer can certainly characterize this third type of claim as a "burden," it has been well understood since before *Smith* that the Free Exercise Clause does not cover any such government decisions, regardless of the label. This is most unmistakably demonstrated by *Lyng*. There, the federal government had permitted the building of a road and the harvesting of timber on publicly owned land. *Lyng*, 485 U.S. at 441–42. Some Native American tribes argued that this would burden their religious practice on the government's land. *Id.* at 447. But as the Court explained, the project did not burden religious exercise within the meaning of the Free Exercise Clause. *Id.* at 452. Notwithstanding that the claimed effects from the roadbuilding project could be "severe" and "virtually destroy the … Indians' ability to practice their religion," those effects did not give rise to a cognizable burden. *Id.* at 447, 450–51.

The reason the Indian tribes lacked a Free Exercise Clause claim in *Lyng* was because, despite the "devastating" incidental effect that the government's management of its own land would have on their religious exercise, *id.* at 451, the tribes would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying [them] … benefits," *id.* at 449. As *Lyng* made clear, the "Free Exercise Clause affords an individual protection from certain forms of governmental *compulsion*; it does not afford an individual a right to dictate the conduct of the Government's internal" affairs, particularly the government's management of its own property. *Id.* at

448 (emphasis added) (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)).

Nothing since *Lyng* has cast into question the straightforward understanding that the Free Exercise Clause does not require the government to let you use its property—including its real property—to exercise your religion. Our court, sitting en banc fifteen years ago, reviewed these same cases and reached the same conclusion. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068–73 (9th Cir. 2008) (en banc). [4] Regardless of how you label it, the government's nondiscriminatory use of its own property has never been understood to impose a constitutionally cognizable burden on someone's religious freedom—even when such governmental decisions incidentally have "devastating" and "severe adverse effects on the practice of [a] religion." *Lyng*, 485 U.S. at 447, 451.

C. RFRA adopted the ordinary meaning of "burden" as that term had been uniformly understood in Free Exercise Clause cases.

Echoing decades of Free Exercise precedent, RFRA prohibits the government from burdening a person's religious exercise. 42 U.S.C. § 2000bb-1(a). As is typical in many statutes, RFRA defined some but not all terms that determine whether a person has a cognizable RFRA claim. For example, RFRA tells us that a person's "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* at §§ 2000bb-2(4), 2000cc-5(7)(A). Since this is a clear departure from how religious exercise had been

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[4] Our court reached the right result in *Navajo Nation*, although I might quibble with some of its rationale.

understood under the First Amendment,[5] it made sense for Congress to provide that definition. But tellingly, RFRA does not define what it means for the government to "burden" religious exercise. The obvious reason for that, given the context of RFRA's enactment and its clear textual departures from the

First Amendment in other regards, is that RFRA meant "burden" in the way it had been commonly understood in the Free Exercise Clause context. Indeed, the Supreme Court has acknowledged as much. *See Tanzin v. Tanvir*, 592 U.S. 43, 46–48 (2020) (citing Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012)).

In pre-RFRA First Amendment caselaw, it was well understood that the government burdens religious exercise when it acts in a coercive manner, and that the government's decisions about how it uses its own property are not coercive unless they discriminate (as in *Sherbert*). During and immediately after RFRA's enactment, everyone understood that RFRA carried forward this ordinary understanding of what it means to burden religious exercise. Post-RFRA caselaw only further confirmed that RFRA adopted the ordinary meaning of how the government may impose a

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[5] Prior to being amended by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. (RLUIPA), RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Under this standard, courts had required the burdened religious exercise to be "central to" or "compelled by" the religion. *See, e.g.*, *Graham v. C.I.R.*, 822 F.2d 844, 850–51 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 345 (1987); *see also Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997).

burden—and specifically, as relevant to this case, that the government's use of its own property burdens religious exercise only when it is allocated in a discriminatory manner. Here, there is no claim that the government has used its resources in a discriminatory manner, and the government therefore has not burdened the Apaches' religious exercise within the meaning of RFRA.

i. The ordinary understanding of RFRA does not support the claim that the government burdens religious exercise by using its own resources in a nondiscriminatory manner.

If RFRA's plain text doesn't make it obvious enough that RFRA did not depart from the ordinary meaning of "burden" under the Free Exercise Clause, the discussion surrounding the passage of RFRA further confirms that the government does not burden religious exercise by using its own resources in a nondiscriminatory manner.

When Congress enacted RFRA, it was well understood that a burden is imposed by the government's use of its own resources *only* when the use of such resources discriminates against or between religions. Readily accessible examples of this widespread understanding are provided by congressional statements explicitly maintaining that RFRA "does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103–111, at 9 (1993); *see also* 139 Cong. Rec. 26193 (1993) (remarks of Sen. Hatch) (explaining that *Lyng* and *Bowen* are unaffected by

RFRA).[6] Leading religious liberty scholars shared a similar understanding of RFRA's effect, observing immediately after its enactment that, under RFRA, a "cognizable burden" does not exist when the government uses its resources in a nondiscriminatory manner that has only an indirect effect on religion. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev.

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[6] Judge R. Nelson mildly chastises me for engaging in supposed fainthearted textualism by citing the congressional record. I agree with both him and Justice Scalia, whom he quotes, that "[e]ven if the members of each house wish to do so, they cannot assign responsibility or making law—or the details of law—to one of their number, or to one of their committees." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 386 (2012). But as should be sufficiently clear from context, I am not citing to the views of specific legislators for the purpose of conclusively determining what RFRA means. Nor am I (as charged) preferencing legislative history just because it happens to support my understanding of RFRA. Instead, I cite such statements as further evidence of my point—with which I believe Judge Nelson agrees—that at the time of RFRA's enactment, *nobody* would have understood the government's decision about what to do with its own land to be a cognizable burden under RFRA. Individual legislators are no more able to authoritatively speculate about how a law will apply in a certain case than anyone else. That goes for legal academics, too—who I also cite. "The interpretation of the laws is," after all, "the proper and peculiar province of the courts," not Congress or the academy or anyone else. Alexander Hamilton, Federalist No. 78. My point is only to demonstrate the unanimity of understanding about what did and did not constitute a burden on religious exercise at the time of RFRA's passage, which matters here because RFRA's text indicates that it should be understood by reference to the state of Free Exercise jurisprudence before *Smith*.

209, 228–30 (1994) (footnotes omitted).[7] No burden exists because citizens simply "may not demand that the Government join in their chosen religious practices" by providing the resources for such practices. *Id.* (quoting *Lyng*, 485 U.S. at 448). Everyone understood that, under RFRA, the government retains its right to use its resources according to its own preferences.[8] It does not have the

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[7] *See also* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. Rev. 331, 345 (1994) (noting that pre-RFRA courts declined to extend First Amendment protection to "challenges to government control of non-Indian land" and later explaining that, "[s]ince RFRA mandates that strict scrutiny be used only if a burden is first found, Indian free exercise claims will likely be resolved in the very same manner as before"); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171, 202 (1995) (explaining that the "developing case law" on "substantial burden" under RFRA suggests that "religious exercise is burdened only by the combination of legal coercion and religious duty"); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 73 & n.172 (1995) (noting that although "RFRA repudiates *Smith*, … it appears to leave the internal operations cases," such as *Lyng* and *Bowen*, "unaffected").

[8] I of course agree with Judge Nelson that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But I respectfully disagree with his insistence that the uncontradicted view of a "slew of law professors" and legislators "has no bearing" on the proper interpretation of RFRA. I presume that Judge Nelson and I agree that it is the original *public* meaning of the text that controls our analysis, not some hidden or idiosyncratic meaning devised by judges. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain, obvious, and rational meaning of a statute is always to be

obligation to enable religious practice by donating its own property.

ii. Cases interpreting RLUIPA are not inconsistent with this well-established understanding of RFRA.

Understandably seeking to distance themselves from the settled understanding that the government does not burden religious exercise through the mere use of its resources in a nondiscriminatory manner, Apache Stronghold and the dissent focus heavily on caselaw interpreting a different statute, RLUIPA, to argue that the government will burden the Apaches' religious exercise because the Apaches won't be able to access Oak Flat once it is physically destroyed. In

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preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."). Part of the endeavor of surmising the original public meaning is understanding what the *public* would have originally understood the legislative enactment to mean, including the part of the public that was elected to Congress. If, for example, every law professor, every Congressman, and every other literate person in the United States were on record opining that a particular statute meant "X," I would hope good originalists could count that as some useful evidence that its original public meaning was indeed "X," not "Y." *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1757 (Alito, J., concurring) ("As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. … And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law."). That is all I mean by referencing legislative statements above—it is part of my proof that *everyone* who knew anything about RFRA when it was enacted understood it as not requiring holy handouts of the government's own property.

doing so, they improperly divorce the RLUIPA cases from the comprehensive and individualized coercive context inherent in *every single* RLUIPA case, implicitly endorsing that the Apaches are effectively prisoners in this country and therefore indistinguishable from the actual prisoners who bring claims under RLUIPA. Applying that obviously controversial assumption—and making no attempt to show that this assumption was widely shared when RFRA was enacted in 1993—the dissent relies heavily on what has been deemed a substantial burden on religious exercise in the prison context.

I agree with the dissent that the *substantiality* of a burden can be measured the same way under both RLUIPA and RFRA. But whether a burden is cognizable in the first instance has always been a context-dependent inquiry. And what constitutes a cognizable burden in the prison context—surely the most comprehensively coercive setting in America today—obviously may be very different from what constitutes a "burden" under RFRA. That is why, for example, a Jewish prisoner has a right under RLUIPA to require the government to provide him with kosher meals, whereas a Jewish man outside of prison has no right to insist that the government deliver him free kosher food.[9]

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[9] The other category of cases addressed by RLUIPA—land-use regulations, or "zoning"—is equally comprehensively coercive. Every zoning case involves the government telling someone what he can or can't do with his own land. So when the government tells someone he can't build a church on his own land, for example, that is just as coercive as forbidding someone from buying communion wine with his own money. As such, RLUIPA

The dissent's need to resort to RLUIPA prison cases to justify its preferred outcome in this case is very telling. In prisons, the "government exerts a degree of control *unparalleled* in civilian society." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added). It controls every aspect of an inmate's life and renders him fully dependent on the government by stripping him of his ability to provide for his own needs. *Brown v. Plata*, 563 U.S. 493, 510 (2011). It is certainly true that in RLUIPA cases, courts have concluded that the government must provide resources to prisoners for their religious exercise. But that's for the same reason they require the government to provide prisoners with basic sustenance like food and clothing, *id.*, or medical care, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), or protection from other inmates, *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)—because the government has coercively "stripped them of virtually every means of" providing for themselves, *id.* In a very real sense, the prisoner depends on the grace of the government for all his needs and in all his activities. This degree of direct and immediate coercion is, again, "*unparalleled*

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land-use cases, like cases in the prison context, usually don't involve hard questions about whether the government's regulation actually causes a burden on religious exercise. The coercive burden is obvious, inevitably making the litigated question whether the burden is *substantial*. *See, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988–92 (9th Cir. 2006) (discussing whether the regulation was "oppressive to a significantly great extent" (cleaned up)); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (citing *Guru Nanak*, 456 F.3d at 987) ("[O]ur practice is to examine the particular burden imposed by the implementation of the relevant zoning code on the claimant's religious exercise and determine, on the facts of each case, whether that burden is 'substantial.'").

in civilian society." *Cutter*, 544 U.S. at 720 (emphasis added).

As a result, in the vast majority of RLUIPA cases there is no need to explicitly analyze whether the government's action burdens religious exercise—it's a given. The only question is substantiality. And that may also be true for *some* RFRA cases. But it is not true for all of them, and certainly not this one. This case presents the opposite situation encountered in most RLUIPA cases. The substantiality of the effect on the Apaches' religious exercise is obvious; it is the legal cognizability of any burden that is at issue. Thus, the dissent's extensive reliance on inapt RLUIPA cases analyzing the substantiality of an undisputed burden is badly misplaced.

Ultimately, the dissent cannot rely on RLUIPA prison cases without also showing that the Apaches are identically situated vis-à-vis the government as the prisoners in those cases. The dissent makes no attempt to do so, and more importantly makes no attempt to show that this was the common understanding when RFRA was enacted. Absent such a showing, the only justification for the dissent's extensive reliance on inapt RLUIPA jurisprudence to defend its result in this case is an implicit recognition that it can't find justification in RFRA and the Free Exercise Clause. As discussed, all the RFRA and Free Exercise Clause cases support the common understanding that, unless you're the government's prisoner (literally, not metaphorically), the government's nondiscriminatory use of its own property is not the type of action that gives rise to a cognizable burden on religious exercise.

D. The government's swap of Oak Flat for other property does not burden the Apaches' religious exercise under RFRA.

This case is not meaningfully different from *Lyng* or *Navajo Nation*. In all three cases, the government wanted to do something with its own land. In all three cases, what the government planned to do would substantially affect how the tribes wanted to use the government's land for their own religious exercise. In *Lyng* and *Navajo Nation*, courts rejected the First Amendment and RFRA claims because, notwithstanding the "devastating effects" on religious exercise resulting from the government's planned use of its land, the Free Exercise Clause and RFRA simply do not recognize such burdens resulting from the government's nondiscriminatory use of its own property. This case is no different, but the dissent would have this court reach the opposite result. In doing so, it would for the first time characterize something as a "burden" under RFRA that has never before been considered a cognizable burden. To do so would be an obvious rewriting of statutory law—a job for Congress, not the courts.

II.

Reconceiving the government's nondiscriminatory use of its own property as a cognizable burden under RFRA would not only require a judicial rewrite of the statute; it would turn the statute on its head, requiring instead of reducing religious discrimination. Because the government's resources are not infinite, the expansion of RFRA advocated by Apache Stronghold and the dissent would inevitably require the government to discriminate between competing religious claimants. While no doubt some such

claims—including those made by Apache Stronghold in this case—would be sympathetic, there is no way to resolve this case in the Apaches' favor without endorsing a rule that would one day soon force the government to pick religious winners and losers. So even if this court did require the government to effectively hand over Oak Flat as a religious offering to the Apaches, only *some* religions would benefit from the precedent created by such a decision.[10]

Eventually, lines limiting the court-enforced distribution of the government's largesse would need to be drawn. And because, as explained above, the dissent's novel approach has no basis in the text or original understanding of RFRA, any judicially created distinctions limiting the extent of the resulting religious entitlement would similarly lack any statutory justification. Worse, such distinctions would necessarily discriminate between religions, offering government property to some and not others and turning RFRA into a tragic parody of itself. One need

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[10] In Part I of this opinion, I have endeavored to explain why I think the dissent's proposed interpretation of RFRA is wrong as a legal matter. And now, in Part II, I explain why that view is also wrongheaded. Judge Nelson misunderstands this approach, confusing the *reasons* I agree with the majority's interpretation of RFRA (Part I) with the *warnings* I make about religious discrimination that would inevitably result if the dissent's rewrite of RFRA was adopted (Part II). But to be clear, I agree with Judge Nelson that "[t]he dissenters are not wrong … because under their view 'only *some* religions would benefit from the precedent created by such a decision.'" The *reason* the dissenters are *wrong* is because they advance a view of RFRA that has no basis in its original public meaning. My point here is that in addition to being the legally wrong interpretation, the dissenters' judicial revision of RFRA would also undermine the equal protection of religion that RFRA was enacted to protect.

look no further than the dissent itself to see early indications of the kind of discriminatory distinctions that might flow from this atextual understanding of RFRA.

A. The dissent would establish a discriminatory preference in favor or older religions and against newer ones.

Not far into the dissent, the reader encounters the first such distinction: religious practices with a lengthy historical pedigree apparently deserve more protection than newly established ones. Parroting Apache Stronghold's repeated emphasis that the Apaches have worshipped at Oak Flat "since time immemorial," the dissent heavily implies the Apaches should be treated preferentially because their religious exercise is a long-established practice.[11]

The trouble with emphasizing the lengthy history of the Apaches' religious practice at Oak Flat is that it is entirely irrelevant to our analysis under RFRA and the Free Exercise Clause. Our religious liberty protections "apply to all citizens alike," *Lyng*, 485 U.S. at 452, and with equal force to a religion founded yesterday as to one with roots deep in prehistory. How long a person has practiced a religion, or how old that religion is, should be "immaterial to our determination that … free exercise rights have been burdened; the salient inquiry under" both RFRA and the Free Exercise Clause "is the burden involved." *Hobbie v.*

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[11] The dissent is not alone in emphasizing the ancient nature of the Apaches' religious practice. Both the panel and motion-stage dissents did so also. *See, e.g.*, *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting).

Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144 (1987). It is bad enough that Apache Stronghold's counsel made this discriminatory argument. Our court has thankfully refused to make things worse by imbuing it with the force of law.[12]

Of course, the suggestion that long-established religious practices should receive favorable treatment under RFRA is made only lightly. The dissent stops short of a full-throated defense of such a rule. Instead, it contents itself to repeatedly emphasize the longstanding nature of the Apaches' religious practice and leaves the legal significance of that fact to implication. Making the argument explicitly would lay its blatantly discriminatory character bare, but subtle though it may be, the dissent unmistakably lays the groundwork for a discriminatory limiting principle

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[12] It's not hard to see how invidious this argument is when you consider a sincere religious observer whose *newer* religion requires the ceremonial use of Oak Flat, just like the Apaches. The government's action of trading Oak Flat for other land would have *exactly* the same effect on both the observer of a newer religion and an Apache: neither would be able to use Oak Flat for religious ceremonies. But accepting the dissent's implicit premise that the "time-immemorial" nature of the Apaches' religious practice at Oak Flat is legally significant could lead to a different result in each of the two cases: the transfer of Oak Flat *would* burden the Apaches' religious exercise, but the same transfer might *not* burden a similarly situated practitioner of the newer religion simply because the person (or, more precisely, the person's predecessors) had not used the land before or for long enough. And what about a religion of intermediate age—say, a hundred years or so? How long is "long enough" to warrant protection under RFRA? By introducing the age of a religion and the length of religious practice as variables relevant to the analysis, the dissent offers an arbitrary and discriminatory distinction between observers of newer religions and long-established ones—a distinction that has no basis in RFRA.

that (need it be said?) could never be supported under either the Free Exercise Clause or RFRA.

B. The dissent's interpretation of RFRA also discriminates by providing more protection against burdens accompanied by significant physical or environmental impacts.

Both the dissent and Apache Stronghold also take care to emphasize the extent of the physical destruction associated with the transfer of Oak Flat. The import of such argument is clear: as with age, the dissent and the Apaches would also establish a discriminatory preference in favor of protecting burdens on religious exercise with a significant physical or environmental component when compared to burdens associated with less physical manifestations. But doing so would be double error, both because such a rule wrongly implies that a practitioner's religious harm under RFRA claim is somehow predicated on the physical attributes of the intrusion, and because it invites courts to measure the comparative significance of religious harms in physical terms, a behavior strictly prohibited in our jurisprudence. Ultimately, this distinction too is contrary to both the text of RFRA and the background precedent that informed its understanding, and if adopted, it would likewise perpetuate religious discrimination.

i. Attempting to distinguish *Lyng* and *Navajo Nation* by focusing on the extent of the physical impact reads a discriminatory preference for land-based religious practices into RFRA.

The biggest hurdle faced by the dissent and the Apaches is that this case is strikingly similar to both the Supreme Court's decision in *Lyng* and our court's en banc decision in *Navajo Nation*. To get around these cases, which doom its claims, Apache Stronghold attempts to distinguish them by emphasizing the physical differences between the government's actions in those cases and this one. *Navajo Nation* and *Lyng* are different, they contend, because "neither … involved physical destruction of a sacred site." The dissent employs similar logic, distinguishing *Lyng* on the basis that the transfer will result in the "utter destruction" of Oak Flat, which "will prevent the Western Apaches from visiting Oak Flat for eternity." Not only does this argument fail to provide a suitable basis to distinguish *Lyng* and *Navajo Nation*, but it also introduces another arbitrary and discriminatory limitation on the scope of RFRA's protection.

In *Navajo Nation*, the government allowed a mountain sacred to multiple Indian tribes to be showered daily with 1.5 million gallons of poopy water that, according to those tribes, would desecrate the mountain, render it impure, and destroy their ability to perform certain religious ceremonies. 535 F.3d at 1062–63; *id.* at 1081 (Fletcher, J., dissenting). So both *Navajo Nation* and this case present precisely the same impact on religious exercise from government land-use decisions: elimination of the ability to perform religious ceremonies. The dissent here, however, distinguishes *Navajo Nation* by asserting that "nothing 'with religious significance … would be *physically* affected'" by the government's decision to spray recycled wastewater containing human waste onto a sacred mountain (emphasis added). But that downplays the spiritual significance of the

government's action in *Navajo Nation* and ignores the court's later reasoning in the same opinion that "[e]ven were we to assume … that the government action in this case w[ould] 'virtually destroy the … Indians' ability to practice their religion,'" the result would not have changed. *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451).

The dissent similarly distinguishes and downplays the government's land-use decisions in *Lyng*—notwithstanding their "severe" and "devastating effects on traditional Indian religious practices"—by highlighting the limited *physical* effects of the government's actions in *Lyng*. In the face of *Lyng* and *Navajo Nation*, it nevertheless continues to rely on the extent of the physical impact that will result from the government's decision to transfer Oak Flat.

There is little doubt that the government's decision to transfer Oak Flat will have consequences for the physical environment in and around that area, but as much as some may wish otherwise, this is not an environmental case. This is a case about religious injury, and the measure of that injury is the harm to religious exercise. *That* harm is precisely the same here as it was in *Lyng* and *Navajo Nation*: the complete inability of Native Americans to conduct certain religious ceremonies because of government decisions about how it uses government land.

The desire to distinguish *Lyng and Navajo Nation* by emphasizing the physical impact of the challenged government decision is certainly understandable from an environmentalist's perspective, but doing so would result in an unfortunate perversion of RFRA. The view advocated by Apache Stronghold and endorsed by the dissent threatens to turn RFRA into a statute that

arbitrarily gives greater protection to burdens on religious exercise that are more physical in nature, while downplaying equally significant burdens on other forms of religious exercise simply because they don't similarly affect the physical environment. Such an approach privileges forms of religious exercise that preserve the physical environment at the expense of other religious exercise that might arguably lack similar positive environmental externalities. Again, it is understandable why this might be an attractive rewrite of RFRA for some modern judges—one could say that environmentalism is the favored religion du jour[13]—it just has no basis whatsoever in RFRA's text or original meaning.

ii. A rule that distinguishes religious harms by their physical measurability finds no support in either the text of

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[13] *See* Joel Garreau, *Environmentalism as Religion*, The New Atlantis, Summer 2010, at 61 ("For some individuals and societies, the role of religion seems increasingly to be filled by environmentalism."); Freeman Dyson, *The Question of Global Warming*, The New York Review of Books (June 12, 2008), https://www.nybooks.com/articles/2008/06/12/the-question-of-globalwarming/ ("There is a worldwide secular religion which we may call environmentalism .... Environmentalism has replaced socialism as the leading secular religion."); Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 Case W. Res. L. Rev. 51, 51 (2004) ("Environmentalism is a type of modern religion.... Indeed, many leading environmentalists have characterized their own efforts in religious terms."); Andrew Sullivan, *Green Faith*, The Atlantic (March 28, 2007), https://www.theatlantic.com/daily-dish/archive/2007/03/green-faith/229789/; Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 Env't L. 309, 323–42 (2009).

RFRA or the body of caselaw supporting it.

The physical impact of the government's actions has no basis in the text of RFRA, and it is just as foreign to the pre-*Smith* understanding of the Free Exercise Clause that informed RFRA. But it is not simply the case that the dissent's approach finds no support in RFRA's text or caselaw; it has already been affirmatively rejected. Focusing on the physical destruction of Oak Flat resurrects an argument that the Supreme Court rejected outright in *Lyng*.

In *Lyng*, the government sought to build a road that would result in the physical destruction of wilderness conditions necessary for the plaintiffs' religious exercise, including "privacy, silence, and an undisturbed natural setting." 485 U.S. at 442. The Court recognized that "too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible," meaning the "projects at issue … could have devastating effects on traditional Indian religious practices." *Id.* at 451. The Court nevertheless explained that the incidental religious effect of such government action on native tribal religious activity—"devastating" though it might be—could not "meaningfully be distinguished from the use of a Social Security number" in *Bowen v. Roy*, in which a religious practitioner sincerely believed that merely issuing a Social Security number (which had the slightest of physical components) to a child would rob the child of her spirit. *Id.* at 449, 456. "In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious

beliefs." *Id.* at 449. Thus, notwithstanding the significantly different *physical* effects of the government action in each case, the *religious* harms suffered were indistinguishable for purposes of determining whether a burden existed. *Id.* at 449–50. The presence or absence of the burden on religious exercise turns not on the degree of any physical impact from the government's activity, as urged by Apache Stronghold and the dissent, but on the asserted harm to religious exercise, as explained in *Lyng* and *Bowen*.

iii. Analyzing burdens on religious exercise with reference to their associated physical impacts is inherently discriminatory.

Text and caselaw aside, it is also inequitable to let the physical consequences of a government action determine whether religious exercise has been burdened because religions differ in what might burden their exercise. Some religions place more emphasis on the material world, while others are more spiritually directed. Some center their devotion on historic rites held in set-apart, holy places, while others are not as ceremonially or geographically constrained. And of course, many faiths incorporate degrees of some or all of these defining characteristics into their religious practice. The dissent's misguided emphasis on the environmental consequences of the government's action preferences some of these religious aspects over others, and if it were afforded legal significance, it would ensure that RFRA would be applied discriminatorily going forward. Religions that experience a substantial burden to their exercise due to government action that also has a substantial physical manifestation would be treated favorably.

Inversely, religions affected by government actions with less physical impact would be sent to the back of the bus. But our religious liberty protections were designed to extend to *all* religions, not just to those that may suffer a tangibly "objective" and "measurable" burden (whatever that might mean) evaluated in physical terms. A test that relies on the physical effects of government action could significantly reduce protection for religions that do not rely on tangible relics, material artifacts, or other paraphernalia. Such a test would threaten to overtly discriminate against and overwhelmingly under-protect religions less tied to the material world.

C. The dissent encourages discrimination by creating a baseless distinction between the government's real property and its other property.

The dissent relatedly appears to infer that there's something legally special about the religious use of government-owned *real* property that makes it materially distinguishable from other forms of government resources. But again, this distinction bears no connection to anything in RFRA itself, and it too would invite future discrimination between religious groups.

As a legal matter, limiting the dissent's preferred rule that the government must give out its resources for religious exercise to religions that use particular real property in the government's control is clearly disconnected from RFRA's text. The practice of essentially every religion is resource constrained, and nothing in the statutory text supports distinguishing between the types of resources that religious observers need to conduct their religious exercises. Some need

land, some need vehicles, some need cash (or Venmo). Regardless of what they need in a particular instance to exercise their religion, one commonality among religious observers is that they are often limited in what religious activities they can engage in based on the resources they have available to them. And if the government owns the resources they need, they face the exact same problem—regardless of whether it's land or legal tender, the government's refusal to contribute its stuff is hindering their religious exercise.

Grafting onto RFRA a special rule favoring religions that happen to require land would clearly discriminate against other religions. What makes real property special, particularly under RFRA? Is needing specific real property to conduct a ceremony different under RFRA from needing a bike to proselytize? Or needing a sweat lodge made from certain trees under government control? There is no logical or textual basis in RFRA for the dissent's suggestion that land is somehow special. While certain tracts of government-owned land are religiously special for many Native Americans, other government property may be (or become) religiously special for other religions. Under the dissent's approach, the latter would be treated worse than the former without any textual basis for the difference in treatment.

The dissent tries to limit the discriminatory impact of the rule it offers by limiting it to circumstances where the government has unique control over access to religious resources. But that's no limitation at all. The government has unique control over *all* its resources. Every dollar bill in circulation was at one point owned and "uniquely controlled" by the

government—after all, the government alone prints legal tender. So if a religious observer sincerely believes he needs a government resource to exercise his religion, including cash, the dissent's "unique control" principle offers no practical limitation on what resources the government may need to give the religious observer. Arbitrarily carving out government favors for a religion that requires specific *real* property would invite discrimination against religions with different property needs.[14]

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[14] So to recap: I not only think it would badly misinterpret RFRA to revise it the way the dissent does (Part I above), but I also think it would be a bad idea that would necessarily force the government to discriminatorily pick religious winners and losers in the distribution of its largesse (this Part II). Judge Nelson does not dispute my prediction that it would result in discrimination, but instead disputes my premise that such discrimination would be odious to the promise of religious liberty contained in both RFRA and the Constitution's religion clauses.

That surprises me. Since long before *Smith* was decided, it has been a bedrock principle of American religious liberty law that the government "cannot prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). With that time-honored principle in mind, I'm not sure what Judge Nelson is suggesting in his three hypotheticals. I would think it is beyond dispute that the government cannot discriminate by allowing a devout Muslim prisoner to grow a beard for religious reasons while disallowing the same or a similar religious exception for devout Jewish or Native American prisoners. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Sprouse v. Ryan*, 346 F. Supp. 3d 1347 (D. Ariz. 2017). Is Judge Nelson seriously contending we could require a religious zoning exemption for a Catholic cathedral to build a 100-foot steeple, yet deny a mosque across the street the same exemption to build a 100-foot minaret? And does anyone seriously believe that a school-choice program that

D. The dissent further encourages discrimination by reading a reparations theory into RFRA.

Ultimately, none of the distinctions either explicitly or implicitly relied on by the dissent to rationalize its rewrite of RFRA have any basis in its text or original meaning. So what might better explain the result the dissent would prefer this court to reach? It appears that, buttressed by the argument of academics who appeared as amici in this case, what the dissent is really advocating for is what might best be called a reparations version of RFRA. *See* Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

Under this "reconceptualized" and "alternative" theory of RFRA, Native Americans have a special historical and religious need for government-owned land because that land once belonged to them. As the academics explain, because the ancestors of Native Americans were mistreated and their land was taken, RFRA (and other laws) should be re-read to give current tribal members "unique" access to federal land. *Id.* at 1297–1303. Whatever the merits of these academic arguments, this court rightly declined to rewrite RFRA in service to them. If Native Americans

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gave voucher money to Catholic schools but not Lutheran schools would pass constitutional muster?

It has taken too long for the Supreme Court to recognize that discrimination against religion vis-à-vis supposedly "secular" counterparts is constitutionally problematic. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004). But there has always been widespread acceptance that discrimination *between* religions is repugnant to the Constitution.

are going to get unique protection of their religious exercise, they need to obtain it from Congress, not ask the courts to pretend they already got it from Congress.

i. Amici's reparations theory of RFRA has no basis in RFRA.

For starters, the academic argument motivating the dissent's approach has no basis in the text or original meaning of RFRA, nor does it pretend to. The scholars pushing their theory openly acknowledge that courts have historically interpreted RFRA and the Free Exercise Clause to the contrary, *id.* at 1297, and that their approach requires courts to "recontextualize the way in which the law … view[s] coercion"—and thus what constitutes a burden—under RFRA, *id.* at 1302. Boiled down, theirs is a reparations theory of religious liberty for Native Americans, and Native Americans alone. Obviously, the reader will search RFRA in vain for any intergenerational theory of reparations, for Native Americans or otherwise. There is simply nothing in the text to that effect, and unsurprisingly, *nobody* at the time of RFRA's enactment thought it was providing some type of reparations benefit.

To overcome RFRA's obvious textual silence, these scholars try to draw an analogy from religious accommodations in inherently coercive contexts—namely, prisons. If this sounds familiar, that's because it's the same analogy suggested by the dissent, which asserts that the transfer of Oak Flat "prevents the Apaches from practicing their religious beliefs … just as would an outright ban or religious worship … in prison." They correctly observe that the reason religious inmates are entitled to receive government

property in prison to practice their religions under RLUIPA is because of the inherently coercive environment of prison. *Id.* at 1333. Just as prisons are under exclusive government control, the argument goes, many sites sacred to Native Americans are under exclusive government control, and therefore the government should more proactively give its property to indigenous persons to offset the coercion suffered by their ancestors when the government took their land in the first place. *Id.* at 1339–43.

It's an interesting academic theory, and not one entirely devoid of moral force. But as already noted, nothing shows that Congress was attempting to do *anything* reparations related when it passed RFRA. Even assuming the coercive removal of Native Americans from their lands can be analogized in some way to the coercion experienced by prison inmates, direct and immediate coercion is entirely different from ancestral coercion. The religious liberty of an inmate is directly and immediately implicated by the extreme version of coercion the government has imposed *on that inmate*. In contrast, the "reconceptualized" version of coercion relied on by the scholars' attempted rewrite of RFRA is the governmental coercion of the *ancestors* of present-day Native Americans. This reparations-based theory is not entirely different from saying the Fourth Amendment should be applied specially to modern-day African Americans because of the lingering effects of slavery. Again, regardless of whether the theory has any merit, the idea that RFRA meant this when it was enacted in 1993 is entirely unfounded. RFRA was enacted to protect religious freedoms from current and future interference, not to turn back the clock and

hunt for past burdens for which future religious devotees might be remunerated.

ii. To avoid discrimination, a reparations theory of RFRA would entitle a wide variety of religions to government handouts.

But that isn't the only problem with a reparations theory of RFRA. Even assuming that religious reparations for ancestral coercion were somehow legitimate, what is the limiting principle? Should every religious person who can plausibly claim ancestral discrimination be entitled to religious reparations? RFRA is supposed to be generally applicable to protect all religions, so surely if reparations for government-sanctioned ancestral coercion of Native Americans are available under RFRA, they should also be available to others. Native Americans are not the only recipients of past government-imposed or government-allowed mistreatment arguably affecting their modern-day religious exercise. Indeed, if the dissent's reparations theory of RFRA were ever adopted, one could expect swaths of religious claimants to line up for government benefits, each carrying the historical pedigree of discrimination against their respective religious tradition in tow.

Baptists in colonial Virginia were horsewhipped and their ministers were imprisoned when the Church of England enjoyed a monopoly there.[15] Catholics were deprived of their political and civil rights at various

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[15] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421–23 (1990).

times in all thirteen colonies,[16] antebellum mobs burned down their churches and occasionally massacred them,[17] and efforts to ratify a constitutional amendment designed to clamp down on their parochial schools—the "Blaine Amendment of 1870"—gained widespread traction after the Civil War.[18] Mormons were violently expelled from Missouri in 1838,[19] denied the right to vote in Idaho in the 1880s,[20] and had their settlements in Utah

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[16] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 42 (1985).

[17] *E.g.*, Sydney E. Ahlstrom, *A Religious History of the American People* 561 (2d ed. 2004) (describing anti-Catholic riots in Boston), 563 (describing riots in Philadelphia and New York), 1090 (In the United States, "Catholics were subjected to disabilities, intolerance, and violence from the earliest times."); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 451 (2005); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L.J. 1085, 1118–20 (1995) (describing a massacre of Catholics in Kentucky).

[18] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) ("'The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have similarly shameful pedigree.")); *see* Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896*, at 317–21, *in* 7 Oxford Hist. of the United States (David M. Kennedy ed. 2017). *See generally* John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301–05 (2001).

[19] *See, e.g.*, Marie H. Nelson, *Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History*, 21 Legal Stud. F. 353, 358–73 (1997).

[20] *Davis v. Beason*, 133 U.S. 333, 345–48 (1890), *overruled by Romer v. Evans*, 517 U.S. 620, 634 (1996).

undercut by the federal government in favor of Native Americans.[21] The first Jews to arrive in the colonies were nearly expelled because of their religion,[22] Ulysses S. Grant's notorious "General Orders No. 11" expelled Jews from defeated Confederate territories,[23] and "anti-Semitism began to grow virulent as soon as the Jewish immigration rate started to rise during the 1880s."[24] And of course, one could surely argue that some African Americans today continue to experience the lingering effects of slavery and segregation as resource constraints on the uninhibited exercise of their religion.[25] Black churches were sporadically suppressed by Southern states before the Civil War,[26] Bull Connor arrested congregants by the busload as they left the safety of the sanctuary to march for equal rights in the streets,[27] and some of the church

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21 *See Uintah Ute Indians of Utah v. United States,* 28 Fed. Cl. 768, 772-72 (1993).

22 Eli Faber, *America's Earliest Jewish Settlers, 1654–1820*, at 25, *in* The Columbia Hist. of Jews and Judaism in Am. (Marc Lee Raphael ed. 2008).

23 *See, e.g.*, Eric Muller, *All the Themes but One*, 66 U. Chi. L. Rev. 1395, 1420–24 (1999).

24 Ahlstrom, *supra*, at 973–74, 1090.

25 *See, e.g.*, *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759–60 (7th Cir. 2006); *Cato v. United States*, 70 F.3d 1103, 1105–06, 1109–11 (9th Cir. 1995); *see also* Margaret Russell, *Cleansing Moments and Retrospective Justice*, 101 Mich. L. Rev. 1225, 1240 (2003).

26 Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* 45 (2003).

27 Taylor Branch, *Pillar of Fire: America During the King Years 1963–65* 77 (1998).

buildings they left behind were bombed in their absence.[28]

History is replete with examples of the mistreatment of groups of people by other groups, and this nation's history is unfortunately not exempt. Given this reality, it's unclear why the reparations theory of RFRA offered by the dissent would stop with Native Americans and not extend to Baptists, Catholics, Mormons, Jews, and descendants of slaves, to name but a few possible groups.

Regardless of the philosophical arguments for and against reparations, RFRA was not designed to create reparations for *any* aggrieved religious group. There is zero legal or textual basis for reading such a program into RFRA. If reparations are ever to come from any source, it must be from Congress, not the courts. And until Congress enacts religious reparations for Native Americans, courts should studiously avoid inventing such remedies under the auspices of RFRA, a statute designed to protect religious liberty for *all*. RFRA does not play favorites, and neither should we. For these reasons, I wholeheartedly agree with the majority's refusal to rewrite RFRA to include an affirmative mandate to discriminate

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[28] *Id.* at 137–38; *see also Church Fires in the Southeast: Hearing Before the H. Comm. on the Judiciary*, 104th Cong. 9–13 (1996) (statement of Donald L. Payne, Representative in Congress from the State of New Jersey, summarizing church burning incidents under criminal investigation in 1995–1996 in the Southeast states). *See generally* S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 Calif. L. Rev. 471 (2008).

MURGUIA, Chief Judge, dissenting, with whom GOULD, BERZON, and MENDOZA, Circuit Judges, join, and LEE, Circuit Judge, joins as to all but Part II.H:

We are asked to decide whether the utter destruction of *Chí'chil Biłdagoteel*, a site sacred to the Western Apaches since time immemorial, is a "substantial burden" on the Apaches' sincere religious exercise under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to bb-4. Under any ordinary understanding of the English language, the answer must be yes. This conclusion comports with the First Amendment's protection against government conduct prohibiting the free exercise of religion, because the destruction of the Apaches' sacred site will prevent worshipers from ever again exercising their religion. *See* U.S. Const. amend. I.

Our decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), wrongly defined "substantial burden" as a narrow term of art and foreclosed any relief. Although a majority of this en banc court rejects *Navajo Nation*'s reasoning, *see* Nelson Op. at 125; Collins Op. at 47 (no mention of *Navajo Nation* while recognizing that in certain instances "substantial burden" under RFRA can be read by its plain meaning), a different majority concludes that the Apaches' RFRA claim fails under *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Relying on *Lyng*, Judge Collins' majority opinion ("the majority") holds that the destruction of a sacred site cannot be described as a substantial burden no matter how devastating the impact on religious exercise, erroneously concluding that preventing a religious

practice is neither prohibitory nor coercive. In so doing, the majority misreads RFRA, Supreme Court precedent, and our own case law. And rather than using the rare opportunity of sitting en banc to provide clarity, the majority leaves litigants in the dark as to what "substantial burden" means. I respectfully dissent.

I. Background

In a rider to a must-pass defense spending bill, Congress directed the Secretary of Agriculture to transfer 2,422 acres of federal land to Resolution Copper Mining, a foreign-owned limited liability company, to build an underground copper mine. The copper ore is located beneath *Chí'chil Biłdagoteel*, also known as Oak Flat, a sacred place where Western Apache people have worshiped and conducted ceremonies since time immemorial.[1] Once the land transfer occurs, Resolution Copper will mine the ore through a panel caving process, causing the land to subside and eventually creating a crater nearly two miles wide and a thousand feet deep. It is undisputed that this subsidence will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise at their sacred site.

The land transfer, however, is subject to RFRA. Congress enacted RFRA to protect the right to engage in religious practice without substantial government interference, which "the framers of the Constitution" understood "as an unalienable right." 42 U.S.C. §

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[1] Western Apache generally refers to the Apaches living in modern day Arizona, including ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache.

2000bb(a)(1). Thus, under RFRA, the federal government must provide a "compelling" justification pursued by the least restrictive means for any action that "substantially burden[s]" sincere religious exercise. *Id.* § 2000bb-1(b). Apache Stronghold, an Arizona nonprofit organization founded by a former Chairman of the San Carlos Apache Tribe to preserve Indigenous sacred sites, sued to enjoin the land transfer, arguing that, among other things, it violates RFRA. The district court, relying on our decision in *Navajo Nation*, declined to preliminarily enjoin the transfer, concluding that the destruction of Oak Flat did not amount to a substantial burden on the Apaches' religious exercise. The district court therefore did not determine whether the government had provided sufficient justification for the land transfer.

Because the land transfer will prevent Apache worshippers from engaging in sincere religious exercise at their sacred site, I would hold that Apache Stronghold is likely to succeed in establishing that the government has imposed a "substantial burden" on the Apaches' religious exercise. Such a holding stems from the Supreme Court's jurisprudence before and after the enactment of RFRA, as well as our own case law, which have long recognized that preventing people from engaging in religious exercise impermissibly burdens that exercise. And such a decision reflects the government's unique control of access to Oak Flat, a degree of control that is rare outside the prison and land-use context. I would therefore reverse the district court's order concluding that there is no substantial burden, vacate the rest of the order, and remand to the district court to determine whether the government can demonstrate

that the substantial burden posed by the land transfer is justified under subsection 2000bb-1(b).

A. Oak Flat and the Land Transfer

The Western Apache believe that their ancestral landscape is imbued with *diyah*, or spiritual power. This is especially true for *Chí'chil Biłdagoteel*, which means "Emory Oak Extends on a Level" or "Flat with Acorn Trees" or more simply "Oak Flat," a 6.7-square-mile sacred site located primarily in the Tonto National Forest. Oak Flat is situated between *Ga'an Bikoh* (Devil's Canyon), a canyon east of Oak Flat, and *Dibecho Nadil* (Apache Leap), the edge of a plateau west of Oak Flat.

Oak Flat, Devil's Canyon, and Apache Leap comprise a hallowed area where the Apaches believe that the *Ga'an*—the "guardians" and "messengers" between *Usen*, the Creator, and people in the physical world—dwell. *Usen* created the *Ga'an* as "the buffer between heaven and earth" and created specific "blessed places" for the *Ga'an* to reside. The *Ga'an* are "the very foundation of [Apache] religion," and they protect and guide the Apache people. The Apaches describe the *Ga'an* as their "creators, [their] saints, [their] saviors, [and their] holy spirits."

Through *Usen* and the *Ga'an*, the Apaches believe that everything has life, including air, water, plants, animals, and *Nahagosan*—Mother Earth herself. The Apaches strive to remain "intertwined with the earth, with the mother" so they can "communicate with what [is] spiritual, from the wind to the trees to the earth to what [is] underneath." Because of the importance of remaining connected to the land, the Apaches view Oak Flat as a "direct corridor" to their Creator's spirit

and as the place where the *Ga'an* "live and breathe." Oak Flat is thus "uniquely endowed with holiness and medicine," and neither "the powers resident there, nor [the Apaches'] religious activities . . . can be 'relocated.'"

The *Ga'an* come "to ceremonies to impart well-being to" the Apaches "to heal, and to help the people stay on the correct path." Oak Flat thus serves as a sacred ceremonial ground, and these ceremonies cannot take place "anywhere else." For instance, young Apache women have a coming-of-age ceremony, known as a "Sunrise Ceremony," in which each young woman will "connect her soul and her spirit to the mountain, to Oak Flat." Similarly, "young boys that are coming into manhood" have a sweat lodge ceremony at Oak Flat. There, the Apaches also conduct a Holy Grounds Ceremony, which is a "blessing and a healing ceremony . . . for people who are sick, have ailments[,] or seek guidance." The Apaches gather "sacred medicine plants, animals, and minerals essential to [these] ceremonies" from Oak Flat, and they use "the sacred spring waters that flow[ ] [] from the earth with healing powers" that are not present elsewhere. "Because the land embodies the spirit of the Creator," if the land is desecrated, then the "spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, [Oak Flat] is like a dead carcass." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021).

The Apaches have held Oak Flat sacred since long before the United States government and its people ventured west of the Rio Grande. The Apaches, however, were dispossessed from their ancestral land during the nineteenth century, when miners and

settlers moved west and clashed repeatedly with the local Apaches. To make peace, various Apache leaders signed the Treaty of Santa Fe in 1852, wherein the United States government promised the Apaches that it would "designate, settle, and adjust their territorial boundaries" and "pass and execute" laws "conducive to the prosperity and happiness of" their people. Despite the treaty, conflict continued as more settlers, miners, and United States soldiers entered the Apaches' ancestral land, resulting in several massacres of the Apaches by soldiers and civilians. By the late 1870s, the United States government forcibly removed the Apaches from their ancestral homelands and onto reservations, so that today, the Apaches no longer live on lands encompassing their sacred places. Nonetheless, the Apaches "remain connected to their spirituality" and "the earth," and they continue to come to Oak Flat to worship, conduct ceremonies, sing and pray, and gather sacred plants. *Apache Stronghold*, 519 F. Supp. 3d at 603–04.

In the twentieth century, the United States government took steps to protect Oak Flat from mining activity. In 1955, President Eisenhower reserved 760 acres of Oak Flat for "public purposes" to protect it from mineral exploration or other mining-related activities. 20 Fed. Reg. 7319, 7336–37 (Oct. 1, 1955). President Nixon renewed that protection in 1971. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). That approach changed in 1995, after miners discovered a large copper deposit 7,000 feet beneath Oak Flat. The following decades saw several congressional attempts to transfer Oak Flat to Resolution Copper. Those efforts reached fruition in 2014, when Congress passed the National Defense

Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014) ("NDAA"). The NDAA included a rider that stripped Oak Flat's mining protections and "authorized and directed" the Secretary of Agriculture to convey 2,422 acres of federal land, including Oak Flat, to Resolution Copper in exchange for 5,344 acres of Arizona land currently owned by the company. *See id.* § 3003, 128 Stat. 3292 (codified at 16 U.S.C. § 539p) (the "Land Transfer Act").[2] Congress's stated purpose for authorizing the exchange is to "carry out mineral exploration activities under" Oak Flat. 16 U.S.C. § 539p(c)(6)(A)(i).

Under the Land Transfer Act, the Secretary of Agriculture must prepare an environmental impact statement ("EIS") before the land transfer may take place. *See id.* § 539p(c)(9)(B).[3] This EIS will "be used as the basis for all" federal government decisions "significantly affecting the quality of the human environment," including permitting necessary for any development of the transferred land. *Id.* The EIS must "assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under [the Land Transfer Act] on the cultural and archeological resources that may be located on [that] land" and "identify measures that may be taken, to the extent practicable, to minimize potential adverse

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[2] The 2,422-acre tract is known as the "Oak Flat Federal Parcel," and includes the 760-acre section of land originally protected by President Eisenhower in 1955 (known as the "Oak Flat Withdrawal Area") as well as additional National Forest Service lands near Oak Flat. The copper deposit sits primarily beneath the Oak Flat Withdrawal Area.

[3] The Land Transfer Act is subject to several other conditions not at issue here. *See, e.g.*, 16 U.S.C. § 539p(c)(2)(A), (B).

impacts on those resources." *Id.* § 539p(c)(9)(C). Within sixty days of the Final EIS's publication, and regardless of its contents, "the Secretary shall convey" the land to Resolution Copper. *Id.* § 539p(c)(10).

In January 2021, the Forest Service, a division of the Department of Agriculture, issued an EIS, which has since been withdrawn. In that EIS, the Forest Service concluded that the land transfer would remove Oak Flat from the Forest Service's jurisdiction, making the Forest Service unable to "regulate" the mining activity under applicable environmental laws. The Forest Service found that the mine would be "one of the largest" and "deepest" "copper mines in the United States," with an estimated 1,970 billion metric tons of copper situated 4,500 to 7,000 feet beneath Oak Flat. Resolution Copper will use an underground mining technique known as panel caving that carves a network of tunnels below the ore. As the ore is removed, the land above the ore "moves downward or 'subsides.'" This "subsidence zone" or crater will reach between 800 and 1,115 feet deep and nearly two miles wide. The crater would start to appear within six years of active mining. The crater and related mining activity will have a lasting impact on the land of approximately eleven square miles. The Forest Service "assessed alternative mining techniques in an effort to prevent subsidence, but alternative methods were considered unreasonable."

As a result of the crater, the Forest Service determined that "access to Oak Flat and the subsidence zone will be curtailed once it is no longer safe for visitors." The Forest Service therefore concluded that the mine would cause "immediate,

permanent, and large in scale" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources."[4] Oak Flat would "be permanently affected," and tribal members would irreversibly lose access to the area for "religious purposes," thus resulting in "an indescribable hardship to [Indigenous] peoples." "[T]he impacts of the Resolution Copper [mine] . . . are substantial and irreversible due to the changes that would occur at Oak Flat." The Forest Service also found that there are no mitigation measures that could "replace or replicate the historic properties that would be destroyed by project construction. . . . Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated."

In March 2021, the Department of Agriculture ordered the Forest Service to rescind the EIS. The Department explained that the government needed "additional time" to "fully understand concerns raised by Tribes and the public" and to "ensure the agency's compliance with federal law." While counsel for the government informed the en banc panel at oral argument in March 2023 that the environmental analysis would be completed and the EIS republished by the summer, the Forest Service has not yet issued a revised Final EIS.

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[4] Removing the ore will also create roughly one-and-a-half billion tons of waste that will need to be stored "in perpetuity" at a site close to Oak Flat. The Forest Service determined that development of the storage facility will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials."

B. Procedural History

Apache Stronghold filed this action several days before the government issued the now-withdrawn EIS.[5] As relevant on appeal, Apache Stronghold alleges that the Land Transfer Act violates RFRA, the First Amendment's Free Exercise Clause, and trust duties created by the 1852 Treaty of Santa Fe. Two days after filing its complaint, Apache Stronghold filed a motion for a temporary restraining order and for a

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[5] Besides this case, there are two other pending cases seeking to prevent the land transfer. In January 2021, the San Carlos Apache Tribe sued the Forest Service to stop the land transfer under RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe, and moved to vacate the now withdrawn EIS as deficient under the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), the Land Transfer Act, and the National Historic Preservation Act. *See San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 21-cv-0068 (D. Ariz.). Also in January 2021, a coalition of environmental and tribal groups sued the Forest Service to enjoin the land transfer and vacate the EIS as deficient under the APA, NEPA, the Land Transfer Act, the Forest Service Organic Act, the Federal Land Policy and Management Act, and other statutory grounds. *See Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, No. 2:21-cv-0122-DLR (D. Ariz.). Resolution Copper intervened in both cases, and the Defendants moved to consolidate all three cases. The district court in this case denied that motion, concluding that "there is minimal overlap in controlling questions of law between the pending cases" given the different legal theories advanced by the three plaintiffs.

The parties agreed to stay both cases after the Forest Service withdrew its original EIS. *See San Carlos Apache Tribe*, No. 21-cv-0068 (D. Ariz. Mar. 15, 2021); *Ariz. Mining Reform Coal.*, No. 21-cv-0122 (D. Ariz. Mar. 15, 2021). Those cases remain stayed, and the parties have filed regular joint status reports. The government has stated that it will give the defendants sixty days' notice prior to filing an updated Final EIS. As of now, that notice has not been given.

preliminary injunction to prevent the government from transferring the land to Resolution Copper. The district court denied the temporary restraining order, reasoning that Apache Stronghold could not show immediate and irreparable injury. *Apache Stronghold*, 519 F. Supp. 3d at 597.

The district court then held a hearing and took evidence before denying Apache Stronghold's motion for a preliminary injunction. *Id.* at 611. The district court found that Apache Stronghold was unlikely to succeed on the merits of its RFRA, Free Exercise Clause, and breach of trust claims. *See id.* at 598–609. As to the RFRA claim, the district court concluded that although the "Government's mining plans on Oak [Flat] will have a devastating effect on the Apache people's religious practices," there was no "substantial burden" under this circuit's limited definition of that term. *Id.* at 605–08 (citing *Navajo Nation*, 535 F.3d at 1063–72). The district court therefore did not determine whether the government could establish a compelling interest to justify its actions, nor did the district court analyze the other preliminary injunction factors under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *See Apache Stronghold*, 519 F. Supp. 3d at 611. Apache Stronghold appealed, and moved for an injunction pending appeal.

After the district court denied Apache Stronghold's preliminary injunction motion, the Forest Service withdrew the Final EIS. The three-judge motions panel that considered Apache Stronghold's motion for an injunction pending appeal therefore concluded that Apache Stronghold had failed to show that it needed immediate relief to "avoid irreparable harm," because

the Forest Service expected to take "months" to complete its revised environmental review and the land transfer would not occur until then. *Apache Stronghold v. United States*, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *2 (9th Cir. March 5, 2021) ("Injunction Order"). Accordingly, the divided motions panel denied Apache Stronghold's motion. *Id.* In dissent, Judge Bumatay stated that he would have granted the motion and held that the land transfer violated RFRA because "the complete destruction of the land . . . . is an obvious substantial burden on [the Apaches'] religious exercise, and one that the Government has not attempted to justify." *Id.* at *5 (Bumatay, J., dissenting).

On the merits, a divided three-judge panel affirmed the district court's order. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022). We granted rehearing en banc. *Apache Stronghold v. United States*, 56 F.4th 636 (9th Cir. 2022).[6]

II. Discussion

In *Winter*, the Supreme Court emphasized that injunctive relief, whether temporary or permanent, is an "extraordinary remedy never awarded as of right." 555 U.S. at 24. A party seeking a preliminary injunction must show that: (1) it is "likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [its] favor"; and (4) "an injunction is in the public interest." *Id.* at 20. "Where,

[6] After oral argument, Resolution Copper intervened in this case before the district court, as well as before this court, for the limited purpose of participating in potential future litigation before the Supreme Court.

as here, the government opposes a preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021).

The district court concluded that Apache Stronghold could not establish a likelihood of success on any of its three claims, so it denied the motion for a preliminary injunction. *See Apache Stronghold*, 519 F. Supp. 3d at 598–609. Because I conclude that *Navajo Nation*'s reasoning is incorrect and because I would hold that preventing a person from engaging in sincere religious exercise is a substantial burden under RFRA, I would reverse and remand. I would therefore consider neither the other two claims nor the remaining *Winter* factors. Finally, I conclude that RFRA applies to the Land Transfer Act. Because a majority of judges have voted to affirm, I respectfully dissent.

A. RFRA and the Religious Land Use and Institutionalized Persons Act

In RFRA, Congress crafted a statutory right to the free exercise of religion broader than the corresponding constitutional right delineated by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the First Amendment tolerates neutral, generally applicable laws even when those laws burden or prohibit religious acts. *Id.* at 885–90. The Supreme Court explained that so long as the government's burden on religious exercise, even if substantial, was not the "object of" a law, "the First Amendment has not been offended" and the government need not demonstrate a narrowly tailored, compelling

governmental interest to justify it. *Id.* at 878–79; *see also id.* at 886 n.3 ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.").

In response, in 1993, Congress enacted RFRA. Congress disagreed with the Supreme Court's decision in *Smith* to "virtually eliminate[] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Instead, Congress found that "the framers of the Constitution[] recogniz[ed the] free exercise of religion as an unalienable right," and that governments, therefore, "should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Congress further determined that "the compelling interest test"—*i.e.*, strict scrutiny—"is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5); *see Gonzales v. O Centro Espírita Beneficente Uniaõ do Vegetal*, 546 U.S. 418, 430 (2006). Congress then stated that RFRA's two "purposes" were (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened," and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). RFRA therefore goes "far beyond what . . . is constitutionally required" under the Free Exercise Clause, and thus "provide[s] very broad protection for religious liberty." *Burwell v.*

Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014); *see Ramirez v. Collier*, 595 U.S. 411, 424 (2022).

Four years later, however, the Supreme Court struck down the portion of RFRA regulating state and local governments, concluding that Congress had exceeded its power under § 5 of the Fourteenth Amendment to regulate states. *City of Boerne v. Flores*, 521 U.S. 507, 511, 536 (1997). To repair RFRA's constitutional defect, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. §§ 2000cc to cc-5, "which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Recognizing their history and overlapping purposes, the Supreme Court has characterized RLUIPA and RFRA as "sister statute[s]" that "impose[ ] the same general test," distinguished only in that they apply to different "categor[ies] of governmental actions." *Hobby Lobby*, 573 U.S. at 695, 730. In contrast to RFRA's more general application to all federal government action, including federal prisons and federal land-use regulations by the District of Columbia or U.S. territories, *see* 42 U.S.C. §§ 2000bb-1, 2000bb-3, RLUIPA governs only state land use regulations, *see id.* § 2000cc, and religious exercise by institutionalized persons, typically in the state prison context, *see id.* § 2000cc-1. RLUIPA otherwise generally "mirrors RFRA." *Holt*, 574 U.S. at 357–58; *compare* 42 U.S.C. § 2000cc-1(a) (providing that a "substantial burden" in the state prison context must be justified by a compelling governmental interest pursued through the least restrictive means); *with id.* § 2000bb-1(b) (same test for federal government action).

B. Defining "Substantial Burden"

i. Plain Meaning

With that background in mind, I turn to Apache Stronghold's claim that the government will violate RFRA by transferring Oak Flat to Resolution Copper, which will result in the destruction of the Apaches' place of worship. Under RFRA, the federal government may not "substantially burden a person's exercise of religion . . . except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). Subsection (b) provides that the "Government may substantially burden a person's exercise of religion only if it 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." *Id.* § 2000bb-1(b). Thus, to proceed with its RFRA claim, Apache Stronghold must show that (i) its sincere religious exercise is (ii) subject to a substantial burden imposed by the government. If Apache Stronghold makes that showing, the government must then justify that burden by demonstrating that (iii) it has a compelling interest that (iv) it is pursuing through the least restrictive means.

As to the Apaches' religious exercise, the district court found, and the government does not dispute, that the Apaches have a sincere religious belief in worshipping and conducting ceremonies at Oak Flat. *See Apache Stronghold*, 519 F. Supp. 3d at 603; *see also* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (defining the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a

system of religious belief").[7] Because the government concedes that "it is undisputed that RFRA applies to federal land-management statutes and their implementation," on appeal, we must determine whether the transfer and resulting destruction of Oak Flat constitutes a substantial burden on the Apaches' religious exercise.

To define "substantial burden," I begin with RFRA's text. *Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020); *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Because RFRA does not define "substantial burden," I "turn to the phrase's plain meaning at the time of enactment." *Tanzin*, 592 U.S. at 48; *see also FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011). Indeed, when grappling with RFRA's undefined terms, the Supreme Court has done just that. *Tanzin*, 592 U.S. at 45–49 (looking to RFRA's plain meaning, using dictionaries, to conclude that "appropriate relief" encompasses claims for money damages against government officials in their individual capacities).

At the time of RFRA's passage, a "burden" was defined as "[s]omething oppressive" or "anything that imposes either a restrictive or onerous load" on an activity. *Burden*, *Black's Law Dictionary* (6th ed. 1990); Webster's Third New International Dictionary 298 (1986) (defining burden as "something that weighs down [or] oppresses"). A burden is "substantial" if it is

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[7] RFRA appropriately does not permit courts to judge the significance or "centrality" of a particular belief or practice, given that courts are not the proper arbiters of religious doctrine. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Courts can only inquire into the sincerity of the professed religiosity. *See Hobby Lobby*, 573 U.S. at 696, 717 n.28; *cf. Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

"[o]f ample or considerable amount, quantity, or dimensions." *Substantial*, *Oxford English Dictionary* 66–67 (2d ed. 1989). And "substantial" does not mean complete or total. *Substantial*, *Black's Law Dictionary* (6th ed. 1990) (defining "substantial" as something "considerable"; not "nominal"). In light of the plain meaning of substantial burden, therefore, RFRA prohibits government action that "oppresses" or "restricts" "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," to a "considerable amount," unless the government can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. *Accord* Injunction Order, 2021 U.S. App. LEXIS 6562, at *8–9 (Bumatay, J., dissenting).

ii. *Navajo Nation*'s Flawed Reasoning

Our decision in *Navajo Nation*, relied upon by the district court, rejected a plain meaning reading of "substantial burden." There, Native American tribes and their members sought to enjoin the use of artificial snow, made from recycled wastewater, on a public mountain sacred to their religion. *Navajo Nation*, 535 F.3d at 1062–63. This court concluded that using artificial snow was not a substantial burden under RFRA, because "the sole effect of the artificial snow is on the Plaintiffs' *subjective* spiritual experience." *Id.* at 1063, 1070 (emphasis added). Aside from holding that subjective interference with religious exercise is not a substantial burden under RFRA, *Navajo Nation* also concluded that because Congress "incorporated" *Sherbert* and *Yoder* into RFRA, the only two categories of burden that could

constitute a "substantial burden" are the specific types of burdens at issue in those cases. 535 F.3d at 1069–70; *see also id.* at 1063. *Navajo Nation* therefore held:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Id. at 1069–70. This is erroneous for six reasons.

First, *Navajo Nation* made too much of the fact that RFRA explicitly mentions *Sherbert* and *Yoder* by name in explaining the statute's purpose. *See* 535 F.3d at 1074–75. Reading "substantial burden" by its plain language is fully consistent with RFRA's statements of purpose. Congress explained that RFRA's two "purposes" are (1) "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*[,] *and* to guarantee its application in *all* cases where free exercise of religion is substantially burdened," *and* (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b) (emphasis added) (citations omitted). Section 2000bb(b) thus links *Sherbert* and *Yoder* to the "compelling interest test," *not* to the "substantial burden" inquiry. *See* 42 U.S.C. § 2000bb(b) (not mentioning *Sherbert* or *Yoder* in

RFRA's second purpose). Consonant with the statute's purposes, the Supreme Court has recognized that "RFRA expressly adopted the *compelling interest* test 'as set forth in *Sherbert* and *Yoder*.'" *Gonzales*, 546 U.S. at 431 (quoting 42 U.S.C. § 2000bb(b)(1) (emphasis added) (citations omitted)). "In each of those cases, [the] Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.*

In other words, when enacting RFRA, Congress was focused on governments' *justifications* for burdens on religious exercise created by generally applicable laws—the requirement present in *Sherbert* and *Yoder* that *Smith* eliminated—not the definition of substantial burden. Justice O'Connor, concurring only in the judgment in *Smith*, made this point when she critiqued the *Smith* majority for dropping the "*Sherbert* compelling interest test" and argued that "[r]ecent cases have instead affirmed that [*compelling interest*] *test* as a fundamental part of our First Amendment doctrine. The cases cited by the [majority] signal no retreat from our consistent adherence to the *compelling interest test*." *Smith*, 494 U.S. at 898, 900 (O'Connor, J., concurring in the judgment) (emphasis added) (cleaned up). Justice O'Connor notably did not describe the test as the "*Sherbert* substantial burden test," because her disagreement with the *Smith* majority was not with the meaning of substantial burden but with the *level of scrutiny*. And the *Smith* majority never defined substantial burden because it concluded the *Sherbert* test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See id.* at 884–85.

Second, neither *Sherbert* nor *Yoder* contains the term "substantial burden." It would therefore be surprising for Congress to invoke an interpretation of a purported term of art by referencing two cases, neither of which uses the term. *See Sherbert*, 374 U.S. at 406 ("substantial infringement"); *Yoder*, 406 U.S. at 220 ("unduly burdens"). *Navajo Nation*'s argument that "substantial burden" is a term of art from the Supreme Court's pre-RFRA First Amendment jurisprudence makes little sense given that neither case includes that term. 535 F.3d at 1074. Indeed, the Supreme Court did not commonly or consistently use the term "substantial burden."

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for example, decided just months before Congress enacted RFRA, the Court explained that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," without using the term "substantial burden." 508 U.S. 520, 546 (1993). If "substantial burden" truly was a term of art, then one would expect consistent usage. *See Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2445 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

In looking to the term's plain meaning, I do not ignore the significance of RFRA mentioning *Sherbert* and *Yoder* by name. But rather than implausibly reading "substantial burden" as a term of art shackled to *Sherbert* and *Yoder*, I rely on those cases—along with other "Federal court rulings," 42 U.S.C. § 2000bb(a)(5)—to properly situate "substantial

burden" within RFRA. *See infra* § II(D). And it would unreasonably contort the English language to read "substantial burden" to exclude the utter destruction of sacred sites. "Because common sense rebels" at the majority's interpretation of RFRA, "we should not adopt that interpretation unless the statutory language compels us to conclude that Congress intended such a startling result." *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000) (Canby, J., dissenting).

Third, *Navajo Nation* (and the majority here) proceeds as if RFRA's coverage is identical to that of the Free Exercise Clause, frozen in time at the moment of the statute's enactment. But Congress amended RFRA in 2000 and repealed RFRA's previous definition of the "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5 (1993). As the Supreme Court explained: "[t]hat amendment deleted the prior reference to the First Amendment," and it is unclear "why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Hobby Lobby*, 573 U.S. at 714. Congress also broadened the definition of "religious exercise" in two ways: it eliminated any requirement that a religious exercise be "compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc5(7)(A), and it specified that "religious exercise" includes "[t]he use, building, or conversion of real property for the purpose of religious exercise," 42 U.S.C. § 2000cc-5(7)(B). The term "substantial burden" must therefore be construed in light of Congress's express direction that RFRA applies to the use of property for religious purposes. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S.

439, 455 (1993) (explaining that statutory construction "is a holistic endeavor," so "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law" (quotation marks omitted) (cleaned up)). That Congress amended RFRA to expressly include religious use of property reinforces my conclusion that the denial of religious exercise at a sacred site is a substantial burden on religious exercise, contrary to the holding of *Navajo Nation*.

Fourth, considering this amendment to RFRA, and after *Navajo Nation*, the Supreme Court has rejected the notion that RFRA "merely restored [its] pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715–16. Instead, the Court explained that "the amendment of RFRA through RLUIPA surely dispels any doubt" that Congress did not intend "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Id.* at 714; *see also id.* at 706 n.18 (explaining that there is "no reason to believe" that RFRA "was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases"). I therefore rely on pre-*Smith* cases for guidance only.

Fifth, and relatedly, as discussed in the next section, *Navajo Nation*'s choice to confine "substantial burden" to a term of art cannot stand in the face of the Supreme Court's directive that RFRA and RLUIPA impose "the same standard." *Holt*, 574 U.S. at 356–58 (quoting *Gonzales*, 546 U.S. at 436); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (noting that courts do not "ordinarily imbue statutory terms with a specialized . . . meaning when Congress has not itself invoked" one).

Finally, instead of just answering the question before it, *Navajo Nation*'s decision to define substantial burden as a narrow term of art swept too broadly. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) ("A broad holding . . . might have implications for future cases that cannot be predicted."). This case asks whether the utter destruction of a sacred site is a substantial burden. That is a fundamentally different question than the one *Navajo Nation* considered, because there, plaintiffs still had "*virtually unlimited access* to the mountain" to "continue to pray, conduct their religious ceremonies, and collect plants for religious use." *Navajo Nation*, 535 F.3d at 1063 (emphasis added); *see id.* (noting that nothing "with religious significance, or religious ceremonies . . . would be physically affected"). Because the *Navajo Nation* majority went to great lengths to emphasize that "no places of worship [were] made inaccessible," *id.*, *Navajo Nation* should not have adopted a rule that extends to cases where places of worship will be obliterated. And by adopting such a broad holding, it erred.

Accordingly, I would revise *Navajo Nation*'s definition of "substantial burden" to the extent that it defined that phrase as a term of art limited to the kinds of burdens at issue in *Sherbert* and *Yoder*. Rather, as discussed *infra* § II(D), the kinds of burdens challenged in *Sherbert* and *Yoder* are examples *sufficiently* demonstrating a substantial burden, not those *necessary* to do so.[8]

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[8] As reflected in the first paragraph of the per curiam opinion, a majority of this court has overruled *Navajo Nation*'s narrow test for a "substantial burden" under RFRA. I echo Judge

C. RFRA and RLUIPA Are Interpreted Uniformly

RLUIPA, RFRA's sister statute, supports my conclusion to define substantial burden by its plain meaning. RLUIPA's "substantial burden" test largely mirrors RFRA's test, and like RFRA, it does not define "substantial burden." *See* 42 U.S.C. §§ 2000cc, 2000cc-1, 2000cc-5(4)(A). So, as we did in *San Jose Christian College v. City of Morgan Hill*, I look to RLUIPA's plain meaning to interpret "a 'substantial burden' on 'religious exercise'" in the land-use context as "a significantly great restriction or onus upon such exercise." 360 F.3d 1024, 1034 (9th Cir. 2004); *id.* ("When a statute does not define a term, a court should construe that term in accordance with its ordinary, contemporary, common meaning." (quotation marks omitted)). Since then, we have relied on this plain meaning definition of substantial burden in other RLUIPA cases. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 988–89 (9th Cir. 2006); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011).[9]

Nelson's clear refutation of any suggestion to the contrary. *See* Nelson Op. at 130–33.

[9] Dictionaries contemporaneous with the enactments of RFRA and RLUIPA define "substantial" synonymously as either a "considerable" or a "significant" amount. To the extent there is any semantic difference, I conclude that the meaning of "substantial" is the same under both statutes, particularly given that RLUIPA was meant to restore part of RFRA's original reach. *See Holt*, 574 U.S. at 357–58 (RLUIPA "mirrors RFRA"); *Gonzales*, 546 U.S. at 436 (RLUIPA allows incarcerated people

That "substantial burden" has the same meaning under both RFRA and RLUIPA is a logical application of statutory construction for several reasons. First, it is significant that these two Title 42 statutes use the same "substantial burden" and "compelling interest" language. *See United States v. Nishiie*, 996 F.3d 1013, 1026 (9th Cir. 2021) ("When Congress uses the same language in two statutes having similar purposes," this Court starts with the "presum[ption] that Congress intended that text to have the same meaning in both statutes." (quotation marks omitted) (cleaned up)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172–73 (2012) (presumption of consistent usage). The term "religious exercise" also has an identical definition in the two statutes. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). The two sister statutes differ only in what categories of government action they control: RFRA applies to all federal action, including federal prisons and land-use restrictions, whereas RLUIPA governs state government land-use regulations and state prisons. Diverging definitions for identical terms in the two statutes would allow federal prisons to burden religious rights more heavily than state prisons, or vice versa, which is implausible given the statutes' history and purpose. *See Gonzales*, 546 U.S. at 436; *Holt*, 574 U.S. at 356–58 (explaining that the two statutes impose "the same standard"); *Cutter*, 544 U.S. at 716–17 ("To secure redress for [incarcerated persons] who encountered undue barriers to their religious observances, Congress carried over from RFRA [to RLUIPA] the 'compelling governmental

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"to seek religious accommodations pursuant to the same standard as set forth in RFRA.").

interest'/'least restrictive means' standard."); *see also Austin v. U.S. Navy Seals 1–26*, 142 S. Ct. 1301, 1307 (2022) (Alito, J., dissenting) (explaining that RLUIPA "essentially requires prisons to comply with the RFRA standard").

Second, the Supreme Court has cross-referenced the two statutes for support. *See, e.g.*, *Holt*, 574 U.S. at 356–57 (a RLUIPA case invoking RFRA cases); *Hobby Lobby*, 573 U.S. at 695, 729 n.37 (a RFRA case invoking RLUIPA cases).

Third, at least seven other circuits agree with my conclusion that the two statutes' "substantial burden" standards are one and the same. *See, e.g.*, *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) ("[T]he two statutes are analogous for purposes of the substantial burden test."); *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003) (RLUIPA "reinstate[d] RFRA's protection against government burdens" and "mirror[s]" its provisions); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 n.64 (5th Cir. 2010) ("same 'substantial burden' question"); *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) ("same understanding"); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) ("same definition"); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 n.13 (10th Cir. 2013) ("interpreted uniformly"), *aff'd sub nom. Hobby Lobby*, 573 U.S. 682; *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144 n.23 (11th Cir. 2016) ("same substantial burden analysis"); *see also Sabir v. Williams*, 52 F.4th 51, 60 & n.5 (2d Cir. 2022) (applying RLUIPA's substantial burden precedent to a RFRA claim); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 587

(6th Cir. 2018) (relying on *Holt*, a RLUIPA case, to define substantial burden in a RFRA case), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

The great weight of authority thus buttresses my conclusion that RFRA and RLUIPA employ the same substantial burden test defined by its plain meaning.

D. Preventing a Person from Engaging in Religious Exercise Is an Example of a Substantial Burden

I next consider which government actions amount to a substantial burden on religious exercise. Keeping in mind that RFRA did not "merely restore[the Supreme] Court's pre-*Smith* decisions in ossified form," *Hobby Lobby*, 573 U.S. at 715, the Supreme Court's pre-*Smith* Free Exercise jurisprudence, as well as our own case law, provide at least three clear examples of a substantial burden on religious exercise: where the government (1) forces a religious adherent to choose between sincere religious exercise and receiving government benefits; (2) threatens a religious adherent with civil or criminal sanctions for engaging in sincere religious exercise; or (3) prevents a person from engaging in sincere religious exercise.

i. Pre-*Smith* Free Exercise Jurisprudence

I begin with *Sherbert* and *Yoder*, the two pre-*Smith* cases that RFRA mentions by name. *See* 42 U.S.C. § 2000bb(b)(1). In *Sherbert*, a state employer fired a Seventh-day Adventist because she refused to work on Saturdays, her faith's day of rest. 374 U.S. at 399. The state denied the plaintiff's claim for unemployment compensation benefits, finding that she had failed to accept work without good cause. *Id.* at 399–401. The

Supreme Court held that the state's denial of unemployment compensation to the plaintiff because she was exercising her faith imposed a "substantial infringement" under the Free Exercise Clause. *Id*. at 403–04, 406. Such a condition unconstitutionally forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. Having determined that there was a "substantial infringement" on religious exercise, the Court then "consider[ed] whether some compelling state interest enforced in the eligibility provisions of the [state] statute justifie[d] the substantial infringement of [her] First Amendment right," and held that the state's concern about protecting against "fraudulent [unemployment] claims" was insufficiently compelling. *Id*. at 406–09.

In *Yoder*, a state prosecuted members of the Amish faith for violating a state law that required children to attend school until the age of sixteen. 406 U.S. at 207–08. The defendants sincerely believed that their children's attendance in high school was "contrary to the Amish religion and way of life." *Id*. at 209. The Supreme Court reversed the convictions, holding that the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" their exercise of religion in violation of the Free Exercise Clause. *Id*. at 207, 220. According to the Court, the state law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id*. at 218. As to the state's interest underlying its truancy law, the Court explained that a

general interest in compulsory education was insufficiently compelling. *Id*. at 221.

But pre-RFRA precedents did not limit the kinds of burdens protected under the Free Exercise Clause to the types of burdens challenged in *Sherbert* (the choice between sincere religious exercise and receiving government benefits) and in *Yoder* (the threat of civil or criminal sanctions). Beyond these two cases, the Supreme Court's pre-*Smith* jurisprudence recognizes at least one other category of government action that violates the Free Exercise Clause: preventing a religious adherent from engaging in religious exercise. In *Cruz v. Beto*, for example, a prison denied a Buddhist access to the prison chapel and prohibited him from corresponding with his religious advisor. 405 U.S. 319, 322 (1972) (per curiam). The Court reversed the dismissal of the complaint and held that, taking the allegations as true, the prison had violated the Free Exercise Clause. *Id.*

And in *O'Lone v. Estate of Shabazz*, prison officials "prevented Muslims . . . from attending Jumu'ah," an Islamic congregational service held on Friday afternoons. 482 U.S. 342, 347 (1987). The plaintiffs sued, "alleging that the prison policies unconstitutionally denied them their Free Exercise rights under the First Amendment." *Id.* The Supreme Court recognized that preventing Muslims from engaging in religious exercise gave rise to a cognizable Free Exercise Clause claim. But, at the time, before RFRA and RLUIPA, prison officials were only required to show that a policy that burdened religious exercise was "reasonable." *Id.* at 350. So the Court concluded that preventing Muslims from attending religious services was "justified by concerns of

institutional order and security." *Id.*; *see id.* at 351–52 (concluding that, although there were "no alternative means of attending Jumu'ah," the prison policy of preventing religious exercise was reasonable because "alternative means of exercising the [First Amendment] right" remained open as the plaintiffs were "not deprived of all forms of religious exercise" such as daily prayer).

In dissent, Justice Brennan agreed that preventing an adherent from engaging in religious practices was sufficient to demonstrate a Free Exercise claim, but disagreed with the majority's reasonableness standard:

> The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali*, [which requires the government to demonstrate a compelling interest] and would find their proffered justifications wanting.
>
> The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose.

Id. at 359 (Brennan, J., dissenting). RFRA and RLUIPA later essentially codified Justice Brennan's dissent, eliminating the reasonableness test for evaluating prison policies and instead requiring federal and state prison policies that substantially burden religious exercise to be justified by a

compelling interest furthered by the least restrictive means. *See* 42 U.S.C. § 2000cc-1(a); *id.* § 2000bb-1(b).[10]

RFRA also instructs that courts look to "prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5). Like the Supreme Court, our own cases prior to *Smith* recognized that preventing a person from engaging in religious exercise implicates the Free Exercise Clause. For instance, in *Graham v. Commissioner of Internal Revenue*, we required a religious adherent, there a taxpayer, to show that the government action "burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion *or by preventing* him or her from engaging in conduct or having a religious experience." 822 F.2d 844, 850–51 (9th Cir. 1987) (emphasis added), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680 (1989).

The same is true in other cases. *See, e.g.*, *McElyea v. Babbitt*, 833 F.2d 196, 197–99 (9th Cir. 1987) (citing

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[10] Other pre-*Smith* examples falling outside the *Sherbert*/*Yoder* framework are Free Exercise Clause challenges to government autopsies. *See Tanzin*, 592 U.S. at 51 (noting that autopsies are among the cases in which RFRA grants effective relief) (citing *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) (autopsy of son that violated Hmong beliefs), *opinion withdrawn in light of Smith*, 750 F. Supp. 558 (D.R.I. 1990)); *see also City of Boerne*, 521 U.S. at 547 (O'Connor, J., concurring in part) (discussing *Yang* as an example of why *Smith* was wrongly decided in the context of RFRA); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1893 & n.26 (2021) (Alito, J., concurring in judgment) (discussing the import of *Yang* in the lead up to Congress enacting RFRA and stating that "*Smith*'s impact was quickly felt, and Congress was inundated with reports of the decision's consequences" (citing 139 Cong. Rec. 9681 (1993))).

O'Lone and recognizing a Free Exercise Clause claim where a prison had no weekly Jewish services and the plaintiff alleged that prison officials "prevented him from practicing his religion"); *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (assuming that denial of access to a sweat lodge was a viable Free Exercise Clause claim, but upholding the prison policy under the *O'Lone*, pre-RFRA, reasonableness test); *cf. Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997) (holding, in a Free Exercise Clause case decided post-*City of Boerne* and pre-RLUIPA, that "[i]n order to establish a free exercise violation, [a plaintiff] must show the defendants burdened the practice of his religion, by preventing him from engaging in [religious exercise], without [proper] justification" (footnote omitted)).

ii. This Circuit's Precedents Recognize Preventing Religious Exercise Is a Substantial Burden

Given this legal backdrop, it is unsurprising that in our first RFRA case in 1995, we relied on pre-*Smith* Free Exercise Clause cases to define substantial burden to include preventing a person from engaging in religious exercise. In *Bryant v. Gomez*, we held that to show a "substantial burden" under RFRA,

> the religious adherent has the obligation to prove that a governmental action burdens the adherent's practice of his or her religion by preventing him or her from engaging in conduct or having a religious experience . . . . This interference must be more than an inconvenience.

46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (cleaned up) (quoting *Graham*, 822 F.2d at 850–51).[11]

The majority makes no effort to explain why we should not adhere to *Bryant*'s formulation of substantial burden. Nor does it distinguish our subsequent pre-*Navajo Nation* RFRA cases in which we consistently invoked the concept of preventing a person from engaging in religious conduct as a substantial burden in various contexts, including ones outside of the two RLUIPA contexts. For example, in a case considering a university's mandatory student registration fee that, in part, covered abortion services, we "look[ed] to our decisions prior to *Smith*," including a Free Exercise Clause challenge by a taxpayer, to define substantial burden to include "preventing [a person] from engaging in conduct or having a religious experience." *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) (quoting *Graham*, 822 F.2d. at 850–51, and discussing *Bryant*); *see also*

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[11] In *Bryant*, we rejected the plaintiff's RFRA claim because "full Pentecostal services" were not "mandated by his faith." 46 F.3d at 949 (stating that religious exercise must be one that "the faith mandates" or "a tenet or belief that is central to religious doctrine"). However, as discussed *supra* § II(B)(ii), in 2000, Congress expanded the statutory protection for religious exercise by amending RFRA and RLUIPA's definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). So to the extent that *Bryant* and other cases discussed below applied a narrower definition of "religious exercise" that required it to be central to or mandated by a person's faith, Congress has abrogated them. Similarly, RFRA and RLUIPA's definition of "exercise of religion" is broader than *O'Lone* and *Freeman*'s definition under the Free Exercise Clause. Otherwise, *Bryant*'s discussion of substantial burden remains good law.

Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Bryant*'s substantial burden standard in a copyright case and concluding that the unauthorized use of intellectual property of religious texts was not a substantial burden under RFRA); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (citing *Bryant*'s standard and finding no substantial burden because an incarcerated person was not "prevented" from "engaging in any [religious] practices" when the prison confiscated a religious text not central to his practice).[12]

Similarly, before and since *Navajo Nation*, we have routinely recognized that preventing religious exercise qualifies as a substantial burden under RLUIPA, which applies the "same standard" as RFRA, *Holt*, 574 U.S. at 356–57. *See Johnson v. Baker*, 23 F.4th 1209, 1215–16 (9th Cir. 2022) (recognizing that prohibiting plaintiff from possessing scented prayer oil in his cell substantially burdened his religious exercise); *Foursquare Gospel*, 673 F.3d at 1061, 1066–70 (recognizing that preventing the plaintiff from building a place of worship could constitute a substantial burden); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise"—*i.e.*, a "policy of prohibiting [a person] from attending group religious worship

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[12] The Seventh, Eighth, and Tenth Circuits have followed *Bryant*'s interpretation of a substantial burden under RFRA. *See Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (expressly drawing on *Bryant*); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citing *Bryant*).

services"—"is a substantial burden on that religious exercise."); *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d at 981–82 (holding that a county "imposed a substantial burden" on a Sikh organization's "religious exercise" by denying applications from the group for a conditional use permit to build a temple); *cf. United States v. Antoine*, 318 F.3d 919, 923–24 (9th Cir. 2003) (assuming that "raz[ing]" a "house of worship" to build a freeway would be a substantial burden).[13]

E. The Land Transfer Act Substantially Burdens the Exercise of Religion

The foregoing firmly establishes that where the government prevents a person from engaging in religious exercise, the government has substantially

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[13] Several other circuits also recognize that denying access to or preventing religious exercise qualifies as a substantial burden under RLUIPA. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004); *cf. C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Notably, the Tenth Circuit referenced this circuit's definition of a substantial burden when defining it to include preventing religious exercise. *See Werner*, 49 F.3d at 1480 (citing *Bryant*); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1313 (10th Cir. 2010) (citing *Werner*).

And in a recent RLUIPA case, the Supreme Court stayed the execution of an incarcerated person who requested that "his long-time pastor be allowed to pray with him and lay hands on him while he is being executed." *Ramirez*, 595 U.S. at 416; *see id.* at 426, 433 (holding that the state's refusal to permit audible prayer or religious touch, denying him access to his religious rites, "substantially burdens his exercise of religion," because "he will be unable to engage in protected religious exercise in the final moments of his life").

burdened the exercise of religion. The plain meaning of RFRA clearly reaches such instances. The Free Exercise Clause cases prior to *Smith* so recognized. *O'Lone*, 482 U.S. at 347–52; *Graham*, 822 F.2d at 850–51. We held as much in our first RFRA case. *See Bryant*, 46 F.3d at 949. And, as Judge Bumatay pointed out in his dissent from the order declining to enjoin the land transfer pending appeal, this understanding is consistent with RLUIPA. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9 (Bumatay, J., dissenting) ("[A]s then-Judge Gorsuch wrote [in a RLUIPA case], a substantial burden exists when the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014))).

I now turn to whether Apache Stronghold is likely to succeed in showing that the transfer and eventual destruction of Oak Flat constitutes a substantial burden on the Western Apaches' religious exercise. The district court heard extensive testimony about the impact of the land transfer and mine. The district court found:

> Because the land embodies the spirit of the Creator, "without any of that, specifically those plants, because they have that same spirit, that same spirit at Oak Flat, that spirit is no longer there. And so without that spirit of *Chí'chil Biłdagoteel*, it is like a dead carcass." If the mining activity continues, Naelyn Pike testified, "then we are dead inside. We can't call ourselves Apaches." Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned

> mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood. . . . [T]he land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship.

Apache Stronghold, 519 F. Supp. 3d at 604, 606 (citations omitted).

As discussed *supra* § I(A), the Forest Service, in its now withdrawn EIS, similarly documented the extensive, irreversible, and devastating impact of the mine's construction, and how the mining activity would prevent Apache worshipers from engaging in religious exercise at their religious sites. The crater will start to appear within six years of active mining, and the Forest Service concluded that the mining activity will cause "immediate" and "permanent" destruction of "archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources." In addition, once the government publishes its Final EIS, regardless of its contents, "the Secretary *shall* convey" the land to Resolution Copper within sixty days. 16 U.S.C. § 539p(c)(10) (emphasis added). So once the land transfer occurs, Oak Flat will be private property no longer subject to RFRA and other federal protections.

In other words, the land transfer will result in a crater that will subsume Oak Flat. The impact of the mining activity on sacred sites will be immediate and irreversible. All that will be left is a massive hole and rubble, making the site unsuitable for religious exercise. Religious worship will be impossible, and the Apaches will be prevented from ever again

worshipping at Oak Flat. As I have concluded, where the government prevents a religious adherent from engaging in religious exercise, the government has restricted the exercise of religion to a considerable amount. I would therefore hold that Apache Stronghold is likely to succeed in establishing that transferring Oak Flat to Resolution Copper will amount to a substantial burden under RFRA. *See* 42 U.S.C. § 2000bb-1(a). Because the district court did not determine whether the government could justify that burden by demonstrating a compelling interest pursued through the least restrictive means, I would remand for the district court to make that determination in the first instance. *See id.* § 2000bb-1(b)

F. *Lyng* Is Consistent with My Analysis

i. *Lyng* and Prohibitions on Free Exercise

The majority concludes that the destruction of a sacred site cannot be a substantial burden but cites no authority squarely supporting that proposition. Indeed, the majority fails to cite even one case foreclosing a RFRA claim where the government completely prevents a person from engaging in religious exercise. Confusingly, the majority agrees with me that then-Judge Gorsuch correctly held in *Yellowbear* "that 'prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief' qualifies as prohibiting free exercise." Collins Op. at 29 (quoting *Yellowbear*, 741 F.3d at 55). And the majority concedes that it is undisputed that the Land Transfer Act will categorically prevent the Apaches from participating in any worship at Oak Flat because their religious site will be obliterated. *See* Collins Op. at 19. If the

majority agrees with *Yellowbear*'s formulation—which mirrors the one I have laid out above in § II(D) (explaining that preventing religious exercise is an example of a substantial burden)—and agrees that the Apaches will be prevented from worshiping at Oak Flat, Apache Stronghold's claim cannot fail. *See* Injunction Order, 2021 U.S. App. LEXIS 6562, at *9–10 (Bumatay, J., dissenting) (relying on *Yellowbear* to conclude that the destruction of Oak Flat is a substantial burden). And yet, the majority says that it does.

Rather than acknowledge this inconsistency, the majority relies entirely on a pre-RFRA Free Exercise Clause case: *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). But *Lyng* cannot bear the weight the majority places on it.

The Supreme Court in *Lyng* did not analyze whether there was a substantial burden under the Free Exercise Clause. The case is therefore not inconsistent with my RFRA analysis and cannot foreclose Apache Stronghold's statutory claim, which rests on the "substantial burden" concept.

In its retelling of *Lyng*, the majority omits crucial facts. The *Lyng* plaintiffs challenged the federal government's proposal to permit timber harvesting and build a road through part of a national forest that "ha[d] traditionally been used for religious purposes by members of three American Indian tribes." 485 U.S. at 441–42. The proposed road "avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Id.* at 443. Unlike here—a fact that the majority entirely disregards—"[n]o sites where specific rituals t[ook] place were to be disturbed." *Id.* at 454. The *Lyng*

plaintiffs continued to have full access to their sacred sites to engage in religious exercise, and there were "one-half mile protective zones around all the religious sites," insulating them from any logging activity. *See id.* at 441–43. However, because the road and logging activity would generally disturb the "privacy," "silence," "spiritual development," and the subjective enjoyment of those sacred sites, the plaintiffs brought a Free Exercise Clause challenge. *Id.* at 442, 444, 454 (citing the record to note that "successful use of the area is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting" (cleaned up)); *see id.* at 462 (Brennan, J., dissenting) (quoting the record to highlight that "silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of [each] particular site").

Assuming that the noise and general disturbance from logging would "have severe adverse effects" on the individuals' subjective religious experience, the Supreme Court held that the government's actions did not trigger the compelling interest test under the Free Exercise Clause. *Id.* at 447, 450–51. Relying on *Bowen v. Roy*, 476 U.S. 693 (1986), the Court concluded that the *Lyng* plaintiffs' subjective spiritual harm from the loss of silence and privacy was "incidental" to the government's "internal" affairs. *Lyng*, 485 U.S. at 448, 451. In *Roy*, the Supreme Court had rejected a religious objection to the use of Social Security numbers as a numerical identifier that, according to the plaintiffs' religious beliefs, would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. The *Roy* Court held that the "Free Exercise Clause simply

cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699.

Applying *Roy*, the *Lyng* Court explained that the plaintiffs' allegations of spiritual harm "cannot meaningfully be distinguished from the use of a Social Security number in *Roy*":

> Similarly, in this case, it is said that disruption of the natural environment caused by the . . . road will diminish the sacredness of the area in question and create distractions that will interfere with "training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power."

485 U.S. at 448–49 (quoting the record). The Court construed the harm in both cases as "subjective" and so refused to decide whether the spiritual harm in *Roy* was "significantly greater" than the *Lyng* plaintiffs' harm. *Id.* at 449.[14]

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[14] In rejecting the plaintiffs' challenge, the Supreme Court did not minimize the impact that the road building and logging activity would have on the plaintiffs' "personal spiritual development." *Lyng*, 485 U.S. at 451. The Court, however, did not wish to weigh the magnitude of the subjective spiritual harm. *Id.* at 449, 451. So it explained that the noise and invasion of privacy caused by roadbuilding and logging had only an "*incidental*" constitutional effect under the Free Exercise Clause

Lyng emphasized that the "crucial word in the constitutional text [of the Free Exercise Clause] is '*prohibit*': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* at 451 (emphasis added) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). The Court therefore concluded its analysis by reiterating that "[t]he Constitution does not permit [the] government to discriminate against religions that treat particular physical sites as sacred, and a law *prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions*." *Id.* at 453 (emphasis added).

The majority argues that, as in *Lyng*, the land transfer here is not "a situation in which the Government ha[s] 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 27 (quoting *Lyng*, 485 U.S. at 453). The majority is mistaken on two fronts. First, the Land Transfer Act is *exactly* that kind of "prohibitory" law. It is undisputed and indisputable that once implemented, the Act will prevent the Western Apaches from visiting Oak Flat

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because the government was not "outright prohibit[ing]" religious exercise, "indirect[ly] coerc[ing]" an individual to act contrary to their religious belief, or "penal[izing]" religious practice. *Id.* at 450–51 (citing U.S. Const. amend. I; *Sherbert*, 374 U.S. at 404).

This discussion also highlights that Free Exercise Clause claims are not limited to the circumstances presented in *Sherbert* and *Yoder* but include the broader concept of "prohibitions." *Id.* at 450; U.S. Const. amend. I.

for eternity. The majority concedes this point, but then goes on to argue that where government action only "frustrates or inhibits" religious exercise, the government does not violate RFRA. But Apache Stronghold does not argue that the destruction of Oak Flat merely "frustrates" their ability to worship there; they argue—and the district court found—that worship there will be "impossible," and their spiritual practice will be eviscerated. *See Apache Stronghold*, 519 F. Supp. 3d at 604 ("Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood."); *id.* at 606 ("[T]he land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship."). So, contrary to the majority, this case does not ask us to determine at what point "frustrating" religious exercise qualifies as a substantial burden;[15]

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[15] *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality opinion) (no infringement where a law merely "operates so as to make the practice of [the individual's] religious beliefs more expensive"); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306 (6th Cir. 1983) (similar); *Goehring*, 94 F.3d at 1299; *Worldwide Church of God*, 227 F.3d at 1121; *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008) ("We are skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA."); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (no infringement where government action "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed"); *Abdulhaseeb*, 600 F.3d at 1316 ("[W]e do not intend to imply that

instead, we are confronted only with the utter erasure of a religious practice. In other words, the burden here is categorical and thus undisputedly "synonymous with 'prohibit.'" Collins Op. at 29.

Second, that the Land Transfer Act does not specially "discriminate" against the Western Apaches by name—*i.e.*, that the Act is neutral and generally applicable to all who would visit Oak Flat—is irrelevant because, when enacting RFRA, Congress eliminated *Smith*'s neutrality test. *See* 42 U.S.C. § 2000bb(a)(2) ("Congress finds that . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."). *All that matters under RFRA*, as opposed to the Free Exercise Clause, is whether the government has "substantially burden[ed]" sincere religious exercise. *Id.* § 2000bb-1(a). The majority thus misunderstands Congress's purpose in enshrining a broad right to religious liberty by eliminating *Smith*'s neutrality requirement.

The majority argues that such a reading of RFRA is too "broad." But a clear-cut conclusion that making religious exercise impossible is a "substantial burden" can hardly be called broad, especially when it adheres closely to both RFRA's text and the Supreme Court's precedent. The majority also contends that claims like Apache Stronghold's would subject the government to "religious servitude." Yet the majority proceeds as if, once a religious adherent has satisfied the substantial burden test, the outcome is a foregone conclusion. However, Congress explicitly identified the compelling

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every infringement on a religious exercise will constitute a substantial burden.").

interest test as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

At this stage, Apache Stronghold has only proven that there is a substantial burden. On remand, the government could demonstrate that transferring Oak Flat is justified by a compelling interest pursued through the least restrictive means.[16] *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an

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[16] The compelling interest test has not proven fatal to the government. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 44–45 & n.66 (2020–21) (noting that "the compelling-interest standard has not come close to producing the 'anarchy' of which *Smith* warned" and finding that "free-exercise claims, including RFRA claims, were the least likely to invalidate the government action" (citing Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 857–58, 861 (2006))).

And if the majority were correct that my reading of RFRA would subject the government to "religious servitude," then we would necessarily have seen that concern play out in circuits that have long employed a broader reading of "substantial burden." Neither the government nor the majority provide evidence that other circuits are inundated with such claims, and I have found no evidence hinting at that possibility. *Cf. Yellowbear*, 741 F.3d at 62 (Gorsuch, J.) (rejecting slippery slope argument). In addition, before *Smith*, the government was not yoked to religious deference—as the majority and the government fears it would be—even though the Supreme Court had read the Free Exercise Clause to cover claims about preventing religious exercise.

inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *see also Gonzales*, 546 U.S. at 430, 436 (rejecting the government's "slippery slope" argument under RFRA, and noting that *Sherbert* did so under the Free Exercise Clause); *cf. Cutter*, 544 U.S. at 722 (stating that the Supreme Court had "no cause to believe" that the compelling interest test "would not be applied in an appropriately balanced way"). So although *Lyng* did not specifically address government action that prevented religious exercise, contrary to the majority's assertions, *Lyng*'s discussion of "discrimination" by "prohibiting" access to a sacred site confirms that the Land Transfer Act creates a substantial burden.

ii. *Lyng*'s Post-RFRA Limits

Moreover, to the degree *Lyng*'s Free Exercise ruling is in any tension with my understanding of RFRA, those aspects of *Lyng* were not carried forward into RFRA. *Smith* makes that much evident, as it treats *Lyng* as declining to apply the compelling interest test to a neutral law of general applicability, and RFRA displaced that standard for governmental decisions governed by RFRA.

Smith held that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities 'could have devastating effects on traditional Indian religious practices.'" *Smith*, 494 U.S. at 883 (quoting *Lyng*, 485 U.S. at 451). Per *Smith*, *Lyng* stood for the proposition that the compelling interest test is "inapplicable" to "across-the-board" neutral laws.

Smith, 494 U.S. at 884–85. In declining to apply the compelling interest test, *Smith* relied on *Lyng* for the point that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Smith*, 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451). *Smith* then concluded that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3.

In so holding, *Smith* emphatically rejected Justice O'Connor's concurrence suggesting that *Lyng* created an exception for Free Exercise challenges to the government's conduct of its internal affairs. 494 U.S. at 885 n.2.[17]

The *Smith* majority first acknowledged that "Justice O'Connor seeks to distinguish *Lyng* and *Roy* on the ground that those cases involved the government's conduct of 'its own internal affairs.'" *Id.* (citations omitted). *Smith* then considered Justice O'Connor's position that challenges to the government's conduct of its internal affairs are "different because, as Justice Douglas said in *Sherbert*, 'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* (internal quotation marks and citation omitted). "But," said the *Smith* majority in refuting the internal affairs proposition, "that quote

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[17] Judge Nelson's concurring opinion so recognizes.

obviously envisioned that what 'the government cannot do to the individual' includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs . . . in such fashion as to harm the individual's religious interests." *Id.* "Moreover," *Smith* continued, "*it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, Lyng, supra.*" *Id.* (emphasis added).[18]

Smith treated *Lyng* as reflecting not any special exception for challenges to the government's internal affairs, but as concerning the type of neutral and generally applicable laws not subject to the compelling interest test under *Smith*. *Id.* at 884–85 (citing *Lyng,* 485 U.S. at 451). *Smith*'s understanding of *Lyng* remains controlling. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) ("*Smith* . . . drew support for the neutral and generally applicable standard from cases involving internal government affairs." (citing *Lyng*, 485 U.S. at 439)).

Accordingly, *Lyng* was not about measuring the extent of burdens sufficient to trigger the compelling interest test. Nor was *Lyng*, as the majority and concurring opinions posit, a case concerning the borders of the Free Exercise Clause or a special carve-out category of government actions that were not

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[18] As the *Smith* majority alluded to, it is hard to see how an exception permitting the government to substantially burden religious exercise when "manag[ing] its internal affairs," Nelson Op. at 144, would not encompass most government action and indeed swallow RFRA whole.

covered by *Smith*. Instead, *Lyng* reflected the principle, further developed in *Smith* and rejected in RFRA, that the compelling interest test was categorically inapplicable to neutral and generally applicable laws. *See Smith*, 494 U.S. at 884–85; *Fulton*, 141 S. Ct. at 1878.

Smith's controlling interpretation of *Lyng* thus makes clear that (1) *Lyng* turned on the categorical inapplicability of the compelling interest test to the Free Exercise challenge in that case; and (2) the reason the compelling interest test was inapplicable in *Lyng* was that "the test [is] inapplicable to such challenges" to generally applicable laws. *Smith*, 494 U.S. at 885. RFRA's rejection of *Smith*'s rule—that the compelling interest test is inapplicable to neutral and generally applicable laws—means that *Lyng* likewise does not control in RFRA cases.

The majority's flawed response to this point is that *Lyng* did not involve a neutral or generally applicable law. Collins Op. at 31–32. But that proposition is wrong. Indeed, elsewhere in its opinion, the majority asserts, accurately, that *Lyng* did not involve "a situation in which the Government had 'discriminate[d]' against the plaintiffs, as might be the case if Congress had passed 'a law prohibiting the Indian [plaintiffs] from visiting the [sacred] area.'" Collins Op. at 27 (quoting *Lyng*, 485 U.S. at 453). A law that "does not 'discriminate' against religious adherents," like the policy in *Lyng*, is a neutral one for purposes of Free Exercise doctrine. *See Church of the Lukumi Babalu Aye,* 508 U.S. at 533 (explaining that a "law is not neutral" if "the object of a law is to infringe upon or restrict practices because of their religious motivation" (citing *Smith*, 494 U.S. at 878–

89)). The plan to build the road at issue in *Lyng* was indisputably neutral in this sense, as it would affect equally all who preferred leaving the wilderness untouched—environmentalists, for example, or ranchers.

Nor is the majority correct that the policy challenged in *Lyng* was not generally applicable. In *Lyng*, the Forest Service proposed building a road connecting two towns and permitting timber harvesting in the same area; the road would be open to all, and there was no suggestion that the purpose of the Forest Service's plan was to discriminate against Native American tribes. Indeed, the Forest Service took steps to mitigate the impact on tribes by "select[ing] a route that avoided archeological sites and was removed as far as possible from the sites used by [tribes] for specific spiritual activities." *Lyng*, 485 U.S. at 443. While the litigation in *Lyng* was pending in the court of appeals, Congress enacted the California Wilderness Act, which designated portions of the forest as a protected wilderness area but excluded the proposed route. *Id.* at 444. While the choice of the route in the Act was made with knowledge of the tribes' religious interest in it, there was no indication that it was made because of, rather than in disregard of, that interest, and the impact of the choice remained generally applicable and neutral.[19]

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[19] Moreover, even if the majority were correct as to the impact of the California Wilderness Act, that would be beside the point. *Lyng* involved a challenge to the Forest Service's plan to construct the road and harvest timber, not to the California Wilderness Act. *See Lyng*, 485 U.S. at 448; Collins Op. at 24

In short, the plan to construct a road and harvest timber in *Lyng* was generally applicable and "'neutral' toward religion" in the sense that its purpose was not to "interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Therefore *Lyng*, a Free Exercise Clause case that rejected the compelling interest test for neutral laws of general applicability, does not answer the question of whether, under RFRA, preventing a person from engaging in religious exercise by denying them access to a sacred site is a substantial burden.

iii. *Terry Williams* Is Inapplicable Here

There is another, related problem with the majority's treatment of *Lyng*. Relying on *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("*Terry Williams*"), the majority erroneously proceeds as if Congress must be understood to have adopted the term "substantial burden" as interpreted in Justice O'Connor's concurrence in *Smith*, and so excepted cases similar to *Lyng* from that concept.

Terry Williams explained that "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision." 529 U.S. at 411. Where "[t]he separate opinions" in a prior Supreme Court case "concerned the very issue addressed" in a subsequently enacted statute, the prior case can "confirm what [the statutory] language already makes clear." *Id*. at 411–12. But the majority

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(acknowledging that the California Wilderness Act was not enacted until the litigation in *Lyng* "was pending on appeal in this court").

opinion's premises for applying *Terry Williams* here are flawed.

First, the majority here is wrong that *Smith* "concerned the very issue" of what constitutes a cognizable substantial burden. The majority opinion asserts that "in superseding *Smith*, RFRA uses the phrase 'substantially burden,' *id.* § 2000b-1(a), (b)," so "[t]he inference is overwhelming that Congress thereby 'adopt[ed]' the 'meaning given [that] certain term in that decision.'" Collins Op. at 43 (quoting *Terry Williams*, 529 U.S. at 411). From that premise, the majority concludes that "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* places on what counts as a governmental imposition of a substantial burden on religious exercise."

But as Judge Nelson's concurring opinion appears to acknowledge, neither *Lyng* nor the *Smith* majority interpreted the term "substantial burden." Nelson Op. at 135. *Lyng* simply refused to apply the compelling interest test. *See* 485 U.S. at 450–51 (explaining that *Sherbert* and *Yoder* "cannot imply that incidental effects of government programs," without outright prohibition, coercion, or penalty, "require government to bring forward a compelling justification"); *see also Smith*, 494 U.S. at 883. Thus, Judge Nelson writes that *Lyng* is not

> part of any "old soil" that was used to define "substantial burden," Bea Dissent at 75. Indeed, *Lyng* does not even use "substantial burden" or any analogous framing of the phrase. *Lyng* therefore cannot be read as establishing a precise definition of

> "substantial burden" "carried over into the soil" of RFRA.

Nelson Op. at 136 (citation omitted).

Likewise, *Smith* was about categorically excepting neutral and generally applicable laws from the compelling interest test, rather than about defining the term "substantial burden." *See* 494 U.S. at 884–85; *see also supra* § II(F)(ii) (discussing Justice O'Connor's *Smith* concurrence and explaining that the *Smith* majority did not apply the compelling interest test). Although Justice O'Connor's concurring opinion took the position that the denial of unemployment benefits based on religious drug use constituted a substantial burden, she did not rely on *Lyng* in her discussion of that term. *See Smith*, 494 U.S. at 897–98 (O'Connor, J., concurring in the judgment). Moreover, the *Smith* majority never reached the question of what types of burdens would be required to satisfy the first step of the *Sherbert* test. Instead, it concluded that the test was entirely "inapplicable" in cases challenging neutral, generally applicable laws. *See Smith*, 494 U.S. at 884–85. So there was no "vigorous debate" in *Smith* on the meaning of the term substantial burden, contrary to the majority's representation.

Furthermore, *Terry Williams* involved a situation in which Congress did "not mention a prior decision of this Court by name in a statute's text." 529 U.S. at 411. That is not the circumstance here. Instead, RFRA explicitly identified which portion of *Smith* Congress sought to address. Congress declared that "in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. §

2000bb(a)(4) (citation omitted). Congress's view, by contrast, was that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2). Consequently, although the majority opinion points to RFRA's citation to *Smith* as reinforcing its holding, the appropriate conclusion is the opposite: Congress was specific about the aspect of *Smith* that it intended to address—the rule that neutral and generally applicable laws are not subject to the compelling interest test. Congress could not have, by expressly citing *Smith* in the course of negating its exception for neutral and generally applicable laws, intended to incorporate the "meaning given a certain term," *Terry Williams,* 529 U.S. at 411, when that term simply was not at issue in *Smith*.

The upshot is that RFRA's text does not support the majority's conclusion that Congress intended a special exception for certain types of government actions. Rather, RFRA is explicit that:

- Religious exercise includes the use of real property for the purpose of religious exercise. 42 U.S.C. § 2000bb-2(4); *Id.* § 2000cc-5(7)(B).
- Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion" *except when* the compelling interest test is satisfied. *Id.* § 2000bb-1(a), (b). No other exceptions are provided.
- Government "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." *Id.* § 2000bb-2(1).

- RFRA "applies to all *Federal law*, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a) (emphasis added)
- "Nothing in" RFRA "shall be construed to authorize any government to burden any religious belief." *Id.* § 2000bb-3(c). Here, Congress used the term "burden" rather than "substantial burden."
- "[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5).

Given these congressional directives, unlike in *Terry Williams*, this is not a case in which reference to *Smith* can "confirm what" RFRA's statutory "language already makes clear." *Terry Williams*, 529 U.S. at 411–12. Rather, for the reasons I have surveyed, what RFRA's language makes clear is that there is a "substantial burden" when individuals are prevented from practicing their religion by governmental action; if *Lyng* indicates otherwise (which I do not believe), that implication of *Lyng* does not survive RFRA.

G. This En Banc Panel Fails to Clarify Our Law

"As an en banc court, we have a responsibility to bring clarity to our law." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 532 (9th Cir. 2012) (en banc) (Kozinski, C.J., concurring in part). Notably, although the divided three judge panel rejected Apache Stronghold's RFRA claim largely under *Navajo Nation*, the majority makes no mention of that case. Instead, litigants are forced to piece together from a

composite of opinions that a majority of judges on this en banc panel rejects *Navajo Nation*'s reasoning.

Furthermore, the majority opinion creates confusion as to how to define "substantial burden." Although RFRA's text simply provides that the federal government may not "substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), the majority skips the test entirely and asks only whether litigants bring a "cognizable" claim. As I have discussed, *see supra* § II(E), preventing religious adherents from worshipping at a sacred site is inherently prohibitory. For the majority, only once a litigant has shown that the government action is cognizably "prohibitory" can a court ask whether there is a "substantial burden." At that point, the majority finds it "adequate[]" to apply a dictionary definition of "substantial burden" in the context of zoning and confinement under *both* RFRA and RLUIPA, but not in other RFRA contexts. Collins Op. at 47. But this answer is not helpful. Under the majority's approach, dictionaries can supply the meaning of substantial burden in RFRA cases about zoning and confinement, but dictionaries appear to be irrelevant when a person challenges a different type of government action—as Apache Stronghold does here. Either the meaning of "substantial burden" is the same under RFRA and RLUIPA, or the definition under RFRA is case dependent. It cannot be both.

And the majority provides no authority for this sort of distinction. Nor could it. If the meaning of "substantial burden" turned on the type of case, several Supreme Court Free Exercise Clause cases would have lacked any discussion of substantial burden or compelling interest. *See, e.g.*, *Hernandez*,

490 U.S. at 684–85, 699 (discussing substantial burden and concluding the government had a compelling justification in a Free Exercise Clause challenge to the Internal Revenue Service's refusal to recognize payments made by Scientologists to churches as tax deductible charitable contributions).

The majority's shapeshifting definition of substantial burden also finds no support in RFRA's and RLUIPA's text. RLUIPA's land-use provision states that "[n]o government shall *impose or implement a land use regulation* in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc(a)(1) (emphasis added). And the institutionalized persons provision likewise states that "[n]o government shall *impose* a substantial burden on the religious exercise of a person residing in or confined to an institution." *Id.* § 2000cc-1(a) (emphasis added). The majority argues that RLUIPA incorporates or "bake[s] in" the Free Exercise Clause's "prohibition" requirement. But RLUIPA's text does not use the word "prohibit," so it is hard to see how RLUIPA incorporates the Free Exercise Clause in a way that RFRA does not. *Compare id.*, *with* § 2000bb1(a) ("Government shall not substantially burden a person's exercise of religion.").

Nor does the majority meaningfully distinguish the coercion inherent in land-use cases from the coercion here. For instance, the majority contends that in the land-use context, the Free Exercise Clause's "prohibition" requirement is inherent. Collins Op. at 47. But if a city precludes the building of a church on a parcel zoned for single-family dwellings, the city is not conditioning a benefit on forgoing religious

exercise nor is it penalizing religious exercise. So how is the city's zoning law "inherently . . . coercive" in a way that the Land Transfer Act and the destruction of Oak Flat is not? The majority offers little guidance to litigants wondering what governmental actions are sufficiently "coercive" to allow for a substantial burden analysis.

Indeed, contrary to what the majority says, Apache Stronghold's RFRA claim "inherently involve[s] coercive restrictions." Collins Op. at 47. As Judge Berzon noted in her panel dissent, Native American sacred sites—like the contexts of land-use and confinement—are unique in that "the government controls access to religious locations and resources." *Apache Stronghold*, 38 F.4th at 776 (Berzon, J., dissenting) (citing Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)). In each of these contexts the government has control over religious sites and resources, and religious adherents must "practice their religion in contexts in which voluntary choice is *not* the baseline." *Id.* As with the Western Apaches here, Native American religions are typically land-based, so many traditional Native American religious sites are located exclusively on federal land. Therefore, unlike most nonincarcerated Americans, Native Americans are "at the mercy of government permission to access sacred sites." *Id.* (quoting Barclay & Steele, *supra*, at 1301); *see also* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, Cato Sup. Ct. Rev. at 33, 58 (2020–21) (arguing that the government "took control over the tribes' ability to practice their traditions fully—in somewhat the same way that prisons control [incarcerated

persons'] ability to practice their faith"). The Land Transfer Act thus prevents the Apaches from practicing their religion at Oak Flat, substantially burdening their religious exercise, just as would an outright ban of religious worship, meetings, or diet in prison, or a zoning law precluding a religious group from building a mosque, church, or synagogue. In other words, the government's control over access to Oak Flat is coercive, and few other religious adherents are situated similarly to the Apache such that they need the government's permission to worship.

H. RFRA Applies to the Land Transfer Act

For the first time in its Brief in Opposition to Rehearing En Banc, the government urges this court to affirm on the alternative ground that, under the legislative anti-entrenchment principle, RFRA cannot apply to the Land Transfer Act. Because the government did not raise that argument before the district court, and did not develop it on appeal, I would normally consider such eleventh-hour arguments waived. *See Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962). However, the issue is purely legal, and the government could and likely would raise the argument to the district court on remand. *See Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002). So for the sake of judicial efficiency, I address it now.

RFRA applies to "all Federal" statutes enacted after RFRA's adoption "unless such [later-enacted] law explicitly excludes such application by reference." 42 U.S.C. § 2000bb-3(b). The government argues that § 2000bb-3(b) holds no force whatsoever and instead maintains the Land Transfer Act supersedes RFRA because "one legislature cannot abridge the powers of

a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). Generally, under the legislative anti-entrenchment doctrine, a prior Congressional enactment "may be repealed, amended, or disregarded by the legislature which enacted it, and is not binding upon any subsequent legislature." *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996) (cleaned up).

The Supreme Court has held, however, that "RFRA operates as a kind of super statute" because it applies to all federal statutes and thus "displac[es] the normal operation of other federal laws." *Bostock*, 140 S. Ct. at 1754. In two RFRA cases, the Supreme Court accordingly determined that RFRA was controlling even though it conflicted with later-enacted federal law. *See Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (applying RFRA to the Affordable Care Act ("ACA"), a later-enacted statute, because the "ACA does not explicitly exempt RFRA"); *Hobby Lobby*, 573 U.S. at 719 n.30 (rejecting an implied repeal argument for the same reason). And as the Seventh and Eleventh Circuits have recognized, RFRA is consistent with the anti-entrenchment principle because "the statute does not apply to a subsequently enacted law if it 'explicitly excludes such application by reference to'" RFRA. *Korte*, 735 F.3d at 672–73 (cleaned up) (quoting 42 U.S.C. § 2000bb-3(b)); *accord Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995). In other words, because a majority of Congress can preclude the application of RFRA to any subsequently-enacted statute, Congress "remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274

(2012).[20] RFRA does not therefore limit the authority of future Congresses and so does not violate the anti-entrenchment principle. *See Little Sisters of the Poor*, 140 S. Ct. at 2383 (RFRA "permits Congress to exclude statutes from RFRA's protections." (citing 42 U.S.C. § 2000bb-3(b))).

I note that RFRA's express exemption provision is no different from the one contained in the Administrative Procedure Act ("APA"), which the Supreme Court considered in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). The question in *Marcello* was whether the Immigration and Nationality Act ("INA") satisfied the APA's requirement that any exemptions from its procedures be "express[ ]," such that the APA was inapplicable to deportation proceedings. 349 U.S. at 305–10. The INA section at issue provided that "[t]he procedure (herein prescribed) shall be the *sole and exclusive procedure* for determining the deportability of an alien under this section." *Marcello*, 349 U.S. at 309 (emphasis added) (quotation marks omitted). The Supreme Court explained that this textual provision was a "clear and categorical direction" that the INA "was meant to exclude the application of the" APA. *Id.*

In other words, the Supreme Court held that the INA did not need to explicitly mention the APA or use a "magical password[ ]" to supersede the APA's express repeal provision. *Id.* at 309–10. The INA's

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[20] Neither Judge Bea's concurrence nor the government explain why we should depart from *Korte* and *Cheffer* and create a circuit split. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("[W]e decline to create a circuit split unless there is a compelling reason to do so.").

express inclusion of a "notwithstanding" clause—*i.e.*, "notwithstanding the provisions of any other law"—was sufficient. *Id.* Consistent with *Marcello*, we have recognized the inclusion of a "notwithstanding" clause as "a method—akin to an express reference to the superseded statute—by which Congress can demonstrate that it intended to partially repeal an [earlier] Act." *United States v. Novak*, 476 F.3d 1041, 1052 (9th Cir. 2007) (en banc) (cleaned up).

In short, for a statute to exempt itself from RFRA, a simple majority of Congress need only exempt that later enacted statute from RFRA under 42 U.S.C. § 2000bb-3(b), either by referencing RFRA specifically *or* by including some variation of a "notwithstanding any other law" provision under *Marcello*. *See Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 747 (9th Cir. 2000), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Such a requirement does not require a "magical password" to supersede RFRA, nor does it violate the legislative anti-entrenchment principle. *Marcello*, 349 U.S. at 309–10; *see Korte*, 735 F.3d at 672–73.

Here, the Land Transfer Act cannot escape RFRA's reach. It neither explicitly exempts itself from RFRA, nor does it contain a "notwithstanding any other law" provision of any kind. *See* 16 U.S.C. § 539p. At the same time, had Congress wanted to exempt the Land Transfer Act from RFRA, it knew how to do so. The Land Transfer Act includes a specific exemption from another statute—the Federal Land Policy and Management Act of 1976—reinforcing that Congress could have, but did not, enact a similar exemption from RFRA. *See* 16 U.S.C. § 539p(c)(5)(B)(ii) ("The Secretary may accept a payment in excess of 25

percent of the total value of the land or interests conveyed, *notwithstanding section 206(b) of the Federal Land Policy and Management Act of 1976* (43 U.S.C. 1716(b)).” (emphasis added)). If Congress meant to exempt the Land Transfer Act from RFRA, Congress could and would have done so explicitly. Accordingly, RFRA applies to the Land Transfer Act.

III. Conclusion

The majority tragically errs in rejecting Apache Stronghold’s RFRA claim solely under *Lyng*. *Lyng* does not answer the question here, where we are faced with government action that will result in a massive hole obliterating Oak Flat and categorically preventing the Western Apaches from ever again communing with *Usen* and the *Ga’an*, the very foundation of the Apache religion. The effect will be immediate and irreversible. Under RFRA, preventing religious adherents from engaging in sincere religious exercise undeniably constitutes a “substantial[] burden.” 42 U.S.C. § 2000bb-1(a). RFRA’s plain text encompasses such claims, and the Supreme Court’s and our jurisprudence have long so recognized.

I would therefore hold that, at this stage, Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim, and I would remand for the district court to determine whether the Land Transfer Act is justified by a compelling interest pursued through the least restrictive means. 42 U.S.C. § 2000bb-1(b). Because the majority holds the opposite, I respectfully dissent.

LEE, Circuit Judge, dissenting:

Chief Judge Murguia's excellent dissent lays out why *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), incorrectly defined "substantial burden" as a narrow term of art. Simply put, the complete obliteration of the land—which the Western Apache consider sacred and where they have worshipped and conducted ceremonies for at least a millennium—obviously imposes a substantial burden on the Apache's religious exercise.

I join Chief Judge Murguia's dissent except for Section II.H. I do not believe we should address the merits of the government's last-minute argument that the Religious Freedom Restoration Act cannot apply to the Land Transfer Act. The government did not bother raising this difficult question before the district court or on appeal. Rather, the government advanced this argument for the first time in its brief opposing rehearing en banc, and now asks the en banc panel to rule in its favor on this newly developed argument. The government infrequently shows any grace when people miss deadlines or do not follow its rules. *Cf. Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."). I would not show any leniency to the government and would consider this argument waived.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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<tr>
<td>APACHE STRONGHOLD, a 501(c)(3) nonprofit organization,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; THOMAS J. VILSACK, Secretary, U.S. Department of Agriculture (USDA); RANDY MOORE, Chief USDA Forest Service; NEIL BOSWORTH, Supervisor, USDA Forest Service, Tonto National Forest; TOM TORRES, Acting Supervisor, USDA Forest Service, Tonto National Forest,

Defendants-Appellees,</td>
<td>No. 21-15295

D.C. No. 2:21-cv-00050-SPL

OPINION</td>
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Appeal from the United States District Court
For the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted October 22, 2021
San Francisco, California

Filed June 24, 2022

Before: Mary H. Murguia, Chief Judge, and Marsha S. Berzon and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea;
Dissent by Judge Berzon

SUMMARY*

Religious Freedom Restoration Act / Free Exercise Clause

The panel affirmed the district court's denial of Apache Stronghold's motion for a preliminary injunction seeking to stop a land exchange and prevent any copper mining on Oak Flat, a plot of land in Arizona.

A 2014 act of Congress requires the U.S. Secretary of Agriculture to convey Oak Flat to Resolution Copper, a mining company. In exchange, Resolution Copper will convey to the United States a series of nearby plots of land (the "Land Exchange"). To the Apache American Indians, Oak Flat, known to the Apache as Chi'chil Bildagoteel, is sacred ground. Apache Stronghold, a nonprofit organization, sued the government, alleging that the Land Exchange violated the Religious Freedom Restoration Act ("RFRA"), the Free Exercise Clause of the Constitution's First Amendment, and a trust obligation imposed on the United States by the 1852 Treaty of Santa Fe between the Apache and the United States.

Concerning Apache Stronghold's RFRA claim, the panel began by addressing what constituted a

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

"substantial burden" under RFRA. First, RFRA by its text restored *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), their "compelling interest" test, and their "substantial burden" inquiry, and defined a "substantial burden" under RFRA as either of the burdens present in those two cases. Second, the Supreme Court has used the phrase "substantial burden" as a Free Exercise Clause term of art that meant only the two burdens within the *Sherbert/Yoder* framework, and a "substantial burden" under RFRA must hold that same settled meaning. Third, *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), and *Bowen v. Roy*, 476 U.S. 693 (1986), the cases most factually and legally analogous to *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), and this case, confirmed that even burdensome government action did not constitute a "substantial burden" (and did not trigger the "compelling interest" test) if that action fell outside the *Sherbert/Yoder* framework.

The panel next turned to Apache Stronghold's main argument that the Land Exchange would hand Oak Flat over to Resolution Copper for its mining plan, thus incidentally making it impossible for Apache Stronghold's members to worship on Oak Flat and thereby substantially burdening them. The panel held that this argument could not succeed in light of *Navajo Nation*. The Land Exchange's effect on Apache Stronghold's members fell outside of the *Sherbert/Yoder* framework, and thus outside of RFRA's definition of a substantial burden. No government benefits will be lost (as in *Sherbert*) nor will governmental penalties be imposed (as in *Yoder*). The Department of Agriculture will simply transfer

ownership of a plot of government land to Resolution Copper, and the Land Exchange does not coerce the Apache to abandon their religion by threatening them with a negative outcome. Because Apache Stronghold's members have not established that they would suffer a substantial burden under RFRA, Apache Stronghold is not likely to succeed on its RFRA claim. The panel rejected Apache Stronghold's and the dissent's contentions to the contrary.

Next, the panel addressed Apache Stronghold's secondary argument that the Land Exchange did in fact deprive its members of a benefit and subjected its members to a penalty. Namely, the Land Exchange allegedly deprived Apache Stronghold members of the "use and enjoyment of 'government' land for religious exercise" and subjected them to penalties for "trespassing on now 'private' land." The panel disagreed. The government does not substantially burden religion every time it ends a governmental benefit that at one time went to religious beneficiaries: there must be an element of coercion. The Land Exchange does not "condition" any government benefits on the Apache violating their religious beliefs. The panel also rejected Apache Stronghold's argument that the Land Exchange subjected its members to penalties: liability for trespassing on land that will be private after the Exchange. Apache Stronghold has not shown a sufficiently realistic fear of future criminal trespass liability. Also, Apache Stronghold seeks relief that RFRA cannot provide: RFRA does not authorize Apache Stronghold to enjoin the entire Land Exchange. Similarly, it is not clear that the Apache will be subject to civil trespass liability. But even if Apache Stronghold's members were subject to the threat of imminent civil trespass suits, the panel could

not enjoin the entire Land Exchange as Apache Stronghold requested.

The panel rejected Apache Stronghold's claim that the Land Exchange would violate the Constitution's Free Exercise Clause. Apache Stronghold argued that the Land Exchange Provision was neither neutral nor generally applicable and thus was subject to strict scrutiny. The panel held that the Land Exchange was neutral in that its object was not to infringe upon the Apache's religious practices. All the evidence suggests that the Land Exchange was meant to facilitate mineral exploration activities - nothing more and nothing less. The panel concluded that the district court properly found that Apache was not likely to succeed on its Free Exercise claim.

Last, the panel considered Apache Stronghold's trust claim under the Treaty of Santa Fe. Namely, that the Treaty created an enforceable trust obligation on the U.S. government, and the Land Exchange was inconsistent with the U.S.'s obligation to pass laws conducive to the prosperity and happiness of the Apache. The panel agreed with the government that on this record, Apache Stronghold has not established that the Treaty of Santa Fe imposes on the United States an enforceable trust obligation. The panel concluded that Apache Stronghold's trust claim was unlikely to succeed.

The panel recognized the deep ties the Apache have to Oak Flat, and acknowledged that the Land Exchange may impact the Apache's plans to worship at Oak Flat. But RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe do not afford Apache Stronghold the relief that it seeks.

Dissenting, Judge Berzon wrote that the majority applied an overly restrictive test for identifying a "substantial burden" on religious exercise under RFRA. The majority's flawed test leads to an absurd result: blocking Apaches' access to and eventually destroying a sacred site where they have performed religious ceremonies for centuries did not substantially burden their religious exercise. There was no doctrinal basis for limiting the definition of "substantial burden" to the types of burdens imposed in *Sherbert* and *Yoder*. The majority's proffered practical basis for its constricted definition of "substantial burden" is also flawed. Applying the correct definition of "substantial burden," Judge Berzon would hold that Apache Stronghold has shown that it is likely to succeed on the merits of its RFRA claim. She would remand for the district court to address the remaining elements of the preliminary injunction test.

COUNSEL

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OPINION

BEA, Circuit Judge:

A 2014 act of Congress requires the U.S. Secretary of Agriculture to convey Oak Flat, a plot of federal land in Arizona, to a mining company named Resolution Copper. In exchange, Resolution Copper will convey to the United States a series of other nearby plots of land (the "Land Exchange"). Resolution Copper is considering constructing a copper mine under Oak Flat to access one of the world's largest undeveloped copper deposits. But to the Apache American Indians, Oak Flat—or as the Apache call it, Chi'chil Bildagoteel—is sacred ground. So Apache Stronghold, a non-profit organization formed to preserve and protect American Indian sacred sites, sued the government on the grounds that the Land Exchange violates each of: 1) the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq; 2) the Free Exercise Clause of the Constitution's First Amendment; and 3) a trust obligation that Apache Stronghold claims was imposed on the United States by the 1852 Treaty of Santa Fe between the Apache the United States. In the district court below, Apache Stronghold moved for a preliminary injunction, seeking to stop the Land Exchange and prevent any copper mining. The district court reviewed Apache Stronghold's evidence and arguments and ruled that the non-profit was unlikely to succeed on any of its claims. The district court thus denied Apache Stronghold's motion. We affirm.

I. Background

A. The At-Issue Land

The Tonto National Forest stretches across nearly 3 million acres (or about 4,500 square miles) across Arizona. *See Tonto National Forest*, U.S. Dep't of Agriculture, https://www.fs.usda.gov/detail/tonto/home/?cid=fsbdev3_0 18924 (last visited June 15, 2022). Most of the forest is owned by the United States and is managed by the United States Forest Service, a division of the United States Department of Agriculture. *See id.* Within the Tonto Forest is Oak Flat, a 6.7-square-mile plot of plains, oak groves, and rocky cliffs that sits about 4,000 feet above sea level. Beneath Tonto Forest and extending under part of Oak Flat lies "one of the largest undeveloped copper deposits in the world," containing an estimated 1,970 billion tons of copper.

Also within the Tonto National Forest are several areas sacred to the Apache American Indians. Oak Flat is one of these areas, as are Devil's Canyon (called Ga'an Bikoh by the Apache), a depression just east of Oak Flat, and Apache Leap (called Dibecho Nadil by the Apache), a steep slope just to Oak Flat's west. These three adjacent areas are places where the Apache's Ga'an—beings that the Apache describe as their "creators, [their] saints, [their] saviors, [their] holy spirits"—live and where the Apache can communicate with them. Currently, the federal government owns Oak Flat.[1] Devil's Canyon is owned

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[1] Apache Stronghold may dispute the United States' ownership of part of Tonto National Forest later in this litigation but does not do so in this appeal.

partially by Arizona state government trusts[2] and partially by the federal government. And Apache Leap is owned partially by Resolution Copper and partially by the federal government. See 16 U.S.C. § 539p(d)(1)(A)(v).

In recent years, Oak Flat has been used for a variety of purposes, both religious and secular. After decades of holding religious rituals on their reservations, the Apache have recently returned to worship in Tonto Forest. In 2014, the Apache held a "Sunrise Dance" on Oak Flat for just the second time in "more than a hundred years." That 2014 ceremony closely followed another Sunrise Dance held the previous year at Mt. Graham, another sacred site elsewhere in Arizona. Separately, recreational users often camp, hike, or rock-climb throughout Tonto National Forest, including on Oak Flat.

B. The Land Exchange Provision

After nearly a decade of debate, Congress included in the 2014 National Defense Authorization Act a provision (the "Land Exchange Provision") that requires the Secretary of Agriculture to complete a land swap arrangement with Resolution Copper. *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732-41 (2014) (codified at 16 U.S.C. § 539p). Under the Provision's terms, the Department of Agriculture must convey 2,422 acres of federal land, including Oak Flat,

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[2] Arizona holds some land in trust on behalf of a group of public entities, including state universities and state K-12 schools. *See State Trust Land Beneficiaries*, Ariz. State Land Dep't, https://land.az.gov/our-agency-mission/beneficiaries (last visited June 15, 2022).

to Resolution Copper in exchange for 5,344 acres of Arizona land currently owned by Resolution Copper (again, the "Land Exchange"). *See* 16 U.S.C. § 539p(b), (c).[3]

Once the Forest Service and Resolution Copper exchange the land specified in the Land Exchange Provision, Resolution Copper expects to take "several years" to conduct a "detailed feasibility study" regarding whether to proceed with a mine on the land it receives. Under Resolution Copper's current proposal, it would use a mining technique called "panel caving"; while Resolution Copper would not need to dig a mine on the surface, the land over the mine would eventually subside, "profoundly and permanently alter[ing]" the landscape.

The Land Exchange Provision also requires a series of consultation and mitigation measures. The Secretary of Agriculture must conduct "government-to-government consultation" with all "affected Indian tribes," 16 U.S.C. § 539p(c)(3)(A), and must also agree with Resolution Copper on "mutually acceptable measures" to "address the concerns of the affected Indian tribes" and "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities," *id.* § 539p(c)(3)(B), (B)(i), (B)(ii).

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[3] The Land Exchange is also subject to several conditions not at issue here. *See, e.g.*, 16 U.S.C. § 539p(c)(2)(A), (B) (requiring that the parcels of land conveyed by Resolution Copper to the United States be "acceptable to the Secretary [of Agriculture or the Secretary of the Interior, depending on the parcel,]" and "conform[] to the title approval standards of the Attorney General of the United States applicable to land acquisitions by the Federal Government").

The Secretary of Agriculture must also prepare an environmental impact statement under the National Environmental Policy Act of 1969. *See id.* § 539p(c)(9)(B). This impact statement will guide any further federal government decisions on permitting and other approvals necessary for any development of the transferred land. *See id.* To that end, the impact statement must "assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under [the Land Exchange Provision] on the cultural and archeological resources that may be located on [that] land" and "identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources." *Id.* § 539p(c)(9)(C)(i), (ii).

Last, after the Department of Agriculture and Resolution Copper complete the Land Exchange, the Land Exchange Provision prohibits Resolution Copper from mining on Apache Leap and obligates Resolution Copper to surrender all rights to mine on or extract minerals from that land. *See id.* § 539p(g)(3). Apache Leap will be designated the "Apache Leap Special Management Area" with the goal of preserving the area's "natural character" and "cultural and archeological resources" and protecting the "traditional uses of the area by Native American people." *Id.* § 539p(g)(1), (2).

C. Administrative and Procedural History

In the years since Congress passed the Land Exchange Provision, the Forest Service has engaged in a consultation process with the public and with American Indian tribes. The Forest Service held eleven public meetings and accepted public comments for 120 days. Over that period, the Forest Service

received nearly 30,000 comments. Government officials also met with American Indian tribes on dozens of occasions between 2003 and 2020.

Separately, Resolution Copper has also collaborated with Apache tribe members to conduct a series of surveys that identified 6,906 "salvage locations" in Oak Flat, including 6,871 plant salvage locations, 9 animal salvage locations, and 26 mineral salvage locations. Resolution Copper has committed to removing and relocating the relevant articles from the salvage locations and preserving them at another location. Still, these consultation processes and mitigation measures were not enough to reach a solution that satisfied all parties. This lawsuit stands as evidence of this lack of success.

After these consultations, the Forest Service was scheduled to publish its final environmental impact statement on January 15, 2021. But several days before that scheduled publication date, Apache Stronghold filed this lawsuit, alleging that the Land Exchange violates RFRA, the Free Exercise Clause, and certain trust duties that Apache Stronghold argues were created by the 1852 Treaty of Santa Fe between the U.S. government and the Apache.[4] Two days after that, Apache Stronghold filed a motion for a temporary restraining order and for a preliminary injunction to prevent the Land Exchange. The district court denied the temporary restraining order, reasoning that Apache Stronghold "could not show

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[4] Apache Stronghold also brought claims under the Fifth Amendment's Due Process Clause and the First Amendment's Petition Clause. Those claims were rejected by the district court and Apache Stronghold does not appeal those rulings. *See Apache Stronghold v. United States,* 519 F. Supp. 3d 591, 609-11 (2021).

immediate and irreparable injury," and ordered Apache Stronghold's motion for a preliminary injunction to be fully briefed. *Apache Stronghold*, 519 F. Supp. 3d at 597.

After a full round of briefing on Apache Stronghold's motion for a preliminary injunction, the district court held a three-hour hearing, accepted documentary evidence, and heard testimony from witnesses on Apache Stronghold's behalf. After considering the evidence and the parties' arguments, the district court denied Apache Stronghold's motion. *See id.* at 611. As relevant here, the district court found that Apache Stronghold was unlikely to succeed on its claims under RFRA, the Free Exercise Clause, or the 1852 Treaty of Santa Fe. *See id.* at 598-609. Apache Stronghold appealed, and also moved for an injunction pending appeal.

Separate from this litigation, the Forest Service had issued its environmental impact statement on-time in January 2021. But in March 2021, soon after Apache Stronghold filed its motion for an injunction pending appeal, the Department of Agriculture ordered the Forest Service to rescind the environmental impact statement. The Department of Agriculture explained that the government needed "additional time" to "understand concerns raised by Tribes and the public" and to "ensure the agency's compliance with federal law." The Forest Service "cannot give a precise length of time for completing the reinitiation of consultation" but estimates that the process will take "several months."

Returning to this litigation, a Ninth Circuit motions panel heard another full round of briefing, including additional documentary evidence, as to

Apache Stronghold's motion for an injunction pending appeal. The motions panel eventually denied that motion, concluding that Apache Stronghold had again failed to show that it needed immediate relief to "avoid irreparable harm," in large part because the Forest Service expected to take "months" to complete its revised environmental review. In dissent, Judge Bumatay disagreed and would have granted Apache Stronghold an injunction pending our resolution of this appeal. Apache Stronghold's appeal then reached this panel for a decision on the appeal's merits.

Besides this case, there are two other pending cases brought by other plaintiffs who hope to prevent the Land Exchange. Both of these cases were stayed by agreement of the parties after the Forest Service withdrew its original environmental impact statement. *See Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, No. 21-00122 (D. Ariz. Mar. 15, 2021) (order granting, in light of the parties' joint status report, a stay "pending the Forest Service's publication of a future Final Environmental Impact Statement . . . for the Resolution Copper Project and Land Exchange); *San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 21-00068 (D. Ariz. Mar. 15, 2021) (order granting the parties' "Joint Motion to Stay Proceedings").

II. Standard of Review

We review for an abuse of discretion a district court's decision to deny a preliminary injunction but review de novo any questions of law underlying that decision. *See Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020).

III. Discussion

A party seeking a preliminary injunction must show that: 1) it is "likely to succeed on the merits"; 2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; 3) "the balance of equities tips in [its] favor"; and 4) "an injunction is in the public interest."[5] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

In the district court, Apache Stronghold sought a preliminary injunction on the grounds that the Land Exchange violates RFRA, the Free Exercise Clause, and the trust obligations that Apache Stronghold claims were created by the Treaty of Santa Fe. The district court denied Apache Stronghold's motion, finding that it was unlikely to succeed on the merits of any of those three claims. *See Apache Stronghold*, 519 F. Supp. 3d at 598-609. The district court did not analyze the other *Winter* factors. *See id.* at 611. On appeal, Apache Stronghold argues both that it is likely to succeed on the merits of its claims and that the other *Winter* factors favor it. Apache Stronghold requests that the Court reverse and remand for entry of a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292, and we affirm the district court's decision to deny Apache Stronghold's motion for a preliminary injunction upon the grounds given by the district court.

A. Apache Stronghold's RFRA Claim

We first address Apache Stronghold's claim under the Religious Freedom Restoration Act (again, "RFRA"). Under RFRA, the federal government may

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[5] Here, where "the government opposes a preliminary injunction," the third and fourth factors "merge into one inquiry." *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021).

not "substantially burden" a person's sincere exercise of religion unless that burden is both "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(a), (b). Congress passed RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), a case holding that the Constitution's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)).

Apache Stronghold primarily argues that the Land Exchange—by enabling Resolution Copper to mine on Oak Flat if the company so decides—will render Apache religious exercise on Oak Flat "impossible" and thus substantially burden the religious exercise of Apache Stronghold's Apache members.[6] Though that argument is where Apache Stronghold focuses its efforts, Apache Stronghold also contends that the Land Exchange substantially burdens its members in another way: by depriving its members of the "government benefit" of their present right to access the government-owned land of Oak Flat and by subjecting its members to the potential penalty of a

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[6] Apache Stronghold further argues that the Land Exchange violates RFRA because the "substantial burden" that the Exchange imposes is unsupported by a compelling governmental interest. The district court did not address this issue, *see Apache Stronghold*, 519 F. Supp. 3d at 603-08, and we have no need to do so here.

trespass lawsuit for entering Oak Flat once it becomes the private property of Resolution Copper.

The government, for its part, concedes that Apache Stronghold's members seek to exercise sincere religious beliefs by holding ceremonies on Oak Flat, *see Apache Stronghold*, 519 F. Supp. 3d at 604, and wisely so. The government's only response to Apache Stronghold's RFRA claim, at least at this stage of the litigation, is to argue the Land Exchange would not "substantially burden" Apache Stronghold under RFRA. 42 U.S.C. § 2000bb-1(b).

We proceed as follows. First, we summarize the binding Ninth Circuit case law that defines the term "substantially burden" as used in RFRA. Second, we apply that settled understanding of the term to the facts of the Land Exchange and determine whether the Exchange will substantially burden Apache Stronghold under Apache Stronghold's primary RFRA argument. And third, we discuss Apache Stronghold's secondary RFRA argument that the Land Exchange deprives its members of the benefit of access to government land and subjects them to the potential penalty of trespass lawsuits.

1. The Definition of a "Substantial Burden"

The parties contest what constitutes a substantial burden under RFRA but fortunately, we do not write on a clean slate. This Court previously addressed this same question in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). In *Navajo Nation*, our en banc court faced facts that mirror those here. Plaintiffs in *Navajo Nation*, several American Indian tribes and individuals, sued the U.S. Forest Service to enjoin the Service from allowing a ski

resort operating on government land to use recycled wastewater to make artificial snow for skiing. *See id.* at 1063. Like Oak Flat, the site of the ski resort (a mountain named Humphrey's Peak) was "sacred in [the American Indians'] religion" and was a site for religious ceremonies. *Id.* Like the Land Exchange, the Forest Service's plan in *Navajo Nation* to permit the ski resort to use recycled wastewater on Humphrey's Peak would indisputably "spiritually contaminate" a sacred area and inhibit religious ceremonies. *Id.* And like Apache Stronghold, the *Navajo Nation* plaintiffs claimed that the challenged government action would violate RFRA. *See id.*

Just as the facts in *Navajo Nation* parallel the facts here, so do the legal issues. On appeal in *Navajo Nation* was whether Forest Service's proposed plan would create a "substantial burden" under RFRA. *Id.* at 1067.

To determine the definition of a "substantial burden" under RFRA, *Navajo Nation* turned to RFRA's text. RFRA's stated statutory purpose is to "restore the compelling interest test as set forth in [two landmark Free Exercise Clause cases,] *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee [that test's] application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). (This "compelling interest test" is what we typically call strict scrutiny, and it requires that any substantial burden on religion both be "in furtherance of a compelling governmental interest" and be "the least restrictive means of furthering that . . . interest." *Id.* § 2000bb-1(a), (b).)

But *Sherbert* and *Yoder* did not only "set forth the compelling interest test." *Navajo Nation*, 535 F.3d at 1069. These two cases also "define[d] what kind or level of burden on the exercise of religion is sufficient to invoke" that test—in other words, what burden counts as a "substantial burden." *Id.* So, because RFRA expressly "restore[d]" *Sherbert* and *Yoder*'s compelling interest test, 42 U.S.C. § 2000bb(b)(1), we concluded that *Sherbert* and *Yoder* must "also control [RFRA's] 'substantial burden' inquiry," the step that determines whether the compelling interest test applies to government action in the first place, *Navajo Nation*, 535 F.3d at 1069.

Accordingly, to define a "substantial burden" under RFRA, *Navajo Nation* looked to the type of burden on religion that was imposed in *Sherbert* and in *Yoder*. In *Sherbert*, the Supreme Court held that denying government benefits on account of religion imposes a substantial burden on religion. *See* 374 U.S. at 410. South Carolina thus violated the Free Exercise Clause by withholding unemployment benefits from a worker who was fired because she refused to work on her faith's day of rest. *See id.* In *Yoder*, the Supreme Court held that imposing a government penalty on account of religion also imposes a substantial burden. *See* 406 U.S. at 213, 234. Wisconsin thus violated the Free Exercise Clause by fining Amish parents for violating a state truancy law that required children to attend school until age sixteen, even though sending children to high school was "contrary to the Amish religion." *Id.* at 208. So under RFRA, the government imposes a substantial burden on religion only when the government action fits within the framework established by *Sherbert* and *Yoder*: "when individuals are forced to choose between following the tenets of

their religion and receiving a governmental benefit," as in *Sherbert*, or when individuals are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," as in *Yoder*. *Navajo Nation*, 535 F.3d at 1070.

A second textual clue also supports our holding in *Navajo Nation*. RFRA explicitly defined numerous terms but not the phrase "substantial burden." *See* 40 U.S.C. § 2000bb-2. This omission has a simple explanation: "substantial burden" already had a well-established definition in the religious liberty context. The phrase "substantial burden" is "a term of art . . . previously used in numerous Supreme Court cases in applying the Free Exercise Clause." *Navajo Nation,* 535 F.3d at 1074-75; *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (citing *Yoder*, 406 U.S. at 220-21)); *Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.").

How did the Supreme Court define this "substantial burden" term of art? By reference to the *Sherbert/Yoder* framework. In *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, for instance, the Supreme Court held that a generally applicable tax "impose[d] no constitutionally significant burden on [the] appellant's religious practices or beliefs" because "in no sense has the State 'conditioned receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denied

such a benefit because of conduct mandated by religious belief.'" 493 U.S. 378, 391-92 (1990) (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987))). Other Free Exercise cases echoed this understanding of when the Free Exercise Clause applies—in other words, this understanding of when the government has created a substantial burden. [7] *See, e.g.*, *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). With this background in mind, *Navajo Nation*'s conclusion about the meaning of "substantial burden" is even stronger. Where, as here, a statute does not expressly define a term of settled meaning, courts "must infer . . . that Congress means to incorporate the established meaning of that term." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). Guided by this mandate, *Navajo Nation* recognized that the Supreme Court's settled definition of a "substantial burden" in the Free Exercise context—a burden within the *Sherbert/Yoder* framework—governs that same phrase's meaning under RFRA.

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[7] While some of these cases refer to "conditioning receipt" of a benefit and "den[ying]" a benefit, *e.g. Thomas*, 450 U.S. at 717, rather than conditioning the receipt of a benefit or imposing a penalty, *see Navajo Nation*, 535 F.3d at 1070, denying a benefit and imposing a penalty are two sides of the same coin.

Navajo Nation drew further support from *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) and *Bowen v. Roy*, 476 U.S. 693 (1986), two Free Exercise Clause cases that asked and answered essentially the same question that we ask here: what constitutes a "substantial burden" on religion? In *Lyng*, a group of American Indians challenged a federal plan to build a road over, and permit logging on, land those American Indians held sacred. *See* 485 U.S. at 441-42. The challengers claimed that the planned construction would "physically destroy the environmental conditions and the privacy without which the [American Indian] religious practices [could not] be conducted." *Id.* at 449. In *Bowen*, the petitioners challenged a federal statute that required state agencies to use social security numbers to identify welfare benefit recipients; according to the challengers' American Indian religion, assigning a numerical identifier to their daughter would rob her of "spiritual power." *See* 476 U.S. at 695-96. But the petitioners in neither *Lyng* nor *Bowen* had stated a valid Free Exercise claim because in "neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449; *see Bowen*, 476 U.S. at 700. This was true, the Supreme Court held, even if the government's action in *Lyng* would "virtually destroy the . . . Indians' ability to practice their religion." 485 U.S. at 451. *Lyng* and *Bowen* thus confirmed that a "substantial burden" in the Free Exercise context consists *only* of those government actions that fall

within the *Sherbert/Yoder* framework—actions that impose a penalty or deny a benefit—no matter how otherwise burdensome the government might be.[8] The same must be true for substantial burdens under RFRA, given that "*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*"—that is, rulings like *Lyng* and *Bowen*—"control [RFRA's] 'substantial burden' inquiry." *Navajo Nation*, 535 F.3d at 1069.

To summarize, *Navajo Nation* held that a "substantial burden" under RFRA consists only of burdens within the *Sherbert/Yoder* framework for three reasons. First, RFRA by its text "restored" *Sherbert*, *Yoder*, their "compelling interest" test, and their "substantial burden" inquiry, thus defining a "substantial burden" under RFRA as either of the burdens present in those two cases. Second, the Supreme Court has long used the phrase "substantial burden" as a Free Exercise Clause term of art that meant only the two burdens within the *Sherbert/Yoder* framework, and a "substantial burden" under RFRA must hold that same, settled meaning. And third, *Lyng* and *Bowen*, the cases most factually and legally analogous to *Navajo Nation* (and for that matter, to this case) confirmed that even burdensome government action does not constitute a "substantial burden" (and thus does not trigger the "compelling

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8 Admittedly, *Lyng*'s terminology was imprecise. It did not use the phrase "substantial burden" but instead used different words for the same idea: the proposed road through the American Indian sacred site did not impose a "burden on [the American Indians'] religious practices [] heavy enough to violate the Free Exercise Clause," or even heavy enough to "require [the] government to bring forward a compelling justification" for its plan. 485 U.S. at 447, 450.

interest" test) if that action falls outside the *Sherbert*/*Yoder* framework.

Applying *Navajo Nation*'s "substantial burden" standard to that case's facts, we held that under RFRA the Navajo suffered no "substantial burden" on their religion and thus had no RFRA claim against the Forest Service. *See id.* at 1070. To the Navajo, the Forest Service's decision to permit wastewater on Humphrey's Peak would "spiritually desecrate a sacred mountain." *Id.* But that government decision lay outside the *Sherbert*/*Yoder* framework to which RFRA applies. The Forest Service did not "coerce the [Navajo] to act contrary to their religion" by imposing a penalty or denying a governmentally granted benefit when it authorized the ski resort to use wastewater on the peaks. *Id.* The Service thus imposed no substantial burden under RFRA. *See id.* This was so, we held, "[e]ven were we to assume . . . that the government action in this case will 'virtually destroy the . . . [Navajo's] ability to practice their religion.'" *Id.* at 1072 (quoting *Lyng*, 485 U.S. at 451). Where there is no substantial burden, there is no ground to apply the "compelling interest" test, and thus no RFRA violation—no matter how dire the practical consequences of a government policy or decision. Any other result would be inconsistent with RFRA's text and with the Supreme Court's understanding of what constitutes a substantial burden on religious exercise.

While *Navajo Nation*'s "substantial burden" holding has firm doctrinal roots, we noted further that our holding there also has a strong practical basis. Were the scope of a substantial burden under RFRA broader than the *Sherbert*/*Yoder* framework, "any action the federal government were to take, including

action on its own land, would be subject to the personalized oversight of millions of citizens." *Id.* at 1063. And in the specific factual context of *Navajo Nation*—federal land use decisions—"giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone." *Id.* at 1063-64.

2. Apache Stronghold's Primary RFRA Argument

With this background in mind, we turn to Apache Stronghold's arguments. Apache Stronghold's main argument is that the Land Exchange would hand Oak Flat over to Resolution Copper for the latter's mining plan, thus incidentally making it "impossible" for Apache Stronghold's members to worship on Oak Flat and thereby substantially burdening them. Even assuming that the Land Exchange would in fact make Apache Stronghold's members worship "impossible," this argument cannot succeed in light of *Navajo Nation*.

The Land Exchange's effect on Apache Stronghold's members falls outside of the *Sherbert*/*Yoder* framework and thus outside of RFRA's definition of a substantial burden. Under RFRA, the government imposes a substantial burden on religion in two—and only two—circumstances: when the government "force[s individuals] to choose between following the tenets of their religion and receiving a governmental benefit" and when the government "coerce[s individuals] to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 1070. Here, the government will do neither by

transferring Oak Flat to Resolution Copper. No government benefits will be lost (as in *Sherbert*) nor will governmental penalties be imposed (as in *Yoder*). The Department of Agriculture will simply transfer ownership of a plot of government land to Resolution Copper. The Land Exchange's "incidental effects" on the religious exercise of Apache Stronghold's members, as significant as they may be to the Apache, "may make it more difficult [for them] to practice [their religion] but [will] have no tendency to coerce [the Apache] into acting contrary to their religious beliefs." *Lyng*, 485 U.S. at 450-51. Hence, under RFRA the Land Exchange imposes no substantial burden and RFRA thus does not limit the government's ability to complete the Land Exchange.

This is true even if the Land Exchange makes worship on Oak Flat "impossible." The government makes exercises of religion more difficult all the time. Doing so is not inherently coercive. As one example, the United States has a special visa program for "[m]inisters of [r]religion." *See Visas for Immigrant Religious Workers*, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/immigrate/ visa-religious-workers.html (last visited June 15, 2022). When the government denies one of these visas, the government no doubt makes it more difficult for that minister's following to exercise their faith. But the visa denial does not coerce those followers by threatening them with a negative outcome (*i.e.*, a penalty or the denial of a governmental benefit) if they continue to worship despite that hardship. So too here: the Land Exchange does not coerce the Apache to abandon their religion by threatening them with a negative outcome. Accordingly, Apache Stronghold's members have not

established that they would suffer a substantial burden under RFRA. Apache Stronghold is not likely to succeed on its RFRA claim.

Between them, Apache Stronghold and the dissent offer three arguments in response. First, the dissent argues that *Navajo Nation* misread RFRA and should have held that the definition of a "substantial burden" under RFRA extends beyond the *Sherbert*/*Yoder* framework. Second, both the dissent and Apache Stronghold contend that *Navajo Nation* contains exceptions that permit the panel to find a substantial burden here. And third, the dissent would hold that intervening Supreme Court precedent since *Navajo Nation* is "clearly irreconcilable" with *Navajo Nation*, permitting the panel to disregard *Navajo Nation* in its entirety. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). None of these responses persuades us.

The dissent first argues that *Navajo Nation* misread RFRA in concluding that RFRA defines a "substantial burden" as those burdens falling within the *Sherbert*/*Yoder* framework. As an initial matter, our en banc decision in *Navajo Nation* binds this panel—we cannot overrule *Navajo Nation* even if we do not agree with it. *See Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007). But even considering the points that the dissent raises as grounds for overruling *Navajo Nation*, we find them unconvincing.

At the outset, the dissent contends that RFRA was not "concern[ed]" with defining a "substantial burden" but instead with "ensuring that the compelling interest standard would be applied once a substantial burden had been demonstrated." Dissent at 61. In support, the dissent notes that RFRA "offers no definition" of a "substantial burden." *Id.*

We do not agree. The two cases that RFRA explicitly cited and "restored"—*Sherbert* and *Yoder*—both defined the "compelling interest" test *and* set out the two burdens that satisfy the predicate "substantial burden" inquiry: a penalty imposed and a governmental benefit denied. *Navajo Nation*, 535 F.3d at 1069. Moreover, the phrase "substantial burden" was not defined in RFRA's text but *was* a term of art in Free Exercise Clause doctrine that referred to those same two burdens set out in *Sherbert* and *Yoder*. *See id.* at 1074. With this background in mind, the best reading of RFRA's text is that RFRA "restore[d]" both *Sherbert* and *Yoder*'s "compelling interest" test and their "substantial burden" inquiry. 42 U.S.C. § 2000bb(b)(1). RFRA both explicitly silently reject the definition that those same two cases gave that same term of art. We thus have no need to concoct our own definition of a "substantial burden," distinct from the one that Congress chose.

The dissent also argues that *Navajo Nation*'s "substantial burden" definition "lacks a basis in pre-*Smith* precedent." Dissent at 64. Not so. The dissent has identified some cases where courts may have suggested that Free Exercise Clause violations could fall outside of the *Sherbert*/*Yoder* "substantial burden" framework. But the two cases that RFRA specifically "restore[d]" and cited in its very text were indeed *Sherbert* and *Yoder.* 42 U.S.C. § 2000bb(b)(1). Relying on that statutory text, *Navajo Nation* rightly focused on the burdens on religion imposed in those two cases. Moreover, the cases that the dissent cites all predate *Lyng*, which confirmed that under Free Exercise doctrine, the *Sherbert*/*Yoder* framework defines the scope of a "substantial burden." *See Lyng*, 485 U.S. at 449 (noting that the government imposes no

substantial burden unless "affected individuals [are] coerced by the Government's action into violating their religious beliefs" or "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"). Before *Lyng* made this clear, it is perhaps not surprising that Free Exercise cases occasionally diverged from that framework.

Further, and as noted above, the Supreme Court's post- *Lyng* but pre-*Smith* Free Exercise doctrine reinforces *Navajo Nation*'s understanding of the scope of a "substantial burden." Pre-*Smith*, the Free Exercise Clause applied only when the government "placed a substantial burden" on religious exercise. *Hernandez*, 490 U.S. at 699. And a "substantial burden" referred only to burdens within the *Sherbert*/*Yoder* framework. *See Lyng*, 485 U.S. at 449; *Jimmy Swaggart Ministries,* 493 U.S. at 391-92.

With the above in mind, we also reject the dissent's suggestion that *Navajo Nation* "constricted" the definition of a "substantial burden" relative to pre-*Smith* Free Exercise Clause doctrine. Dissent at 67. As just shown, and setting aside the potential outliers that the dissent identified, pre-*Smith* Free Exercise Clause doctrine already defined a "substantial burden" as only those burdens that fall within the *Sherbert*/*Yoder* framework: coercion caused by the government either imposing a penalty or denying a benefit. *See Lyng*, 485 U.S. at 449; *Jimmy Swaggart Ministries*, 493 U.S. at 391-92. So, when *Navajo Nation* recognized that this same framework also defines the scope of a "substantial burden" under RFRA, *Navajo Nation* did not narrow or constrict the definition of a "substantial burden." Rather, *Navajo*

Nation stayed faithful to a substantial burden's already settled scope.

The dissent also points to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*, as evidence that "the definition of 'substantial burden' [under RFRA] includes the denial of access to religious locations and resources." Dissent at 69. RLUIPA imposes RFRA's "compelling interest" test on substantial burdens on religion in two specific contexts: prison and local land use regulation. *See* 42 U.S.C. §§ 2000cc, 2000cc-1.

Yet we disagree with the dissent here too: RLUIPA's definition of a "substantial burden" casts no doubt on how *Navajo Nation* defined that term as to RFRA. We have previously interpreted a "substantial burden" under RLUIPA to be defined not by the *Sherbert*/*Yoder* framework but by the "plain meaning" of the phrase "substantial burden." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). But unlike RFRA, RLUIPA's text does not even mention, much less cite, either *Sherbert* or *Yoder*. *Compare* 42 U.S.C. §§ 2000cc, 2000cc-1, *with id.* § 2000bb. So *Navajo Nation*'s key inference—that a "substantial burden" under RFRA is defined by the burdens in *Sherbert* and *Yoder*—does not carry over to RLUIPA. While a "substantial burden" under RLUIPA is defined by the "plain meaning" of the phrase "substantial burden," *San Jose Christian Coll*, 360 F.3d at 1034, *Navajo Nation* correctly held otherwise as to RFRA.

The dissent also equates the two contexts covered by RLUIPA—prisons and local land regulation—to situations involving "Native American sacred sites located on government land." Dissent at 62. In all

three contexts, the dissent contends, the government substantially burdens religion by "denying access" to "religious locations and resources." *Id.* at 63. But while RLUIPA covers the first two contexts (again, prisons and local land regulation), the third context—the context actually at issue here—falls to RFRA. *Compare* 42 U.S.C. §§ 2000cc, 2000cc-1, *with id.* § 2000bb-1. RFRA's definition of a "substantial burden" thus governs here, regardless what the dissent's RLUIPA cases say, because the Land Exchange involves neither prisons nor local land regulation. *See also Navajo Nation*, 535 F.3d at 1077 ("RLUIPA is inapplicable to this case . . . . RLUIPA applies only to government land-use regulations of private land—such as zoning laws—not to the government's management of its own land."). For all these reasons, we reject the dissent's argument that *Navajo Nation* misread the scope of a "substantial burden" under RFRA.

Second, Apache Stronghold and the dissent both argue that even under *Navajo Nation*, the Land Exchange may substantially burden religious exercise. Both reach this conclusion two ways. Neither approach persuades us.

They first seize onto a statement from *Navajo Nation* that any "burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA," 535 F.3d at 1070 (emphasis added), and argue that the Land Exchange constitutes a substantial burden because it imposes a "greater burden on religious exercise" than that imposed in *Yoder* or *Sherbert*. Dissent at 71. Shorn of context, the "short of" phrase to which the dissent and Apache Stronghold

point might conceivably support their interpretation. But considered with the rest of the opinion, that phrase does not.

Properly understood, *Navajo Nation* did not set out a quantitative floor for a "substantial burden" such that all "greater" burdens qualify. Rather, *Navajo Nation* singled out two specific qualitative burdens—denying a benefit or imposing a penalty—that together form the complete universe of "substantial burdens" under RFRA. For evidence, look no farther than the sentence immediately before the "short of" phrase, which reads: "Under RFRA, a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069-70 (emphasis added). Further proving this point, immediately after the "short of" phrase *Navajo Nation* applies the test that it announced in the preceding sentences: "[T]here is no 'substantial burden' on the Plaintiffs' exercise of religion in this case. The [challenged government action] does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The [challenged action] also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*." *Id.* at 1070. *Navajo Nation* did not further ask if the Forest Service had imposed a burden *greater* than that imposed in *Sherbert* or *Yoder*, reinforcing that such a step is not necessary. Other passages in *Navajo Nation* similarly belie the dissent and Apache Stronghold's reading of

the case.[9] Accurately read, *Navajo Nation* recognized that the government imposes a substantial burden under RFRA only when the government denies the delivery of a benefit (as in *Sherbert*) or imposes a penalty (as in *Yoder*). The "short of" language did not change the character or type of government action that is required to constitute a "substantial burden" under RFRA.

Apache Stronghold and the dissent contend also that both *Navajo Nation* and *Lyng* are limited to cases where the government action would interfere with "subjective spiritual experience," not cases where the government "objectively and severely interfere[s] with a plaintiff's access to religious locations or resources." Dissent at 72 (quoting *Navajo Nation*, 535 F.3d at 1063). (Apache Stronghold's formulation of the same idea is that *Navajo Nation* and *Lyng* do not apply to cases involving a "physical impact" on land.) Because Resolution Copper's mining plan would have such an "objective" or "physical" impact here, they argue that *Navajo Nation* and *Lyng* do not control. True enough, in dicta, *Navajo Nation* pointed out that the challenged government action would not make any "places of worship . . . inaccessible" or physically affect any "religious ceremonies." 535 F.3d at 1063.

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9 *See, e.g.*, *Navajo Nation*, 535 F.3d. at 1075 ("In the pre-*Smith* cases adopted in RFRA, the Supreme Court has found a substantial burden on the exercise of religion *only* when the burden fell within the *Sherbert*/*Yoder* framework.") (emphasis added); *id.* at 1067 ("The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, *as required to establish a 'substantial burden' on religious exercise under RFRA*." (emphasis added)).

Similarly, dicta in *Lyng* states that "[n]o sites where specific rituals take place were to be disturbed." 485 U.S. at 454. But neither case is as narrow as the dissent and Apache Stronghold suggest.

Neither *Navajo Nation* nor *Lyng* turned on whether the challenged government action "objectively" interfered with religious exercise or "physically" affected sacred land. The rule that *Navajo Nation* drew from RFRA's text and from "*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*" was clear: "Under RFRA, a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Id.* at 1069-70 (emphasis added). This rule contains no exception for when the government neither imposes a penalty nor denies a benefit but "objectively" or "physically" interferes with religious exercise.

A close examination of the claimed burden on religion in *Lyng* further refutes the dissent and Apache Stronghold's argument. It was true that "[n]o sites where specific rituals take place were to be disturbed." *Lyng*, 485 U.S. at 454. But those opposed to the government action argued that "the proposed road w[ould] 'physically destroy the environmental conditions and the privacy without which the [American Indian] religious practices [could not] be conducted.'" *Id.* at 449. And even so—despite this "objective," "physical" impact that could "virtually destroy" the American Indians' "ability to practice their religion," the Supreme Court found no

substantial burden there.[10] *See id.* In sum, we cannot differentiate between physical and intangible damage to religious sites as Apache Stronghold asks because the *Sherbert/Yoder* framework turns on the nature of government action, not on the severity of the government's encroachment on a religious site. *See Lyng*, 485 U.S. at 451 (noting that the substantial burden inquiry "cannot depend on measuring the effects of a governmental action" on religious exercise"); *Navajo Nation*, 535 F.3d at 1070 n.12 ("[I]n *Yoder*, it was not the effect . . . on the children's subjective religious sensibilities that constituted the undue burden on the free exercise of religion. Rather, the undue burden was the penalty of criminal sanctions on the parents."); *accord Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723-24 (2014) (noting that courts have "have no business addressing" whether the RFRA substantial burden analysis changes if a religious adherent would only be forced to

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[10] Apache Stronghold also notes that in *Lyng*, the Supreme Court remarked that "a law prohibiting the Indian [plaintiffs] from visiting the Chimney Rock area would raise a different set of constitutional questions." 485 U.S. at 453. But the full sentence reads: "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions." *Id.* Context thus makes clear that the Court was referring to *discriminatory* prohibitions on access. And even if Apache Stronghold were right that a non- discriminatory access prohibition raises a "different set" of legal questions than those covered in *Lyng*, *Navajo Nation* answers those questions. Again, unless the government imposes a penalty or denies a benefit, the government imposes no substantial burden under RFRA. *See Navajo Nation*, 535 F.3d at 1069-70.

participate in a religiously prohibited act in an "attenuated" way).

If any doubts about *Navajo Nation*'s meaning survive the arguments above, the many Ninth Circuit cases that have applied *Navajo Nation* put those doubts to rest. These cases—including one written by the author of the dissent—betray no confusion about *Navajo Nation*'s "substantial burden" holding: "Under RFRA, a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1061 (9th Cir. 2020) (Berzon, J.) (emphasis added) (quoting *Navajo Nation,* 535 F.3d at 1069-70), *rev'd on other grounds by* 142 S. Ct. 1051 (2022).[11]

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[11] *See also Does v. Wasden*, 982 F.3d 784, 794 n.3 (9th Cir. 2020) ("Under RFRA, by contrast, 'a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."' (quoting *Navajo Nation*, 535 F.3d at 1069-70)); *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016) ("[W]e have held that a substantial burden under RFRA exists in a context such as this one 'only when individuals are . . . coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions '" (quoting *Navajo Nation*, 535 F.3d at 1070)); *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012) ("We have held that the government imposes a substantial burden 'only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."' (quoting *Navajo Nation*, 535 F.3d at 1070));

As the dissent notes, none of these post-*Navajo Nation* cases addressed the precise facts at issue here. Dissent at 72 n.4. None need have. RFRA defined a "substantial burden" according to the *Sherbert*/*Yoder* framework. *See Navajo Nation*, 535 F.3d at 1069-70. This is an across-the-board definition that applies in all cases under the statute, not a "restricted railroad ticket, good for th[at] day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (Roberts, J., dissenting) (1944). And dispositive here, this definition contains no exceptions for burdens on religion thought to be quantitatively "greater" than the burdens in *Sherbert* and *Yoder* or for burdens that neither impose a penalty nor deny a benefit but "objectively" or "physically" interfere with religious exercise in an incidental way.

Apache Stronghold (but not the dissent) also points to a scattered set of cases that apply a definition of "substantial burden" in a manner broader than the *Sherbert*/*Yoder* framework.[12] But for a variety of

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Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1214-15 (9th Cir. 2008) ("[W]e have not found any evidence demonstrating that Snoqualmie Tribe members will lose a government benefit or face criminal or civil sanctions for practicing their religion. We therefore hold that . . . FERC's decision relicensing the project . . . does not impose a substantial burden under RFRA on the tribal members' ability to exercise their religion, as we have defined substantial burden in *Navajo Nation*.").

[12] Apache Stronghold also argues briefly that RFRA's legislative history supports its reading of the statute. Regardless whether legislative history is a valid tool of statutory interpretation, neither House reports nor "discussion in Congress" can overcome RFRA's clear text and explicit statutory purpose, as applied in *Navajo Nation*. *See* 42 U.S.C. § 2000bb(b); *Navajo Nation*, 535 F.3d at 1069-70 ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose

reasons, these cases do not affect our interpretation of *Navajo Nation*. As an initial matter, even were courts from other circuits to take approaches different than ours in *Navajo Nation*, *Navajo Nation* binds this panel and this Circuit.[13] But turning to the substance of the in-circuit cases that Apache Stronghold cites, they either interpret RFRA but predate *Navajo Nation*[14] or interpret not RFRA but RLUIPA instead.[15] To the extent our pre-*Navajo Nation* RFRA cases defined a "substantial burden" differently than did *Navajo Nation*, our later en banc decision in *Navajo Nation*

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between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."). And in any event, other legislative history, were we to consider it, supports the government's position instead. *See* S. Rep. No. 103-111, at 9 (1993) ("[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or *the use of the Government's own property* or resources." (emphasis added)).

[13] As a three-judge panel, we are bound by circuit precedent like *Navajo Nation*. *See Robbins*, 481 F.3d at 1149 n.3. We thus cannot rely on conflicting out-of-circuit cases like *Comanche Nation v. United States*, No. 08-00849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), and *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

[14] *See, e.g.*, *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003); *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997).

[15] *See, e.g.*, *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022); *Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011); *Greene v. Solano Cnty. Jail*, 513 F.3d 982 (9th Cir. 2008); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).

controls. *See Robbins*, 481 F.3d at 1149 n.3. And the RLUIPA cases are similarly unpersuasive. As we have explained, we have interpreted RFRA and RLUIPA to apply different substantial burden standards. *Compare Navajo Nation*, 535 F.3d at 1069-70 ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."), *with San Jose Christian Coll.*, 360 F.3d at 1035 (holding that under RLUIPA, the government imposes a "substantial burden" on religion when it "imposes a 'significantly great' restriction or onus" on religious exercise). Apache Stronghold's RLUIPA cases thus give us no guidance for how to interpret the phrase "substantial burden" under RFRA. [16]

Last, the dissent argues that *Navajo Nation* is "clearly irreconcilable" with recent Supreme Court precedent, allowing the panel to ignore *Navajo Nation* entirely. Dissent at 74 (quoting *Miller*, 335 F.3d at 900). *Miller* does permit Ninth Circuit panels to treat as "effectively overruled" any Ninth Circuit cases that are "clearly irreconcilable" with "intervening Supreme Court authority." 335 F.3d at 900. But the "'clearly irreconcilable' requirement 'is a high standard.'" *Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) (quoting *Rodriguez v. AT & T*

[16] Apache Stronghold responds to this point by claiming that RFRA and RLUIPA impose the "same standard." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (quoting *Gonzales v. O Centro Espmta Beneficente Unio do Vegetal*, 546 U.S. 418, 436 (2006)). We address this point below. *See* post at 39-40.

Mobility Servs. LLC, 728 F.3d 975, 979 (9th Cir. 2013)). If, as a panel, "we can apply our precedent consistently with that of the higher authority, we must do so." *Consumer Def.*, 926 F.3d at 1213.

In our view, *Navajo Nation* is fully reconcilable with the Supreme Court's recent cases. The dissent highlights *Holt v. Hobbs*, 574 U.S. 352 (2015), and *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). To this list we add *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), a case that Apache Stronghold cites, and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). When we compare these cases to *Navajo Nation*, we do not see any clear irreconcilability.

Turning first to *Hobby Lobby*, that case does not contradict *Navajo Nation*'s "substantial burden" holding. *Hobby Lobby* held that closely held corporations can maintain a RFRA claim but it provided no comprehensive definition of "substantial burden." *See* 573 U.S. at 719. In fact, *Hobby Lobby* framed a substantial burden in precisely the way *Navajo Nation* did: Hobby Lobby suffered a substantial burden because it would have had to "pay an enormous sum of money" to the government—a government penalty—"if [it] insist[ed] on providing insurance coverage in accordance with their religious beliefs." *Id.* at 726.

As the dissent rightly notes, *Hobby Lobby* made clear that RFRA claims need not perfectly track pre-*Smith* Free Exercise doctrine in every single way. RFRA plaintiffs are not limited to those who "fell within a category of plaintiffs [who] had brought a free-exercise claim that [the Supreme] Court entertained in the years before *Smith*" because RFRA

did not "merely restore[the Supreme] Court's pre-*Smith* decisions in ossified form." *Id.* at 715-16.

But *Navajo Nation* did not assume otherwise. Rather, *Navajo Nation* observed that RFRA, by its own terms, "restore[d]" pre-*Smith* Free Exercise doctrine in a single, limited way: it incorporated *Sherbert* and *Yoder*'s "compelling interest test" and predicate "substantial burden" inquiry. 42 U.S.C. § 2000bb(b)(1); *Navajo Nation*, 535 F.3d at 1068. So, because "we can apply [*Navajo Nation*] consistently with [*Hobby Lobby*]," "we must do so." *Consumer Def.*, 926 F.3d at 1213.

Next is *Holt*. There, the Supreme Court stated that RLUIPA "allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'" 574 U.S. at 358 (quoting *Gonzales v. O Centro Esp^rita Beneficente Unio do Vegetal,* 546 U.S. 418, 436 (2006)). From this connection, the dissent argues that RFRA, like RLUIPA, recognizes a "substantial burden" "when the government denies access to religious locations or resources." Dissent at 64. But we do not read *Holt*'s dicta to support the dissent's position. This quotation from *Holt* is best read as applying to the "compelling interest" test—that is, the stage of the RFRA (and RLUIPA) analysis at which individuals "seek religious accommodations" and have those accommodations assessed against the government's justification—not as applying to the predicate "substantial burden" stage. The dissent seems to recognize this nuance as well, observing that "RLUIPA sets forth the 'same standard' for evaluating governmental justifications for imposing substantial burdens on religion as RFRA—strict scrutiny." Dissent at 68-69.

Further, the actual "substantial burden" standard that *Holt* applied matches the *Sherbert/Yoder* framework almost perfectly. Holt challenged a prison grooming policy that required him to "shave his beard and thus to 'engage in conduct that seriously violates his religious beliefs.'" *Holt*, 574 U.S. at 361 (quoting *Hobby Lobby*, 573 U.S. at 720). If Holt violated that policy, he would "face serious disciplinary action" and the Supreme Court reasoned that "[b]ecause the grooming policy puts [Holt] to this choice, it substantially burdens his religious exercise." *Id.* The *Sherbert/Yoder* "substantial burden" framework includes situations when individuals are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1070. The government action in *Holt*—requiring a prisoner to violate his religious beliefs or "face serious disciplinary action," 574 U.S. at 361—falls squarely within that framework. So here, too, "we can apply our precedent consistently with that of the higher authority." *Consumer Def.*, 926 F.3d at 1213.

For similar reasons, we dismiss the dissent's appeal to *Ramirez*. First, *Ramirez* was a RLUIPA case, not a RFRA case. And more pointedly, the scope of a "substantial burden" under either statute was explicitly not at issue. The government "d[id] not dispute that any burden [its] policy impose[d] on Ramirez's religious exercise [wa]s substantial," and *Ramirez* accordingly provided no analysis whatsoever concerning the scope of a substantial burden.[17] 142 S.

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[17] The dissent suggests that both *Ramirez*'s "locution" and ultimate outcome in Ramirez's favor indicate that the Supreme Court agreed with the government's waiver on the "substantial

Ct. at 1278. Instead, the Court simply cited *Holt*, which (as noted above) framed a "substantial burden" consistent with those discussed in *Navajo Nation*. *See id.*; ante at 40-41; *Holt,* 574 U.S. at 361.

Finally, Apache Stronghold points to *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), in which the Supreme Court held that RFRA "permits litigants . . . to obtain money damages against federal officials in their individual capacities." *Id.* at 493. If such a citation sounds irrelevant, that's because it is. The district court below dismissed the plaintiffs' RFRA claims on the sole basis that "RFRA does not permit monetary relief," *id.* at 489; the Supreme Court rejected that argument without discussing what constitutes a "substantial burden" under RFRA. True, *Tanzin* explained that a "damages remedy . . . is also the only form of relief that can remedy some RFRA violations" and noted that "[f]or certain injuries . . . effective relief consists of damages, not an injunction." *Id.* at 492. But that is as far as the case went. *Tanzin* did not hold that a "substantial burden" extends beyond the *Sherbert/Yoder* framework or even say as much in dicta.

We also reject the idea that *Tanzin* implied any substantial burden holding through its choice of lower-court cases to cite. *Tanzin* included a "*See, e.g.*,"

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burden" issue. Dissent at 70 n.3. The outcome sheds no light here: Ramirez would have also prevailed had the Court merely accepted the government's concession. And as for the Supreme Court's locution, we take the Court at its word: the scope of a "substantial burden" on religion was "not [in] dispute" in *Ramirez*, 142 S.Ct. at 1278, so *Ramirez* neither created nor implied a "substantial burden" rule that can be compared with *Navajo Nation*'s.

citation to *DeMarco v. Davis*, 914 F.3d 383 (5th Cir. 2019), a Free Exercise Clause case involving a prison officials' destruction of a prisoner's personal property—his legal and religious books.[18] *See id.* at 389-90. From that citation, Apache Stronghold divines the principle that the government can violate RFRA through the "destruction of religious property," purportedly including government-owned real property (*i.e.*, land). But the *DeMarco* citation supported the unremarkable proposition that "[f]or certain injuries . . . effective relief consists of damages, not an injunction." *Id.* at 492. This proposition has nothing to do with what qualifies as a substantial burden under RFRA. And in any event, we are skeptical that the Supreme Court would revolutionize the scope of a "substantial burden" on religion—as plainly set out in cases like *Lyng*—through its choice of cases in a string citation. If we expect Congress not to "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), we should hold the Supreme Court to the same standard.

We also add an overarching consideration that further supports our conclusion that *Navajo Nation* and the Supreme Court's decisions cited by the dissent can be reconciled. We must read *Hobby Lobby*, *Holt*, *Ramirez*, and *Tanzin* in conjunction with the Supreme Court's other precedents. And the Supreme Court reaffirmed as recently as 2017 that a "substantial burden" on religion is still defined by the

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[18] That "*See, e.g.*," citation also included *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I.), *withdrawn* 750 F. Supp. 558 (D.R.I. 1990), a Free Exercise Clause case involving an autopsy of a man whose parents' religion holds that autopsies "are a mutilation of the body." 750 F. Supp. at 558.

Sherbert/Yoder framework recognized in *Navajo Nation*. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court quoted *Lyng*'s "substantial burden" rule: even actions that "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" pose "no free exercise violation . . . [if] the affected individuals were not being 'coerced by the Government's action into violating their religious beliefs.'" 137 S. Ct. 2012, 2020 (2017) (quoting *Lyng*, 485 U.S. at 449). That reasoning matches ours here perfectly. So when the dissent's cases and *Trinity Lutheran* are taken together, as they must be, they cast no doubt on the scope of the *Sherbert/Yoder* framework or on *Navajo Nation*'s "substantial burden" holding.[19] Given that we decline to apply our past precedents only when more recent Supreme Court decisions are "clearly irreconcilable" with those

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[19] In the dissent's view, *Trinity Lutheran* "does not imply the Court would reach the same result [as it did in *Lyng*] in a case in which the government controlled access to religious resources and entirely denied a plaintiff access to those resources." Dissent at 73. To the contrary: *Trinity Lutheran* must imply that result. *Trinity Lutheran* quotes *Lyng*'s unequivocal "substantial burden" rule: There is "no free exercise violation . . . [if] the affected individuals were not being 'coerced by the Government's action into violating their religious beliefs.'" *Trinity Lutheran*, 137 S. Ct. at 2020 (quoting *Lyng*, 485 U.S. at 449). And as discussed above, the Land Exchange may incidentally prevent religious exercise on Oak Flat but involves no coercion. *See* ante at 25-26; *see also Lyng*, 485 U.S. at 450-51 (rejecting the view that the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions").

precedents, *Miller*, 335 F.3d at 893, we must apply *Navajo Nation* here and we do so without hesitation.

We thus conclude that under *Navajo Nation*, the Land Exchange does not substantially burden Apache Stronghold within the meaning of RFRA, even if the Land Exchange does make it "impossible" for Apache Stronghold's members to worship on Oak Flat. Apache Stronghold is unlikely to succeed on its RFRA claim and the district court was right to so find. We acknowledge that this is a harsh result for Apache Stronghold's members. But it is the result that RFRA commands. And for multiple reasons, this result is necessary.

As we observed in *Navajo Nation*, were the definition of "substantial burden" under RFRA any broader than the *Sherbert/Yoder* framework, "any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens." *Navajo Nation*, 535 F.3d at 1063. Limiting RFRA violations to government action that makes an exercise of religion "impossible" or "deny access" to a religious site does little to reduce that risk. We recognize that currently, Apache Stronghold objects only to the Land Exchange, and not also to the presence on Oak Flat of hikers, climbers, and other recreational users who now use the land. But other religions have stricter requirements, and a wide array of government or government-authorized actions could, in some worshippers' views, render "impossible" exercises of religion or otherwise obstruct the land on which those exercises would take place. In *Lyng*, in fact, the government project took care not to disturb any "sites where specific rituals [took] place," but to the

worshippers, the planned paved road would still "physically destroy the environmental conditions and the privacy without which the[ir] religious practices [could not] be conducted." *Lyng*, 485 U.S. at 449. "[S]uch beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property." *Id*. at 453. And again, when it comes to the federal government's use of its own land, "giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone." *Navajo Nation,* 585 F.3d at 1063-64.

The dissent is surely right that some government action swept into RFRA by a more expansive "substantial burden" definition would survive strict scrutiny. *See* Dissent at 77-77. But even so, RFRA cannot require the government to satisfy strict scrutiny every time that the government, through the management of its own land, interferes with religion or denies "access to religious resources." Every new hiking path, ranger station, or "Keep Off the Grass" sign in every National Park could deny access to land or "physically destroy the environmental conditions and the privacy" necessary to some religious practices. *Lyng*, 485 U.S. at 449. The government need not satisfy strict scrutiny to manage federal lands in these ways.

Apache Stronghold's broader definition of "substantial burden" would also create another, deeper problem: It would force judges to make decisions for which we are fundamentally unsuited. The dissenters in *Navajo Nation* were correct on one important point: "[R]eligious exercise invariably, and centrally, involves a 'subjective spiritual experience.'"

535 F.3d at 1096 (Fletcher, J., dissenting); *see also id.* at 1070 n.12 (majority opinion) (agreeing with the dissent on this point). Who are we to say whether government action has an "objective" impact on religious observance or merely "diminishes [a worshipper's] subjective spiritual fulfillment"? *Id.* Questions like this raise issues on which judges must not pass. As we are often reminded, it is outside the "judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez*, 490 U.S. at 699. The straightforward *Sherbert*/*Yoder* framework avoids these problems.

Of course, the U.S. government may propose future projects that, like the Land Exchange here, would impose no substantial burden but still have an incidental impact on religious observance or fulfillment. And someone must decide whether the government should ultimately pursue each such project. But RFRA's text trusts that unenviable task to the hands of those both more accustomed to these tradeoffs and more accountable to the people: our elected representatives in Congress.

3. Apache Stronghold's Secondary RFRA Argument

Apache Stronghold's secondary argument is that the Land Exchange does in fact deprive its members of a benefit and subject its members to a penalty. Apache Stronghold contends that the Exchange deprives its members of "the use and enjoyment of 'government' land for religious exercise" disagree.

Turning first to Apache Stronghold's argument that the Land Exchange denies its members a benefit, that argument has a problem. The government does

not substantially burden religion every time it ends a "governmental benefit" that at one time went to religious beneficiaries. There must be an element of coercion: the government must "condition" the benefit upon conduct that would violate sincerely held religious beliefs. *Navajo Nation*, 535 F.3d at 1067. Consider this example. Suppose that for many years, the Forest Service has paid Apache Stronghold's members to host educational sessions to teach local children about the Apache's history and culture, including the Apache's religious traditions. But this year, the Forest Service says to Apache Stronghold: "our budget's been cut—we can't renew your contract for more sessions next year." Apache Stronghold's members have just been deprived of a benefit—payment for the educational sessions that they previously held—but they have not been coerced to abandon their religious beliefs. We need not apply strict scrutiny to every contract cancellation or revision.

Under this rubric, the Land Exchange thus presents no "substantial burden." The Exchange does not "condition" any government benefits on the Apache violating their religious beliefs. Like the cancelled educational sessions in the hypothetical above, the Land Exchange does not force Apache Stronghold's members to choose between following their religion and losing a benefit (the "use and enjoyment" of Oak Flat). The Land Exchange just incidentally keeps everybody—Apache Stronghold's members included—from using Oak Flat: No conditioning of a benefit; no coercion. Were the rule otherwise, the federal government would substantially burden religion any time it cancels a contract with a religious entity or

repeals a program that subsidized both parochial and secular private schools.

Next is Apache Stronghold's argument that the Land Exchange subjects its members to penalties: liability for trespassing on land that will be private after the Exchange. We also reject this argument.

Turning first to criminal trespass liability, when a religious plaintiff has a "sufficiently realistic fear" that the government will punish him for exercising his religious beliefs, he can sue the government under RFRA to forestall any such prosecution. *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016); *see also O Centro*, 546 U.S. at 425 (affirming "declaratory and injunctive relief" after a religious sect that used a prohibited hallucinogen in its ceremonies had been "threatened . . . with prosecution" under the Controlled Substances Act). If the government's intended prosecution cannot satisfy strict scrutiny, RFRA "immuniz[es]" a religious adherent's conduct "from official sanction—even though such conduct violated a law that is otherwise valid." *Christie*, 825 F.3d at 1055.

But Apache Stronghold's argument faces two problems. For one, Apache Stronghold has not shown a "sufficiently realistic fear" of future criminal liability. *Christie*, 825 F.3d at 1055. Unlike in *O Centro*, there has been no threat of prosecution here. The record shows no imminent plans by Arizona state law enforcement (who are not defendants here and thus could not be subject to the requested preliminary injunction) or by the federal government to prosecute Apache Stronghold's members for any trespasses that may or may not occur in the future.

And even had Apache Stronghold shown a "sufficiently realistic fear" of criminal prosecution, it seeks relief that RFRA cannot provide. Injunctive relief "must be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991). Here, that means that RFRA could give Apache Stronghold's members "immun[ity]" from any criminal trespass charges brought against them for entering Oak Flat after the land passed into private hands unless the government can prove a compelling and narrowly tailored government interest. *Christie*, 825 F.3d at 1055. But Apache Stronghold does not ask for immunity. It asks instead that we enjoin a complex, multi-step land exchange that does much more than (potentially) subject Apache Stronghold's members to criminal liability. RFRA does not authorize Apache Stronghold to enjoin the entire Land Exchange any more than RFRA authorized the *O Centro* plaintiffs to strike down the entire Controlled Substances Act.

Next, when we consider potential civil trespass suits brought by Resolution Copper, we again see two problems with Apache Stronghold's argument.[20] The first problem is factual. At this early stage in the litigation, it is not clear whether the Apache will in fact be subject to civil trespass liability. Even after the Land Exchange, Resolution Copper "will ensure ongoing public access to the Oak Flat Campground, recreational trails and climbing," and will

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[20] RFRA is not a defense in private litigation. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999). RFRA thus would not prevent Resolution Copper from pursuing private trespass actions against any would-be worshipers.

"accommodate requests to periodically close the campground to the public for traditional and ceremonial purposes." Resolution Copper also committed to "permit harvesting of the Emory oak groves by individuals, or commercially through an authorization." And the Apache need not rely on Resolution Copper's goodwill alone. The Land Exchange Provision itself obligates Resolution Copper to "provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes." 16 U.S.C. § 539p(i)(3). True, Resolution Copper may restrict access once "the operation of the mine precludes continued public access for safety reasons." *Id.* But Resolution Copper is still "several years" and a "detailed feasibility study" away from any final decision as to whether to proceed with the mine at all. So the mine may never come to be, and Resolution Copper may never restrict access at all. At this preliminary injunction stage, these factual uncertainties prevent Apache Stronghold from showing a "likelihood" that Resolution Copper will subject Apache Stronghold's members to trespass liability for using Oak Flat.[21]

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[21] We also acknowledge the novelty of Apache Stronghold's fallback argument. RFRA applies only to "[g]overnment" action that substantially burden religious exercise, 42 U.S.C.A. § 2000bb-1, and it is far from clear that it constitutes "government" action for the Forest Service to transfer government land to a private entity which might (or might not) sue other private parties for trespassing on that land. *Cf. Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 66 (D.C. Cir. 2006). But the parties sparsely briefed Apache Stronghold's secondary argument and the government did not argue that there is no "government" action here, so we leave this issue for another day.

The second problem is legal. As with the (potential) criminal charges, even were the Land Exchange to subject Apache Stronghold's members to the threat of civil trespass lawsuits, the substantial burden would be the lawsuits themselves, not Resolution Copper's mining activities. Again, injunctive relief "must be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc.*, 941 F.2d at 974. Even assuming Apache Stronghold's members were subject to imminent civil trespass suits, we could at most require the government to negotiate with Resolution Copper an easement or a license giving Apache Stronghold's members some access to Oak Flat even after the Land Exchange. We could not enjoin the entire Land Exchange as Apache Stronghold asks us to do.

B. Apache Stronghold's Free Exercise Clause Claim

We next address Apache Stronghold's claim that the Land Exchange would violate the Constitution's Free Exercise Clause. *See* U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Under *Employment Division v. Smith*, a "valid and neutral law of general applicability" does not violate the Free Exercise Clause, even if that law burdens religion. 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment)). But laws that are not neutral or are not generally applicable are subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not neutral if the law's "object . . . is to infringe upon or restrict practices because of their religious motivation"; a law is not "generally applicable" if the

law "impose[s] burdens only on conduct motivated by religious belief" in a "selective manner." *Id.* at 533, 543. Apache Stronghold argues that the Land Exchange Provision is neither neutral nor generally applicable and is thus subject to strict scrutiny. We are not persuaded.

First, the Land Exchange is "neutral" in that its "object" is not to infringe upon the Apache's religious practices. *Id.* at 533. The Land Exchange Provision never mentions religion, and when it comes closest to doing so, the Provision shows solicitude towards religion, not intent to infringe. *See* 16 U.S.C. § 539p(g) (designating a "special management area" "to allow for traditional uses of the area by Native American people"). And even though "[f]acial neutrality is not determinative," Apache Stronghold has identified no "subtle departures from neutrality" here. *Lukumi*, 508 U.S. at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). All the evidence suggests that the Land Exchange is meant to facilitate "mineral exploration activities." 16 U.S.C. § 539p(c)(6)(A)(i). Nothing more and nothing less.

Apache Stronghold disagrees, arguing that the Land Exchange "targets religious conduct for distinctive treatment." As evidence, it posits that Congress must have known the adverse impact that the Land Exchange would have on the Apache. But even assuming that 535 distinct Congresspersons could have a single collective "knowledge" or "purpose," Congress's knowledge is not enough to prove its purpose.[22] It is one thing to pass a statute

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[22] Apache Stronghold cites, as "evidence of hostility" toward

with the knowledge that it could burden the Apache's religious exercise. It is another entirely to pass a statute with the purpose or goal of creating that burden. *Cf., e.g.*, Model Penal Code § 2.02 (distinguishing between actions made "knowingly" and actions made "purposely").

The Land Exchange is also generally applicable: it does not selectively "impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Rather, the Land Exchange will also burden all manner of secular activities on the areas to be transferred to Resolution Copper. After the Land Exchange, parts of the Tonto National Forest will "no longer [be] accessible to hikers, rock climbing enthusiasts, cyclists, equestrians, campers, hunters, and other recreational users."

Apache Stronghold responds that the Land Exchange is not generally applicable because it is

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religion, a snippet from the Congressional record where a "bill sponsor criticized 'the San Carlos Apache' for 'car[ing] more about some issues [*i.e.*, religion] than they do about the prospect of employment,' and called for 'an end to' religious 'delays.'" (All alterations here are Apache Stronghold's.) This argument has two problems. First, once Senator McCain's remarks are shorn of all misleading editing, they show no hostility toward religion. *See Resolution Copper: Hearing on H.R. 1904 and S. 409 Before the S. Comm. on Energy and Nat. Res.*, 112th Cong. 4 (2012) (statement of Sen. John McCain) ("So, the tribal leaders . . . obviously care more about some issues than they do about the prospect of employment for their tribal members . . . ."); *id.* at 4 ("Mr. Chairman, it is time for Congress to put an end to these delays."). And second, Senator McCain's remarks shed no light on how Congress as a whole perceived the Land Exchange's purpose. They show only a single Senator's frustration with impediments to the Exchange achieving the purpose that particular Senator had in mind: increased gainful employment.

"designed to apply to only one piece of land," but this argument misconstrues the legal standard. We do not ask if the law was "designed to apply to only one piece of land." Indeed, the statute challenged in *Smith*—and upheld there as neutral and generally applicable—was designed to apply to only one type of conduct: the "knowing or intentional possession of a 'controlled substance.'" 494 U.S. at 874 (quoting Ore. Rev. Stat § 475.992(4) (1987)). The question under *Smith* is whether a government action "burdens only . . . conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543; *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) ("A law is not generally applicable if it, 'in a selective manner, imposes burdens only on conduct motivated by religious belief.'" (quoting *Lukumi*, 508 U.S. at 543)). And again, the Land Exchange does not impose such a selective burden. The Exchange affects not just the Apache but all "hikers, rock climbing enthusiasts, cyclists, equestrians, campers, hunters, and other recreational users" who wish to enjoy the areas to be conveyed to Resolution Copper. We thus hold that the Land Exchange Provision is a neutral and generally applicable law and passes muster under *Smith*. The district court properly found that Apache Stronghold is not likely to succeed on its Free Exercise claim.

C. Apache Stronghold's Trust Claim

We last consider Apache Stronghold's trust claim. As relevant background, the Apache and the U.S. government signed the Treaty of Santa Fe in 1852. In that treaty, the U.S. promised to "designate, settle, and adjust [the Apache's] territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness

of [the Apache].” Importantly, however, Apache Stronghold has not adduced any evidence that the U.S. ever formally designated any such boundaries. Apache Stronghold nevertheless argues that this language created an enforceable trust obligation on the U.S. government’s part, and that the Land Exchange is “inconsistent” with the U.S.’s obligation to pass laws “conducive to the prosperity and happiness” of the Apache.

The government responds that this trust claim fails for three reasons: 1) Apache Stronghold cannot bring a trust claim under the Treaty of Santa Fe because it is a non-profit group, not the Apache tribe that signed the treaty; 2) the Treaty of Santa Fe does not create an “enforceable trust duty”; and 3) the Land Exchange Provision abrogated the Treaty of Santa Fe by statute. We need address only the second reason, as it is dispositive here.[23]

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[23] The government phrases its first argument—that a non-profit like Apache Stronghold cannot bring claims under the Treaty of Santa Fe—in terms of “standing.” But the government does not assert that Apache Stronghold lacks Article III standing to bring this claim. Rather, the government argues that treaties between the U.S. and American Indian Tribes, like other “treaties between sovereigns,” “do not create privately enforceable rights.” The government thus claims that the Treaty of Santa Fe gives only the American Indian tribe that signed the treaty—and not individual members of that tribe—a cause of action upon which a court can grant relief. But this is a question of substantive law, not of Article III, and thus “is not a jurisdictional question.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1156 (9th Cir. 2015). We thus need not address the government’s first argument before considering its second argument: that the Treaty of Santa Fe creates no enforceable trust duty. And because we agree with that second argument, we need not address the

We agree with the government that on this record, Apache Stronghold has not established that the Treaty of Santa Fe imposes on the United States an enforceable trust obligation. As a general matter, the U.S. government shoulders a trust obligation with respect to an American Indian tribe when the U.S. government "takes on or has control or supervision over tribal monies or properties." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (Ct. Cl. 1980)). But here, the government does not control or supervise tribal properties at Oak Flat. Oak Flat belongs to the government, a fact that Apache Stronghold does not presently contest. Apache Stronghold argues that title over Oak Flat is irrelevant, as it seeks not title but "usufructuary rights to use land for traditional purposes." But the Treaty's language explicitly tied any obligations that it created to the Apache's title to land. The government promised to "designate, settle, and adjust [the Apache's] territorial boundaries, and pass and execute *in their territory* such laws," "their" referring to the Apache treaty signatories. Even assuming that Oak Flat was once Apache land according to historical maps, Apache Stronghold has not pointed to any evidence indicating that the government designated any boundaries of the Apache's territory after the 1852 Treaty, let alone boundaries that encompass Oak Flat. Because Apache Stronghold points to no evidence

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government's first argument at all. "[I]f it is not necessary to decide more, it is necessary not to decide more." *N. Cnty. Commc'ns Corp. of Ariz. v. Qwest Corp.*, 824 F.3d 830, 838 n.2. (9th Cir. 2016) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1030 (9th Cir. 2013) (Bea, J., concurring in part and dissenting in part)).

establishing that the U.S. government "designate[d] . . . territory" on which the government has any obligation to "pass and execute" laws, it is not likely to prove that the government has assumed any Treaty-based trust obligations with respect to Oak Flat.

This conclusion accords with how both we and other courts have interpreted identical treaty language in other cases. The Treaty with the Utah, just like the Treaty of Santa Fe, required the United States to "designate, settle, and adjust [the American Indians'] territorial boundaries, and pass and execute such laws, in their territory, as the [United States] may deem conducive to the happiness and prosperity of said [American] Indians." Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 984. But that language only "reserves for a future date the final delineation of boundaries." *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 788, 789 (Fed. Cl. 1993). The Treaty with the Utah "contains no obligations with respect to property" and created neither "a trust relationship [n]or trust protection," at least not until "the Government established boundaries" that delineated American Indian land upon which the United States could have some obligations. *Id.* We agreed in *Robinson v. Jewell* when we held that the Treaty with the Utah did not "create[] any enforceable property rights." 790 F.3d 910, 916 (9th Cir. 2015); *see also id.* at 917.

So too here. Apache Stronghold has not adduced evidence which establishes that the U.S. government implemented the Treaty of Santa Fe by designating any land or recognizing any title vested in the Apache. And without title vested in the Apache, there can be no trust relationship arising from the Treaty of Santa

Fe and no trust obligations relating to "usufructuary rights." Apache Stronghold's trust claim is thus unlikely to succeed.

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We are a "cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). This pluralism is a source of strength, but it places demands on us all. In some cases, the many must accommodate the needs of the few—we accept that the government must sometimes "expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 573 U.S. at 730. But in other cases, our need to "maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Lee*, 455 U.S. at 259. This give-and-take suits perfectly neither the religious nor the secular. The "diversity of beliefs in our pluralistic society" demands as much. *Bowen*, 476 U.S. at 712 (plurality opinion). Here, for the reasons given above, this case is the second of those two types.

As we reach this conclusion, we do not rejoice. Rather, we recognize the deep ties that the Apache have to Oak Flat and to the nearby Apache Leap and Devil's Canyon. And we acknowledge that the Land Exchange may impact the Apache's plans to worship on Oak Flat. But RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe do not afford Apache Stronghold the relief that it seeks. This dispute must be resolved as are most others in our pluralistic nation: through the political process. In fact, legislation seeking to repeal the Land Exchange

Provision is already before Congress. *See* Save Oak Flat Act, H.R. 1884, 117th Cong. (2021).

The district court's denial of Apache Stronghold's motion for a preliminary injunction is **AFFIRMED**.

BERZON, Circuit Judge, dissenting:

The majority applies an overly restrictive test for identifying a "substantial burden" on religious exercise under the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb to § 2000bb-4. The majority's flawed test leads to an absurd result: blocking Apaches' access to and eventually destroying a sacred site where they have performed religious ceremonies for centuries does not substantially burden their religious exercise. The majority offers both a doctrinal and a practical basis for its unduly narrow definition of "substantial burden." Both are incorrect.

First, the doctrinal argument rests on the notion that RFRA limited the concept of "substantial burden" to the types of burdens the Supreme Court found in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), two cases that preceded *Employment Division v. Smith*, 494 U.S. 872 (1990), the case that precipitated RFRA. But RFRA did no such thing. Instead, RFRA codified only the "compelling interest test" from *Sherbert* and *Yoder*—the level of justification the government must provide *after* a substantial burden on religion has been found. The statute does not define "substantial burden," and there is no doctrinal basis for narrowing that term to the types of burdens described in *Sherbert* and *Yoder*.

The majority ignores the reality that pre-*Smith* federal cases applied a broader definition of "substantial burden," particularly in the prisoner context. Those cases recognized that when a plaintiff depends on the government for access to religious resources, the government's withholding of those

resources can constitute a substantial burden on religious exercise. By making religious practice impossible, instead of merely discouraging or penalizing it, such a burden can be *greater* than those imposed in *Sherbert* and *Yoder*.

The majority derives its definition of "substantial burden" from *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Because that case held that RFRA did not remedy burdens "short of" those described in *Sherbert* and *Yoder*, *id.* at 1070, I would read *Navajo Nation* as leaving room for recognizing a greater burden as actionable under RFRA. Alternatively, if *Navajo Nation* does not bear that reading, it is irreconcilable with Supreme Court precedent recognizing such burdens in the prisoner context, *see Ramirez v. Collier,* 142 S. Ct. 1264, 1277-78 (2022), and so is no longer binding precedent, *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

Second, the "practical basis" for the majority's definition stems from the concern that "giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone." Majority Op. 24-25 (quoting *Navajo Nation*, 535 F.3d at 1063-64). But redefining "substantial burden" to exclude great burdens on religious exercise because accommodating a religious practice could interfere with other uses of federal land is a disingenuous means of reconciling those competing claims. Instead of denying the burden exists, the appropriate way to address the conflicting interests is at the justification stage. If accommodating the religious practice would cause other societal harms, then the government may well be able to show that applying the burden is the

"least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb- 1(b). Here, the government has not attempted to make that showing.

Applying the correct definition of "substantial burden," I would hold that Apache Stronghold has shown it "is likely to succeed on the merits" of its RFRA claim. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). I would therefore remand for the district court to address the remaining elements of the preliminary injunction test. [1]

I.

I begin with the majority's principal doctrinal argument—that RFRA limited the definition of "substantial burden" to the types of burdens described in *Sherbert* and *Yoder*. RFRA certainly did not do so expressly. Instead, Congress found that "governments should not substantially burden religious exercise without compelling justification"; that "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"; and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(3)-(5). The purpose of RFRA was therefore "to restore the compelling interest test as set

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[1] Because I would hold that Apache Stronghold is likely to succeed on its RFRA claim, I would not reach its claims under the Free Exercise Clause of the First Amendment or the 1852 Treaty of Santa Fe.

forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1). This recitation makes evident that Congress's concern was not with defining "substantial burden"—for which RFRA offers no definition—but with ensuring that the compelling interest standard would be applied once a substantial burden had been demonstrated.

The majority relies on *Navajo Nation* for the conclusion that "*Sherbert* and *Yoder* must 'also control [RFRA's] "substantial burden" inquiry.'" Majority Op. 19 (alteration in original) (quoting *Navajo Nation*, 535 F.3d at 1069). As explained in more detail below, I do not read *Navajo Nation* as so instructing. And the idea that RFRA—a statute intended to *restore* religious freedom—silently limited the concept of "substantial burden" to the two types of burdens found in *Sherbert* and *Yoder* requires an inferential leap justified neither by logic nor by the pre-*Smith* federal case law.

Sherbert and *Yoder* both addressed situations occurring in private life—that is, life outside an institutional setting such as a prison. In private life, "government inhibitions on voluntary religious practice are the exception rather than the norm." Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021). Two common tools the government uses to influence behavior "in contexts in which voluntary choice is the baseline" are so-called "carrots and sticks." *Id.* at 1326. The government offers carrots, or government benefits, to

induce desired behavior, and uses sticks, or penalties, to deter undesired behavior. As *Sherbert* and *Yoder* recognized, the government substantially burdens religious exercise when it denies carrots, or threatens sticks, based on a person's religious activity. Or, as the majority puts it: "the government imposes a substantial burden on religion . . . 'when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit,' as in *Sherbert*, or when individuals are 'coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions,' as in *Yoder*." Majority Op. 20 (quoting *Navajo Nation*, 535 F.3d at 1070).

But some Americans seek to practice their religion in contexts in which voluntary choice is *not* the baseline. In these contexts, the government controls access to religious locations and resources. *See Barclay & Steele*, *supra*, at 1301. Three main examples of these contexts are prisons, Native American sacred sites located on government land, and zoning.

Prisoners "are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). Prisons may allow or prevent access to resources such as prison chapels or religious texts. Many traditional Native American religious sites are located on federal land. The government controls access to and other aspects of these sites, leaving Native Americans "at the mercy of government permission to access sacred sites." Barclay & Steele, *supra*, at 1301. And through zoning decisions, local governments can limit religious groups' ability to "build, buy, or rent" "a place of worship . . . adequate

to their needs and consistent with their theological requirements," which is "at the very core of the free exercise of religion." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)). In these three contexts, the government may exercise its sovereign power more directly than by using carrots and sticks. By simply preventing access to religious locations and resources, the government may directly prevent religious exercise.

It would be an exceedingly odd statute that recognized and provided remedies for government-created substantial burdens on religious exercise only when the government uses carrots and sticks to influence people's behavior indirectly but not when it directly prevents access to religious resources. Yet the majority reaches just that illogical interpretation of RFRA in this case, without acknowledging its incoherence.

Of course, Congress can enact illogical laws if it chooses. But there is no basis for concluding that RFRA is such a statute, and several reasons for concluding it is not.

First, as discussed, the majority relies primarily on RFRA's invocation of *Sherbert* and *Yoder* in reinstating the compelling interest test. RFRA also refers generally to "Federal court rulings" "prior" to *Smith*. 42 U.S.C. § 2000bb(a)(5). But the majority overlooks the many pre-*Smith* federal cases that recognized, in the prison context, that the government may substantially burden religion simply by controlling access to religious resources.

Second, the Supreme Court has held repeatedly that courts should apply the "same standard" in deciding cases under RFRA and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (quoting *Gonzales v. O Centro Esp^rita Beneficente Unio do Vegetal*, 546 U.S. 418, 436 (2006)). RLUIPA prevents governments from substantially burdening religious exercise in prisons or through zoning decisions unless the compelling interest standard is met. 42 U.S.C. §§ 2000cc, 2000cc-1. The Supreme Court, our court, and other courts of appeals have recognized a substantial burden under RLUIPA in prisoner and zoning cases when the government denies access to religious locations or resources.

Third, recent Supreme Court case law makes evident that pre-*Smith* cases should not be read to cabin RFRA's reach. As the Supreme Court has explained, there is "no reason to believe" that RFRA "was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 n.18 (2014). If this court held otherwise in *Navajo Nation*, 535 F.3d 1058—which I do not believe it did—then *Navajo Nation* is in irreconcilable conflict with subsequent Supreme Court case law and is no longer binding. *See Miller*, 335 F.3d at 900.

A.

A review of the pre-*Smith* Free Exercise cases ignored by the majority demonstrates that the majority's constrained definition of "substantial burden" lacks a basis in pre-*Smith* precedent. In *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam), for example, a Buddhist prisoner in Texas alleged that the prison

denied him access to the prison chapel and prohibited him from corresponding with his religious adviser. The Supreme Court reversed the dismissal of the complaint, noting that if the allegations were "assumed to be true," "Texas has violated [the Free Exercise Clause of] the First and Fourteenth Amendments." *Id.* at 322. Later, in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), Muslim prisoners assigned to an outside work detail were prevented from attending "Jumu'ah, a weekly Muslim congregational service." *Id.* at 345. The Supreme Court held that the policy requiring the prisoners to remain outside did not violate the Free Exercise Clause, but not because there was no burden on the prisoners' religious exercise. Assuming a burden, the Court went on to evaluate the question whether the burden was justified by "legitimate penological objectives" and found that it was. *Id.* at 352-53. In both these cases, the claim was not that the plaintiffs were "forced to choose between following the tenets of their religion and receiving a governmental benefit" or "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," Majority Op. 20 (internal quotation marks omitted), but that they were directly denied access to religious resources.

Similarly, in *McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987), we reversed a grant of summary judgment in favor of an Arizona prison because the plaintiff had raised triable issues of fact regarding his claims that "(1) there were no weekly Jewish services conducted at the prison; (2) he was unreasonably denied permission to attend a special service on the High Holy Days; (3) he was unable to obtain a kosher diet; and (4) there were no Jewish religious writings available at the

prison." *Id.* at 197. Our reversal for further factual development recognized that, if true, the allegations not only raised equal protection concerns but also showed a burden on religious exercise that the government must justify. *Id.* at 199. We explained, for example, that "the defendants cannot erect a barrier to an inmate's access to religious reading material absent a security or penological interest." *Id.*[2]

Other federal courts of appeals decided similar cases before *Smith*. For example, in *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), the Seventh Circuit upheld a district court ruling that a prison "violated plaintiffs' right to the free exercise of their religion by not allowing communal religious services, by not permitting prisoners participation in rituals of their faith, and by depriving the inmates of religious counseling and instruction." *Id.* at 877-78. In *Kennedy v. Meacham*, 540 F.2d 1057 (10th Cir. 1976), the Tenth Circuit reversed the dismissal of a complaint alleging that a prison violated the plaintiffs' right to practice "the Satanic religion" when, among other things, it "denied them the right to possess necessary ritual items in their cell." *Id.* at 1059. The Court held that further factual development was needed, as the prison's "asserted justification of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to

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[2] In *Allen v. Toombs*, 827 F.2d 563 (9th Cir. 1987), we held that a prison did not violate plaintiffs' Free Exercise rights by denying them access to a sweat lodge ceremony. But as in *O'Lone*, the reason was not that plaintiffs' religious exercise was not burdened, but because we accepted the prison's determination that allowing high-risk prisoners to participate in the ceremony would present unacceptable security risks. *Id.* at 567.

outweigh the inmates' First Amendment rights." *Id.* at 1061; *see also LaReau v. MacDougall*, 473 F.2d 974, 97980 & n.9 (2d Cir. 1972) (requiring case-by-case evaluations of governmental justifications for banning prisoners in segregation from attending chapel).

In short, federal cases prior to *Smith* accepted that governments substantially burden religious exercise—and so must justify their actions—when they control access to religious resources and deny plaintiffs access to those resources. The notion that pre-*Smith* cases recognized a substantial burden *only* when the government denied a benefit or threatened a penalty is revisionist history not supported by the case law.

B.

Nor is there any reason to believe that Congress, in enacting RFRA, *narrowed* the definition of "substantial burden" from what it had been in the pre-*Smith* Free Exercise cases. Congress enacted RFRA as a reaction to *Smith*, "which held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt,* 574 U.S. at 356-57. "Following . . . *Smith,* Congress enacted RFRA in order to provide *greater* protection for religious exercise than is available under the First Amendment." *Id.* at 357 (emphasis added). The majority's implicit suggestion that in so doing, Congress silently *constricted* the definition of "substantial burden" is exceedingly difficult to credit in light of the overall thrust of RFRA.

If there were any question whether Congress intended for RFRA's definition of "substantial burden" to be broad enough to encompass governmental denial

of access to religious resources, it is laid to rest by Congress's passage of RLUIPA seven years later. By then, *City of Boerne v. Flores*, 521 U.S. 507 (1997), had "invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." *Cutter*, 544 U.S. at 715. "Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses." *Holt*, 574 U.S. at 357.

Section 2 of RLUIPA governs land-use regulation such as zoning. It provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).

Section 3 of RLUIPA governs religious exercise by institutionalized persons, such as prisoners. "Section 3 mirrors RFRA and provides that '[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Holt*, 574 U.S. at 357-58 (alterations in

original) (quoting 42 U.S.C. § 2000cc-1(a)). As the Supreme Court has repeatedly recognized, "RLUIPA thus allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'" *Id.* at 358 (quoting *Gonzales*, 546 U.S. at 436).

Given that Congress enacted RLUIPA to restore part of RFRA's original reach, that RLUIPA uses the same "substantial burden" language as RFRA, and that RLUIPA sets forth the "same standard" for evaluating governmental justifications for imposing substantial burdens on religion as RFRA—strict scrutiny—there is no reason to believe that "substantial burden" means something different under RFRA and RLUIPA. Cases decided under RLUIPA, in both the prison and zoning contexts, confirm that the definition of "substantial burden" includes the denial of access to religious locations and resources.

For example, in *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008), a county jail denied the plaintiff, a maximum-security prisoner, the opportunity to attend group worship services. We had "little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise." *Id.* at 988. Similarly, in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.), the Tenth Circuit held that it did not "take much work to see that" a prison substantially burdened the plaintiff's religious exercise by "flatly prohibiting" him from using the prison's sweat lodge. *Id.* at 56. And in *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014), the Sixth Circuit held that prison officials substantially burdened plaintiffs' religious

exercise by denying them permission to buy ceremonial foods for an annual event. *Id.* at 565.

Most recently, the Supreme Court stayed the execution of a prisoner who requested that "his long-time pastor be allowed to pray with him and lay hands on him while he is being executed." *Ramirez*, 142 S. Ct. at 1272. The Court held that Ramirez was entitled to a preliminary injunction because, among other things, he was "likely to succeed in showing that Texas's" refusal to permit audible prayer or religious touch "substantially burdens his exercise of religion." *Id.* at 1278.[3]

In the zoning context, we have held that a county "imposed a substantial burden" on a Sikh organization's "religious exercise under RLUIPA" by

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[3] The majority dismisses *Ramirez* as irrelevant because the government officials in that case did "not dispute that any burden their policy imposes on Ramirez's religious exercise is substantial," 142 S. Ct. at 1278, and "the scope of a 'substantial burden' under either statute was [therefore] explicitly not at issue," Majority Op. 41. But the Court's "do not dispute" language was followed by the statement that "Ramirez is likely to succeed in showing that Texas's policy substantially burdens his exercise of religion." 142 S. Ct. at 1278. That statement, along with the "do not dispute" locution, indicates agreement with the proposition not disputed rather than a waiver determination, which is what the majority suggests. Further, if the burden alleged by Ramirez were simply not cognizable under RLUIPA no matter the actual impact on his exercise of religion, as the majority's ruling here would indicate, surely the Supreme Court would not have taken the extraordinary measures of staying his execution, requiring Texas to "prove that [its] refusal to accommodate" his religious exercise furthered a compelling interest by the least restrictive means, and—after finding Texas had not carried its burden—ordering preliminary relief. *Id.* at 1278, 1284.

denying applications from the group, Guru Nanak, for a conditional use permit to build a temple. *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter,* 456 F.3d 978, 981-82 (9th Cir. 2006). The denials "to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future" and so "imposed a substantial burden on Guru Nanak's religious exercise." *Id.* at 992. Likewise, in *International Church of the Foursquare Gospel*, which concerned a city's denial of a conditional use permit to build a church, we reversed the district court's grant of summary judgment to the city. 673 F.3d at 1061. The church "presented significant evidence that no other suitable properties existed," raising a "triable issue of material fact regarding whether the City imposed a substantial burden on the Church's religious exercise under RLUIPA." *Id.* at 1061, 1068.

As demonstrated by this case law in the prison and zoning contexts, when the government controls access to religious locations and resources, it substantially burdens religious exercise by directly—rather than indirectly through the use of carrots and sticks—denying access to those locations or resources, objectively interfering with the plaintiff's religious practice.

C.

Navajo Nation is not to the contrary. There, we held that "[a]ny burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA." 535 F.3d at 1070 (emphasis added). By excluding burdens "short of" those described in *Sherbert* and *Yoder*, we left room for a more severe burden to qualify as substantial.

As discussed, the government's denial of access to religious resources may result in a *greater* burden on religious exercise—potentially preventing religious practice altogether—than when it influences religious exercise indirectly by withholding benefits or threatening penalties. *See Cutter,* 544 U.S. at 720-21 (explaining that the "degree of control" the government exercises in institutional contexts is "severely disabling to private religious exercise"); *Yellowbear*, 741 F.3d at 56 (holding that when a "prison refuses *any* access" to a sweat lodge, the restriction does not present "a situation where the claimant is left with some degree of choice in the matter and we have to inquire into the degree of the government's coercive influence on that choice," but instead "easily" qualifies as a substantial burden); *Haight*, 763 F.3d at 565 ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").

Navajo Nation's failure to recognize a substantial burden under the facts of that case supports rather than undermines my reading of the opinion. In *Navajo Nation*, the plaintiffs objected to the government's planned "use of artificial snow," made from recycled wastewater, "for skiing on a portion of a public mountain sacred in their religion." 535 F.3d at 1062. "[N]o plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected by the use of such artificial snow," "no places of worship [would be] made inaccessible," and the plaintiffs would "continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes." *Id.* at 1063. Additionally, the plaintiffs were unable to identify an objective impact on their

religious practice. We concluded that "the sole effect of the artificial snow [would be] on the Plaintiffs' subjective spiritual experience." *Id.* at 1063.

In short, in *Navajo Nation*, the government did not deny access to or destroy a religious site, as the en banc court emphasized. So the case did not involve a situation in which the government objectively and severely interfered with a plaintiff's access to religious locations or resources.[4]

Nor does *Bowen v. Roy*, 476 U.S. 693 (1986), *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), or *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), support the majority's constricted understanding of the term "substantial burden" in RFRA. In *Bowen*, the plaintiff objected to the government's use of a Social Security number in conducting its "internal affairs." 476 U.S. at 699. *Bowen* thus did not address a context in which the government controlled the plaintiff's access to religious resources. In *Lyng*, as in *Navajo Nation*, the government did control access to several religious sites, but the government action at issue—a proposed road in a national forest—did not deny access to or directly damage the sites. "No sites where specific

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[4] The majority cites several cases in which it says we applied the constrained definition of "substantial burden" the majority derives from *Navajo Nation*. Majority Op. 37-38 & n.11. But none of those cases addressed a situation in which the government entirely denied access to or destroyed a religious site or resource. *See, e.g.*, *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1215 (9th Cir. 2008) ("The issuance of a new license [to operate for another forty years the Snoqualmie Falls Hydroelectric Project] . . . does [not] prohibit or prevent the Snoqualmies' access to Snoqualmie Falls, their possession and use of religious objects, or the performance of religious ceremonies.").

rituals take place were to be disturbed" by the road, and the government sited the road so as to minimize "audible intrusions" and "visual impact" on the religious sites. 485 U.S. at 454. Last, *Trinity Lutheran*, in discussing the Court's Free Exercise Clause jurisprudence, simply noted that the Court had not found government coercion in *Lyng*. 137 S. Ct. at 2020. That summation is accurate and does not imply the Court would reach the same result in a case in which the government controlled access to religious resources and entirely denied a plaintiff access to those resources.

In sum, there is no doctrinal basis for limiting the definition of "substantial burden" to the types of burdens imposed in *Sherbert* and *Yoder*. To the contrary, the case law supports defining "substantial burden" to include, at a minimum, situations in which the government controls access to religious resources and entirely denies access to or destroys those resources, objectively interfering with the plaintiff's religious practice.

Finally, and alternatively, if—contrary to my view—*Navajo Nation*'s discussion of the meaning of "substantial burden" does not leave room to recognize greater burdens than those described in *Sherbert* and *Yoder*, as the majority insists it does not, Majority Op. 31-32, then I would hold that the Supreme Court since *Navajo Nation* was decided has "undercut the theory or reasoning underlying [*Navajo Nation*] in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900.

As discussed, the Supreme Court has repeatedly instructed courts to apply the "same standard" in cases under RFRA and RLUIPA. *Holt*, 574 U.S. at 358

(quoting *Gonzales*, 546 U.S. at 436). Recent Supreme Court cases under RLUIPA and RFRA are irreconcilable with *Navajo Nation* if that case is read, as the majority reads it, to limit "substantial burden" to denied benefits and threatened penalties. In *Ramirez*, a case under RLUIPA, the Court's holding rested on an understanding of "substantial burden" that includes the denial of access to religious resources where the government controls access to those resources. 142 S. Ct. at 1278. And *Hobby Lobby* emphasized that Congress enacted RFRA "to provide very broad protection for religious liberty" that goes "far beyond what [the Supreme] Court has held is constitutionally required." 573 U.S. at 693, 706. The Court rejected as "absurd" the notion that "RFRA merely restored [the Supreme] Court's pre-*Smith* decisions in ossified form." *Id.* at 715. If *Navajo Nation* held that RFRA's definition of "substantial burden" is limited to the types of burdens described in *Sherbert* and *Yoder*, that holding cannot be squared with *Holt*, *Ramirez*, and *Hobby Lobby*, read together. *See Miller*, 335 F.3d at 900.[5]

II.

The majority's proffered "practical basis" for its constricted definition of "substantial burden" fares no better than its faulty doctrinal analysis. Majority Op.

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[5] If I am incorrect that *Navajo Nation*, if understood as the majority posits, does not survive *Holt*, *Ramirez*, and *Hobby Lobby*, then our court should reconsider en banc the majority's holding here that "under RFRA, the government imposes a substantial burden on religion only when the government action fits within the framework established by *Sherbert* and *Yoder*." Majority Op. 20. That reading of RFRA is wrong for all the reasons explained in this dissent.

24-25. Practicality, the majority maintains, requires limiting the concept of "substantial burden" to exclude burdens arising from the government's control over access to Native American sacred sites on federal land because "giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone." *Id.* (quoting *Navajo Nation*, 535 F.3d at 1063-64).

True, recognizing Native Americans' right of access to traditional religious sites on federal land may sometimes constrain competing uses of the land. But this "practical basis" for the majority's definition of "substantial burden" is flawed in two ways. First, there is no justification for resolving competing claims on the uses of federal land by refusing to recognize the Native American claim at the "substantial burden" stage of the analysis. Second, recognizing a substantial burden on religious exercise does not result in an automatic "veto" over other uses of the land. I address these errors in turn.

First, burdens on Native Americans who practice land-based religions and who depend on the federal government for access to federal land are not excluded from RFRA's coverage. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). There is no exception for federal laws relating to federal land or access to sacred sites.

Moreover, it is disingenuous to resolve the concern about competing claims on federal land by slipping it into the substantial burden analysis. The majority's concern, revealed by its discussion of the "practical basis" for its holding, has nothing to do with whether

the Apaches' religious exercise is substantially burdened and everything to do with how we address competing demands for resources—in this case, federal land that hosts both a traditional sacred site and a copper deposit. By pretending that the question is whether there is a "substantial burden" on the Apaches' religious exercise, and not whether the government has shown a compelling interest in putting the site to a different use, we avoid a transparent inquiry into the considerations that should determine the allocation of resources for which there are competing demands, one of which is religion-based.

That brings me to the majority's second error, its assertion that acknowledging a substantial burden when Native Americans are denied access to sacred sites would give Native Americans an automatic "veto" over competing uses of federal land. Majority Op. 24-25. It would not. Instead, it would lead us to the second step of the analysis, the compelling interest test.

Unlike the substantial burden inquiry, the compelling interest test provides a transparent tool for airing and resolving conflicts between the interests of religious adherents and those of others in society. It gives the government an opportunity to provide a rationale for its action and demonstrate the lack of viable alternatives. It allows the court to engage in an open discussion about balancing competing interests. And it does not result in an automatic loss for the government. "Strict scrutiny is not 'strict in theory, but fatal in fact.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995)). According to one empirical analysis, federal courts applying strict

scrutiny in religious liberty cases between 1990 and 2003 upheld the challenged laws nearly 60 percent of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 79697 (2006).

The majority has demonstrated neither a doctrinal nor a practical basis for its narrow definition of "substantial burden" under RFRA. The case law and history of RFRA instead support recognizing a substantial burden when the government controls access to religious resources and completely denies access to or destroy those resources, objectively interfering with the plaintiff's religious exercise. After finding a substantial burden, courts still must apply RFRA's compelling interest standard, which permits a transparent inquiry into the strength of the government's proffered justification for its action.

III.

Applying the proper definition of the term, there is no doubt that the complete destruction of Oak Flat would be a "substantial burden" on the Apaches' religious exercise. As the district court found, the "evidence . . . shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021). And the Oak Flat location is not fungible with other locations for purposes of the Apaches' religious activities. The Apaches perform ceremonies at Oak Flat because they believe the site to be "a 'direct corridor' to the Creator's spirit." *Id.* at 604. "Many of the young Apache women have a coming of age ceremony, known as a 'Sunrise Ceremony,' in which each young woman will 'connect her soul and her spirit

to the mountain, to Oak Flat.' . . . Apache individuals pray at the land and speak to their Creator through their prayers." *Id.* "The spiritual importance of Oak Flat to the Western Apaches cannot be overstated." *Id.* at 603.

The purpose of the Land Transfer Act, and Resolution Copper's planned use of the land, is to extract copper ore from below Oak Flat, using a technique called "block caving" or "panel caving." Once the ore is removed, the land above the deposit will collapse, creating a "subsidence zone" about 1.8 miles in diameter and about 1,000 feet deep, destroying Oak Flat. According to the government's environmental impact statement, "the impacts on archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale." As the district court found, "the land . . . will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship." *Apache Stronghold*, 519 F. Supp. 3d at 606. By preventing the Apache people from using Oak Flat as a site for religious ceremonies as they have for centuries, the Land Transfer Act will "have a devastating effect on the Apache people's religious practices." *Id.* at 607. "The Western Apaches' exercise of religion at Oak Flat will not be burdened—it will be obliterated." Order Denying Emergency Mot. for Injunction Pending Appeal at 9, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting), ECF No. 26.

As the government controls access to Oak Flat and the result of the Land Transfer Act will be to make the site inaccessible and eventually destroy it, objectively

preventing Apaches from holding religious ceremonies there, I would hold Apache Stronghold is likely to succeed in showing a substantial burden on its members' religious exercise.[6]

Once a court finds a substantial burden, "the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a 'compelling governmental interest' and is implemented by 'the least restrictive means.'" *Navajo Nation*, 535 F.3d at 1068. The government has not attempted to satisfy the compelling interest test here or in the district court, instead limiting its arguments to the substantial burden issue.

Because the government bears the burden of persuasion on the compelling interest test and has not carried it, Apache Stronghold is likely to succeed on the merits of its RFRA claim. *See Gonzales*, 546 U.S. at 429 (confirming the government bears the burden of satisfying RFRA's compelling interest test at the preliminary injunction stage). As the district court did not address the other elements of the preliminary

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[6] Alternatively, I would hold that even under the majority's unduly narrow definition of "substantial burden," Apache Stronghold has demonstrated that the Land Transfer Act will coerce its members "to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation,* 535 F.3d at 1069-70. After Resolution Copper closes Oak Flat, but before it is totally destroyed, Apache Stronghold members will face penalties for trespassing if they attempt to hold religious ceremonies there.

I do not stand principally on this point, however. I am reluctant to lend credence to the notion that a trespass conviction is a substantial burden on religion but complete destruction of an irreplaceable religious location is not.

injunction test, I would remand for the district court to do so in the first instance.

I therefore respectfully dissent.

FILED Mar 5, 2021
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APACHE STRONGHOLD, a 501(c)(3) nonprofit organization, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA; et. al., *Defendants-Appellees*,	No. 21-15295 D.C. No. 2:21-cv-00050-SPL District of Arizona, Phoenix ORDER

Before: M. SMITH, BADE, and BUMATAY, Circuit Judges.

Order by Judges M. SMITH and BADE, Dissent by Judge BUMATAY.

Appellant's emergency motion for an injunction pending appeal (Docket Entry No. 6) is denied without prejudice. *See* 9th Cir. R. 27-3; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Government has averred that USFS "will not proceed to convey any right, title, and/or interest of the United States in and to the Federal land, as defined in the Act, to Resolution Copper" until after publication of a new FEIS, which will take "months." The Government has also stated, under penalty of perjury, that USFS "will provide 30-days advance notice" to Apache Stronghold prior to the publication of a new FEIS. These representations mean that Apache Stronghold has not

shown that it "needs relief within 21 days to avoid irreparable harm" pursuant to its request for an emergency stay. 9th Cir. R. 27-3. An examination of the merits of Apache Stronghold's request for a preliminary injunction—denied by the district court and currently pending on appeal—is therefore premature. We express no view on the merits.

The previously established briefing schedule remains in effect.

BUMATAY, Circuit Judge, dissenting:

For a great many people, religious and spiritual tradition is among their most precious inheritances. The Western Apaches are no different. For hundreds of years, they have worshipped at a location in Arizona's Tonto National Forest believed to be the most sacred of grounds—Oak Flat. According to their religious tradition, Oak Flat serves as the dwelling place of the Creator's messengers to the earth and generates a direct connection between the Creator's spirit and the Western Apache peoples. Given the deep bond between the Creator and the natural resources of the land, the Western Apaches regard Oak Flat as the holiest land—the perennial home of their sacred religious ceremonies and a historic place of worship. For them, the grounds, plants, and waters of Oak Flat are imbued with unique spiritual significance. It is no overestimation to say that Oak Flat is the spiritual lifeblood of the Western Apache peoples, connecting them to the Creator since before the founding of the Nation.

Despite this sacred history, the Government seeks to convey Oak Flat to a private mining venture—

Resolution Copper. By the Government's own assessment, Resolution Copper's plans will destroy Oak Flat—constructing a mine underneath it and literally turning it into a crater. The devastation will be "immediate, permanent, and large in scale." 2 Final Environmental Impact Statement ("FEIS") at 789.[1] And it will cause "indescribable hardship" to the Western Apaches. 1 FEIS at ES-29. "Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed[.]" 3 FEIS at 856.

Thus, notwithstanding any economic or other benefit that mining would bring to the area, federal law requires the strictest of scrutiny here: under the Religious Freedom Restoration Act ("RFRA"), Congress has commanded in no uncertain terms that the government may not substantially burden religious exercise but for a compelling reason and with the narrowest of means. *See* 42 U.S.C. § 2000bb-1(a).

Apache Stronghold comes to this court seeking a pause on the transfer of Oak Flat to ensure that the Western Apaches' religious liberty is protected. Under RFRA, Apache Stronghold is entitled to that pause. Transferring Oak Flat to a private venture will result in restricted access to the religious site, strip the Western Apaches of certain legal protections, and eventually lead to the complete destruction of the land. This is an obvious substantial burden on their religious exercise, and one that the Government has not attempted to justify. And the Government's eleventh-hour promises of delay and consultation with the Western Apaches are not enough to allay the

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1 Available at https://www.resolutionmineeis.us/.

threat of irreparable harm. The law affords the Western Apaches more than promises.

For these reasons, I respectfully dissent from the denial of injunctive relief pending appeal.

I.

Oak Flat is situated on a 2,422-acre parcel of land in Arizona. Section 3003 of the National Defense Authorization Act of 2015 authorizes the Government to transfer the land to Resolution Copper, a joint venture of two foreign mining companies. P.L. 113-291, 128 Stat. 3292, 3732, § 3003(c) (2014); 16 U.S.C. § 539p (the "Act"). As a prerequisite to conveying the land, the Government is obligated to publish a "single environmental impact statement." 16 U.S.C. § 539p(c)(9)(B). "Not later than 60 days after" the publication of that statement, the Government is legally obligated to convey the land to Resolution Copper. *Id.* § 539p(c)(10).

In December 2020, the Department of Agriculture announced that the FEIS required by the Act would be published in January 2021. The Department subsequently published that FEIS on January 15, 2021. Under the law, this initiates a 60-day period to convey the land to Resolution Copper, which would end on March 16, 2021. *See id.* The Government was poised to effectuate the transfer on March 11, 2021.

Apache Stronghold, a nonprofit organization seeking to prevent the destruction of Apache holy lands, sought an injunction to prevent the land exchange. After the request was denied, Apache Stronghold applied to this court for an emergency injunction pending appeal. Just hours before its opposition was due in this court, the Government

directed the Forest Service to rescind the FEIS. Gov't Opp'n Br. at 1. Now, instead of March 11, 2021, the Government asserts that the date of the pending transfer is unknown. But it assures us that the transfer is "likely" not imminent. *Id.* at 7. A Forest Service employee also commits to providing Apache Stronghold 30 days' advance notice for reinstatement of the FEIS. Gov't 28(j) Ltr. Even if the transfer were imminent, the Government asserts, the Western Apaches would enjoy continued access to Oak Flat *Campground* "to the maximum extent practicable, consistent with health and safety requirements, until such time as the operation of the mine precludes continued public access for safety reasons, as determined by Resolution Copper." 16 U.S.C. § 539p(i)(3). The Oak Flat Campground, not to be confused with Oak Flat, is "approximately 50 acres of land comprising approximately 16 developed campsites." *Id.* § 539p(b)(5).

II.

A plaintiff seeking a preliminary injunction is ordinarily required to show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest[.]" *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (simplified).

Our circuit applies a sliding scale approach to preliminary injunctions, meaning that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Likelihood of success on the merits is the most important preliminary injunction factor. *Doe #1 v. Trump*, 984 F.3d 848, 861 (9th Cir. 2020). Where the Government is a party to the case, as here, the third and fourth factors merge. *Id.*

Under these factors, Apache Stronghold is entitled to a preliminary injunction.

A.

Apache Stronghold has established a strong likelihood of success on the merits. Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). Concerned that "neutral" laws might nonetheless inhibit religious exercise, Congress commanded that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]" 42 U.S.C. § 2000bb-1(a). The only exception is when the government can demonstrate that the burden "is in furtherance of a compelling governmental interest" and that it has chosen "the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b)(1)-(2). Thus, when the government substantially burdens the exercise of religion, it may only do so by demonstrating a compelling interest and narrow tailoring. *Id.*

"Religious exercise" as defined in RFRA means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief. *Id.* § 2000cc-5(7)(A); *see id.* § 2000bb-2(4). And although not statutorily defined, we have held that a burden is substantial when it is "considerable in quantity or significantly great." *San Jose Christian Coll. v. City of*

Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (simplified). Together, then, the government substantially burdens religious exercise when it places a "significantly great restriction or onus on any exercise of religion, whether or not compelled by, or central to, a system of religious belief of a person." *Id.* at 1035 (simplified). In this way, RFRA "provides a level of protection to religious exercise beyond that which the First Amendment requires." *Guam v. Guerrero*, 290 F.3d 1210, 1218 (9th Cir. 2002); *see also Burwell*, 573 U.S. at 714.

Under RFRA, as then-Judge Gorsuch wrote, a substantial burden exists when the government "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).[2] It also exists when the government "exert[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (simplified). Further, we have acknowledged that "a place of worship . . . is at the very core of the free exercise of religion." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (simplified).

With that in mind, this is not a difficult case. For the Western Apaches, Oak Flat is sacred land—it is a "buffer between heaven and earth" and the dwelling

[2] True enough, it was the Religious Land Use and Institutionalized Persons Act ("RLUIPA") at issue in *Yellowbear*. No matter—RLUIPA mirrors RFRA's "substantial burden" language and, thus, uses the "same standard." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015).

place of the Creator's "messengers." Oak Flat is thus a conduit to the transcendent, and as a result, certain religious ceremonies of the Western Apaches *must* take place there. These practices include the gathering of sacred plants, animals, and minerals for use in ceremony, as well as prayers, songs, and the use of "the sacred spring waters that flow[] from the earth with healing powers not present elsewhere."

Resolution Copper's mining activities won't just temporarily exclude the Western Apaches from Oak Flat, or merely interrupt the worship conducted there. Instead, Resolution Copper will turn Oak Flat into a crater approximately 2 miles across and 1,100 feet deep. 1 FEIS at 10. The Western Apaches' exercise of religion at Oak Flat will not be burdened—it will be obliterated. Simply, the conveyance of the land will render the core religious practices of the Western Apaches' impossible and their primary method of experiencing the divine nonexistent. Everything about Oak Flat will be erased: sacred sites used for various religious ceremonies, trees and plants used in sacred medicine, sacred springs with healing powers, burial grounds, and ancient artifacts.

Worse yet, the Government has not even attempted to justify Oak Flat's annihilation by arguing that it is narrowly tailored to serve a compelling government interest—neither in the district court nor before this court. Amazingly, it instead argues that Resolution Copper's plans will not amount to a substantial burden on the religious exercise of the Western Apaches at all. As just explained, that's wrong.

Our decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), does not require a different result. In that case, the plaintiff

Indian Tribes objected under RFRA to the use of recycled wastewater to make artificial snow on "the Snowbowl" in Arizona, a federally owned, public-recreation facility. *Id.* at 1064-65. The Indian Tribes had long used the mountains around the Snowbowl for religious ceremonies. *Id.* at 1064. Thus, they argued that the use of the artificial snow made from recycled wastewater substantially burdened their religious exercise because it "spiritually contaminate[d] the entire mountain and devalue[d]" their religious experience. *Id.* at 1063.

Rejecting the RFRA claim, we emphasized that "the Forest Service ha[d] guaranteed that religious practitioners would still have access to the Snowbowl and the rest of the Peaks for religious purposes." *Id.* at 1070 (simplified). The "only effect" of the use of recycled wastewater was on the Indian Tribes' "subjective, emotional religious experience." *Id.* [3] Indeed, the district court found that "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected" by the artificial snow. It further concluded that the Indian Tribes would "continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes," including "to pray, conduct their religious ceremonies, and collect plants for religious use." *Id.* at 1063. *Navajo Nation* did not reach the issue here—

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[3] While I would not characterize religious belief and experience as merely "subjective" and "emotional," *see Navajo Nation*, 535 F.3d at 1096 (Fletcher, J., dissenting) (explaining that "the majority misunderstands the nature of religious belief and practice"), this point is nonetheless important to understand the difference between *Navajo Nation* and the present case.

whether the total devastation of a religious site substantially burdens religious exercise. As the dissent noted, "a court would surely hold that the Forest Service had imposed a 'substantial burden' on the Indians' 'exercise of religion' if it paved over the entirety of [the religious] Peaks." *Id.* at 1090 (Fletcher, J., dissenting).

Our holding in *Navajo Nation* is thus of little help here, where the religious burden in controversy is not mere interference with "subjective" experience, but the undisputed, complete destruction of the entire religious site. By the government's own estimation, this destruction will be permanent and irreversible. 2 FEIS at 789-90. And much before that, the Western Apaches will necessarily be physically excluded from Oak Flat, rendering their core religious practices impossible.

Consequently, Apache Stronghold has shown a high likelihood of success on the merits: the conveyance of Oak Flat to Resolution Copper will substantially burden the religious exercise of the Western Apaches, with no purported compelling justification.[4]

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[4] In addition to RFRA, I have serious doubts that the Act would pass constitutional muster under our Free Exercise Clause precedent: it is not neutral or generally applicable because it specifically targets the land on which Oak Flat lies. It therefore must satisfy strict scrutiny. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). As just explained, the Government has not done so.

The Free Exercise Clause "defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God." *Church of the Lukumi*

B.

Apache Stronghold has also shown that the Western Apaches are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. We have held that irreparable harm is "relatively easy to establish" in the context of the First Amendment. *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019). A plaintiff can establish irreparable harm by "demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (simplified), *abrogated on other grounds by Winter*, 555 U.S. at 22. That is because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

It is clear from the record that, absent an injunction, Apache Stronghold faces a strong likelihood of imminent, irreparable harm. The Government published the FEIS on January 15, 2021. Under the Act, the Government is required to transfer Oak Flat to Resolution Copper "[no] later than 60 days after the date of publication." 16 U.S.C. § 539p(c)(10). That would mean that the Government must transfer to the land by March 16, at the latest.

Once the land is transferred, the Western Apaches will suffer immediate, irreparable harm. First, their

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Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and concurring in the judgment). Accordingly, it is an issue of surpassing importance. But because RFRA alone is sufficient ground to grant relief, I would not reach the Free Exercise claim here.

First Amendment rights would be burdened by the certain destruction of their religious site. The Government acknowledged that the mining activity planned by Resolution Copper would cause "immediate, permanent, and large . . . scale" destruction of "archeological sites, tribal sites, [and] cultural landscapes." 2 FEIS at 789. And although the Government contends that "any subsidence-causing mining activities are still years in the future," Gov't Opp'n Br. at 8, Resolution Copper will undoubtedly engage in preparatory activities that are likely to degrade the Oak Flat environment. This includes constructing "new shafts," "new roads," a "water treatment plant," an "admin building," and "substations." 1 FEIS 57, Fig. 2.2.2-3. Any of these construction activities may cause irreparable damage to the Oak Flat, even if the site won't be entirely cratered immediately after conveyance.

Second, the conveyance will result in the Western Apaches being effectively excluded from the Oak Flat site. The Government claims that access to the site will be maintained after the land exchange. Gov't Opp'n Br. at 8. But in a declaration submitted by the Government, Resolution Copper promises only that the venture "will provide access to the surface of the Oak Flat Campground," not Oak Flat in its entirety.[5] The Campground, meanwhile, consists of only "50 acres of land comprising approximately 16 developed

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[5] *See also* 1 FEIS at 314 ("The land exchange would have significant effects on transportation and access. The Oak Flat Federal Parcel would leave Forest Service jurisdiction, and with it public access would be lost to the parcel itself . . . Resolution Copper *may* keep portions of the property open for public access, *as feasible*.") (emphasis added).

campsites." 16 U.S.C. § 539p(b)(5). And even this narrow pledge is accompanied by a wide qualification: Resolution Copper will provide the Western Apaches access only "to the extent practicable and consistent with health and safety requirements." But according to the Act, Resolution Copper "determine[s]" whether access is "practicable" and "consistent with health and safety requirements." *Id.* § 539p(i)(3). The Western Apaches would therefore be dependent on the good grace of a private copper-mining venture for any access to their sacred religious site—that is, until the mining companies eviscerate the site altogether. On closer scrutiny, this guarantee of access appears to be a hollow promise.

Third, once the land leaves the Government's hands, the Western Apaches likely cannot bring a RFRA or Free Exercise claim against Resolution Copper should the venture burden or extinguish their ability to worship or access Oak Flat. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999) ("RFRA does not expressly include private employers within its reach."); *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996) ("[P]rivate entities are considered government actors under the First Amendment [only] if they have a sufficient structural or functional nexus to the government.").

The Government absurdly asserts that we needn't worry about any of these concerns because the transfer can be reversed if it turns out that the Western Apaches' free exercise rights are being violated. Gov't Opp'n Br. at 10. Appeals can take months, even years. By then, who knows what will have happened to the land? It may be rendered unfit for religious worship, making reversal of the transfer futile. Moreover, a

court considering this remedy will also need to balance Resolution Copper's reliance interests in developing the land. Ultimately, whether to rescind a completed land transfer is a matter of judicial discretion. *See Kettle Range Conservation Grp. v. BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998) (declining to rescind land transfer where the land had already been "denuded" and it would "be impractical to attempt to unscramble the eggs"). While the law guarantees Apache Stronghold its rights, all the Government can offer is hope.

Furthermore, the Government's decision to rescind the FEIS only hours before its opposition brief was due does not defeat Apache Stronghold's showing of irreparable harm. While the Government previously told the district court that it will convey the land on March 11, 2021, we now have an assurance that it will "likely" not convey the land imminently, Gov't Opp'n Br. at 7, and a promise from a Forest Service employee that the agency will give Apache Stronghold 30 days' notice before republication of the FEIS. Gov't 28(j) Ltr.

I take the Government's word at face-value, but it doesn't guarantee that Oak Flat won't be transferred during this appeal. The Government cannot even guarantee that the conveyance of the land won't occur imminently. At the very least, and most significantly for me, the Government has not identified any *legal impediment* to reinstating the FEIS and conveying the land at any time.[6] At best, the Government maintains

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[6] To be sure, government regulation requires 30 days' notice before publication of a final environmental impact statement. 40 C.F.R. § 1506.11(b)(2). But the government has already provided that notice. The plain text of the regulation doesn't require a new

discretion to re-issue the FEIS and immediately thereafter transfer the land to Resolution Copper. And as its eleventh-hour decision to rescind the FEIS amply demonstrates, the Government is nimble enough to adjust their timelines at a moment's notice.

Any uncertainty surrounding the immediacy of the harm was introduced by the Government's last-minute maneuvering. It's noteworthy that the Government made the decision to finalize and issue the FEIS on January 15, opposed Apache Stronghold's motions for injunctive relief for almost two months, opposed an agreement with Apache Stronghold to pause the transfer for 60 days, and then scheduled the land transfer for March 11—only to rescind the FEIS just six hours before its opposition brief was due to this court and then claim that there's no longer threat of irreparable harm. The Supreme Court recently suggested we do not acquiesce to such tactics. *See Cuomo*, 141 S. Ct. at 67 (finding irreparable harm notwithstanding government's assurance that it would not enforce violative restrictions).

We are asked to trust the Government that, left to its own devices, it will not transfer the land to Resolution Copper in the near future. Faced with such a substantial harm to the Western Apaches' free

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notice if a final environmental impact statement is published, withdrawn, and then reinstated. Moreover, the regulation also allows for that shortening of the notice period for "compelling reasons." *Id.* § 1506.11(e). Thus, nothing in the words of the regulation bars the Government from reissuing the FEIS at any given time. Most importantly, the Government has never conceded that it is barred from reissuing the FEIS without providing the notice required by § 1506.11(b)(2).

exercise rights, we should require more than the Government's say-so.

C.

The balance of the equities and the public interest also "tip[] sharply" in Apache Stronghold's favor. *Cottrell*, 632 F.3d at 1131 (simplified). Not only would the harm to Apache Stronghold be irreparable, imminent, and of constitutional significance in the absence of an injunction, but on this record an injunction would create few costs for the Government. While courts should never take enjoining the Government lightly, the abstract harm of restraining the Government is "not dispositive of the balance of harms analysis." *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (simplified). Indeed, the Government has withdrawn the FEIS and pledged to re-initiate consultation. According to the Government, the transfer is "likely" not imminent. Govt. Opp'n Br. at 7. An injunction during the pendency of this appeal would therefore not disrupt the Government's plans. As Justice Kavanaugh recently noted in the context of government restrictions on places of worship during COVID-19:

> There also is no good reason to delay issuance of the injunctions, as I see it. If no houses of worship end up in [restrictive] zones, then the Court's injunctions today will impose no harm on the State and have no effect on the State's response to COVID–19. And if houses of worship end up in [restrictive] zones, as is likely, then today's injunctions will ensure that religious organizations are not subjected to the unconstitutional 10-person and 25-person

> caps. Moreover, issuing the injunctions now rather than a few days from now not only will ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

Cuomo, 141 S. Ct. at 74 (Kavanaugh, J., concurring).

Similar concerns counsel in favor of an injunction here. While the Government gives assurances that nothing will "likely" happen soon, the Western Apaches are spared the transfer and eventual destruction of their most sacred site only by the grace of the Government. They are entitled to more clarity. Indeed, "all citizens have a stake in upholding the Constitution." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (simplified). This is particularly so where religious rights are at issue, because "[p]rotecting religious liberty and conscience is obviously in the public interest." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Accordingly, the harm to Apache Stronghold far outweighs any harm to the Government.

III.

Our Constitution and laws have made the protection of religious liberty fundamental. Apache Stronghold has clearly established that the religious exercise of the Western Apaches will be substantially burdened by the Government's actions here. And the preliminary injunction factors weigh sharply in favor of hitting pause on this case while the parties pursue this appeal. Regrettably, instead of legal protection and certainty, today's order will provide Apache

Stronghold with only ambiguity, while Oak Flat remains at the mercy of the Government.

I respectfully dissent from the denial of injunctive relief.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APACHE STRONGHOLD, *Plaintiff*, v. UNITED STATES OF AMERICA et. al., *Defendants*,	No. CV-21-00050-PHX-SPL ORDER

I. BACKGROUND

In 2014, Congress passed the National Defense Authorization Act for Fiscal Year 2015 (hereinafter "NDAA"). PL 113-291, available at https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf (last visited February 12, 2021). Section 3003 of the NDAA, known as the Southeast Arizona Land Exchange and Conservation Act, authorizes the exchange of land between the United States Government and two foreign mining companies (known collectively as "Resolution Copper"). 16 U.S.C.A. § 539p. The 2,422-acre parcel of Arizona land which the Government will convey to Resolution Copper, located within the Tonto National Forest, includes a sacred Apache ceremonial ground called Chi'chil Bildagoteel, known in English as "Oak Flat." (Doc. 1 at ¶ 3). Congress's stated purpose for authorizing the exchange is to "carry out mineral exploration activities under the Oak Flat Withdrawal Area." 16 U.S.C.A. § 539p(6)(i).

On January 12, 2021, Plaintiff Apache Stronghold, a nonprofit organization seeking to prevent the colonization of Apache land, filed a Complaint in this

Court seeking to prevent the land exchange. (Doc. 1 at ¶ 11). Plaintiff argues the land is held in trust by the United States for the Western Apaches by way of an 1852 Treaty. (Doc. 1 at ¶ 7). Plaintiff further alleges the mine will desecrate Oak Flat in violation of the Apaches' religious liberties and will constitute a breach of the trust. (Doc. 1 at ¶ 10).

On January 14, 2021, Plaintiff filed a Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction ("PI") seeking to prevent the United States Department of Agriculture from publishing a Final Environmental Impact Statement ("FEIS"), a document that "describes the potential environmental effects" of the mine and "includes detailed mitigation measures to minimize impacts." (Doc. 7); USDA Forest Service, *Resolution Copper Update*, available at https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166 (last accessed February 12, 2021). The FEIS was set for publication on the following day, January 15. (Doc. 7 at 3). Plaintiff alleges Defendants "nefariously" moved up the timeline of the FEIS publication, which was previously set for April of 2021, so the land transfer could finalize before President Biden's inauguration and without adequate time for Plaintiff to contest the sale. (Doc. 1 at ¶ 33, 36-39).

On January 14, 2021, this Court denied the Motion to the extent it sought an emergency TRO because Plaintiff could not show immediate and irreparable injury. (Doc. 13). Specifically, because Plaintiff could not show the land conveyance would occur immediately upon the publication of the FEIS, and in fact Defendants would have 60 days from the publication to complete the exchange, a TRO without

notice and opportunity for response was unwarranted. (Doc. 13 at 4). The FEIS was published on January 15, 2021 as scheduled, starting the 60-day clock. *See* USDA, FINAL Environmental Impact Statement, Resolution Copper Project and Land Exchange, available at https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf (last visited February 12, 2021). The parties then fully briefed the Motion. (Docs. 7, 18, & 30). In their Response, the Government indicate that the land sale would not take place until 55 days after the publication of the FEIS (*i.e.*, no earlier than March 11, 2021). (Doc. 18-1 at 3-4). The Court held a hearing on the PI on February 3, 2021. (Doc. 37).

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F. App'x 390, 391 (9th Cir. 2014) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). An injunction may be granted only where the movant shows that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *Winter*, 555 U.S. at 20). However, the four factors may be evaluated on a sliding scale under this Circuit's "serious questions" test: "[a] preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips

sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-35 (9th Cir. 2011) (citing *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)) (internal quotations omitted).

"Likelihood of success on the merits is the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors in the absence of serious questions going to the merits." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal citations and quotations omitted); *see also, e.g.*, *Krieger v. Nationwide Mut. Ins. Co.*, No. CV-11-1059-PHX-DGC, 2011 WL 3760876, at *1 (D. Ariz. Aug. 25, 2011) ("Because Plaintiff has failed to show a likelihood of success on the merits or the existence of serious questions, the Court will not issue a preliminary injunction. The Court need not address the other requirements for preliminary injunctive relief.").

III. DISCUSSION

For the following reasons, the Court finds that Plaintiff has not demonstrated a likelihood of success on, or serious questions going to, the merits of its claims.

A. Breach of Trust/Fiduciary Duties

i. Standing

Plaintiff alleges the land at issue is managed by the Government in trust for the Western Apaches "as a result of official U.S. Government support of actions unilaterally removing the Western Apaches from that land and forcing them to struggle to continue to maintain their relationships to their land." (Doc. 1 at

¶ 51) (Count 3). Thus, Plaintiff argues the conveyance to Resolution Copper is in breach of the Government's trustee and fiduciary duties.

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

But "since the prohibition against a party asserting the legal rights of another is prudential—not constitutional—the Supreme Court may 'recognize[ ] exceptions to this general rule.'" *Al–Aulaqi v. Obama*, 727 F.Supp.2d 1, 15 (D.D.C. 2010) (alteration in original) (quoting *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1160 (9th Cir. 2002)). For

example, an organization may have standing to sue on behalf of its members—but only if "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). The issue here, then, is whether Apache Stronghold's members have standing.

Apache Stronghold argues "[t]here were no tribes in 1852 in any formal sense" and that, instead, there were "leaders representing . . . dozens of groups of Apaches." (Doc. 47 at 25). Accordingly, Plaintiff argues "the Treaty of 1852 was between the United States and the Western Apache peoples, not with any particular Tribe." (Doc. 30 at 3). By extension, then, Apache Stronghold argues its individual members have standing to assert the Western Apaches' treaty rights because they are direct descendants of Mangas Coloradus, "one of the Apache signatories to the 1852 Treaty," since they "are among the intended beneficiaries of [their] direct ancestor's agreement with the United States." (Doc. 30 at 3).[1] Plaintiff's arguments are unavailing.

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[1] Plaintiff also argues that the recent Supreme Court case *McGirt v. Oklahoma* "made it abundantly clear that even a single individual Native American and enrolled member of a federally recognized Indian tribe can assert his treaty rights and the aboriginal land title rights of his people." (Doc. 30 at 4) (citing *McGirt v. Oklahoma*, 591 U.S.___, 140 S.Ct. 2452 (2020)); *see also* (Doc. 47 at 77) (Plaintiff's counsel stating he "didn't believe it was necessary" to join the Western Apache tribes as plaintiffs "in light of the Supreme Court's recent decision in *McGirt v. Oklahoma*, where an individual asserted and vindicated his entire tribe's treaty rights to a vast part of the state of

"[T]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *United States v. Mitchell*, 463 U.S. 206, 226 (1983). However, a treaty, by its very definition, "is 'essentially a contract between two sovereign nations,'" not between individuals. *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1699 (2019) (citing *Washington v. Wash. State Com. Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979)). Accordingly, in most situations, "[r]ights, enumerated under treaties, are reserved to communities or 'tribes' rather than to individuals." *United States v. State of Or.*, 787 F. Supp. 1557, 1566 (D. Or. 1992), *aff'd*, 29 F.3d 481 (9th Cir. 1994), *amended*, 43 F.3d 1284 (9th Cir. 1994).[2]

Oklahoma"). But in *McGirt*, the plaintiff did not assert or seek to enforce tribal treaty rights. Rather, he suffered individualized injury belonging to him, not the tribe—he had been tried and convicted of a crime by the state of Oklahoma despite committing the crime on federal Indian land. The Court had to adjudicate the tribal land issue before it could adjudicate McGirt's individual rights. Here, at least as it relates to the breach of trust claim, the individual Apache Stronghold members assert no such personalized right. Accordingly, *McGirt* is not instructive here.

[2] Plaintiff urges the Court to consider cases like *United States v. Winans* in which courts have found individual Indian fishing and/or hunting rights reserved in treaties. (Doc. 51 at 3-4) (citing 198 U.S. 371). But sovereign nations cannot fish or hunt. They can, however, hold title to land. *Compare, e.g.*, *Bess v. Spitzer*, 459 F.Supp.2d 191, 196 (E.D. N.Y. 2006) (finding that "individual Indians lack standing to sue under the Treaty of Fort Albany of 1664 because that Treaty secures rights for 'tribes and bands of Indians' rather than individuals") *with, e.g.*, *United States v.*

Where a treaty grants rights to an entire tribe rather than to individual tribal members, "[o]nly the tribe that signed the treaty, or the signatory tribe, can exercise treaty rights." *State v. Posenjak*, 127 Wash. App. 41, 49, 111 P.3d 1206, 1211 (2005) (citing *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) ("The appellants seek to exercise treaty rights as tribes. They may do so only if they are the tribes that signed the treaties.")). And "[i]ndividual Indians do not have any treaty rights, *even if they are descendents* [sic] *of the signers of the treaty*, because a treaty is a contract between sovereigns, not individuals." *Posenjak*, 127 Wash. App. at 49 (emphasis added) (rejecting plaintiff's argument that "he has treaty rights because his great-great-great-grandfather signed the Point Elliott Treaty" since "[t]reaty rights are rights of signatory tribes, not individual Indians.") (citing *Washington*, 443 U.S. at 675).[3]

Here, it is immaterial that Apache Stronghold's members are direct descendants of the signatories to

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State of Wash., 384 F. Supp. 312, 399 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) (individual Indians had standing to enforce treaty rights because the treaties at issue had individually enforceable provisions guaranteeing the right of the individual Indians to fish on the land). The line of cases in which individual Indians sought to enforce their individual treaty rights to fish or hunt on aboriginal land is inapplicable here.

[3] Although decisions from the Washington Court of Appeals are not binding on this Court, the Ninth Circuit affirmed the *Posenjak* decision, holding in relevant part that "Posenjak also claims treaty rights as an individual, but the Point Elliott Treaty reserves rights to tribes as communities, not to American Indians as individuals." *Posenjak v. Dep't of Fish & Wildlife of State of Wash.*, 74 F. App'x 744, 746 n.2 (9th Cir. 2003).

the 1852 Treaty because the Treaty only grants tribal rights, not individual rights. Although Plaintiff argues the Apache people were not a "tribe" when the Treaty was signed, it is clear from the plain language of the Treaty that the signors bound the Western Apache people as a whole. The Treaty consistently refers to the Apaches as a "nation or tribe" in the Treaty. In the preamble, the Treaty provides that the individual Apache signatories were "acting on the part of the Apache Nation of Indians." Treaty with the Apache preamble, July 1, 1852, 10 Stat. 979. Further, Article I of the Treaty states "[s]aid *nation or tribe* of Indians *through their authorized Chiefs*" submit to U.S. jurisdiction. *Id.* at art. 1 (emphasis added). The Treaty continuously refers to the "*nation or tribe* of Indians" as the party bound to the agreement. Even reading the language of the 1852 Treaty with a liberal construction in favor of Plaintiff's members' interests as Indians, the Court cannot infer an enforceable trust duty as to any individual Indians. *See Herrera*, 139 S. Ct. at 1699 (describing canon of construction requiring courts to interpret treaties in favor of the Indians). Stated differently, Plaintiff has not shown the Treaty—or any other source of law—creates an *individual* trust duty the United States breached by authorizing the land exchange. The individual Western Apache members therefore lack standing to assert a breach of the trust.

ii. Merits

Even if Apache Stronghold had standing to assert the breach of trust claim, it is unlikely to succeed on the merits. Plaintiff does not point to any specific trust language regarding the land at issue, in the 1852 Treaty or elsewhere. Plaintiff has alluded to a trust

duty arising from the relationship between the Government and the Indians generally. *See* (Doc. 36 at 5, n.3) (citing the general "federal-Tribe trust relationship" and "the United States' trust responsibility to all federally recognized Indian tribes and individual Indian beneficiaries"); *see also* (Doc. 47 at 86) ("The notion of a trust, to me, involves an obligation on the part of the United States to . . . act for the happiness and . . . prosperity, of the Apaches."). However, at the PI hearing, Plaintiff's expert witness Dr. John R. Welch testified that he is "not aware of any sort of codified or written-down trust associated with the totality of the Western Apaches or the Eastern Apaches territory referenced in [the] 1852 Treaty." (Doc. 47 at 86).

In 1983, the United States Supreme Court held that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) *even though* nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *United States v. Mitchell*, 463 U.S. 206 (1983) (emphasis added) (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). In *United States v. Jicarilla*, however, the Court clarified the "general trust" relationship between the Government and the Indians. 564 U.S. 162 (2011). The Court acknowledged that a general trustee/beneficiary analogy applied to the Government's relationship with the Indians "in limited contexts." *Id.* at 173. However, the Court explained that, although "relevant statutes denominate the relationship between the Government

and the Indians as a 'trust,' that trust is defined and governed by statutes rather than the common law." *Id.* Accordingly, "the [trust] analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

The requirement that Congress create a specific trust duty by statute derives from Congress's plenary authority over Indian affairs. "[T]he organization and management of the trust is a sovereign function subject to the plenary authority of Congress." *Id.* With this plenary power in mind, the Government "has often structured the trust relationship to pursue its own policy goals." *Jicarilla*, 546 U.S. at 176. Although the Government's trust relationship with the Indians "relat[es] to the welfare of the Indians," it remains "distinctly an interest of the United States" subject to congressional control. *Heckman v. United States*, 224 U.S. 413, 437 (1912). For example, in *Heckman*, the Government sued to prevent certain conveyance of lands by members of an Indian tribe because the conveyances violated restrictions on alienation imposed by Congress. *Id.* at 445–46. The Government sued as the representative of the very Indian grantors whose conveyances it sought to cancel because, while it was formally acting as trustee, the Government was in fact asserting its own sovereign interest in the disposition of the Indian lands. *Id.* at 445. "Such a result was possible because the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law." *Jicarilla*, 546 U.S. at 176.

It is undeniable that the Government "has charged itself with moral obligations of the highest

responsibility and trust" to Indians, *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942), obligations "to the fulfillment of which the national honor has been committed," *Heckman*, supra, at 437. Nonetheless, this Court must follow Supreme Court precedent. And the Supreme Court tells us that when "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian land] nor common-law trust principles matter." *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009). "The Government assumes Indian trust responsibilities *only* to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 546 at 177 (emphasis added).

Here, Mexico ceded the land at issue in this case to the United States via the Treaty of Guadalupe Hidalgo in 1848, four years before the 1852 Treaty was executed. *See* Map of the United States Including Western Territories (scanned map), *in* NATIONAL ARCHIVES CATALOG (1848), available at https://catalog.archives.gov/id/2127339 (last accessed February 12, 2021). At that point, the United States took legal title to the land. This Court has carefully examined the 1852 Treaty and supporting documentation in this case and finds no evidence that the United States ever forfeited that title, or that Congress intended the Government to hold the land in trust for the Western Apaches.

The 1852 Treaty certainly did not create a trust relationship. The parties merely agreed that they would, at a later date, designate territorial boundaries. *See* Treaty with the Apache art. 8, July 1, 1852, 10 Stat. 979 (stating that "the government of the

United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries"). When courts have considered such language in the past, they have consistently held it did not give rise to a trust relationship. For example, in *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1022 (E.D. Cal. 2012), the treaty at issue could "not be said to recognize Indian title" because, by its terms, it did not "designate, settle, adjust, define, or assign limits or boundaries to the Indians" and instead left "such matters to the future." *Id.* The language in the *Robinson* treaty is identical to the language in the 1852 Treaty at issue here. *Id.* (treaty stating that "the aforesaid Government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries"); *see also Uintah*, *Uintah Ute Indians v. United States*, 28 Fed. Cl. 768, 789 (1993) (finding no trust created based on identical language). And here, Plaintiff concedes that, while there were various efforts to designate those boundaries, those efforts ultimately failed. (Doc. 47 at 87).[4] The 1852 Treaty simply provides no indication that the United States is holding the land in trust for the Apaches.[5]

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[4] Although Plaintiff provides the Court with maps indicating territorial boundaries, the maps were created decades after the signing of the Treaty by the Smithsonian Institute based on anthropologists' "best interpretation of what the United States and the parties to the 1852 treaties *would have* agreed to as [sic] the time as being Western Apache's . . . treaty territory." (Doc. 47 at 87-88) (emphasis added). They do not change the conclusion that no government document created a trust.

[5] Plaintiff also references the Western Apaches' aboriginal title to the land. *See, e.g.*, (Doc. 7 at 7) ("[T]he Federal Government . . . attempted to 'quiet' Apaches' reserved treaty

Finally, even assuming the 1852 Treaty did create a trust relationship, Congress made clear its intent to extinguish that trust relationship by passing Section 3003 of the NDAA, and this Court cannot disturb that decision. "It is well settled that an act of [C]ongress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the government." *Thomas v. Gay*, 169 U.S. 264, 271 (1898). "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *see also Cherokee Nation v. Hitchcock*, 187

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rights *or aboriginal land title*"). But Apache Stronghold would run into the same standing issue if it sought to assert aboriginal title to the land. *See United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir. 1989) (finding that "individual Indians do not even have standing to contest a transfer of tribal lands" because "[t]he common view of aboriginal title is that it is held by tribes"). Additionally, any aboriginal title the tribes may have had was extinguished in 1873. *See* The San Carlos Apache Tribes of Arizona, *et al*. v. United States, 21 Ind. Cl. Comm 189, 219 (June 27, 1969) (findings of fact), available at https://portal.azoah.com/oedf/documents/17-001-WQAB/SCAT-3-IndianClaimsComm'n.1969.Bates.pdf (last accessed February 12, 2021). ("May 1, 1873 marks the date on which the United States took from the Western Apache Indians their Indian title to all of their aboriginal lands."); *see also United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) ("The exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.") (internal quotations omitted).

U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts"); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.")

In 1971, President Nixon authorized Oak Flat to be mined if it were first conveyed to a private entity, and in 2014, Congress authorized that conveyance. (Doc. 7 at ¶ 21). This Court's hands are tied both by Congress and by the Constitution. *Skoko v. Andrus*, 638 F.2d 1154, 1158 (9th Cir. 1979) ("The courts cannot interfere with the administration of public property as arranged by the Congress and the Executive, so long as constitutional boundaries are not transgressed by either branch."). The breach of trust claim must fail.

B. RFRA and First Amendment Free Exercise Clause (Substantial Burden)

Although the court cannot find any codified trust, the evidence before the Court shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries. *See* (Doc. 47 at 41) ("[T]he stories from my great-grandmother and her people, [Oak Flat]'s where she came from. And so those stories that my grandfather who taught my mother, who taught me, I am fourth generation of, I guess prisoners of war."). The spiritual importance of Oak Flat to the Western Apaches cannot be overstated and, in many ways, is difficult to put into words. The importance was immediately apparent at the PI hearing in the sometimes-tearful testimony of Apache

Stronghold members Wendsler Nosie and Naelyn Pike. Nosie, co-founder and spokesperson of Apache Stronghold and a member of the San Carlos Apache Tribe, testified that the Apache people grew up with a "fear of military presence" from the U.S., which created a "suppressed way of life." (Doc. 47 at 58). The Apaches, armed with a promise from the U.S. that they "would be able to return to [their] holy and sacred places if [they] conform to being assimilated," were deeply troubled by the forced assimilation. (Doc. 47 at 58). But the Apaches did everything they could to remain connected to their spirituality, remaining "tied to the earth," and "intertwined with the earth, with the mother." (Doc. 47 at 59).

Naelyn Pike, Nosie's granddaughter, testified that, despite the turmoil and threatened ouster, the Apaches have maintained their spiritual connection to the land. Today, the Apache people believe "Usen, the Creator, has given life to the plants, to the animals, to the land, to the air, to the water." (Doc. 47 at 42). Because of this, the Apaches view Oak Flat as a "direct corridor" to the Creator's spirit. (Doc. 47 at 42). The land is also used as a sacred ceremonial ground. Many of the young Apache women have a coming of age ceremony, known as a "Sunrise Ceremony," in which each young woman will "connect her soul and her spirit to the mountain, to Oak Flat." (Doc. 47 at 42, 48). Apache individuals pray at the land and speak to their Creator through their prayers. The Apache people also utilize the land's natural resources, picking acorns, berries, cactus fruit, and yucca to use for consumption. (Doc. 47 at 42). Because the land embodies the spirit of the Creator, "without any of that, specifically those plants, because they have that same spirit, that same spirit at Oak Flat, that spirit is

no longer there. And so without that spirit of Chi'Chil Bildagoteel, it is like a dead carcass." (Doc. 47 at 42). If the mining activity continues, Naelyn Pike testified, "then we are dead inside. We can't call ourselves Apaches." (Doc. 47 at 45). Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood.

In light of the Western Apaches' deep connection to Oak Flat, Apache Stronghold alleges in this lawsuit that conveying the land to Resolution Copper "puts government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs" in violation of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*. (Doc. 1 at ¶¶ 65, 73). Defendants "do not question the sincerity of Plaintiff's religious and historical connection to the lands at issue" and instead argue "Plaintiff has not alleged a government action that 'substantially burdens' their religious exercise." (Doc. 18 at 15, 27).[6]

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[6] Defendants also argue that construction on public land cannot, as a matter of law, constitute a "substantial burden" on religion. (Doc. 18 at 30- 35). While this Court need not reach this argument, the Court notes that the Ninth Circuit has indicated it would reject this argument. In *Navajo Nation*, the Ninth Circuit assumed, without deciding, "that RFRA applies to the government's use and management of its land" and the dissenting opinion explained that "[i]t is hardly an open question whether RFRA applies to federal land. . . . There is nothing in the text of RFRA that says, or even suggests, that such a carve-out from RFRA exists. No case has ever so held, or even suggested that RFRA is inapplicable to federal land." *Navajo*

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const., amend. I. In *Employment Division v. Smith*, the Supreme Court held that the Free Exercise Clause does not bar the Government from burdening the free exercise of religion with a "valid and neutral law of general applicability." 494 U.S. 872, 879 (1990). However, Congress thereafter enacted the Religious Freedom Restoration Act ("RFRA") because the *Smith* decision "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion." 42 U.S.C. § 2000bb(a)(4) (citing *Smith*, 494 U.S. at 872). Thus, the RFRA "created a cause of action for persons whose exercise of religion is substantially burdened by a government action, regardless of whether the burden results from a neutral law of general applicability." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (citing 42 U.S.C. § 2000bb-1). In other words, RFRA is limited to situations in which Congress has passed a religiously neutral law of general applicability, but nonetheless must provide exemptions under that law for certain religious practices if not doing so would substantially burden them.

The law at issue here here—Section 3003 of the NDAA—is a neutral law of general applicability. It merely authorizes the exchange of land with a mining company, and, although it will affect the Apaches'

Nation v. U.S. Forest Serv., 535 F.3d 1058, 1095 (9th Cir. 2008) (Fletcher, J., dissenting).

religious practices deeply, that is not its purpose.[7] In the Ninth Circuit, where courts consider a neutral law of general applicability, Free Exercise violations are found only in very limited situations. "Under RFRA, a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1058 (emphasis added) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In *Yoder*, "the application of the compulsory school-attendance law" to the Amish plaintiffs violated the RFRA because it "affirmatively compel[led them], under the threat of criminal sanction, to perform acts undeniable at odds with fundamental tenets of their religious beliefs." *Id.* (citing *Yoder*, 406 U.S. at 218). In *Sherbert*, the plaintiff refused to work on Saturdays, her faith's day of rest, but was denied government unemployment benefits for failing to accept work without good cause. *Id.* (citing *Sherbert*, 374 U.S. at 399). The state's conditioning of unemployment benefits on the plaintiff's ability to work on Saturdays unconstitutionally forced her "to choose between following the precepts of her religion and forfeiting benefits." *Sherbert*, 374 U.S. at 404. In *Navajo Nation*, the Ninth Circuit held that "[a]ny burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA, and does not require the

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[7] Apache Stronghold argues the law is in fact intentionally discriminatory. *See* (Doc. 1 at 28). The Court considers that argument more thoroughly *infra* Section (III)(C).

application of the compelling interest test set forth in those two cases." *Navajo Nation*, 535 F.3d at 1070.[8]

The facts of this case are similar to those of *Navajo Nation*. There, the Government released plans to use artificial snow containing treated sewage water to expand the Arizona Snowbowl Ski Resort, located within sacred government-owned Navajo land in northern Arizona. *Id.* at 1063. The plaintiffs, the Navajo Tribe and its members, argued the use of the sewage water would "spiritually contaminate the entire mountain and devalue their religious exercises" in violation of the Free Exercise Clause. *Id.* The Ninth Circuit held that the plaintiffs could not maintain an

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[8] The Court is in receipt of the Amicus Brief filed in this case (Doc. 56), and has considered the arguments and cases cited therein. The Brief urges the Court to find that the limited *Yoder*/*Sherbert* scenarios merely "constitute a floor for substantial burden claims, not a ceiling for the type of government coercion that could lead to a finding of substantial burden." (Doc. 56 at 24). However, all of the cases cited in the brief interpret what is required for "substantial burden" under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which applies to prisoners' rights and state land use laws, not the RFRA. And while it is true that each statute uses "the same standard," *see Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015), this merely means that both statutes require the government to pass a strict scrutiny analysis where the law in question imposes a "substantial burden" on religious rights. What constitutes a "substantial burden," however, has evolved differently under each statute. *See Navajo Nation*, 535 F.3d at 1078 (expressly rejecting plaintiffs' reliance on RLUIPA cases because "instead the 'substantial burden' question must be answered by reference to the Supreme Court's Pre-*Smith* jurisprudence, including *Sherbert* and *Yoder*, that RFRA expressly adopted. Under that precedent, the Plaintiffs have failed to show a 'substantial burden' on the exercise of their religion"). Under current Ninth Circuit RFRA precedent, Section 3003 does not impose a substantial burden.

RFRA action because they could not show "substantial burden." *Id.* The Ninth Circuit acknowledged the land's "long-standing religious and cultural significance to Indian tribes." *Id.* at 1064. The Navajo people believed the mountains were "a living entity," conducted religious ceremonies on them, and collected plants, water, and other materials from them. *Id.* Nonetheless, bound by precedent, the Ninth Circuit held "there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion." *Id.* at 1063; *see also, e.g.*, *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1213-15 (9th Cir. 2008) (rejecting tribe's RFRA claim because "[t]he Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.").

To be sure, the *Navajo Nation* court found no substantial burden in part because there were "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." *Navajo Nation*, 535 F.3d at 1063. Instead, "[t]he only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience." *Id.* at 1070. And this

Court recognizes that the burden imposed by the mining activity in this case is much more substantive and tangible than that imposed in *Navajo Nation*—the land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship. *See, e.g.*, FEIS at 84 (finding that the "[c]onstruction and operation of the mine would profoundly and permanently alter . . . Chí'chil Biłdagoteel (Oak Flat) . . . through anticipated largescale geological subsidence"); FEIS at 25 ("the proposed mine would disturb large areas of ground and potentially destroy native vegetation").

However, the Ninth Circuit also explained that the Supreme Court *Lyng* decision would have compelled it to reach the same result even if the use of artificial snow would "virtually destroy the . . . Indians' ability to practice their religion." *Navajo Nation*, 535 F.3d at 1072. In *Lyng*, the plaintiffs, Indian tribes, challenged the U.S. Forest Service's approval of plans to construct a road on a ceremonial tribal ground. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The tribes alleged the construction would interfere with their free exercise of religion by disturbing a sacred area. *Id.* at 442–43. The area was an "integral and indispensable part" of the tribes' religious practices, and a Forest Service study concluded the construction "would cause serious and irreparable damage to the sacred areas." *Id.* at 442 (citations and internal quotation marks omitted). Nonetheless, the Supreme Court rejected the Indian tribes' Free Exercise Clause challenge. The Court held that, although the government's plan would "diminish the sacredness" of the Indian land and would "interfere significantly" with their ability to practice their religion, it did not impose a "heavy enough"

burden to violate their Free Exercise Clause rights. *Id.* at 447-49. Because the plaintiffs were not "coerced by the Government's action into violating their religious beliefs" nor did the "governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens," they could not make out an RFRA claim. *See id.* at 449. Even where land is physically destroyed, the government action must still fall within those two narrow situations to make out a Free Exercise violation under RFRA.[9]

Apache Stronghold runs into the same problem as plaintiffs in both *Navajo Nation* and *Lyng*, each of which is still good law and binding upon this Court: Plaintiff has not been deprived a government benefit, nor has it been coerced into violating their religious beliefs. The Court does not dispute, nor can it, that the Government's mining plans on Oak Creek will have a devastating effect on the Apache people's religious practices. To that same end, the Western Apache peoples no doubt derive great "benefits" from the use of Oak Flat, at least in the common sense of the word.

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[9] Plaintiff urges this Court to apply what it considers a "much more lenient test to prove substantial burden than the *Navajo Nation* test" as set forth in *Little Sisters of the Poor Saints Peter and Paul Home*, 140 S.Ct. 2367 (2020). (Doc. 30 at 12-14). Plaintiff urges the Court to instead consider whether "the government puts substantial pressure on [the Apaches] to substantially modify [their] behavior and to violate [their] beliefs." (Doc. 30 at 13). But the *Little Sisters* case did not abrogate the test set forth in *Lyng* and *Navajo Nation*—it did not reconsider the "substantial burden" standard at all. And in fact, the Ninth Circuit has applied the *Yoder/Sherbert* framework set forth in *Lyng* and *Navajo Nation* recently as July 20, 2020. *See, e.g.*, *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1061 (9th Cir. 2020).

However, Oak Flat does not provide the type of "benefit" required under RFRA jurisprudence: It isn't something the Government gave to the Western Apaches, like unemployment benefits, and then took away because of their religion. Similarly, building a mine on the land isn't a civil or criminal "sanction" under the RFRA. *See* SANCTION, Black's Law Dictionary (11th ed. 2019) (defining a "sanction" as a "provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience"). "Just as the Ninth Circuit and other courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do the same." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 94 (D.D.C. 2017). Accordingly, Plaintiff's RFRA and Free Exercise claims must fail.[10]

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[10] Plaintiff cites *Burwell v. Hobby Lobby* for the proposition that the RFRA cannot be read "as restricting the concept of the 'exercise of religion' to those practices specifically addressed in our Pre-*Smith* decisions." 573 U.S. 682, 714 (2014); *see also* (Doc. 47 at 12) (Plaintiff arguing that the *Hobby Lobby* decision "admonished the lower courts not to narrowly follow the 'specific' holdings of its pre-Smith 'ossified' cases to limit religious believers' RFRA claims"). But in *Hobby Lobby*, the Court considered the discrete issue of whether corporate entities could be considered "persons" under the RFRA, not the type of government activity that would cause a "substantial burden." *See Hobby Lobby*, 573 U.S. at 715-716 ("[T]he results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before Smith."). The *Hobby Lobby* decision did not amend the previous "substantial burden" standard set forth in *Lyng*, and it does not change that analysis here.

C. First Amendment Free Exercise Clause (Intentional Discrimination)

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

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

As explained above, the Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]," U.S. Const., amend. I. The right to freely exercise one's religion, however, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252 (1982) (Stevens, J., concurring in judgment)). Under the governing standard, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the

incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

In assessing neutrality and general applicability, courts evaluate both "the text of the challenged law as well as the effect . . . in its real operation." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (ellipsis in original) (internal quotation marks omitted). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. Even if a law is facially neutral, it may nonetheless fail the neutrality test if "[t]he record . . . compels the conclusion that suppression of [a religion or religious practice] *was the object* of the ordinances." *Id*. at 534, 542 (emphasis added); *see also Selecky*, 586 F.3d at 1130 ("[I]f the *object* of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.") (emphasis added) (quoting *Lukumi*, 508 U.S. at 533).

The Southeast Arizona Land Exchange and Conservation Act is facially neutral, and Plaintiff has provided no evidence of any discriminatory intent behind its passage. At the PI hearing, when asked what evidence of discriminatory intent Apache Stronghold has, Plaintiff's counsel could not directly answer the question. (Doc. 47 at 91-92). Instead, Plaintiff argued Apache Stronghold's members "presented repeatedly before the introduction of the National Defense Authorization Act Section 3003 rider, about the central religious importance of this place, Oak Flat" but that "there's no deliberate regard for it" in the Act, "much less an utterance that there's a compelling government interest" to convey the land

to Resolution Copper. (Doc. 47 at 92). But a lack of deliberate regard for the Apaches religious ties to the land, as disappointing and inappropriate as it may be, in no way shows that the law was passed with the objective to discriminate against them. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect . . ., it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

Because Section 3003 is neutral, Plaintiff is unlikely to succeed on its Intentional Discrimination claim. A neutral law need only be "rationally related to a legitimate government purpose." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015). The Court finds, at this juncture, that the governmental interest in supporting economic development of mineral resources is likely more than sufficient to withstand rational basis review. *See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (noting the "relatively easy standard of rational basis review"). Accordingly, Plaintiff is unlikely to succeed on the Free Exercise Clause Intentional Discrimination claim.

D. Due Process and Petition Clause Claims

i. Standing

Plaintiff's Due Process and Petition Clause claims are based only on the publication of the FEIS. (Doc. 47 at 80). As an initial matter, Plaintiff likely lacks standing to contest the publication of the FEIS because Plaintiff cannot show that a favorable decision from this Court would redress its alleged injury. As the Court stated in its Order denying the

TRO, Plaintiff's alleged injury stems from the land exchange, not the FEIS publication. (Doc. 13 at 3). But the land exchange, and subsequent mining activity, can still occur even if the FEIS was not published or is somehow otherwise rescinded. *See* 16 U.S.C. § 539p(B) (stating that the FEIS "shall be used as the basis for all decisions under Federal law related to the proposed mine and the Resolution mine plan of operations" but not requiring that it be published before the exchange can occur). Although the NDAA indicates that the land exchange would occur within 60 days of the FEIS publication, Plaintiff has not shown the publication was a *requirement* to proceed with the land exchange. From the plain text of the FEIS, it doesn't appear so. Accordingly, Apache Stronghold hasn't demonstrated its standing to bring the Due Process and Petition Clause claims.

ii. Merits

Even if Apache Stronghold had standing to assert the Due Process and Petition Clause claims, it is unlikely to succeed on the merits of those claims. Per Plaintiff's own timeline, on January 4, 2021, Reuters reported that the Forest Service was set to publish the FEIS on January 15, 2021. (Doc. 1 at 12). Plaintiff alleges this eleven-day window did not provide sufficient time for Plaintiff to challenge the FEIS publication and protect their "treaty rights, property rights, religious freedom rights, and other legal rights." (Doc. 1 at ¶ 44). But Plaintiff had much longer than eleven days to contest the FEIS and land exchange.

"The Due Process Clause of the Fifth Amendment prohibits the United States . . . from depriving any person of property without 'due process of law.'"

Dusenbery v. United States, 534 U.S. 161, 167 (2002); *see also* U.S. Const. amend. XV. "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Similarly, the First Amendment Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. However, the Petition Clause "does not impose any affirmative obligation on the government to listen, to respond to or . . . to recognize" those grievances. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979). Plaintiff is unlikely to succeed on the Due Process and Petition Clause claims because it received sufficient notice of, and opportunity to contest, the FEIS and the land exchange itself.

"Publication in the Federal Register is legally sufficient notice [under the Fifth Amendment] to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *State of California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 707 (9th Cir. 2003) (citing *Camp v. U.S. Bureau of Land Mgmt.*, 183 F.3d 1141, 1145 (9th Cir.1999)); *see also* 44 U.S.C. § 1507 (providing that Federal Register publication generally "is sufficient to give notice of the contents of the document to a person subject to or affected by it"). Here, Defendants—specifically the Forest Service—published the "Notice of intent to prepare an Environmental Impact Statement for approval of a plan of operations for the Resolution Copper Project and associated land

exchange; request for comments; and notice of public scoping" on the Federal Register on March 18, 2016. *See* Federal Register, Tonto National Forest; Pinal County, AZ; Resolution Copper Project and Land Exchange Environmental Impact Statement, available at https://www.federalregister.gov/documents/2016/03/18/2016-05781/tonto-national-forest-pinal-county-az-resolution-copper-project-and-land-exchange-environmental (last visited January 26, 2021). The Forest Service received comments for two months following publication. Commentors were invited to send written comments by P.O. box or email, submit comments on USDA's Resolution Copper website, submitting verbal messages to a phone number, or submitting written or oral comments during open house held by the Forest Service on four separate dates.

Although January 4th may have been the first notice of the January 15th date of publication, it is not the first notice Plaintiff had of the land exchange. To the contrary, Apache Stronghold alleges 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." (Doc. 1 at ¶ 11). And at the PI hearing, Wendsler Nosie presented a book, over an inch thick, detailing Apache Stronghold's "Comments on the Resolution Copper Project and Land Exchange Draft Environmental Impact Statement submitted by the

Apache Stronghold." (Doc. 47 at 63). Nosie further testified that he presented testimony to Congress before the passage of the NDAA "many "[m]any times." (Doc. 47 at 65). In fact, Nosie "visited all of the Congressional agencies, leaders, you know, to express the concerns and positions of the tribe," testimony which was "specifically in regard to the religious importance of Oak Flat and what was being proposed in terms of a copper mine." (Doc. 47 at 65). Although Congress disagreed with, or perhaps even disregarded, Apache Stronghold's pleas, Apache Stronghold was not denied a voice—at least not under the law. Plaintiff is therefore unlikely to succeed on its Due Process or Petition Clause claims.

IV. CONCLUSION

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

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

Dated this 12th day of February, 2021.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Judge

FIRST AMENDMENT

Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 2000bb: Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all

cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1: Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it 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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2: Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3: Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4: Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

PUBLIC LAW 113–291
SEC. 3003.
SOUTHEAST ARIZONA LAND EXCHANGE AND CONSERVATION

(a) PURPOSE.—The purpose of this section is to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States.

(b) DEFINITIONS.—In this section:

(1) APACHE LEAP.—The term "Apache Leap" means the approximately 807 acres of land depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Apache Leap" and dated March 2011.

(2) FEDERAL LAND.—The term "Federal land" means the approximately 2,422 acres of land located in Pinal County, Arizona, depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Federal Parcel–Oak Flat" and dated March 2011.

(3) INDIAN TRIBE.—The term "Indian tribe" has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(4) NON-FEDERAL LAND.—The term "non-Federal land" means the parcels of land owned by Resolution Copper that are described in subsection (d)(1) and, if necessary to equalize the land exchange under subsection (c), subsection (c)(5)(B)(i)(I).

(5) OAK FLAT CAMPGROUND.—The term "Oak Flat Campground" means the approximately

50 acres of land comprising approximately 16 developed campsites depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Oak Flat Campground" and dated March 2011.

(6) OAK FLAT WITHDRAWAL AREA.—The term "Oak Flat Withdrawal Area" means the approximately 760 acres of land depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Oak Flat Withdrawal Area" and dated March 2011.

(7) RESOLUTION COPPER.—The term "Resolution Copper" means Resolution Copper Mining, LLC, a Delaware limited liability company, including any successor, assign, affiliate, member, or joint venturer of Resolution Copper Mining, LLC.

(8) SECRETARY.—The term "Secretary" means the Secretary of Agriculture.

(9) STATE.—The term "State" means the State of Arizona.

(10) TOWN.—The term "Town" means the incorporated town of Superior, Arizona.

(11) RESOLUTION MINE PLAN OF OPERATIONS.—The term "Resolution mine plan of operations" means the mine plan of operations submitted to the Secretary by Resolution Copper in November, 2013, including any amendments or supplements.

(c) LAND EXCHANGE.—

(1) IN GENERAL.—Subject to the provisions of this section, if Resolution Copper offers to convey

to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, the Secretary is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land.

(2) CONDITIONS ON ACCEPTANCE.—Title to any non-Federal land conveyed by Resolution Copper to the United States under this section shall be in a form that—

(A) is acceptable to the Secretary, for land to be administered by the Forest Service and the Secretary of the Interior, for land to be administered by the Bureau of Land Management; and

(B) conforms to the title approval standards of the Attorney General of the United States applicable to land acquisitions by the Federal Government.

(3) CONSULTATION WITH INDIAN TRIBES.—

(A) IN GENERAL.—The Secretary shall engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange.

(B) IMPLEMENTATION.—Following the consultations under paragraph (A), the Secretary shall consult with Resolution Copper and seek to find mutually acceptable measures to—

(i) address the concerns of the affected Indian tribes; and

(ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper under this section.

(4) APPRAISALS.—

(A) IN GENERAL.—As soon as practicable after the date of enactment of this Act, the Secretary and Resolution Copper shall select an appraiser to conduct appraisals of the Federal land and non-Federal land in compliance with the requirements of section 254.9 of title 36, Code of Federal Regulations.

(B) REQUIREMENTS.—

(i) IN GENERAL.—Except as provided in clause (ii), an appraisal prepared under this paragraph shall be conducted in accordance with nationally recognized appraisal standards, including—

(I) the Uniform Appraisal Standards for Federal Land Acquisitions; and

(II) the Uniform Standards of Professional Appraisal Practice.

(ii) FINAL APPRAISED VALUE.—After the final appraised values of the Federal land and non-Federal land are determined and approved by the Secretary, the Secretary shall not be required to reappraise or update the final appraised value—

(I) for a period of 3 years beginning on the date of the approval by the Secretary of the final appraised value; or

(II) at all, in accordance with section 254.14 of title 36, Code of Federal Regulations (or a successor regulation), after an exchange agreement is entered into by Resolution Copper and the Secretary.

(iii) IMPROVEMENTS.— Any improvements made by Resolution Copper prior to entering into an exchange agreement shall not be included in the appraised value of the Federal land.

(iv) PUBLIC REVIEW.—Before consummating the land exchange under this section, the Secretary shall make the appraisals of the land to be exchanged (or a summary thereof) available for public review.

(C) APPRAISAL INFORMATION.—The appraisal prepared under this paragraph shall include a detailed income capitalization approach analysis of the market value of the Federal land which may be utilized, as appropriate, to determine the value of the Federal land, and shall be the basis for calculation of any payment under subsection (e).

(5) EQUAL VALUE LAND EXCHANGE.—

(A) IN GENERAL.—The value of the Federal land and non-Federal land to be exchanged under this section shall be equal or shall be equalized in accordance with this paragraph.

(B) SURPLUS OF FEDERAL LAND VALUE.—

(i) IN GENERAL.—If the final appraised value of the Federal land exceeds the value of the non-Federal land, Resolution Copper shall—

(I) convey additional non-Federal land in the State to the Secretary or the Secretary of the Interior, consistent with the requirements of this section and subject to the approval of the applicable Secretary;

(II) make a cash payment to the United States; or

(III) use a combination of the methods described in subclauses (I) and (II), as agreed to by Resolution Copper, the Secretary, and the Secretary of the Interior.

(ii) AMOUNT OF PAYMENT.—The Secretary may accept a payment in excess of 25 percent of the total value of the land or interests conveyed, notwithstanding section 206(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(b)).

(iii) DISPOSITION AND USE OF PROCEEDS.—Any amounts received by the United States under this subparagraph shall be deposited in the fund established under Public Law 90–171 (commonly known as the "Sisk Act"; 16 U.S.C. 484a) and shall

be made available to the Secretary for the acquisition of land or interests in land in Region 3 of the Forest Service.

(C) SURPLUS OF NON-FEDERAL LAND.—If the final appraised value of the non-Federal land exceeds the value of the Federal land—

(i) the United States shall not make a payment to Resolution Copper to equalize the value; and

(ii) except as provided in subsection (h), the surplus value of the non-Federal land shall be considered to be a donation by Resolution Copper to the United States.

(6) OAK FLAT WITHDRAWAL AREA.—

(A) PERMITS.—Subject to the provisions of this paragraph and notwithstanding any withdrawal of the Oak Flat Withdrawal Area from the mining, mineral leasing, or public land laws, the Secretary, upon enactment of this Act, shall issue to Resolution Copper—

(i) if so requested by Resolution Copper, within 30 days of such request, a special use permit to carry out mineral exploration activities under the Oak Flat Withdrawal Area from existing drill pads located outside the Area, if the activities would not disturb the surface of the Area; and

(ii) if so requested by Resolution Copper, within 90 days of such request, a special use permit to carry out mineral exploration activities within the Oak Flat Withdrawal

Area (but not within the Oak Flat Campground), if the activities are conducted from a single exploratory drill pad which is located to reasonably minimize visual and noise impacts on the Campground.

(B) CONDITIONS.—Any activities undertaken in accordance with this paragraph shall be subject to such reasonable terms and conditions as the Secretary may require.

(C) TERMINATION.—The authorization for Resolution Copper to undertake mineral exploration activities under this paragraph shall remain in effect until the Oak Flat Withdrawal Area land is conveyed to Resolution Copper in accordance with this section.

(7) COSTS.—As a condition of the land exchange under this section, Resolution Copper shall agree to pay, without compensation, all costs that are—

(A) associated with the land exchange and any environmental review document under paragraph (9); and

(B) agreed to by the Secretary.

(8) USE OF FEDERAL LAND.—The Federal land to be conveyed to Resolution Copper under this section shall be available to Resolution Copper for mining and related activities subject to and in accordance with applicable Federal, State, and local laws pertaining to mining and related activities on land in private ownership.

(9) ENVIRONMENTAL COMPLIANCE.—

(A) IN GENERAL.—Except as otherwise provided in this section, the Secretary shall carry out the land exchange in accordance with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) ENVIRONMENTAL ANALYSIS.—Prior to conveying Federal land under this section, the Secretary shall prepare a single environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), which shall be used as the basis for all decisions under Federal law related to the proposed mine and the Resolution mine plan of operations and any related major Federal actions significantly affecting the quality of the human environment, including the granting of any permits, rights-of-way, or approvals for the construction of associated power, water, transportation, processing, tailings, waste disposal, or other ancillary facilities.

(C) IMPACTS ON CULTURAL AND ARCHEOLOGICAL RESOURCES.—The environmental impact statement prepared under subparagraph (B) shall—

(i) assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under this section on the cultural and archeological resources that may be located on the Federal land; and

(ii) identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources, if any.

(D) EFFECT.—Nothing in this paragraph precludes the Secretary from using separate environmental review documents prepared in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or other applicable laws for exploration or other activities not involving—

(i) the land exchange; or

(ii) the extraction of minerals in commercial quantities by Resolution Copper on or under the Federal land.

(10) TITLE TRANSFER.—Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.

(d) CONVEYANCE AND MANAGEMENT OF NON-FEDERAL LAND.—

(1) CONVEYANCE.—On receipt of title to the Federal land, Resolution Copper shall simultaneously convey—

(A) to the Secretary, all right, title, and interest that the Secretary determines to be acceptable in and to—

(i) the approximately 147 acres of land located in Gila County, Arizona, depicted on the map entitled "Southeast Arizona Land

Exchange and Conservation Act of 2011–Non-Federal Parcel–Turkey Creek" and dated March 2011;

(ii) the approximately 148 acres of land located in Yavapai County, Arizona, depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Tangle Creek" and dated March 2011;

(iii) the approximately 149 acres of land located in Maricopa County, Arizona, depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Cave Creek" and dated March 2011;

(iv) the approximately 640 acres of land located in Coconino County, Arizona, depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–East Clear Creek" and dated March 2011; and

(v) the approximately 110 acres of land located in Pinal County, Arizona, depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Apache Leap South End" and dated March 2011; and

(B) to the Secretary of the Interior, all right, title, and interest that the Secretary of the Interior determines to be acceptable in and to—

(i) the approximately 3,050 acres of land located in Pinal County, Arizona, identified

as "Lands to DOI" as generally depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Lower San Pedro River" and dated July 6, 2011;

(ii) the approximately 160 acres of land located in Gila and Pinal Counties, Arizona, identified as "Lands to DOI" as generally depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Dripping Springs" and dated July 6, 2011; and

(iii) the approximately 940 acres of land located in Santa Cruz County, Arizona, identified as "Lands to DOI" as generally depicted on the map entitled "Southeast Arizona Land Exchange and Conservation Act of 2011–Non-Federal Parcel–Appleton Ranch" and dated July 6, 2011.

(2) MANAGEMENT OF ACQUIRED LAND.—

(A) LAND ACQUIRED BY THE SECRETARY.—

(i) IN GENERAL.—Land acquired by the Secretary under this section shall—

(I) become part of the national forest in which the land is located; and

(II) be administered in accordance with the laws applicable to the National Forest System.

(ii) BOUNDARY REVISION.—On the acquisition of land by the Secretary under this section, the boundaries of the national

forest shall be modified to reflect the inclusion of the acquired land.

(iii) LAND AND WATER CONSERVATION FUND.—For purposes of section 7 of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–9), the boundaries of a national forest in which land acquired by the Secretary is located shall be deemed to be the boundaries of that forest as in existence on January 1, 1965.

(B) LAND ACQUIRED BY THE SECRETARY OF THE INTERIOR.—

(i) SAN PEDRO NATIONAL CONSERVATION AREA.—

(I) IN GENERAL.—The land acquired by the Secretary of the Interior under paragraph (1)(B)(i) shall be added to, and administered as part of, the San Pedro National Conservation Area in accordance with the laws (including regulations) applicable to the Conservation Area.

(II) MANAGEMENT PLAN.—Not later than 2 years after the date on which the land is acquired, the Secretary of the Interior shall update the management plan for the San Pedro National Conservation Area to reflect the management requirements of the acquired land.

(ii) DRIPPING SPRINGS.—Land acquired by the Secretary of the Interior under paragraph (1)(B)(ii) shall be managed in accordance with the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and applicable land use plans.

(iii) LAS CIENEGAS NATIONAL CONSERVATION AREA.—Land acquired by the Secretary of the Interior under paragraph (1)(B)(iii) shall be added to, and administered as part of, the Las Cienegas National Conservation Area in accordance with the laws (including regulations) applicable to the Conservation Area.

(e) VALUE ADJUSTMENT PAYMENT TO UNITED STATES.—

(1) ANNUAL PRODUCTION REPORTING.—

(A) REPORT REQUIRED.—As a condition of the land exchange under this section, Resolution Copper shall submit to the Secretary of the Interior an annual report indicating the quantity of locatable minerals produced during the preceding calendar year in commercial quantities from the Federal land conveyed to Resolution Copper under subsection (c). The first report is required to be submitted not later than February 15 of the first calendar year beginning after the date of commencement of production of valuable locatable minerals in commercial quantities from such Federal land. The reports shall be submitted February 15 of each calendar year thereafter.

(B) SHARING REPORTS WITH STATE.—The Secretary shall make each report received under subparagraph (A) available to the State.

(C) REPORT CONTENTS.—The reports under subparagraph (A) shall comply with any recordkeeping and reporting requirements prescribed by the Secretary or required by applicable Federal laws in effect at the time of production.

(2) PAYMENT ON PRODUCTION.—If the cumulative production of valuable locatable minerals produced in commercial quantities from the Federal land conveyed to Resolution Copper under subsection (c) exceeds the quantity of production of locatable minerals from the Federal land used in the income capitalization approach analysis prepared under subsection (c)(4)(C), Resolution Copper shall pay to the United States, by not later than March 15 of each applicable calendar year, a value adjustment payment for the quantity of excess production at the same rate assumed for the income capitalization approach analysis prepared under subsection (c)(4)(C).

(3) STATE LAW UNAFFECTED.—Nothing in this subsection modifies, expands, diminishes, amends, or otherwise affects any State law relating to the imposition, application, timing, or collection of a State excise or severance tax.

(4) USE OF FUNDS.—

(A) SEPARATE FUND.—All funds paid to the United States under this subsection shall be deposited in a special fund established in the Treasury and shall be available, in such

amounts as are provided in advance in appropriation Acts, to the Secretary and the Secretary of the Interior only for the purposes authorized by subparagraph (B).

(B) AUTHORIZED USE.—Amounts in the special fund established pursuant to subparagraph (A) shall be used for maintenance, repair, and rehabilitation projects for Forest Service and Bureau of Land Management assets.

(f) WITHDRAWAL.—Subject to valid existing rights, Apache Leap and any land acquired by the United States under this section are withdrawn from all forms of—

(1) entry, appropriation, or disposal under the public land laws;

(2) location, entry, and patent under the mining laws; and

(3) disposition under the mineral leasing, mineral materials, and geothermal leasing laws.

(g) APACHE LEAP SPECIAL MANAGEMENT AREA.—

(1) DESIGNATION.—To further the purpose of this section, the Secretary shall establish a special management area consisting of Apache Leap, which shall be known as the "Apache Leap Special Management Area" (referred to in this subsection as the "special management area").

(2) PURPOSE.—The purposes of the special management area are—

(A) to preserve the natural character of Apache Leap;

(B) to allow for traditional uses of the area by Native American people; and

(C) to protect and conserve the cultural and archeological resources of the area.

(3) SURRENDER OF MINING AND EXTRACTION RIGHTS.—As a condition of the land exchange under subsection (c), Resolution Copper shall surrender to the United States, without compensation, all rights held under the mining laws and any other law to commercially extract minerals under Apache Leap.

(4) MANAGEMENT.—

(A) IN GENERAL.—The Secretary shall manage the special management area in a manner that furthers the purposes described in paragraph (2).

(B) AUTHORIZED ACTIVITIES.—The activities that are authorized in the special management area are—

(i) installation of seismic monitoring equipment on the surface and subsurface to protect the resources located within the special management area;

(ii) installation of fences, signs, or other measures necessary to protect the health and safety of the public; and

(iii) operation of an underground tunnel and associated workings, as described in the Resolution mine plan of operations, subject

to any terms and conditions the Secretary may reasonably require.

(5) PLAN.—

(A) IN GENERAL.—Not later than 3 years after the date of enactment of this Act, the Secretary, in consultation with affected Indian tribes, the Town, Resolution Copper, and other interested members of the public, shall prepare a management plan for the Apache Leap Special Management Area.

(B) CONSIDERATIONS.—In preparing the plan under subparagraph (A), the Secretary shall consider whether additional measures are necessary to—

(i) protect the cultural, archaeological, or historical resources of Apache Leap, including permanent or seasonal closures of all or a portion of Apache Leap; and

(ii) provide access for recreation.

(6) MINING ACTIVITIES.—The provisions of this subsection shall not impose additional restrictions on mining activities carried out by Resolution Copper adjacent to, or outside of, the Apache Leap area beyond those otherwise applicable to mining activities on privately owned land under Federal, State, and local laws, rules and regulations.

(h) CONVEYANCES TO TOWN OF SUPERIOR, ARIZONA.—

(1) CONVEYANCES.—On request from the Town and subject to the provisions of this

subsection, the Secretary shall convey to the Town the following:

(A) Approximately 30 acres of land as depicted on the map entitled “Southeast Arizona Land Exchange and Conservation Act of 2011–Federal Parcel–Fairview Cemetery” and dated March 2011.

(B) The reversionary interest and any reserved mineral interest of the United States in the approximately 265 acres of land located in Pinal County, Arizona, as depicted on the map entitled “Southeast Arizona Land Exchange and Conservation Act of 2011–Federal Reversionary Interest–Superior Airport” and dated March 2011.

(C) The approximately 250 acres of land located in Pinal County, Arizona, as depicted on the map entitled “Southeast Arizona Land Exchange and Conservation Act of 2011–Federal Parcel–Superior Airport Contiguous Parcels” and dated March 2011.

(2) PAYMENT.—The Town shall pay to the Secretary the market value for each parcel of land or interest in land acquired under this subsection, as determined by appraisals conducted in accordance with subsection (c)(4).

(3) SISK ACT.—Any payment received by the Secretary from the Town under this subsection shall be deposited in the fund established under Public Law 90–171 (commonly known as the “Sisk Act”) (16 U.S.C. 484a) and shall be made available to

the Secretary for the acquisition of land or interests in land in Region 3 of the Forest Service.

(4) TERMS AND CONDITIONS.—The conveyances under this subsection shall be subject to such terms and conditions as the Secretary may require.

(i) MISCELLANEOUS PROVISIONS.—

(1) REVOCATION OF ORDERS; WITHDRAWAL.—

(A) REVOCATION OF ORDERS.—Any public land order that withdraws the Federal land from appropriation or disposal under a public land law shall be revoked to the extent necessary to permit disposal of the land.

(B) WITHDRAWAL.—On the date of enactment of this Act, if the Federal land or any Federal interest in the non-Federal land to be exchanged under subsection (c) is not withdrawn or segregated from entry and appropriation under a public land law (including mining and mineral leasing laws and the Geothermal Steam Act of 1970 (30 U.S.C. 1001 et seq.)), the land or interest shall be withdrawn, without further action required by the Secretary concerned, from entry and appropriation. The withdrawal shall be terminated—

(i) on the date of consummation of the land exchange; or

(ii) if Resolution Copper notifies the Secretary in writing that it has elected to

withdraw from the land exchange pursuant to section 206(d) of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1716(d)).

(C) RIGHTS OF RESOLUTION COPPER.—Nothing in this section shall interfere with, limit, or otherwise impair, the unpatented mining claims or rights currently held by Resolution Copper on the Federal land, nor in any way change, diminish, qualify, or otherwise impact Resolution Copper's rights and ability to conduct activities on the Federal land under such unpatented mining claims and the general mining laws of the United States, including the permitting or authorization of such activities.

(2) MAPS, ESTIMATES, AND DESCRIPTIONS.—

(A) MINOR ERRORS.—The Secretary concerned and Resolution Copper may correct, by mutual agreement, any minor errors in any map, acreage estimate, or description of any land conveyed or exchanged under this section.

(B) CONFLICT.—If there is a conflict between a map, an acreage estimate, or a description of land in this section, the map shall control unless the Secretary concerned and Resolution Copper mutually agree otherwise.

(C) AVAILABILITY.—On the date of enactment of this Act, the Secretary shall file and make available for public inspection in the Office of the Supervisor, Tonto National Forest, each map referred to in this section.

(3) PUBLIC ACCESS IN AND AROUND OAK FLAT CAMPGROUND.— As a condition of conveyance of the Federal land, Resolution Copper shall agree to provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable, consistent with health and safety requirements, until such time as the operation of the mine precludes continued public access for safety reasons, as determined by Resolution Copper.

TREATY WITH THE APACHE

July 1, 1852

At Santa Fe, New Mexico

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.

ARTICLE 1.

Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

ARTICLE 2.

From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the Government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or

powers, who may be at any time at war or enmity with the government or people of said United States.

ARTICLE 3.

Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

ARTICLE 4.

All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

ARTICLE 5.

Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

ARTICLE 6.

Should any citizen of the United States, or other person or persons subject to the laws of the United

States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7.

The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

ARTICLE 8.

In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

ARTICLE 9.

Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10.

For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States

will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

ARTICLE 11.

This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fe, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

E. V. Summer, (SEAL.)
Bvt. Col. U.S.A. commanding Ninth Department In charge of Executive Office of New Mexico.
John Greiner, (SEAL.)
Act. Supt. Indian Affairs, New Mexico.
Capitan Vuelta, his x mark (SEAL.)
Cuentas Azules, his x mark (SEAL.)
Blancito, his x mark (SEAL.)
Negrito, his x mark (SEAL.)
Capitan Simon, his x mark (SEAL.)
Mangus Colorado, his x mark (SEAL.)

Witnesses:
F. A. Cunningham,

Paymaster, U.S.A.
J. C. McFerran,
1st Lt. 3d Inf. Act. Ast. Adj. Gen.
Caleb Sherman.
Fred. Saynton.
Chas. McDougall.
Surgeon, U.S.A.
S. M. Baird.

Witness to the signing of Mangus Colorado:
John Pope, Bvt. Capt. T. E.

USDA
United States Department of Agriculture

FINAL Environmental Impact Statement
Resolution Copper Project and Land Exchange

Volume 1

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Front Cover photo captions:

Top: Map of the Preferred Alternative Project location and the Tonto National Forest

Bottom Left: Oak Flat Federal Parcel

Executive Summary

ES-1. Introduction

This executive summary provides an overview of the final environmental impact statement (FEIS) for the proposed Resolution Copper Project and Land Exchange (herein called the project). The FEIS describes the process undertaken by the U.S. Forest Service (Forest Service), a land management agency under the U.S. Department of Agriculture, to evaluate the predicted effects of and issues related to the submittal of a mining General Plan of Operations (GPO) by Resolution Copper Mining, LLC (Resolution Copper), along with a connected, legislatively

mandated land exchange of Federal and private parcels in southeastern Arizona (figure ES-1).

This Executive Summary does not provide all details contained in the FEIS. Please refer to the FEIS, its appendices, or referenced reports for more information. The FEIS and supporting documents are available on the project website at https://www.ResolutionMineEIS.us/.

ES-1.1 Background

Resolution Copper proposes developing an underground copper mine on unpatented mining claims on National Forest System (NFS) land near the town of Superior in Pinal County, Arizona, approximately 60 miles east of Phoenix. Resolution Copper is a limited liability company that is owned by Rio Tinto (55 percent) and BHP Copper, Inc. (45 percent). Rio Tinto is the managing member.

Resolution Copper has ties to the century-old Magma Mine located in Superior, Arizona. The Magma Mine began production in 1910. In addition to constructing substantial surface facilities in Superior, the Magma Mine created approximately 42 miles of underground workings.

In 1995, the Magma Copper Company discovered a copper deposit about 1.2 miles south of the Magma Mine through exploration of those underground workings. The ore deposit lies between 4,500 and 7,000 feet below the surface.

In 1996, BHP Copper, Inc., acquired the Magma Copper Company, along with the Resolution Copper Mine deposit. Later that year, BHP closed operations

at the Magma Mine, but exploration of the copper deposit continued.

In 2001, Kennecott Exploration, a subsidiary of Rio Tinto, signed an earn-in agreement with BHP, and initiated a drilling program to further explore the deposit. Based on drilling data, officials believe the Resolution Copper Mine deposit to be one of the largest undeveloped copper deposits in the world, with an estimated copper resource of 1,970 billion metric tonnes at an average grade of 1.54 percent copper.

The portion of the Resolution Copper Mine deposit explored to date is located primarily on the Tonto National Forest and open to mineral entry under the General Mining Law of 1872. The copper deposit likely extends underneath an adjacent 760-acre section of NFS land known as the "Oak Flat Withdrawal Area." The 760-acre Oak Flat Withdrawal Area was withdrawn from mineral entry in 1955 by Public Land Order 1229, which prevented Resolution Copper from conducting mineral exploration or other mining-related activities. Resolution Copper pursued a land exchange for more than 10 years to acquire lands northeast of the copper deposit.

In December 2014, Congress authorized a land exchange pending completion of the environmental impact statement (EIS), as outlined in Section 3003 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 (which is referred to as Public Law [PL] 113-291). The exchange parcel to be conveyed to Resolution Copper includes not only the Oak Flat

Withdrawal Area but also the NFS lands above the location of the copper deposit. This collective 2,422-

acre tract of land is known as the "Oak Flat Federal Parcel."

The draft EIS (DEIS) was published for public review and comment in August 2019. The FEIS contains corrections, modifications, and additional analysis in direct response to public comments submitted on the DEIS. Appendix R of the FEIS contains written responses to all public comments received.

ES-1.2 Project Overview

Resolution Copper is proposing to develop an underground copper mine at a site in Pinal County, about 60 miles east of Phoenix near Superior, Arizona. Project components include the mine site, associated infrastructure, a transportation corridor, and a tailings storage facility.

The project would progress through three distinct phases: construction (mine years 1 to 9), operations, also referred to as the production phase (mine years 6 to 46), and reclamation (mine years 46 to 51-56). At the end of operations, facilities would be closed and reclaimed in compliance with permit conditions.

Operational projections are removal of 1.4 billion tons of ore and production of 40 billion pounds of copper using a mining technique known as panel caving. Using this process, a network of shafts and tunnels is constructed below the ore body. Access to the infrastructure associated with the panel caving would be from vertical shafts in an area known as the East Plant Site, which would be developed adjacent to the Oak Flat Federal Parcel. This area would include mine shafts and a variety of surface facilities to support mining operations. This area currently

contains two operating mine shafts, a mine administration building, and other mining infrastructure. Portions of the East Plant Site would be located on NFS lands and would be subject to Forest Service regulatory jurisdiction. Ore processing would take place at the old Magma Mine site in Superior.

Construction of a tailings storage facility would house the waste material left over after processing. The facility disturbance footprint would occupy from 2,300 to 5,900 acres, depending on the location and embankment design. Pipelines would be constructed to transport the tailings waste from the ore processing facility to the tailings storage facility.

The estimated total quantity of external water needed for the life of the mine (construction through closure and reclamation) is substantial and varies by alternative (180,000 to 590,000 acre-feet). Resolution Copper proposes to use water either directly from the Central Arizona Project (CAP) canal and/or groundwater pumped from the East Salt River valley. Over the past decade, Resolution Copper has obtained banked water credits for recharging aquifers in central Arizona; the groundwater pumped would be recovery of those banked water credits, or groundwater use authorized by the State of Arizona under a mineral extraction withdrawal permit.

While all mining would be conducted underground, removing the ore would cause the ground surface to collapse, creating a subsidence area at the Oak Flat Federal Parcel. The crater would start to appear in year 6 of active mining. The crater ultimately would be between 800 and 1,115 feet deep and roughly 1.8 miles across. The Forest Service assessed alternative mining techniques in an effort to prevent subsidence,

but alternative methods were considered unreasonable.

ES-3. Summary of Impacts

ES-3.1 Introduction

Information in chapter 3 of the FEIS describes the natural and human environment that may be affected by the proposed action and its alternatives and discloses the direct, indirect, and cumulative impacts that could occur as a result of implementation of the proposed action or alternatives. The effects of the legislated land exchange are also disclosed in the FEIS. Once the land exchange is completed, Forest Service management regulations would no longer apply on 2,422 acres of the Oak Flat Federal Parcel transferred to Resolution Copper; and 5,460 acres scattered across southeast Arizona would transfer from private ownership into Federal ownership and regulation.

ES-3.2 Geology, Minerals, and Subsidence

This section describes known geological characteristics at each of the major facilities of the proposed mine—including alternative tailings storage locations—and how the development of the project may impact existing cave and karst features, paleontological resources, area seismicity, and unpatented mining claims. It also outlines subsidence impacts that would result from Resolution Copper's plans to extract the ore from below the deposit using a mining technique known as "block caving" or "panel caving." The analysis concludes the following:

- The subsidence zone at the Oak Flat Federal Parcel would break through to the surface at

mine year 6, would be between 800 and 1,115 feet deep, and would be about 1.8 miles in diameter.

- No damage is expected to Apache Leap, Devil's Canyon, or U.S. Route 60 because of the subsidence. The mine is also unlikely to induce seismic activity that would cause damage.
- Some unpatented mining claims not belonging to Resolution Copper are located within the project footprint, and access to these claims may be inhibited.

ES-3.3 Soils and Vegetation

This section explains how the proposed mine would disturb large areas of ground and potentially destroy native vegetation, including species given special status by the Forest Service, and encourage noxious or invasive weeds. The analysis concludes the following:

- Between 9,900 and 17,000 acres of soil and vegetation would be disturbed by the project.
- Revegetation success in these desert ecosystems is demonstrated. However, impacts to soil health and productivity may last centuries to millennia, and the ecosystem may not meet desired future conditions. The habitat may be suitable for generalist wildlife and plant species, but rare plants and wildlife with specific habitat requirements are unlikely to return.
- Arizona hedgehog cactus (endangered) may be impacted during operations at the East Plant Site, by ground subsidence, and by the pipeline/power line corridor for Alternative 6.

The pipeline corridor associated with Alternative 5 would impact critical habitat for acuña cactus (endangered).

- Reclamation of disturbed areas would decrease but not eliminate the likelihood of noxious weeds becoming established or spreading.

ES-3.7 Water Resources

This section analyzes how the Resolution Copper Project could affect water availability and quality in three key areas: groundwater quantity and groundwater-dependent ecosystems (GDEs); groundwater and surface water quality; and surface water quantity. The analysis concludes the following:

- Impacts to between 18 and 20 GDEs are anticipated. Six of these are springs that are anticipated to be impacted by groundwater drawdown under the no action alternative as a result of ongoing dewatering by Resolution Copper. When block-caving occurs, groundwater impacts expand to overlying aquifers, and two more springs are impacted. Direct disturbance within the project footprint would impact another six to nine springs or ponds. Depending on the alternative, GDEs associated with Queen Creek, Devil's Canyon, and the Gila River would be impacted as a result of reductions in surface runoff. The loss of water would be mitigated for some GDEs, but impacts to the natural setting would remain.
- Groundwater supplies in Superior and Top-of-the-World could be impacted by groundwater drawdown but would be replaced through mitigation.

- Over the mine life, 87,000 acre-feet of water would be pumped from the mine, and between 180,000 and 590,000 acre-feet of makeup water would be pumped from the Desert Wellfield in the East Salt River valley. Alternative 4, which uses filtered (dry-stack) tailings, requires the least amount of makeup water. The wellfield pumping would incrementally contribute to the lowering of groundwater levels and cumulatively reduce overall groundwater availability in the area.
- After closure, the reflooded block-cave zone could have poor water quality. However, a lake in the subsidence zone is not anticipated, and no other exposure pathways exist for this water.
- Stormwater runoff could have poor water quality, but under normal conditions no stormwater contacting tailings or facilities would be released during operations or post-closure until reclamation is successful. For some combination of extreme storms (300-year return period or greater) and operational upset conditions, stormwater could be released over the spillway of the seepage pond.
- All of the tailings facilities would lose seepage with poor water quality to the environment, and all are dependent on a suite of engineered seepage controls to reduce this lost seepage. Modeling indicates that seepage from Alternatives 2 and 4 would result in water quality problems in Queen Creek; Alternative 3 would not, but requires highly efficient seepage control to achieve this (99.5 percent capture). Seepage from Alternatives 5 and 6 does not

result in any anticipated water quality problems. These two alternatives also have substantial opportunity for additional seepage controls if needed.

- There would be a reduction in average annual runoff as a result of the capturing of precipitation by the subsidence zone and tailings facilities, varying by alternative: 3.5 percent at the mouth of Devil's Canyon, between 6.5 and 8.9 percent in Queen Creek at Whitlow Ranch Dam, and between 0.2 and 0.5 percent in the Gila River. Alternative 4 also would result in an almost 20 percent loss of flow in Queen Creek at Boyce Thompson Arboretum.
- Under the Clean Water Act, Alternatives 2, 3, and 4 impact zero acres of jurisdictional waters, based on a decision by the USACE that no such waters exist above Whitlow Ranch Dam. Alternative 5 directly impacts about 180 acres, and Alternative 6 directly impacts about 130 acres of potentially jurisdictional waters.

ES-3.8 Wildlife and Special Status Wildlife Species

This section describes how impacts to wildlife can occur from habitat loss and fragmentation, as well as from artificial lighting, noise, vibration, traffic, loss of water sources, or changes in air or water quality. The analysis concludes the following:

- Habitat would be impacted in the analysis area for about 50 special status wildlife species. General impacts include a high probability of mortality or injury with vehicles or from grading, increased stress due to noise,

vibration, and artificial light, and changes in cover. Changes in behavior include changes in foraging efficiency and success, changes in reproductive success, changes in growth rates of young, changes in predator–prey relationships, increased movement, and increased roadkill.

- There would be loss and fragmentation of movement and dispersal habitats from the subsidence area and tailings storage facility. Ground-clearing and consequent fragmentation of habitat blocks for other mine-related facilities would also inhibit wildlife movement and increase edge effects.
- For Tonto National Forest and BLM sensitive wildlife species, the proposed project may adversely impact individuals but is not likely to result in a loss of viability in the analysis area, nor is it likely to cause a trend toward Federal listing of these species as threatened or endangered.
- The general removal of vegetation, increased activity, and potential changes in streamflow and associated riparian vegetation along Devil's Canyon could impact the yellow-billed cuckoo (threatened); during consultation under Section 7 of the Endangered Species Act, USFWS concurred that the project may affect, but will not likely adversely affect, the yellow-billed cuckoo and proposed critical habitat.
- The pipeline crossings of the Gila River under Alternative 5, including removal of vegetation and increased activity, could impact southwestern willow flycatcher (endangered).

- Critical habitat for Gila chub (endangered) occurs in Mineral Creek above Devil's Canyon. No individuals have been identified here during surveys, and this area is not anticipated to be impacted by groundwater drawdown. During consultation under Section 7 of the Endangered Species Act, USFWS concurred that the project may affect, but will not likely adversely affect, the Gila chub and designated critical habitat.

ES-3.9 Recreation

This section quantifies, when possible, anticipated changes to some of the area's natural features and recreational opportunities as a result of infrastructure development related to the project. The analysis concludes the following:

- Public access (Tonto National Forest, Arizona State Land Department, and BLM lands) would be eliminated on 7,500 to 14,300 acres. Alternatives 2, 3, and 4 would result in 7,200 to 7,800 acres of access lost on Tonto National Forest land. Alternative 5 would primarily impact access to 2,600 acres of Tonto National Forest Land and 7,000 acres of BLM land, as well as 4,600 acres of Arizona State land, and Alternative 6 would primarily impact access to 10,700 acres, of which 8,200 acres is Arizona State land.
- There would be changes to the recreation opportunity spectrum acres within the Globe Ranger District, ranging from less than 1 percent of semi-primitive non-motorized, up to 3 percent of semi-primitive motorized, and less than 1 percent of roaded natural.

ES-3.11 Scenic Resources

This section addresses the existing conditions of scenic resources (including dark skies) in the area of the proposed action and alternatives. It also addresses the potential changes to those conditions from construction and operation of the proposed project. The analysis concludes the following:

- All tailings facilities would be visible from long distances, and the change in contrast caused by land disturbance and vegetation removal, dust, and equipment would strongly impact viewers, including recreationists on scenic highways.
- Alternatives 2 and 3 would impact Arizona Trail users and off-highway vehicle users, as would Alternative 4. Alternative 4 would be the tallest facility when viewed (1,000 feet in height). It would dominate the scene and be viewable from sensitive locations (like Picketpost Mountain). Alternative 5 would also be highly visible and would impact Arizona Trail and off-highway vehicle users. Alternative 6 would be visible from within the valley of Dripping Spring Wash but otherwise would not be as visible on the landscape as the other alternatives.

ES-3.12 Cultural Resources

This section analyzes potential impacts on all known cultural resources within the project area. The analysis concludes the following:

- The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently

damaged by the subsidence area at the Oak Flat Federal Parcel.

- All alternative areas would have 100 percent pedestrian surveys prior to ground disturbance; the majority of surveys have been completed. Any remaining acreage slated for ground disturbance or land sale would be inventoried per the Programmatic Agreement, and cultural sites identified and addressed in accordance with the Programmatic Agreement. From surveyed areas, the number of NRHP-eligible sites are as follows: Alternatives 2 and 3—120 eligible sites and 18 sites of undetermined eligibility would be directly affected, and 62 sites indirectly affected; Alternative 4—145 NRHP-eligible sites, 2 sites of undetermined eligibility would be directly affected, and 58 sites would be indirectly affected; Alternative 5—154 NRHP-eligible sites, 3 sites of undetermined eligibility would be directly affected, and 77 sites would be indirectly affected; and Alternative 6—377 NRHP-eligible sites, 3 sites of undetermined eligibility would be directly affected, and 58 sites would be indirectly affected.

ES-3.13 Socioeconomics

This section examines the social and economic impacts on the quality of life for neighboring communities near the proposed mine. The analysis concludes the following:

- On average, the mine is projected to directly employ 1,434 workers, pay about $149 million per year in total employee compensation, and

purchase about $490 million per year in goods and services. Including direct and multiplier effects, the proposed mine is projected to increase average annual economic value added in Arizona by about $1.2 billion.

- The proposed mine is projected to generate an average of between $80 and $120 million per year in State and local tax revenues and would also produce substantial revenues for the Federal Government, estimated at more than $200 million per year. There would be a loss of hunting revenue as a result of the tailings storage facilities. The loss would be highest in the Superior area with Alternatives 2, 3, and 4.
- Construction and operations of the proposed mine could affect costs for both the Town of Superior and Pinal County to maintain street and road networks and could strain public services. A number of agreements between Resolution Copper and the Town of Superior would offset impacts to quality of life, education, and emergency services.
- Property values are expected to decline in close proximity to the tailings storage facilities.

ES-3.14 Tribal Values and Concerns

This section discusses the high potential for the proposed mine to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource gathering localities, burial locations, and other places and experiences of high spiritual and other value to tribal members.

No tribe supports the desecration/destruction of ancestral sites. Places where ancestors have lived are considered alive and sacred. It is a tribal cultural imperative that these places should not be disturbed or destroyed for resource extraction or for financial gain. Continued access to the land and all its resources is necessary and should be accommodated for present and future generations. Participation in the design of this destructive activity has caused considerable emotional stress and brings direct harm to a tribe's traditional way of life; however, it is still deemed necessary to ensure that ancestral homes and ancestors receive the most thoughtful and respectful treatment possible.

- Oak Flat is a sacred place to the Western Apache, Yavapai, O'odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples.
- Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP. One or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, likely would be lost. Other unspecified mineral or plant collecting locations and culturally important landscapes are also likely to be affected.
- Dewatering likely would impact between 18 and 20 GDEs, mostly sacred springs. Although mitigation would replace water, impacts to the natural setting of these places would remain.

- Burials are likely to be impacted. The numbers and locations of burials would not be known until such sites are detected as a result of project-related activities.

ES-3.15 Environmental Justice

This section examines issues in the context of the Resolution Copper Project and Land Exchange that have the potential to harm vulnerable or disadvantaged communities. The analysis concludes the following:

- There are four environmental justice communities in the area, as well as eight Native American communities, that would be impacted by cultural impacts described above. Impacts considered both high and disproportionate on environmental justice communities include impacts to scenic resources and dark skies, impacts to transportation networks, and impacts associated with tribal values and cultural resources. The town of Superior would experience the most direct impacts.

Chapter 1. Purpose of and Need for Action

1.1 Introduction

The U.S. Forest Service (Forest Service) is a land management agency under the U.S. Department of Agriculture. The Forest Service's mission is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. The Tonto National Forest, a unit of the Forest Service located in south-central Arizona, prepared this environmental impact statement (EIS) to disclose the potential

environmental effects of the Resolution Copper Project and Land Exchange (project). The project includes (1) the Southeast Arizona Land Exchange (land exchange), a congressionally mandated exchange of land between Resolution Copper Mining, LLC[1] (Resolution Copper) and the United States; (2) approval of the "General Plan of Operations" (GPO)[2] for any operations on National Forest System (NFS) land associated with a proposed large-scale underground mine (Resolution Copper Project); and (3) amendments to the "Tonto National Forest Land and Resource Management Plan" (forest plan) (1985, as amended).

Resolution Copper is a limited liability company that is owned by Rio Tinto (55 percent) and BHP (45 percent). Rio Tinto is the managing member. In November 2013, Resolution Copper submitted a proposed GPO to the Forest Service for development and operation of a large-scale mine near Superior, Arizona (figure 1.1-1).[3] The proposed GPO sought

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[1] Resolution Copper Mining, LLC, is a U.S. corporation registered in Delaware.

[2] The GPO, as amended, is available online at http://www.resolutionmineeis.us/eis-documents, and at the Tonto National Forest Supervisor's Office, 2324 East McDowell Road, Phoenix, AZ 85006.

[3] The maps contained in this EIS are based on a variety of sources of electronic and geographic data. Every effort has been made to ensure the correctness of these data coverages; however, the U.S. Department of Agriculture Forest Service makes no warranty, expressed or implied, about the accuracy, reliability, completeness, or utility of geospatial data not developed specifically for the Resolution Copper Project and Land Exchange EIS.

authorization for surface disturbance on NFS lands for mining operations and processing of copper and molybdenum. The proposed mine would be located in the Globe and Mesa Ranger Districts. The Forest Service determined the proposed GPO to be complete in December 2014 (U.S. Forest Service 2014c). As proposed in the GPO, the mining portion of the project would occur on a mixture of private, State, and NFS lands.

Overview

On March 18, 2016, the Tonto National Forest issued a Notice of Intent to prepare an environmental impact statement for the Resolution Copper Project and Land Exchange.

Three separate but related components are analyzed in the EIS:

- Approval of a proposed mine plan governing surface disturbance on NFS lands outside of the exchange parcels from mining operations that are reasonably incident to extraction, transportation, and processing of copper and molybdenum that was submitted to the Tonto National Forest in November 2013
- An exchange of the Oak Flat Federal Parcel (2,422 acres of NFS land) for eight parcels located throughout Arizona (5,344* acres of Resolution Copper land)
- Approval of an amendment to the Tonto National Forest Plan, if needed.

* Resolution Copper increased the offered parcel by an additional 32 acres of privately held land that is adjacent to the 110 acres presented in PL 113-291 as

part of the Apache Leap Special Management Area. The additional land was provided to allow for a more contiguous parcel and for ease of surveying.

However, in December 2014, Congress passed the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015 (which is referred to as Public Law [PL] 113-291 in this final EIS [FEIS]). Section 3003 of PL 113-291 (appendix A) authorizes and directs the Secretary of Agriculture to administer an exchange of NFS lands, which would convey 2,422 acres of NFS land in the area of the proposed mine to Resolution Copper in exchange for approximately 5,344 acres[4] of private land on eight parcels located elsewhere in eastern Arizona (see section 1.4.2).

The offered private lands would be transferred from Resolution Copper to the United States, to be administered by the Forest Service and the U.S. Department of the Interior Bureau of Land Management (BLM). Upon completion of the land exchange, it is expected that one of the largest copper mines in the United States would be established on the exchange parcel, with an estimated surface disturbance of 6,951 acres[5] (approximately 11 square miles). It would also be one of the deepest mines in the

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[4] Resolution Copper increased the offered parcel by an additional 32 acres of privately held land that is adjacent to the 110 acres presented in PL 113-291 as part of the Apache Leap Special Management Area. The additional land was provided to allow for a more contiguous parcel and for ease of surveying.

[5] This acreage includes a number of different facilities. See section 2.2.4 for full details.

United States, with mine workings extending 7,000 feet beneath the surface.

Section 3003 of PL 113-291 explicitly requires the Secretary of Agriculture to prepare an EIS prior to conveying the Federal land. This EIS shall be used as the basis for all decisions under Federal law related to the proposed mine, the GPO, and any related major Federal actions, including the granting of permits, rights-of-way, or the approvals for construction of associated power, water, transportation, processing, tailings, waste disposal, or other ancillary facilities.

Section 3003 of PL 113-291 requires this EIS to assess the effects of mining and related activities on such cultural and archaeological resources that may be located on the NFS lands conveyed to Resolution Copper, and identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources, if any. The Secretary of Agriculture is further directed to engage in government-to-government consultation with affected Indian Tribes regarding issues of concern to the affected tribes related to the land exchange and, following such consultation, consult with Resolution Copper and seek to find mutually acceptable measures to address affected tribes' concerns and "minimize the adverse effects on the affected Indian Tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper" (see 16 United States Code [U.S.C.] 539p(c)(3)).

1.1.1 Document Structure

The Tonto National Forest prepared this EIS in compliance with the National Environmental Policy Act (NEPA) and other relevant Federal and State laws

and regulations. This EIS discloses the direct, indirect, and cumulative environmental impacts that would result from the proposed action and alternatives.

This document has four volumes: volume 1, which contains an executive summary and chapters 1, 2, and the first portion of chapter 3; volume 2, which contains the remainder of chapter 3 and chapters 4-8; and volumes 3 and 4, which contain appendices. The general contents of each volume follow.

The land surface overlying the copper deposit is located in an area that has a long history of use by Native Americans, including the Apache, O'odham, Puebloan, and Yavapai people currently represented by the following federally recognized tribes: Fort McDowell Yavapai Nation, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, Pueblo of Zuni, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe. The Forest Service maintains formal and informal consultations with these tribes and other interested and affected parties to better understand the historical, cultural, and religious importance of the area.

1.3 Purpose of and Need for Action

The purpose of and need for this project is twofold:

1. To consider approval of a proposed mine plan governing surface disturbance on NFS lands outside of the exchange parcels from mining operations that are reasonably incident to extraction, transportation, and processing of copper and molybdenum.

2. To disclose the effects of the exchange of lands between Resolution Copper and the United States as directed by Section 3003 of PL 113-291.

The role of the Forest Service under its primary authorities in the Organic Administration Act, Locatable Minerals Regulations (36 Code of Federal Regulations (CFR) 228 Subpart A), and the Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources and comply with all applicable environmental laws. The Forest Service may also impose reasonable conditions to protect surface resources. Through the Mining and Mineral Policy Act, Congress has stated that it is the continuing policy of the Federal Government, in the national interest, to foster and encourage private enterprise in

- the development of economically sound and stable domestic mining, minerals, and metal and mineral reclamation industries; and
- the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help ensure satisfaction of industrial, security, and environmental needs.

The Southeast Arizona Land Exchange and Conservation Act was included in a large public lands package containing 68 bills which was amended to the NDAA during the 113th Congress. The NDAA was signed into law by President Obama on December 19, 2014. Under the Southeast Arizona Land Exchange and Conservation Act, Resolution Copper would receive 2,422 acres of Federal land at the site of the future underground copper mine in exchange for 5,376

acres of privately owned conservation and recreation lands throughout Arizona after the completion of a FEIS. While the mine itself would be located on private land after the exchange is completed, ancillary mining operations would need to occur on NFS land, and possibly other Federal and non-Federal land, outside of the exchange parcel.

1.4 Proposed Action

The proposed action consists of (1) approval of a mining plan of operations on NFS land associated with a proposed large-scale mine, which would be on private land after the land exchange, (2) the land exchange between Resolution Copper and the United States as directed under PL 113-291, (3) amendment of the forest plan, if needed, and (4) mitigations to offset impacts from the proposed project.

It should be noted that the proposed action is one of several alternatives considered in the EIS. The proposed action should not be confused with the preferred alternative. The preferred alternative is identified in the executive summary and chapter 2 and is the agency's preference for implementation based on the alternatives evaluated and the current analysis.

1.4.1 General Plan of Operations

The following is a brief summary of the mining proposal components. A detailed description of the GPO can be found in section 2.2.2.2. The complete GPO is available on the project website, www.ResolutionMineEIS.us.

Resolution Copper proposes to conduct underground mining of a copper-molybdenum deposit located 4,500 to 7,000 feet below the ground surface

within the exchange parcel. Resolution Copper estimates that the mine would take approximately 10 years to construct, would have an operational life of approximately 41 years, and would be followed by 5 to 10 years of reclamation activities.

The mining operation would include the following facilities and activities analyzed in the EIS, which would be conducted on a mixture of NFS, private, and State lands:

- The mining itself would take place under the Oak Flat Federal Parcel, which is to be transferred to Resolution Copper pursuant to Section 3003 of PL 113-291. Mining would use an underground mining technique known as panel caving. Resolution Copper would use this process to construct a network of shafts and tunnels below the ore body. They would access the tunnels from vertical shafts in an area known as the East Plant Site. The panel caving technique fractures ore with explosives; gravity moves the ore downward, and then Resolution Copper removes it from below the ore deposit. As the ore moves downward and is removed, the land surface above the ore body also moves downward or "subsides." Analysts expect a "subsidence" zone to develop near the East Plant Site; there is potential for downward movement to a depth between 800 and 1,115 feet. Resolution Copper projects the subsidence area to be up to 1.8 miles wide at the surface.
- An area known as the East Plant Site would be developed adjacent to the Oak Flat Federal Parcel. The East Plant Site is the location of the Magma Mine #9 Shaft and #10 Shaft and

associated surface mining support facilities. This area would include mine shafts and a variety of surface facilities to support mining operations. This area currently contains two operating mine shafts, a mine administration building, and other mining infrastructure. Existing roads would provide access to the mine. Magma Mine Road would eventually be relocated as a result of the expected subsidence.[6]

- Resolution Copper would crush the mined ore underground and then transport it underground approximately 2.5 miles west to an area known as the West Plant Site. There, operations would process the ore to produce copper and molybdenum concentrates. The West Plant Site is the location of the old Magma Mine processing and smelter facilities in Superior. Portions of the West Plant Site would be located on NFS lands and would be subject to Forest Service regulatory jurisdiction. A flotation process would process the ore; no heap leach processing is proposed.
- The molybdenum concentrate would then be dried, bagged, and transported to market from the West Plant Site.

[6] A full description of subsidence can be found in section 2.2.2.2.

1.5.7 Financial Assurance for Closure and Post-closure Activities

1.5.7.1 Forest Service

The Forest Service mission of promoting healthy and resilient forests and grasslands is a key component for ensuring that the lands and resources the Forest Service manages are available for future generations. Mineral development on NFS lands is a temporary use of those lands, although some uses like tailings storage facilities are permanent and remain part of the landscape in perpetuity. Reclamation of mining sites is an integral part of all mine plans considered by the Forest Service, as is the requirement that adequate fiscal resources be available to ensure that reclamation can be conducted.

The primary authority for the Forest Service to require financial assurance is contained in the locatable mineral regulations (36 CFR 228 Subpart A). These include the requirement for a plan of operations to include provisions for reclamation: "The plan of operation shall include . . . measures to be taken to meet the requirements for environmental protection. . . ." (36 CFR 228.4). The regulations include specific requirements for financial assurance: "Any operator required to file a plan of operations shall, when required by the authorized officer, furnish a bond conditioned upon compliance with 228.8(g), prior to approval of such plan of operations" (36 CFR 228.13). The amount of financial assurance is also addressed by regulation: "In determining the amount of the bond, consideration would be given to the estimated cost of stabilizing, rehabilitating, and reclaiming the area of operations" (36 CFR 228.13b).

Reclamation and financial assurance requirements are summarized in Forest Service guidance (U.S. Forest Service 2004), which notes that while in the past long-term maintenance, monitoring, and interim management have not been included in bonding or financial assurance estimates, it is now accepted practice to include these items. The Forest Service guidance notes that: "A basic premise of the estimate is that the operator is not available to complete the reclamation and the Forest Service would need to do the reclamation work" (U.S. Forest Service 2004).

However, funding of long-term maintenance and monitoring has always posed a logistical problem, because of the long time frames that would be required. In 2015, the Forest Service issued guidance for establishment of long-term trusts for future large mines, with the intent of eliminating the growing mine-related liabilities on NFS lands (U.S. Forest Service 2015a). The guidance allows the Forest Service to accept trust accounts from operators of large mines by establishing a trust with the Forest Service as a benefactor to address long-term liabilities such as water treatment, dam maintenance, and care and maintenance of infrastructure, which may be required for many years (or centuries) beyond a planned or unplanned mine closure. Use of a long-term trust is one method that will be considered to provide fiscal resources to ensure maintenance and monitoring that extend beyond the closure of the mine.

More detail on financial assurances specific to individual resources can be found in Section 3.3, Soils, Vegetation, and Reclamation; and Section 3.7.2, Groundwater and Surface Water Quality.

The above discussion is specific to the Forest Service mineral regulations (36 CFR 228 Subpart A). If the project pipelines and utilities are instead approved under special use regulations (36 CFR 251), a different regulatory framework would be used for financial assurances. The special use authorization would incorporate terms and conditions (36 CFR 251.56), including minimizing damage to the environment, protecting the public interest, and requiring compliance with water and air quality standards. Pursuant to 36 CFR 252.56(e), the Forest Service may require the holder to furnish a bond or other security to secure all or any of the obligations imposed by the terms of the authorization or by any applicable law, regulation, or order.

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other consulting parties. The PA outlines the roles and responsibilities of parties, the procedure for identification and evaluation of historic properties, assessment for effects, and each party's responsibilities for resolving adverse effects from the project. Several versions of the PA were sent out to the consulting parties, including the tribes, for review and comment. Comments were received and incorporated into each new draft of the PA. In addition, the Forest Service held meetings with the tribes to discuss the PA on October 28 and 29, 2019. The final version of the PA circulated for signature is included as appendix O of the FEIS.

The Section 106 process is described in more detail in Section 3.12 Cultural Resources of the FEIS, as well as in Chapter 5 Consulted Parties.

1.7 Issues

Issues serve to highlight effects or unintended consequences that may occur from the proposed action and alternatives, giving opportunities during the analysis to reduce adverse effects and compare trade-offs. Issues help set the scope of the actions, alternatives, and effects to consider in our analysis (FSH 1909.15.12.4) (U.S. Forest Service 2012a).

Comments submitted during the scoping period were used to formulate issues concerning the proposed action. Issues are statements of cause and effect, linking environmental effects to actions (FSH

1909.15.12.41) (U.S. Forest Service 2012a). The EIS ID team separated the issues into two groups: significant and non-significant. Significant issues were defined as those directly or indirectly caused by implementing the proposed action. Non-significant issues as identified by CEQ regulations include issues that are outside the scope of the proposed action; already decided by law, regulation, forest plan, or other higher level decision; irrelevant to the decision to be made; or conjectural and not supported by scientific or factual evidence.

The CEQ NEPA regulations state that the EIS should "identify and eliminate from detailed study the issues which are not significant, or which have been covered by prior environmental review (Sec. 1506.3)." A list of non-significant issues and reasons regarding

their categorization as nonsignificant may be found in the project record.[12]

While completing the EIS analysis, some factors and issues formulated during scoping were modified to accurately analyze the resource impacts. Appendix E, Table E-1, Alternatives Impact Summary, documents the issues and issue factors used or modified during the EIS analysis.

The following issue summaries represent brief synopses of the 14 major project issues that were developed from input provided by agencies, tribes, stakeholders, and the public during scoping for this EIS. Many of the identified primary issues were then subdivided into detailed sub-issues in an effort to more fully and accurately capture the concerns expressed. The complete listing of primary issues and sub-issues is included in Appendix E, Table E-1, Alternatives Impact Summary, as well as in the "Resolution Copper Project and Land Exchange Environmental Impact Statement: Final Summary of Issues Identified Through Scoping Process" (Issues Report), available at https://www.resolutionmineeis.us/documents/usfs-tonto-issues-report-201711.

1.7.1 Issue 1 – Tribal Values and Concerns

Tribes are concerned about current and future adverse effects on area resources from the Resolution Copper Project, as well as other ongoing mining, transportation, energy transmission, pipeline, and other developments in and around the Superior

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[12] See "Resolution Copper Project and Land Exchange Environmental Impact Statement FINAL Summary of Issues Identified Through Scoping Process" (U.S. Forest Service 2017i).

region. These affected resources may include physical resources such as access routes, air, groundwater and surface water, plant and animal life, and landscapes, as well as less tangible attributes such as sense of place; sense of historical, spiritual, religious, and tribal identity; opportunities for solitude; and opportunities to continue traditional cultural practices and ceremonies.

1.7.2 Issue 2 – Socioeconomics

Construction and operation of the Resolution Copper Project would result in substantial economic and "quality of life" changes—both beneficial and adverse—in the greater Superior area. A large influx of workers to the area would lead to greater demands for housing and capacity pressures on local schools, hospitals, and other medical service providers, as well as on municipal infrastructure such as roads, water and sewer systems, and electrical and communications systems. Conversely, this same influx of workers would contribute to greater retail spending on goods and consumer services in the area and to increased tax revenues to local, county, and state governments. Residential and commercial property values may increase for some but decline for those whose properties are considered negatively affected by proximity to mine facilities (such as the tailings storage area). Some qualities of rural life may be diminished through increased traffic and a possible decrease in local recreational opportunities.

1.7.3 Issue 3 – Environmental Justice

Economic benefits may not be experienced by all sectors of society equally; historically, minority and low-income communities (including tribal

communities) in a given area tend to accrue less benefit from large-scale land development and mining projects than the population of the area as a whole. In addition, it is possible that minority and low-income communities may be disproportionately affected by adverse environmental effects, potentially including greater risks to human health and safety.

1.7.4 Issue 4 – Cultural Resources

Construction and operation of the mine would profoundly and permanently alter the NRHP-listed *Chí'chil Biłdagoteel* (Oak Flat) Historic District Traditional Cultural Property (TCP) through anticipated largescale geological subsidence. Linear facilities, including new pipelines, power lines, and roads, as well as other facilities such as electrical substations, would also be constructed in support of mine operations. In addition, development of the proposed tailings storage facility at any of the four proposed or alternative locations would permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials. Disturbance of known or unknown cultural resources is an impact that is important to many tribes, regardless of whether data recovery is undertaken. Under the terms of the land exchange, the Oak Flat Federal Parcel would leave Forest Service jurisdiction. Historic properties leaving Federal management is considered an adverse effect.

1.7.5 Issue 5 – Public Health and Safety

Construction and ongoing operation of the mine may have a variety of adverse effects on public health and safety. These concerns have focused principally on possible risks of breach or other failure of the tailings

facility embankment; emissions and negative effects on air quality; possible seepage from or other contamination related to the tailings facility fouling local groundwater supplies; the potential for hazardous material/chemical spills; conflicts between mine-related haul truck and employee vehicles and residential traffic (including pedestrians); possible safety issues resulting from the anticipated subsidence in the Oak Flat area; and potentially increased risk of wildfire from mine operations.

1.7.6 Issue 6 – Water Resources

Potential effects on groundwater and surface water resources from construction, operation, closure, and reclamation of the Resolution Copper Mine is a multi-faceted and complex issue. In many ways, groundwater and surface waters are interconnected, and depletions and geochemical or other alterations of one are likely to affect the other, as well as to affect water-dependent resources such as vegetation and wildlife.

This issue is further complicated by the highly complex geological setting in which the Resolution Copper Mine would be constructed, which would be permanently altered by large-scale ore removal and geological subsidence. The resulting 7,000-foot-deep area of fractured rock and approximately 1.8-milewide subsidence area at the surface of Oak Flat, together with ongoing mine dewatering, would be likely over time to result in measurable reductions in flows in Devil's Canyon and Queen Creek and the long-term loss of some seeps and springs in the Superior area.

In addition, a tailings storage facility at either the proposed (Near West) location or at any of the three

alternative sites (Silver King, Peg Leg, and Skunk Camp) would, through necessary stormwater management and seepage control practices, reduce the amount of surface water available in that particular watershed. The tailings storage facility also presents risks to the watershed through the potential for contaminants from metals or chemicals in tailings seepage to escape controls and enter groundwater and/or downstream surface waters, thereby potentially threatening riparian areas and other wildlife habitats, human uses, and waters provided to livestock.

1.7.7 Issue 7 – Biological Resources

Mine development has the potential to adversely affect local flora and fauna, including through direct injury or mortality; habitat alteration and loss; habitat fragmentation; reduction in water available to the ecosystem; disturbance by vehicular traffic, increased noise, and increased light; potential exposure to toxic chemicals or other hazardous substances; introduction and/or propagation of noxious or invasive plant species; and curtailed reproduction, pollination, seed dispersal, and other biological processes.

1.7.8 Issue 8 – Air Quality

Construction, ongoing ore recovery and processing, and other related activities at the mine and along transportation and utility corridors would increase dust, airborne chemicals, and transportation-related (mobile) emissions in the area, which has the potential to result in exceedances of one or more established air quality standards.

1.7.9 Issue 9 – Long-term Land Suitability

The mining proposed in the GPO is expected to cause large-scale surface subsidence in the Oak Flat area, eventually resulting in a subsidence area up to 1.8 miles in diameter at the surface and between 800 and 1,115 feet deep. In addition, mine-related ground disturbance from clearing vegetation, grading, and stockpiling soils or equipment or other materials has the potential to compact soils, accelerate erosion, and reduce soil productivity. Damage, disturbance, contamination, or removal of soil may result in a long-term loss of soil productivity, physical structure, and ecological function across the proposed mine site as well as on lands downgradient of mine facilities.

1.7.10 Issue 10 – Recreation

Mine development in the Oak Flat area, including within the anticipated subsidence area and, ultimately, at Oak Flat Campground, would eliminate numerous recreational opportunities in this part of the Tonto National Forest. Much of the area would be fenced off and no longer accessible to hikers, rock climbing enthusiasts, cyclists, equestrians, campers, hunters, and other recreational users of these former public lands.

Mine-related linear facilities such as pipelines, power lines, and development within the MARRCO corridor may also sever connectivity of existing roads and trails and further limit recreational access. In addition, construction of a large tailings storage facility and associated pipeline and power line corridors could directly impact the Arizona National Scenic Trail or alter the user experience. Wherever constructed, the area of such a facility would be closed

to all recreational uses, resulting in displacement of existing recreation in that area to other locations. Similarly, the exchange of the Oak Flat Federal Parcel would reduce the Federal land base available for recreation and alter recreation access.

1.7.11 Issue 11 – Scenic Resources

Construction and operation of the Resolution Copper Mine would, as a result of anticipated geological subsidence at the East Plant Site, permanently alter the topography and scenic character of the Oak Flat area. Development of a proposed tailings storage facility at any of the four alternative locations now being considered would ultimately result in a new and permanent landform approximately 3,200 to 5,800 acres in area (depending on the alternative) and several hundred feet higher than the current landscape, thus forever altering the existing viewsheds. New utility lines and construction of other mine facilities and infrastructure at the West Plant Site, East Plant Site, and filter plant and loadout facility would alter existing viewsheds, although some of these facilities may be removed and the associated areas reclaimed following mine closure. Changes to viewsheds could alter the user experience along scenic highways and the Arizona National Scenic Trail.

1.7.12 Issue 12 – Transportation and Access

Transportation of personnel, equipment, supplies, and materials related to mine development, operation, and reclamation would increase traffic in and around the town of Superior. Increased mine-related traffic on local roads and highways has the potential to impact local and regional traffic patterns, levels of service,

and planned transportation projects and users of NFS roads. Increased mine-associated rail traffic along the MARRCO corridor also has the potential to impact traffic patterns in the local area.

Mine development is likely to result in permanently altered, added, or decommissioned NFS roads or to temporarily restrict access to NFS roads and lands, which could impact recreational users, visitors, and permittees.

1.7.13 Issue 13 – Noise and Vibration

Development, operation, and reclamation of the mine would result in an increase in noise and vibration in the immediate vicinity of mine facilities. Activities that could increase noise and vibration include blasting, underground conveyance of ore, processing operations, operations at the filter plant and loadout facility, and, in the Oak Flat area, episodic land subsidence events. Increases in traffic associated with worker commuting, material delivery, and mine product shipment could also contribute to an overall increase in noise and vibration on area roads and highways.

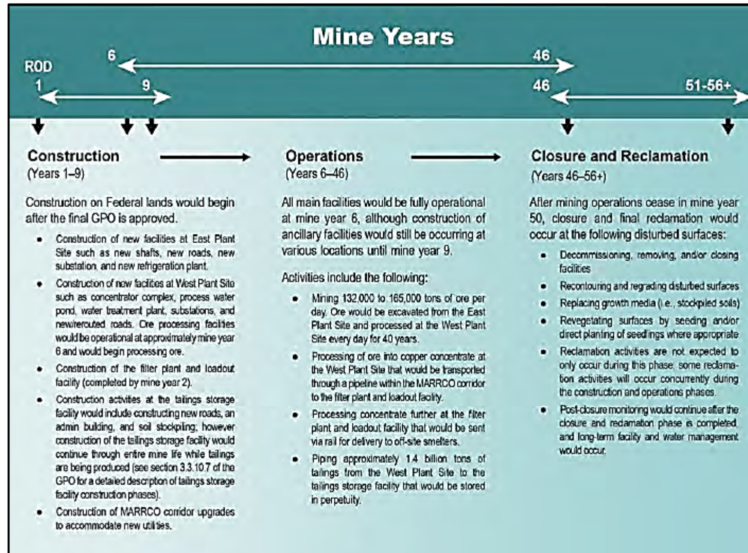

Figure 2.2.2-3. Mine phases, time frames, and mine activities by phase

Mining Process Overview

The Resolution Copper Mine, including all facilities described in this document, would operate 24 hours per day, 365 days per year. Figure 2.2.2-4 shows an overview of the entire mining process that would occur at full operation.

Mining the copper deposit would occur between approximately 4,500 and 7,000 feet below ground. At full operation, underground mining would produce 132,000 to 165,000 tons of ore per day. Ore would be crushed underground before being transported to two production shafts that would hoist the ore to an offloading station approximately halfway to the surface. From the offloading station, a conveyor system would transport the ore underground to the concentrator complex at the West Plant Site, approximately 2.25 miles west of the East Plant Site.

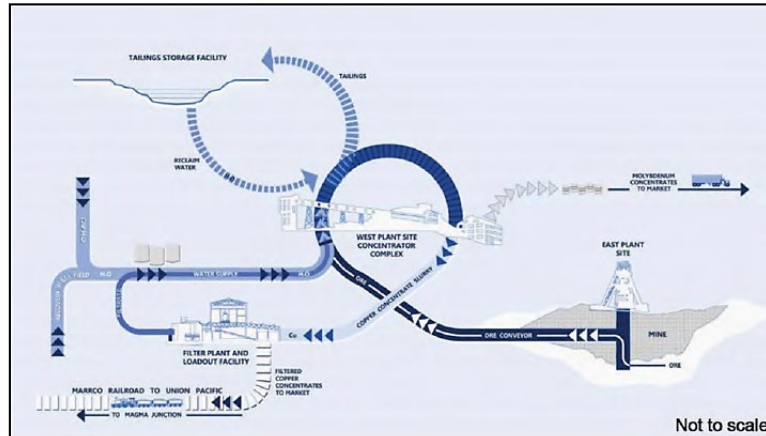

Figure 2.2.2-4. Overview of the mining process at full operation

Once arriving at the concentrator complex, the ore would either be processed right away or stockpiled for future processing at a covered stockpile. The ore would then be conveyed into a concentrator building for additional crushing and grinding to a sand-size fraction and then further processed by flotation, whereby copper and molybdenum minerals are separated from non-economic minerals in a water bath with the addition of air and reagents. This process produces two products: molybdenum concentrate and copper concentrate. The molybdenum concentrate would be sent to the molybdenum plant for additional processing, packaging, and delivery to market via truck. Approximately 24,145 tons of molybdenum concentrate would be produced per year and sent to market during the operations phase. The copper concentrate slurry would be partially dewatered and pumped about 21 miles to the filter plant and loadout facility through two 8-inch high-density polyethylene

(HDPE)-lined steel pipelines that would be located within the MARRCO corridor.

At the filter plant and loadout facility, copper concentrate would be filtered to remove more water and prepared for transport by railcar to Magma Junction for unloading at the Union Pacific Railroad. During the operations phase, between 6,000 and 7,000 wet tons per day of copper concentrate would be produced and sent out for smelting at an off-site smelter. The final smelter destination is unknown at this time. Water recovered during the filter process would be returned to the process water pond at the West Plant Site through the mine's main water supply pipeline in the MARRCO corridor.

The non-economic sand-like material that remains after the ore has been crushed and the copper and other valuable minerals has been extracted is called tailings. Tailings would be sent to a tailings storage facility approximately 4.7 miles west of the West Plant Site through two pipelines (48-inch pipe for NPAG, 24-inch pipe for PAG; reclaimed water would return to West Plant Site in an 18-inch pipe).

Approximately 1.37 billion tons of tailings would be created during the mining process and would be permanently stored at the tailings storage facility. Tailings leaving the processing plant would be split into two separate streams. About 16 percent of the tailings are classified as potentially acid generating,

* * *

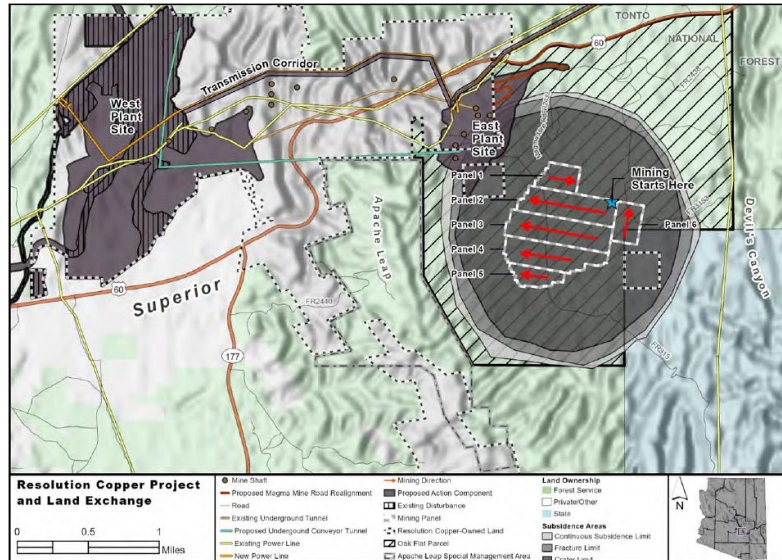

Figure 2.2.2-5. Predicted mining subsidence areas and the East Plant Site area

Operations Processes and Activities

TRANSPORTATION

Each mine facility would have distinct access routes and traffic volumes during the construction, operations, and reclamation and closure phases. For detailed calculations of predicted traffic volumes that would be generated by the mine, including employee traffic, see the "Transportation and Access" resource section in chapter 3. Table 2.2.2-6 summarizes the access roads that would be used for each of the four main facilities and the materials and equipment deliveries that would occur during the construction and operation phases.

Table 2.2.2-6. Existing and proposed mine access roads and traffic

Facility	Access Routes	Construction Phase Materials and Equipment Traffic	Operation Phase Materials and Equipment Traffic	Closure and Post-closure Materials and Equipment Traffic
East Plant Site	Magma Mine Road from U.S. Route 60 (U.S. 60)	Materials deliveries would consist of fuel, underground concrete, underground production consumables, construction steel, other construction materials, and construction concrete. Major process equipment would be delivered over a 4-year period during the construction phase and would consist of crushers, conveyors, rail dump station, locomotives and railcars, ventilation equipment, hoisting equipment, dewatering equipment, and batch plants.	Materials deliveries would consist of fuel, underground concrete, and underground production consumables.	Salvageable equipment, unused chemical reagents, instrumentation, or other salvageable materials would be removed from site. Structures and other facilities would be demolished and/or dismantled and removed from site. Any contamination would be disposed of as appropriate. Replacement of growth media for revegetation would be delivered if not enough found within the footprint or stockpile.
West Plant Site	Main entrance: Rerouted Silver King Mine Road (NFS Road 229) from U.S. 60 and Main Street/Lone Tree (Smeltertown) Road	Materials deliveries would consist of concrete, rebar, structural steel, handrails/stairs, prefabricated buildings, chutes/launders, tanks, pipe, electrical equipment, overhead transmission line, semi-autogenous grinding mills, ball mills, and flotation cells. These shipments would occur during a 3-year period within the construction phase.	Materials deliveries would consist of semi-autogenous mill balls, ball mill balls, regrind mill balls, lime, sodium hydrosulfide, and miscellaneous reagents. Molybdenum concentrate shipments would leave the site daily from the concentrator complex.	Same as East Plant Site
Tailings storage facility	From U.S. 60 at three locations: service road adjacent to tailings pipeline corridor, Hewitt Canyon Road (NFS Road 357), and NFS Road 8	Materials and equipment deliveries would consist of pipe, valves, concrete, asphalt, and structural steel. These shipments would occur during a 3-year period within the construction phase.	Material deliveries would primarily consist of equipment and replacement equipment to operate spigots, recycle barges and pumps, and seepage collection systems.	Same as East Plant Site
Filter plant and loadout facility	East Skyline Road; rail via MARRCO corridor	Materials and equipment deliveries would consist of pipe, valves, concrete, asphalt, and structural steel. These shipments would occur during a 3-year period within the construction phase.	Filtered copper concentrate would be loaded and shipped 7 miles along the MARRCO corridor by rail car to Magma Junction where the rail line meets the Union Pacific Railroad. Final smelter destination is unknown at this time.	Same as East Plant Site

ELECTRICITY SUPPLY AND TRANSMISSION LINES

Electricity is currently supplied to the East Plant Site by an existing 115-kilovolt (kV) SRP transmission line and to the West Plant Site by an existing 500-kV SRP transmission line to existing facility substations. Construction and operation of the proposed mine would require electrical transmission lines between these main facilities to accommodate greater power

needs, as well as new transmission lines to power the new tailings storage facility, new filter plant, and loadout facility. Substations also would need to be upgraded and/or new 230-kV substations would need to be constructed to accommodate electricity from the upgraded lines and distribute the electricity throughout the site (see East Plant Site, West Plant Site, tailings storage facilities, and filter plant and loadout facilities descriptions earlier in this chapter for upgraded/new substation descriptions).

We estimated power use by the mine in the DEIS (Garrett 2019c). Power use ramps up over time and varies slightly by tailings alternative, but during full operations is estimated to be approximately 250 to 280 megawatts (MW). The primary electricity consumers at the mine site would be as follows:

1. The hoist motors at the East Plant Site that raise the ore out of the mine (roughly 20 to 25 percent of total power use), and underground ore flow (roughly 10 to 15 percent of total power use).

2. The ventilation and cooling systems at the East Plant Site for the underground mine (roughly 10 to 15 percent of total power use).

3. The operation of the grinding and flotation machinery at the concentrator complex at the West Plant Site (roughly 40 to 50 percent of total power use).

4. For Alternatives 5 and 6, pumping of tailings to the tailings storage facility (roughly 5 to 10 percent of total power use). Note that Alternatives 2 and 3 use gravity flow to deliver the tailings to the tailings storage facility, and

do not require substantial power for tailings pumping.

5. For Alternative 4, filtering of tailings prior to placement (roughly 5 to 10 percent of total power use).

SRP would provide all electricity used at the mine facilities through the upgraded and new transmission lines. Figure 2.2.2-15 shows the proposed upgraded and new SRP transmission lines that would supply the main facilities with electricity. The Tonto National Forest would use analysis in this EIS to approve any rights-of-way and special use permits needed to construct the upgraded and new power lines.

Public comments received on the DEIS suggested that we underestimated water use for the mine. Based on published water use estimates for other copper mines, commenters suggest that water use for the Resolution Copper project could be as high as 50,000 acre-feet per year, compared to the disclosed values (about 17,000 acre-feet per year). We confirmed that the water use anticipated for Resolution Copper is indeed less than other mines in Arizona; however, commenters failed to account for the differences between these mines (Garrett 2020c). Specifically, the Resolution Copper Project uses thickened tailings ranging from 50 to 65 percent solids, compared to 20 to 50 percent solids in a conventional tailings slurry. The Resolution Copper Project uses less water than other mines since the mine proponent has incorporated enhanced technology (thickening) in order to reduce water use.

Note that in response to public comments on competing water uses, drought, climate change, and

potential water scarcity, we included an expansive discussion of these issues as part of the cumulative effects analysis in chapter 4.

SANITARY AND SOLID WASTE MANAGEMENT

New wastewater treatment plants would be constructed at both the East Plant Site and West Plant Site. Effluent from the East Plant Site wastewater treatment plant would be combined with the mine dewatering system, which would be delivered to the concentrator supply water pipeline for use in the concentrator.

Wastewater from the filter plant and loadout facility would be routed to an on-site septic tank and leach field. Septic solids would be removed and disposed of off-site as needed and in accordance with State laws. Non-hazardous solid waste and special wastes (e.g., petroleum-contaminated soils) generated by any activities at the mine facilities would be disposed of in a manner consistent with applicable local, State, and Federal regulations. Resolution Copper drafted an environmental materials management plan that identifies the disposal method for each anticipated waste (Resolution Copper 2016b). Recycling programs currently used at the East Plant Site and West Plant Site would continue in an effort to reduce waste.

Waste is currently being disposed of and would continue to be disposed of in the following ways:

- Asbestos- and petroleum-contaminated soils waste streams would be managed in accordance with waste-handling protocols and disposed of at an approved waste facility.

- All trash and garbage would be hauled to State-approved landfills. Trash and garbage would be collected on-site in containers before being removed for disposal at permitted landfills. No open burning of garbage and refuse would occur at the project site.
- Wood and inert wastes such as concrete would be buried on-site as part of final closure and reclamation in selected areas in accordance with applicable county, State, and Federal regulations.
- Measures to maintain the general project area in a safe condition in compliance with MSHA safety regulations,
- Measures to manage regulated materials (hazardous materials) in accordance with applicable requirements,
- Measures to maintain access and utilities would continue to function, and
- Plans for managing water systems and maintaining facilities as required by the Stormwater Pollution Prevention Plan (SWPPP), APP, and Arizona Pollutant Discharge Elimination System (AZPDES). Dewatering and treatment of water from the mine infrastructure would continue, and the water would be discharged.

CONCURRENT RECLAMATION

Reclamation completed during operations is termed concurrent reclamation (or sometimes progressive reclamation). Concurrent reclamation differs from interim reclamation in that this

reclamation is designed to provide permanent achievement of reclamation goals and performance standards. Resolution Copper would implement concurrent reclamation of the outer slopes of the tailings storage facility, where practicable, as the operation progresses.

The ability to conduct concurrent reclamation varies by alternative, depending on construction of the tailings storage embankment. These differences among alternatives are explored more in Section 3.3, Soils, Vegetation, and Reclamation.

FINAL RECLAMATION

Final reclamation efforts would occur for a duration of 5 to 10 years after the operations phase. The general steps to be used in reclaiming disturbed areas at the mine are

- decommissioning facilities,
- removing and/or closing structures and facilities,
- recontouring and regrading,
- replacing growth media (i.e., store and release cover design for tailings), and
- seeding and/or direct seedling plantings where appropriate.

The final reclamation efforts that would occur at each of the main facilities are described in the following text.

EAST PLANT SITE CLOSURE AND RECLAMATION

Reclamation at the East Plant Site would consist of salvaging and demolishing all buildings, except for the headframes and hoists, which would be used for post-closure groundwater monitoring. All salvageable and non-salvageable materials would be disposed of off-site. All disturbed surfaces except those needed for long-term monitoring, including paved and graveled areas, would be regraded and reseeded with appropriate local seed mixes. Contact water basins would be closed in accordance with APP requirements. Shaft collars and subcollars would be permanently sealed by an engineered seal.

Reclamation activities would not occur within the subsidence area. There would be a berm and/or fence constructed around the perimeter of the continuous subsidence area. To the extent practicable, surface water diversions would be constructed to divert stormwater away from the subsidence area and into natural drainages.

POWER TRANSMISSION FACILITIES CLOSURE AND RECLAMATION

Power transmission facilities, which include electrical substations, transmission lines, and power centers, may be removed as part of the reclamation program, unless a post-mining use is identified. SRP would continue to own the power lines and may have a post-mining use for ongoing power transmission in the area.

RECLAMATION FINANCIAL ASSURANCE

Resolution Copper would be required to establish and maintain sufficient financial assurance in accordance with requirements from the Forest Service, ASLD, BLM, USACE, the APP program, and the Arizona Mined Land Reclamation Act. The purpose of financial assurance is to ensure that responsible agencies would be able to continue any remaining reclamation activities if Resolution Copper becomes unable to meet reclamation and closure and post-closure obligations under the terms and conditions of the applicable permits and approvals. Under the Arizona Mined Land Reclamation Act, the Arizona State Mine Inspector would receive financial assurance for reclamation and closure activities required on private lands, the Forest Service would receive financial assurance for reclamation and closure activities on lands managed by the Forest Service previously described in section 1.5.5, and BLM would receive financial assurance for reclamation and closure activities on BLM-managed lands. USACE would receive financial assurance for compensatory mitigation activities. The APP program would receive financial assurance for reclamation and closure activities for facilities that have the potential to discharge water into the groundwater (tailings storage facility, process ponds, and stormwater ponds), regardless of the facility's location on private or NFS lands.

2.2.3 Alternative 1 – No Action Alternative

Under the no action alternative, current management plans would continue to guide management of the project area. The Forest Service would not approve the GPO, none of the activities in

the final GPO would be implemented on NFS lands, and the mineral deposit would not be developed. However, note that certain activities are currently taking place on Resolution Copper private property, such as reclamation of the historic Magma Mine; exploration; monitoring of historic mining facilities such as tailings under existing State programs and permits; maintenance of existing shaft infrastructure, including dewatering; and water treatment and piping of treated water along the MARRCO corridor to farmers for beneficial use. These types of activities would be expected to continue, regardless of approval of the GPO. These activities are therefore assumed to occur in the no action alternative (Garrett 2018d). This alternative is required by regulation (40 CFR 1502.14(d)).

The no action alternative includes the following:

- The final GPO would not be approved, thus, none of the activities in the final GPO would be implemented, and the mineral deposit would not be developed;
- The land exchange would not take place;
- Certain ongoing activities on Resolution Copper private land, such as reclamation of the historic Magma Mine, exploration, monitoring of historic mining facilities such as tailings under existing State programs and permits, maintenance of existing shaft infrastructure, including dewatering, and water treatment and piping of treated water along the MARRCO corridor to farmers for beneficial use, would continue regardless of GPO approval;

- Ongoing trends not related to the proposed project would continue, such as population growth, ongoing impacts on air quality from fugitive dust and vehicle emissions, human-caused fires from recreation, ranching, and a corresponding increase in use of public lands; and
- No agency land and resource management plans would be amended for this project.

2.2.3.1 Need for Inclusion of Land Exchange in Document

PL 113-291 directs the Forest Service to prepare a single EIS prior to the final execution of the land exchange to serve as the basis for all Federal decisions related to the proposed mine. The proposed action and action alternatives analyzed in detail in chapter 3 therefore assume that the land exchange would occur as directed by Congress; for this reason, it is included as a component common to all action alternatives (see section 2.2.2.1).

However, even though directed by Congress, the land exchange remains a discretionary decision on the part of Resolution Copper, which may or may not choose to undertake the exchange after receipt of the appraised value. It is possible that mining under the proposed action or action alternatives could also take place without the land exchange occurring. The single EIS must therefore allow for a comparison of potential impacts of mining that occurs on land remaining in Federal ownership with potential impacts that would occur following the land exchange. Whether the land exchange occurs or not, the mine would be developed in accordance with the Federal, State, and local laws

governing mining operations. However, these laws could differ, depending on whether or not a land exchange occurred.

The no action alternative provides one baseline against which the proposed action and action alternatives may be compared. The no action alternative assumes no land exchange and no Forest Service approval of a GPO. This baseline allows a direct comparison of the effects of most of the mining impacts that would occur from the proposed action and action alternatives. However, the no action alternative is not sufficient to fully analyze the effects of the exchange of the selected lands.

Two other combinations of no action were considered during analysis:

- A fully executed land exchange, but no approval of the GPO; and
- The land exchange would not occur, Oak Flat would stay in Federal management, and the GPO would be approved with the mining taking place on public land.

The first combination was not carried forward as the Forest Service is unable to refuse approval of the GPO within their regulations and guidance. The second combination was considered because the land exchange is a discretionary action on the part of Resolution Copper. Therefore, an analysis was completed that compared the regulatory framework of mining activity on lands remaining in Federal ownership with the regulatory framework on lands being transferred to private ownership (appendix I). This provides the comparison of no land exchange, but approval of the mining plan of operations. See section

2.4 for more details. The effects of the land exchange are also assessed individually in each resource section of chapter 3.

2.2.4 Alternative 2 – Near West Proposed Action – Mine Plan Components

Alternative 2 – Near West Proposed Action would include approximately 9,780 acres of disturbance, of which 7,178 acres is NFS land, 312 acres is ASLD managed, and 2,290 acres is private land. Additional project activities would occur on 92 acres for recreational mitigations (see section 2.3.1-3).

Based on comments heard in scoping, in February 2018, Resolution Copper formally notified the Tonto National Forest that the company was revising its proposed action in the May 2016 version of the GPO and replacing the plan for an upstream-type tailings embankment at the GPO location with a modified centerline design, which would provide greater overall stability and a more robust design. This change

* * *

Purpose of this Appendix

As noted in chapter 1, the EIS must consider a situation in which the mine is built but the land exchange is not executed. This situation is a possibility because the land exchange is a discretionary action on the part of Resolution Copper Mining, LLC. Under this scenario, the development of a mine on National Forest System lands would proceed under Title 36 Code of Federal Regulations (CFR) Part 228 surface management regulations (commonly known as Forest Service mining regulations).

The physical impacts to resources from the ore extraction, including subsidence and dewatering, are identical whether the mine is built on private land or public land. These are the impacts considered in chapter 3 of the EIS. With respect to the mine itself, the primary difference made by the land exchange is the regulatory framework under which the mine is regulated. The purpose of this appendix is to compare the regulatory framework applicable to private land (if a land exchange occurs) to the regulatory framework applicable to National Forest System lands (if no land exchange occurs).

Comparison of 36 CFR 228 Regulations with Other Related State (Arizona) and Federal Environmental Regulations

In virtually all cases, some level of regulatory requirements apply to mining operations, regardless of whether they are taking place on private lands or National Forest System lands (see table I-1). U.S. Department of Agriculture Forest Service (herein called Forest Service) 36 CFR 228 surface management regulations (columns 1 and 2 in the table) apply only to Federal lands administered by the Forest Service. Other applicable laws, regulations, and rules (column 3) apply to both Federal and private lands, except for State mined land reclamation rules, which apply only to private lands.

Unless otherwise indicated in the table, surface resource management regulations are taken from 36 CFR 228. Aquifer Protection Permit (APP) laws and regulations are taken from Arizona Revised Statutes (ARS) 49-241 through 49-252 and Arizona Administrative Code (AAC) R18-9-101 through R18-9-403. Arizona State Mine Inspector laws and

regulations are taken from Arizona State reclamation statutes at ARS 27-901, et seq., and rules at R11-2-201, et seq. Other regulations and rules are indicated in table I-1.

See table 1.5.6-1 in chapter 1 of the FEIS for descriptions of the applicable laws, statutes, regulations and rules listed in table I-1. This includes aquifer protection permits administered by the Arizona Department of Environmental Quality, mined land reclamation overseen by the Arizona State Mine Inspector, Clean Water Act permits administered by both the Arizona Department of Environmental Quality and the U.S. Army Corps of Engineers, and Clean Air Act permits administered by both Arizona Department of Environmental Quality and the Pinal County Air Quality Control District,

Table I-1. Comparison of 36 CFR 228 with Other Applicable Laws, Statutes, Regulations, and Rules

Forest Service Regulations 36 CFR 228 Subpart A – Locatable Minerals	Description	Other Applicable Laws, Statutes, Regulations, and Rules that are comparable to 36 CFR 228 Subpart A – Locatable Minerals
36 CFR 228.4	*Description of Operations.* In a notice of intent submitted to the appropriate District Ranger, sufficient description of the proposed area of activity, route(s) of access, equipment, devices, or practices proposed for use during operations, including, where applicable—	None

Further discussion of financial assurance is included in section 1.5.5, and in certain sections of chapter 3, including section 3.3 (Soils, Vegetation, and Reclamation), 3.7.2 (Groundwater and Surface Water Quality), and 3.10.1 (Tailings and Pipeline Safety).

2.4 Effects of the Land Exchange

As described in section 2.2.3.1, a completed land exchange is considered for all resource analyses in chapter 3.

Physically, the panel caving proposed to take place under Oak Flat is independent of the land exchange. The deposit would be mined with fundamentally the same techniques and require fundamentally the same infrastructure, and result in the same surface subsidence, regardless of whether the surface is under Forest Service jurisdiction or is private. The two primary differences are (1) the regulatory framework under which mining would occur "with" or "without" Federal oversight, and (2) without the land exchange, minerals underneath the withdrawal boundary could not be extracted. If a land exchange does not occur, Resolution Copper would mine and reclaim the mined land under Federal, State, and local permits and an approved GPO under 36 CFR 228 Subpart A. If the land exchange does occur and the Oak Flat area becomes private lands, Resolution Copper would be required to conduct its activities in accordance with all applicable Federal, State, and local permits but may not be subject to the requirement of obtaining an approved GPO under 36 CFR 228 Subpart A.

Public comments on the DEIS noted various surface uses of Oak Flat. Foremost among these are uses by tribal members. Other uses include recreation, grazing, and reported use by educational institutions. The land exchange would not necessarily prohibit these uses, but they would take place only with the permission of the private landowner, Resolution Copper. Most of these surface uses would be in conflict with mining operations and likely would cease or be greatly curtailed.

Mine operations are governed by several Federal, State, and local regulatory frameworks. Each of the regulatory frameworks is founded in statute and

implemented through regulations and policies of the responsible agency. Agency regulations or rules provide guidance to the agency so it can implement the laws and provide guidance to mine operators so they can follow the laws. Each agency requires certain types of information (filing requirements) before it can process and issue permits under its regulations.

Many of the filing requirements for permits from the various agencies are duplicative, even though each agency has its own regulatory authority and responsibilities. Performance standards specify the norm governing how operations would occur and describe the level of compliance expected by the agency.

Performance standards required by the Forest Service for mining on Federal land are contained in 36 CFR 228.8: "All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources." These include specific requirements for air quality, water quality, solid waste, scenery values, fishery and wildlife habitat, roads, and reclamation.

State agencies have similar performance standards. For example, the goal of the State's APP program is to ensure no degradation of the state's groundwater. ADEQ ensures this goal by implementing the performance standards outlined by the best available demonstrated control technology (Arizona Department of Environmental Quality 2004). Also, the goal of the state mined land reclamation rules is to ensure safe and environmentally sound reclamation of mined lands. The Office of the Arizona State Mine Inspector ensures this goal by requiring operators to meet operational and post-mine

performance standards specified in the regulations at ARS R11-2-601 *et seq*.

* * *

NOISE AND VIBRATION — FEIS SECTION 3.4

Key factors to analyze the issue of noise and vibration	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Assessment of the ability of alternatives to meet rural landscape expectations • Assessment of noise levels (A-weighted decibels [dBA]) and geographic area impacted from mine operations, blasting, and traffic, and qualitative assessment of effects of noise at nearby residences and sensitive receptors • Assessment of effects of vibrations from blasting and mine operations at nearby residences and sensitive receptors	Noise impacts were modeled for 15 sensitive receptors representing residential, recreation, and conservation land uses. Under most conditions, predicted noise and vibrations during construction and operations, for both blasting and non-blasting activities, at sensitive receptors are below thresholds of concern; rural character would not change due to noise (see section 3.4.4.3).	Yes. For Alternatives 3, 4, and 5, noise impacts are the same, with noise and vibration levels at sensitive receptors below thresholds of concern under most conditions. For Alternative 6, noise levels along Dripping Springs Road exceed thresholds of concern. However, there would be no residual impacts after mitigation is implemented (i.e., paving the road, imposing 15 miles per hour speed limit, daytime deliveries only), therefore rural character would not be altered due to increased noise.

TRANSPORTATION AND ACCESS — FEIS SECTION 3.5

Key factors to analyze the issue of transportation and access	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Assessment of change in type and pattern of traffic by road and vehicle type • Assessment of the change in level of service (LOS) on potential highway routes and local roads • Assessment of roads decommissioned by the mine and roads lost to motorized access	Sixty-four trips expected during the peak hour in peak construction and 46 trips expected during the peak hour during normal operations. Project-related traffic would contribute to decreased LOS at many intersections; unacceptable LOS (E/F) caused by project-related traffic occurs Main Street/U.S. 60 (construction and operations), SR 177/U.S. 60 (construction), and Magma Mine Road/U.S. 60 (operations). Eight miles of NFS roads would be lost due to the West Plant Site, East Plant Site, and filter plant and loadout facility. For the tailings facility, 21.7 miles of NFS roads would be lost and decommissioned.	Yes. Alternatives 3, 5, and 6 would have similar impacts as Alternative 2, but Alternative 4 would increase to 88 trips expected during the peak hour in peak construction and 58 trips expected during the peak hour during normal operations, due to placing the filter plant and loadout facility at the West Plant Site. LOS impacts from project-related traffic are similar to Alternative 2 for all other alternatives. At Alternative 4, about 18 miles of NFS roads would be lost to the tailings storage facility. Alternative 5 would not have loss of NFS roads but would result in the loss or decommissioning of 29 miles of BLM inventoried routes. Alternative 6 would be located on private lands and impact 5.7 miles of Dripping Springs Road.

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WATER RESOURCES: GROUNDWATER QUANTITY AND GROUNDWATER-DEPENDENT ECOSYSTEMS (GDEs) — FEIS SECTION 3.7.1

Key factors to analyze the issue of groundwater quantity and groundwater-dependent ecosystems	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Geographic extent in which water resources may be impacted and number of GDEs degraded or lost • Impact on public groundwater supplies • Comparison of mine water needs • Potential for subsidence to occur as a result of groundwater withdrawal	Under no action, six GDEs (all springs) are anticipated to be impacted by groundwater drawdown from ongoing dewatering (see "Alternative 1 – No Action" in section 3.7.1.5). When block caving occurs, groundwater impacts expand to overlying aquifers and two more GDEs (springs) are anticipated to be impacted. Alternative 2 also directly disturbs nine GDEs (springs and ponds), and reductions in stormwater runoff impact three more GDEs (Devil's Canyon and two reaches of Queen Creek). There are surface water rights associated with many of these GDEs. A total of 20 GDEs would be impacted by Alternative 2. Loss of water would be mitigated but impacts on natural setting would remain (see Alternative 2, "Groundwater-Dependent Ecosystems Impacted," in section 3.7.1.5). Groundwater supplies in Superior and Top-of-the-World could be impacted by groundwater drawdown but would be replaced through mitigation (see "Anticipated Impacts on Water Supply Wells" in section 3.7.1.5). Over the mine life, Alternative 2 would dewater about 87,000 acre-feet from the mine and would require about 590,000 acre-feet of makeup water pumped from the Desert Wellfield. The wellfield pumping would incrementally contribute to ground subsidence in the East Salt River valley, and cumulatively reduce overall groundwater availability in the area (see "Changes in Basin Water Balance – Mine Dewatering" and Alternative 2, "Changes in Desert Wellfield Pumping," in section 3.7.1.5.	Yes. There are differences between alternatives in the number of GDEs impacted and the amount of makeup water required. Alternative 3 would impact the same GDEs as Alternative 2 but would pump about 490,000 acre-feet from the Desert Wellfield over the mine life (see Alternative 3 in section 3.7.1.5). Alternative 4 would impact 18 GDEs (8 springs from groundwater drawdown, 7 springs or ponds from direct disturbance, and 3 stream reaches from reductions in stormwater runoff [Devil's Canyon and 2 areas of Queen Creek]). Alternative 4 uses filtered tailings and would pump about 180,000 acre-feet from the Desert Wellfield over the mine life, much less than the other alternatives (see Alternative 4 in section 3.7.1.5). Alternative 5 would impact 18 GDEs (8 springs from groundwater drawdown, 6 springs or ponds from direct disturbance, and 4 stream segments from reductions in stormwater runoff [Devil's Canyon, 2 areas of Queen Creek, and the Gila River]). Alternative 5 would pump about 540,000 acre-feet from the Desert Wellfield over the mine life (see Alternative 5 in section 3.7.1.5). Alternative 6 would impact the same GDEs and would pump about the same amount of water as Alternative 5 (see Alternative 6 in section 3.7.1.5).

* * *

WILDLIFE AND SPECIAL STATUS WILDLIFE SPECIES — FEIS SECTION 3.8

Key factors to analyze the issue of wildlife	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Assessment of effects on riparian habitat and species due to changes in flow • Assessment of acres of suitable habitat disturbed for each special status species and by type of terrestrial and aquatic habitat lost, altered, or indirectly impacted • Potential of mortality of animal species resulting from the increased volume of traffic related to mine operations • Effects on wildlife behavior from noise, vibrations, and light • Change in movement corridors and connectivity between wildlife habitats • Impacts on aquatic habitats and surface water that support wildlife and plants	Alternative 2 would impact 20 groundwater-dependent ecosystems (GDEs). For the springs or stream segments impacted by groundwater drawdown or surface water flow reductions, mitigation would replace the water source and prevent widespread loss of riparian habitat. The remaining GDEs are lost to surface disturbance and would not be mitigated. Loss of xeroriparian habitat occurs for all alternatives. Habitat would be impacted to some extent for about 50 special status wildlife species (see table 3.8.4-2 for details). Specific impacts could occur with western yellow-billed cuckoo (endangered) and southwestern willow flycatcher (endangered) from vegetation removal or project activities. Gila chub (endangered) has critical habitat along Mineral Creek but is not known to be present and habitat in Mineral Creek is not anticipated to be impacted (see "Impacts on Special Status Wildlife Species" in section 3.8.4.2). There is a high probability of mortality and/or injury of wildlife individuals from collisions with mine construction and employee vehicles as well as the potential mortality of burrowing animals in areas where grading would occur. Some individuals would be likely to move away from the sources of disturbance to adjacent or nearby habitats. Project-related noise, vibration, and light may also lead to increased stress on individuals and alteration of feeding, breeding, and other behaviors (see "General Construction Impacts" and "General Operations Impacts" in section 3.8.4.2). There would be loss and fragmentation of movement and dispersal habitats from the subsidence area and tailings storage facility. Ground-clearing and consequent fragmentation of habitat blocks for other mine-related facilities would also inhibit wildlife movement (see "Wildlife Connectivity" in section 3.8.4.2). There are 15 identified wildlife waters within 5 miles of the project footprint. Under Alternative 2, three would be lost beneath the tailings storage facility.	Yes. Alternative 3 is similar to Alternative 2. Alternative 4 would have more reduction in surface flow and greater impacts on Queen Creek. Alternatives 5 and 6 would have less impact on Queen Creek due to surface flow reductions. A total of 18 GDEs and 2 wildlife waters would be impacted under Alternatives 4, 5, and 6. Specific acres of habitat affected varies between alternatives (see table 3.8.4-2 for details). Alternative 6 would impact the greatest amount of acreage for Habitat Block 1 areas.

RECREATION — FEIS SECTION 3.9

Key factors to analyze the issue of recreation	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Changes in Recreation Opportunity Spectrum designations • Assessment of acres of the Tonto National Forest that would be unavailable for recreational use, for various phases of mine life and reclamation • Assessment of potential for noise to reach recreation areas (i.e., audio "footprint") • Assessment of impacts on solitude in designated wilderness and other backcountry areas • Assessment of hunter-days lost (quantity based on number of permits available and number of days in season) • Assessment of miles of Arizona National Scenic Trail, NFS trails, or other known trails requiring relocation, and qualitative assessment of user trail experience • Assessment of increased pressure on other areas, including roads and trails/trailheads, from displacement and relocation of recreational use as a result of mine facilities	Under Alternative 2, based on the Recreation Opportunity Spectrum (ROS) designation of user experiences, direct removal of 4,407 acres of the semi-primitive motorized setting, and 1,266 acres within the roaded natural setting (see table 3.9.4-1). All public access (Tonto National Forest, ASLD, BLM lands) would be eliminated on 7,490 acres. Rock climbing opportunities at Euro Dog Valley, Oak Flat, and other portions of the mine area would be lost under all action alternatives but would be partially mitigated by new climbing area(s) set aside by Resolution Copper (see "Rock Climbing" in section 3.9.4.2). Under most conditions, with sensitive receptors representing recreation users, predicted noise during construction and operation are below thresholds of concern (see Alternative 2, "Recreation Opportunity Spectrum," in section 3.9.4.3). Visitors to the Superstition Wilderness, Picketpost Mountain, and Apache Leap would have foreground and background views of the tailings facilities from trails and overlooks, and the recreation setting from certain site-specific views could change. Under Alternative 2, 0.07 mile of the tailings pipeline corridor would intersect the Arizona Trail (see Alternative 2, "Recreation Sites," in section 3.9.4.3). The number of Arizona hunting permits that are issued in individual Game Management Units would not change as a result of the any of the action alternatives being implemented, though some individual's preferred hunting grounds may be lost (see "Hunting" in section 3.9.4.2). Under all action alternatives, it is likely that increased use would occur on other nearby lands that provide similar experiences, depending upon the recreational user type. A minor to moderate increase in user activity would be expected to occur in recreational use areas elsewhere, with uses largely similar to those displaced.	Yes. Alternative 3 is identical to Alternative 2. Alternative 4 would remove 18 acres of the semi-primitive non-motorized setting, 5,088 acres of the semi-primitive motorized setting, and 608 acres within the roaded natural setting. All public access (Tonto National Forest, ASLD, BLM lands) would be eliminated on 8,094 acres. Alternative 4 would require 3.05 miles of the Arizona Trail to be closed and relocated to an area that would be safe for public use. Under Alternative 4, 26 NFS roads would be impacted for motorized recreation. Alternative 5 would remove 95 acres of the semi-primitive motorized setting and 1,044 acres of the roaded natural setting. All public access (Tonto National Forest, ASLD, BLM lands) would be eliminated on 14,307 acres. Under Alternative 5, 23 miles of BLM routes would be impacted for motorized recreation, and additional BLM and NFS roads would be crossed by the pipeline. Alternative 5 would intersect the Passage 16 segment of the Arizona Trail by 0.18 mile of the proposed tailings storage facility pipeline. Visitors to the White Canyon Wilderness would have background views of the Alternative 5 pipeline from some trails and overlooks. Alternative 6 would remove 146 acres of the semi-primitive non-motorized setting, 246 acres of the semi-primitive motorized setting, and 253 acres of the roaded natural setting. All public access (Tonto National Forest, ASLD, BLM lands) would be eliminated on 10,685 acres. Under Alternative 6, no BLM or NFS roads are within the footprint, although roads are crossed by the pipeline. The Alternative 6 pipeline would be visible from trails and overlooks in the Superstition Wilderness.

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CULTURAL RESOURCES — FEIS SECTION 3.12

Key factors to analyze the issue of cultural resources	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Assessment of the impacts on places of traditional and cultural significance to Native Americans, including natural resources • Assessment of number of NRHP-eligible historic properties, sacred sites, and other landscape-scale properties to be buried, destroyed, or damaged • Assessment of impacts on historic properties, including number of NRHP-eligible historic properties expected to be visually impacted	The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently damaged. Under Alternatives 2 and 3, 120 NRHP-eligible sites and 18 sites of undetermined eligibility would be directly affected; another 62 sites would be indirectly affected (see "Direct Impacts" and "Indirect Impacts" in section 3.12.4.3). Additional historic properties and archaeological sites are located within 6 miles of the proposed project and could be impacted by their proximity to mining disturbance (see "Atmospheric Impacts" in section 3.12.4.3).	Under any action alternative, impacts of mine development at the associated project facilities would have equivalent adverse effects on cultural resources. Some surveys continue; all alternatives will be 100% pedestrian surveyed. For Alternative 4, 145 NRHP-eligible sites and 2 sites of undetermined eligibility would be directly affected; another 58 sites would be indirectly affected (see section 3.12.4.5). For Alternative 5, 154 NRHP-eligible sites and 3 sites of undetermined eligibility would be directly affected; another 77 sites would be indirectly affected (see section 3.12.4.6). For Alternative 6, 377 NRHP-eligible sites and 3 sites of undetermined eligibility would be directly affected; another 58 additional sites would be indirectly affected (see section 3.12.4.7).

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TRIBAL VALUES AND CONCERNS — FEIS SECTION 3.14

Key factors to analyze the issue of tribal values and concerns	What are the results of impact analysis for the proposed action (Alternative 2)?	Are the analyzed impacts of these issues substantially different under Alternatives 3, 4, 5, or 6?
• Assessment of how cumulative resource disturbance impacts tribal values and spiritual practices • Assessment of number of sacred springs or other discrete sacred sites that would be impacted, and potential effects on Native Americans from the desecration of land, springs, burials, and sacred sites • Estimated acres of traditional resource collection areas that would be impacted	Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP. Other large-scale mine development along with smaller transportation, utility, and private land development projects in the greater Superior region may also affect places and resources of value to Native Americans, including historical and ceremonial sites and culturally valued landforms and features. Dewatering or direct disturbance would impact between 18 and 20 groundwater dependent ecosystems, mostly sacred springs. While mitigation would replace water, impacts would remain to the natural setting of these places. Burials are likely to be impacted; the numbers and locations of burials would not be known until such sites are detected as a result of mine-related activities. Under this or any action alternative, one or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, would likely be lost. Other unspecified mineral- and/or plant-collecting locations would also likely be affected; historically, medicinal and other plants are frequently gathered near springs and seeps, so drawdown of water at these locations may also adversely affect plant availability.	Under any action alternative, impacts of mine development at the East Plant Site (Oak Flat), West Plant Site, MARRCO corridor, and at other ancillary facilities would have equivalent adverse effects on tribal values and concerns. Impacts on tribal values and concerns would be similar in context and intensity under Alternatives 4, 5, and 6; however, because the tailings storage facility under each of these alternatives would be in a different location, the specific impacts on potentially meaningful sites, resources, routes, and viewsheds would vary. See sections 3.11.4 (Scenic Resources), 3.12.4 (Cultural Resources), and 3.14.4 (Tribal Values and Concerns) for detailed impact analyses specific to each alternative.

*   *   *

to the dewatering that has taken place in the deep groundwater system since 2009 has been limited to the Resolution Graben (see section 3.7.1).The analysis area has undergone multiple episodes of folding and faulting since the Precambrian. Geological structures, and rotation, thickness, and offset of the geological units in the area (see figure 3.2.3-2) are the result of this series of large-scale structural movements and deformation. The late Cretaceous to early Tertiary Laramide Orogeny caused northeast-trending shortening, which resulted in basement core uplifts and folding along range-front thrust faults across large portions of the western United States (Kloppenburg 2017). Laramide-style compression was followed later in the Tertiary by regional extension, which resulted in fault-block style deformation—which creates the alternating mountain and valley topography that characterizes the region.

Mineral Resources

GENERAL MINERAL OCCURRENCE

Mineral occurrences in the analysis area include a range of metallic, non-metallic, and industrial minerals. There is a more than 100-year history of silver and copper mining near the analysis area, and several operations continue to contribute to the region's economy. In addition to the nearby formerly producing Magma and Silver King mines, over 30 (active or inactive) mines are regionally located near what is known as the "Copper Triangle." These represent a variety of operations but primarily include copper, gypsum, and marble mining. The closest currently active major copper mines are the Ray Mine, approximately 9 miles south of the analysis area, the Pinto Valley Mine, approximately 14 miles northeast of the analysis area, and the Carlota Mine, also northeast of the analysis area. These mines are open-pit operations, but, like the Resolution ore deposit, they are large tonnage, low-grade copper porphyry deposits (Kloppenburg 2017).

RESOLUTION ORE DEPOSIT

The Resolution ore deposit is approximately 64 million years old and is a porphyry copper-molybdenum deposit. It lies approximately 4,500 to 7,000 feet below Oak Flat. As defined by the 1 percent copper shell, the deposit extends over an area of at least 1.2 miles in an east-northeast direction, and 0.9 mile in a north-northwest direction. A detailed description of the deposit and associated mineralization is included in Hehnke et al. (2012).

Rock types with diabase, limestone, and local breccia host and control the strongest copper

mineralization. Quartz-rich sedimentary rocks and Cretaceous-Tertiary intrusive rocks demonstrate the strongest molybdenum mineralization. The highest copper grades (greater than 3 percent) are located in the upper central portion of the deposit associated with a large hydrothermal breccia body and hosted primarily in breccia and diabase. The total mineral resource at the Resolution ore deposit is currently estimated (indicated and inferred) to be 1,970 million tons (1,787 million metric tonnes), with an average grade of 1.54 percent copper and 0.035 percent molybdenum (Rio Tinto 2018).

The location and geometry of the mineralization are structurally controlled by several generations of faulting that occurred before, during, and after mineralization. Chalcopyrite is the dominant copper mineral in the deposit, with lesser chalcocite and bornite. Molybdenum occurs primarily as molybdenite. The deposit is associated with hydrothermal alteration and includes a strong pyrite "halo" in the upper areas of the deposit, containing up to 14 percent pyrite. This mineralization has ramifications for water quality, as all of these are sulfide-bearing minerals and have the potential to interact with oxygen and cause water quality problems (acid rock drainage), as discussed in detail in section 3.7.2.

While several karst features have been noted in Queen Creek Canyon upstream of Superior, only one existing cave has been identified in the area: Hawks Claw Cave is located near Alternative 2 tailings storage facility site.

Unpatented Mining Claims

Numerous unpatented mining claims—both lode and placer—are located within the footprint of the mine components. These are summarized in the GPO in appendix A and figure 3.2-1 (Resolution Copper 2016c) for Alternatives 2 and 3, and have been compiled separately for Alternatives 4, 5, and 6 (Garrett 2019b).

- No unpatented claims unrelated to Resolution Copper are located within the Oak Flat Federal Parcel, or on the East Plant Site.
- The West Plant Site is privately owned. No unpatented claims unrelated to Resolution Copper are located around the periphery of the West Plant Site.
- The MARRCO corridor right-of-way is already existing and in use. No unpatented claims unrelated to Resolution Copper are located within the MARRCO corridor.
- Unpatented claims unrelated to Resolution Copper are located within the various alternatives tailings storage facility footprints and/or the tailings pipeline corridor footprints. In section 3.2.4, impacts on these claims are assessed specific to each alternative.

3.2.4 Environmental Consequences of Implementation of the Proposed Mine Plan and Alternatives

3.2.4.1 Alternative 1 – No Action Alternative

Under the no action alternative, the mine would not be constructed, block caving would not occur, and

there would be no impacts from subsidence, induced seismicity, increased potential for landslides or rockfall, impacts on caves, karst, or paleontological resources, or impacts on mining claims.

3.2.4.2 Impacts Common to All Action Alternatives

Effects of the Land Exchange

The land exchange would have effects on geology and mineral resources.

The Oak Flat Federal Parcel would leave Forest Service jurisdiction. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources from the proposed mine and block caving. With respect to mineral development, no unpatented mining claims other than those associated with Resolution Copper are located on the Oak Flat Federal Parcel (see figure 1.3-2 in the GPO (Resolution Copper 2016c)).

The offered land parcels would enter either Forest Service or BLM jurisdiction. Section 3003 of PL 113-291 specifies that any land acquired by the United States is withdrawn from all forms of entry, appropriation, or disposal under the public land laws, location, entry, and patent under the mining laws, and disposition under the mineral leasing, mineral materials, and geothermal leasing laws.

Specific management of mineral resources on the offered lands would be determined by the agencies, but in general when the offered lands enter Federal jurisdiction, mineral exploration and development would not be allowed. Given these restrictions, no or little mine-related activity would be expected to occur on the offered lands.

The land exchange also effectively ends the mineral withdrawal currently in place for the 760-acre Oak Flat Withdrawal Area. After a land exchange occurs, this area would be privately held and would be open to mineral exploration and mineral development that would not otherwise occur. Because no exploration has taken place within this area, the potential for future mining activities is not known.

If the land exchange does not occur, not only would mineral exploration not take place within the 760-acre Oak Flat Withdrawal Area, but subsidence caused by block caving would not be allowed to impact the Withdrawal Area. This would potentially result in less of the Resolution ore deposit being developed, and the resulting surface disturbance and resource impacts would be less than those disclosed in the EIS.

Effects of Forest Plan Amendment

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 Forest Plan was conducted to identify the need for amendment due to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). A number of standards and guidelines (18) were identified applicable to management of mineral, cave, or paleontological resources. None of these standards and guidelines were found to require amendment to the proposed project, either a forest-wide or management area-specific basis. For additional details on specific rationale, see Shin (2020).

Effects of Compensatory Mitigation Lands

The compensatory mitigation lands are not anticipated to affect geological resources or subsidence. These lands are protected by conservation easements or similar mechanisms and mining would not occur on these lands.

Effects of Recreation Mitigation Lands

The recreation mitigation lands are not anticipated to affect geological resources or subsidence. Since these existing roads and trails, as well as new planned routes, are on NFS lands that are open to mineral development, they may now or in the future overlap with unpatented claims. If conflicts arise between surface use for mineral exploration, surface use for the development of mineral resources associated with unpatented claims, and surface use for recreation, the conflicts would be resolved as appropriate under Forest Service mineral regulations.

Summary of Applicant-Committed Environmental Protection Measures

A number of environmental protection measures are incorporated into the design of the project that would act to reduce potential impacts on geology and mineral resources or reduce potential impacts from subsidence and other geological hazards. These are non-discretionary measures, and their effects are accounted for in the analysis of environmental consequences.

* * *

Irreversible and Irretrievable Commitment of Resources

Irreversible commitment of geological and mineral resources would occur with the excavation and relocation of approximately 1.4 billion tons of rock and with the recovery of approximately 40 billion pounds of copper, as well as the burying of any mineral resources below the alternative tailings facilities.

With respect to paleontological and cave/karst resources, a commitment of resources is considered to be irretrievable when project impacts limit the future use or productivity of a nonrenewable resource over a limited amount of time—for example, structures built on top of paleontologically sensitive geological units that might later be removed. A commitment of resources is considered to be irreversible when project impacts cause a nonrenewable resource to be permanently lost—for example, destruction of significant fossils and loss of associated scientific data.

An irreversible commitment of paleontological resources could occur at the Alternative 2 and 3 tailings storage facility location, where potentially fossil-bearing rocks associated with the Martin limestone could be destroyed in site preparation or buried permanently.

* * *

VEGETATION COMMUNITIES, SPECIAL STATUS PLANT SPECIES, NOXIOUS WEEDS

Construction

All action alternatives would involve the removal of vegetation during construction activities, resulting in the direct loss of plant communities. Construction of tailings facilities for all alternatives would continue throughout most of mine life as areas would not be disturbed until necessary. The primary impacts on vegetation communities during construction of the action alternatives would be associated with

- removal and/or crushing of natural, native species;

- increased potential for noxious and invasive weed establishment and spread;
- decreased plant productivity from fugitive dust;
- plant community fragmentation; and
- changes in plant growth and seasonal phenology from artificial lighting.

Vegetation Communities

Vegetation removal could have a variety of effects on vegetation communities ranging from changes in community structure and composition within the project footprint to alteration of soils. This could result in further loss of soil and vegetation, as well as increased sediment input to water resources. This impact would occur in localized areas of disturbance.

Soil disturbance may lead to the increased potential for the introduction and colonization of disturbed areas by noxious and invasive plant species, which may lead to changes in vegetation communities, including a possible shift over time to more wildfire-adapted vegetation that favors noxious or invasive exotic species over native species. This potential impact would be greatest in vegetation communities that are not adapted to fire, such as Arizona Upland and Lower Colorado River subdivisions of Sonoran Desertscrub. In more fire-adapted communities, such as Interior Chaparral and Semidesert Grasslands, these impacts could still occur, but the intensity of the impacts would decrease as native vegetation in these communities may respond positively to fire.

Fugitive dust from construction activities has the potential to affect photosynthetic rates and decrease plant productivity. Dust can have both physical and

chemical impacts (Farmer 1993; Goodquarry 2011; Havaux 1992; Sharifi et al. 1997; Thompson et al. 1984; Walker and Everett 1987). Physical impacts of windborne fugitive dust on plants could include blockage and damage to stomata, shading, and abrasion of leaf surface or cuticle. Dust can increase leaf temperature; inhibit pollen germination; reduce photosynthetic activity, respiration, transpiration, and fruit set; decrease productivity; alter community structure; and contribute to cumulative impacts (e.g., drought stress on already stressed species or allow the penetration of phytotoxic gaseous pollutants, such as sulfur dioxide, nitrogen dioxide, and ozone). Some studies, however, indicate that plant species living in high light conditions are flexible to adapting to lower light conditions (e.g., desert plants) (Alves et al. 2002; Barber and Andersson 1992; Werner et al. 2002) and that some plant species show improved growth with increased dust deposition (i.e., limestone) (Brandt and Rhoades 1972). The overall impact on vegetation from fugitive dust would be localized near sources of dust and would be highest near areas of ground disturbance during construction activities and would decrease with the completion of construction activities.

The construction of project facilities would fragment vegetation communities and create edge areas. Edge areas have different microclimatic conditions and structure and may be characterized by compacted soils and increased runoff that can lead to changes in species composition and vegetation structure.

* * *

Noxious Weeds

Reclamation of disturbed areas would decrease but not eliminate the likelihood of noxious weeds becoming established or spreading in and adjacent to the project area. In areas where reclamation activities would occur, there would likely be reduced soil stability and an initial increase in the potential for noxious and invasive weed establishment and spread due to ground disturbance and decreased competition for space, light, and water. Efforts to reclaim these areas would lessen the potential for weed establishment and spread in the long term; however, it is anticipated that reclaimed areas would have a higher density of these non-native species than were present before ground-disturbing activities, even at completion of reclamation activities.

3.3.4.3 Alternative 2 – Near West Proposed Action

Potential impacts on soils, vegetation communities, and special status plant species, as well as impacts from noxious weeds, would be as described earlier under "Impacts Common to All Action Alternatives" and "Potential to Achieve Desired Future Conditions." Alternative 2 would remove or modify approximately 9,938 acres of vegetation and impact 9,938 total acres of soils (see table 3.3.4-2). This area represents all areas where activities could occur, though some areas are within fence lines and not anticipated to be physically impacted. This area also included mitigation lands, where disturbance would happen but result in an overall improvement in land condition. Of the disturbed area, 3,387 acres would potentially be revegetated and would recover productivity to some extent, as described under "Impacts Common to All Action Alternatives." Other areas—such as the East

Plant Site, West Plant Site, and filter plant and loadout facility—could also be revegetated like the tailings storage facility and pipeline, but also may be reclaimed for other uses. The acres of potential impacts on vegetation communities and special status plant species habitat by alternative are given in tables 3.3.4-3 and 3.3.4-4.

Financial Assurance for Closure and Post-Closure Activities

Alternative 2 potentially involves long time periods of post-closure maintenance and monitoring related to revegetation and reclamation of the tailings storage facility. This raises the concern for the possibility of Resolution Copper's going bankrupt or otherwise abandoning the property after operations have ceased. If this were to happen, the responsibility for these long-term activities would fall to the Forest Service. The Forest Service would need to have financial assurance in place to ensure adequate funds to undertake these activities for long periods of time—for decades or even longer.

The authority and mechanisms for ensuring long-term funding is discussed in section 1.5.7. The types of activities that would likely need to be funded could include the following:

- Monitoring of the success of revegetation
- Implementing remedial actions if revegetation success criteria are not met
- Monitoring of the post-closure landform for excessive erosion or instability, and performance of any armoring

- Maintenance and monitoring of post-closure stormwater control features
- Monitoring the water quality of stormwater runoff associated with the closure cover, to determine ability to release stormwater back to the downstream watershed

Additional financial assurance requirements for long-term maintenance and monitoring are part of the Arizona APP program and include the following:

> The applicant or permittee shall demonstrate financial responsibility to cover the estimated costs to close the facility and, if necessary, to conduct post-closure monitoring and maintenance by providing

* * *

Construction and Operations Phase – Non-Blasting Vibration Modeling

Non-blasting vibration occurs from train movement, construction activities, stationary equipment, and other mobile equipment. Ground-borne vibrations were predicted using the type of equipment generally causing the greatest vibrations (an earthmoving truck), using estimates from the Federal Transit Administration (Quagliata et al. 2018).

3.4.3 Affected Environment

3.4.3.1 Relevant Laws, Metrics, Regulations, Policies, and Plans

No single regulatory agency or threshold is applicable to non-blasting noise generated by activities at the project sites. A full discussion of noise

thresholds of significance appropriate for mining activities can be found elsewhere (Newell 2018d).

Primary Legal Authorities and Technical Guidance Relevant to the Noise and Vibration Effects Analysis

- U.S. Department of Housing and Urban Development standards
- Pinal County Excessive Noise Ordinance
- Federal Highway Administration and Arizona Department of Transportation (ADOT) standards
- Office of Surface Mining Reclamation and Enforcement
- Federal Transit Administration
- Occupational Safety and Health Administration
- Mine Safety and Health Administration

3.4.3.2 Selected Thresholds

A variety of thresholds are used to put the predicted noise and vibration modeling results in context. These thresholds are being used for the purposes of the NEPA analysis. Note that these thresholds are likely not applicable to the project in a legal or regulatory sense, and in many cases have very specific applications or specific limitations that are not included explicitly in this analysis.

Blasting Noise Thresholds (Peak Air Overpressure)

The selected threshold for airblast level is at or below 120 unweighted decibels (dBL), which is based on results presented in U.S. Bureau of Mines RI 8485 (Siskind et al. 1980) and represents a reasonable maximum threshold to avoid impacts on structures and humans.

Non-Blasting Noise Thresholds

Thresholds of interest for non-blasting noise include the following:

- For the Ldn metric, the selected threshold is 65 A-weighted decibels (dBA). This is based on the U.S. Department of Housing and Urban Development's Acceptability Standards.
- For the Leq(h) metric, the selected threshold is 55 dBA. This is based on the Pinal County Excessive Noise Ordinance for residential areas during nighttime hours.

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Changes in Access

Public access to NFS land and transportation infrastructure would not be impacted under the no action alternative because there would be no new roads, updates to existing roads, or closures of existing roads under this alternative. There would be no direct, indirect, or cumulative effects on changes in access as a result.

3.5.4.2 Impacts Common to All Action Alternatives

Effects of the Land Exchange

The land exchange would have significant effects on transportation and access. The Oak Flat Federal Parcel would leave Forest Service jurisdiction, and with it public access would be lost to the parcel itself, as well as passage through the parcel to other destinations, including Apache Leap and Devil's Canyon. These locations have other means of access, but those routes may not be as direct or convenient.

Resolution Copper may keep portions of the property open for public access, as feasible.

The offered land parcels would enter either Forest Service or BLM jurisdiction. The eight parcels would have beneficial effects; they would become accessible by the public and be managed by the Federal Government for multiple uses. Roads and access would be managed in accordance with the appropriate management plans and agency direction.

Effects of Forest Plan Amendment

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 forest plan was conducted to identify the need for amendment due to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). A number of standards and guidelines (12) were identified applicable to management of transportation and access. None of these standards and guidelines were found to require amendment to the proposed project, either on a forest-wide or management area-specific basis. For additional details on specific rationale, see Shin (2020).

Effects of Compensatory Mitigation Lands

Activities on the compensatory mitigation lands would involve some transportation of equipment to each location, but the traffic volumes would be negligible (a few vehicles) and are short-lived. These parcels are preserved for conservation and would have no long-term effects on traffic patterns or transportation.

Effects of Recreation Mitigation Lands

The recreation mitigation lands are not anticipated to affect transportation but will improve access to recreation opportunities on NFS lands. Staging areas have been strategically located to be close to recreation areas while being accessible to passenger vehicles, and in close enough proximity to the town of Superior to encourage use. The recreation mitigation lands will facilitate access to recreational opportunities currently unavailable to recreationists in and around Superior as well as those traveling from the Phoenix metropolitan area. Access to the Inconceivables area is provided in the recreation mitigation lands; this area is not readily accessible under current conditions.

* * *

Transportation Routes and Changes in Access

Changes in access to the NFS road system as a result of the proposed activities at the East Plant Site, West Plant Site, and filter plant and loadout facility are shown in table 3.5.4-4. Approximately 8.0 miles of NFS roads are expected to be decommissioned or lost.

The primary impacts occur from the subsidence area development and include large portions of NFS

Roads 315 and 3153. These roads provide access to areas that include Apache Leap and Devil's Canyon as well as connectivity to other NFS roads. Access would still be available to these areas, but those routes may not be as direct or convenient. Resolution Copper may keep portions of the property open for public access, as feasible, but the roads that pass through the Oak Flat Federal Parcel are not expected to remain open.

All alternatives would involve impacts on Silver King Mine Road and NFS Road 229, which provide through travel to the highlands north of Superior, as well as to private inholdings in the Tonto National Forest. All alternatives would maintain access to these areas; for Alternative 4, access would be administrative due to the presence of the tailings storage facility.

Table 3.5.4-4. Miles of NFS roads decommissioned and lost for East Plant Site, West Plant Site, and filter plant and loadout facility

Facility	Tonto National Forest NFS Roads Decommissioned and Lost (miles)*	Resolution Copper Applicant-Committed Improvements and Maintenance
West Plant Site: Total Roads	2.54	
NFS Road 1010	0.37	Level 1
NFS Road 229	2.17	Portions reconstructed to level 3
East Plant Site/Subsidence Area: Total Roads	5.45	
NFS Road 2432	0.78	None
NFS Road 2433	0.23	None
NFS Road 2434	0.29	None
NFS Road 2435	0.28	None
NFS Road 2438	0.32	None
NFS Road 3153	1.19	None
NFS Road 3791	0.1	None
NFS Road 315	2.28	None
San Tan Valley Filter Plant and Loadout Facility: Total Roads	0.0	None

Notes: Roads intersected by pipeline corridors or transmission line corridors are considered to remain open.
Level 1 – Basic custodial care; Level 2 – High-clearance vehicles; Level 3 – Suitable for passenger cars
* Includes West Plant Site, East Plant Site, subsidence area, and maximum impact acreage for Silver King Mine Road alignment. Road segments less than 0.05 mile not shown

Roadway Maintenance

Transportation of personnel, equipment, supplies, and materials related to mine development, operation, and reclamation could increase roadway maintenance requirements. Increased traffic can contribute to earlier and more extensive deterioration of road surfaces, therefore requiring more frequent and higher levels of maintenance.

* * *

This section analyzes impacts on GDEs and local water supplies from dewatering and block caving, the amount of water that would be used by each alternative, the impacts from pumping of the mine water supply from the Desert Wellfield, and the potential for ground subsidence to occur because of groundwater pumping. Some aspects of the analysis are briefly summarized in this section. Additional details not included here are in the project record (Newell and Garrett 2018d).

Changes from the DEIS

We received a number of technical comments on the groundwater modeling effort used in the DEIS. We assessed these comments with the assistance of the reconvened Water Resources Workgroup. Many of the comments represented alternative modeling choices but not errors in the modeling process (Garrett 2020e). A review of these comments resulted in several clarifications and additions to this section, including details of baseline conditions and model calibration.

This section incorporates updated information with respect to springs and hydrologic conditions at the

Skunk Camp location. We added further discussion of the development of the Desert Wellfield model in the East Salt River valley, and a refined analysis of potential subsidence impacts in that area.

The cumulative effects analysis was revised for the FEIS to better quantify impacts. It is described in detail in chapter 4 and summarized in this section. We received numerous comments concerned with water use by the mine and potential water scarcity due to drought, climate change, and competing water uses. The cumulative effects analysis now includes an expanded discussion of these issues. Mitigations developed between the DEIS and FEIS are summarized in appendix J and, if applicable to water quantity, are analyzed for effectiveness in this section.

3.7.1.2 Analysis Methodology, Assumptions, and Uncertain and Unknown Information

Analysis Area

The analysis area for assessing impacts on groundwater quantity and GDEs comprises the groundwater model boundary for the mine site (figure 3.7.1-1) as well as the groundwater model boundary for the East Salt River valley model (figure 3.7.1-2). Models were run up to 1,000 years in the future, but as described below, quantitative results were reasonably applied up to 200 years in the future.

Modeling Process

In September 2017, the Tonto National Forest convened a multidisciplinary team of professionals, referred to as the Groundwater Modeling Workgroup. The Groundwater Modeling Workgroup included

Tonto National Forest and Washington-level Forest Service hydrologists, the groundwater modeling experts on the project NEPA team, representatives from ADWR, AGFD, the EPA, the San Carlos Apache Tribe, and Resolution Copper and its contractors. This group included not only hydrologists working on the groundwater model itself, but also the biologists and hydrologists who have conducted monitoring in the field and are knowledgeable about the springs, streams, and riparian systems in the project vicinity. The Groundwater Modeling Workgroup tackled three major tasks: defining sensitive areas, evaluating the model and assisting the Tonto National Forest in making key decisions on model construction and methodology, and assisting the Tonto National Forest in making key decisions on how to use and present model results.

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combined professional judgment, the Groundwater Modeling Workgroup determined that results could be reasonably assessed up to 200 years into the future. All quantitative results disclosed in the EIS are restricted to this time frame.

The Groundwater Modeling Workgroup also recognized that while quantitative predictions over long time frames were not reliable, looking at the general trends of groundwater levels beyond the 200-year time frame still provides valuable context for the analysis. In most cases, the point of maximum groundwater drawdown or impact for any given GDE does not occur at the end of mining. Rather, it takes

time for the full impacts to be observed—decades or even centuries. Even if quantitative results are unreliable at long time frames, the general trends in modeled groundwater levels can indicate whether the drawdown or impact reported at 200 years represents a maximum impact, or whether conditions might still worsen at that location. These trends are qualitatively explored, regardless of time frame. Specifically, see the discussions in section 3.7.1.5 titled "Longer Term Modeled Impacts". These qualitative discussions include impacts beyond the 200-year time frame for springs, Devil's Canyon, Queen Creek, Telegraph Canyon, Arnett Creek, and water supplies.

Time frames are only pertinent for transient models. Some public comments suggest that alternative approaches could have been used for the EIS analysis, either using a steady-state model to predict postmine conditions or simply assuming that post-mine conditions would eventually (many centuries in the future) return to pre-mining conditions. Neither of these approaches is supportable for predicting impacts from the mine.

Steady-state modeling requires aquifer conditions and boundary conditions that are unchanging and in equilibrium. Regarding the mine, the use of block caving will incrementally change the aquifer characteristics over time during operations. Additionally, the amount of pumping is anticipated to change during operations. A transient model that allows for these changes is the only approach that can predict the groundwater levels as conditions change during operations. A steady-state model conceivably could have been used after operations cease to predict post-closure conditions. However, the modeling

suggests equilibrium in the aquifer likely will not be achieved for over 1,000 years. Any results from a steady-state model would take place beyond 1,000 years. Thus, we considered such results to be remote and speculative.

Modeling could be avoided entirely if the assumption could be supported that post-mine conditions would eventually return to pre-mining conditions. This will never occur. Block caving is anticipated to fundamentally alter the hydrogeologic framework of the aquifer system, effectively eliminating the Whitetail Conglomerate unit that to date has separated the deep groundwater system from the Apache Leap Tuff aquifer. There is no expectation that the post-mine aquifer system eventually will look the same as it does today. Modeling is the most appropriate tool to predict how an altered aquifer system, fundamentally different from current conditions, would function.

KEY DECISION ON USE OF MODEL RESULTS – LEVEL OF PRECISION

Numerical groundwater models produce highly precise results (i.e., many digits beyond the decimal point). Even in a well-calibrated model, professional hydrologists and modelers recognize that there is a realistic limit to this precision, beyond which results are meaningless. The Groundwater Modeling Workgroup was tasked with determining the appropriate level of precision to use for groundwater modeling results.

Based on combined professional judgment, the Groundwater Modeling Workgroup determined that to properly reflect the level of uncertainty inherent in the

modeling effort, results less than 10 feet should not be disclosed or relied upon, as these results are beyond the ability of the model to predict. For values

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extend west, below Apache Leap, and into the Superior Basin. Near Superior, water levels associated with these units have declined roughly 20 to 90 feet since 2009 (Montgomery and Associates Inc. and Resolution Copper 2016).

In the Oak Flat area, the Apache Leap Tuff aquifer overlies the deep groundwater system, and the Whitetail Conglomerate unit separates the two groundwater systems. The Whitetail Conglomerate unit acts as an aquitard—limiting the downward flow of groundwater from the Apache Leap Tuff. Groundwater level changes in the Apache Leap Tuff that have been observed have generally been 10 feet or less since 2009.

Groundwater levels in the Apache Leap Tuff are important because they provide water to GDEs, such as the middle and lower reaches of Devil's Canyon (Garrett 2018e). Resolution Copper has extensively monitored Devil's Canyon since as early as 2003. Most hydrologic indicators show no significant change over time in Devil's Canyon (Garrett 2019f). A number of other water sources have been monitored on Oak Flat and show seasonal drying, but these locations have been demonstrated to be disconnected from the Apache Leap Tuff aquifer, relying instead on localized precipitation (Garrett 2018e; Montgomery and Associates Inc. 2017a). Other pumping also occurs within the Superior Basin, but is substantially less

than the Resolution Copper dewatering, roughly accounting for less than 10 percent of groundwater pumped within the model area (Montgomery and Associates Inc. 2018).

GROUNDWATER-DEPENDENT ECOSYSTEMS

The Tonto National Forest evaluated 67 different spring or stream locations in the project area as potential GDEs. These include the following:

- **Queen Creek watershed.** Areas evaluated include Queen Creek itself from its headwaters to Whitlow Ranch Dam, four tributaries (Number Nine Wash, Oak Flat Wash, Arnett Creek, and Telegraph Canyon), and 29 spring locations.
- **Devil's Canyon watershed.** Areas evaluated include Devil's Canyon from its headwaters to the confluence with Mineral Creek at the upper end of Big Box Reservoir, three tributaries (Hackberry Canyon, Rancho Rio Canyon, and Iron Canyon), and seven spring locations. Four of these springs are located along the main stem of Devil's Canyon and contribute to the general streamflow.
- **Mineral Creek watershed.** Areas evaluated include Mineral Creek from its headwaters to the confluence with Devil's Canyon at the upper end of Big Box Reservoir, and five spring locations. Three of these springs are located along the main stem of Mineral Creek and contribute to the general streamflow.

After evaluating available lines of evidence for portions of Queen Creek, Devil's Canyon, Mineral

Creek, Telegraph Canyon, and Arnett Creek, the Groundwater Modeling Workgroup thought it likely that some stream segments within these watersheds could have at least a partial connection to regional aquifers, and each is described in more detail in the following text of this section. In addition, the Groundwater Modeling Workgroup identified 17 springs that demonstrate at least a partial connection to regional aquifers. The remainder of the potential GDEs were eliminated from analysis for various reasons (Garrett

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Devil's Canyon

The upper reach of Devil's Canyon (from above the U.S. 60 bridge to approximately km 9.3) includes a reach of perennial flow from approximately DC-11.0 to DC-10.6. The geohydrology suggests that this section of Devil's Canyon lies above the water table in the Apache Leap Tuff aquifer and is most likely supported by snowmelt or precipitation stored in near-surface fractures, and/or floodwaters that have been stored in shallow alluvium along the stream, before slowly draining into the main channel. Further evaluation of hydrochemistry and flow data support this conclusion (Garrett 2018e). Streamflow in Upper Devil's Canyon is not considered to be connected with the regional Apache Leap Tuff aquifer and would not be expected to be impacted by groundwater drawdown caused by the block-cave mining and dewatering. This portion of Devil's Canyon is also upstream of the subsidence area and unlikely to be impacted by changes in surface runoff.

Moving downstream in Devil's Canyon, persistent streamflow arises again about km 9.3. From this point downstream, Devil's Canyon contains stretches of perennial flow, aquatic habitat, and riparian galleries. Flow arises both from discrete springs along the walls of the canyon (four total), as well as groundwater inflow along the channel bottom. These reaches of Devil's Canyon also are supported in part by nearsurface storage of seasonal precipitation; however, the available evidence indicates that these waters arise primarily from the regional Apache Leap Tuff aquifer. Streamflow in middle and lower Devil's Canyon is considered to be connected with the regional aquifer, which could potentially be impacted by groundwater drawdown caused by the block-cave mining and dewatering. These reaches of Devil's Canyon also receive runoff from the area where the subsidence area would occur and therefore may also lose flow during runoff events.

Queen Creek

The available evidence suggests that Queen Creek from headwaters to Whitlow Ranch Dam is ephemeral in nature, although in some areas above Superior it may be considered intermittent, as winter base flow does occur and likely derives from seasonal storage of water in streambank alluvium, which slowly seeps back in to the main channel (Garrett 2018e). This includes three springs located along the main stem of Queen Creek above Superior.

An exception for Queen Creek is a perennially flowing reach between km 17.39 and 15.55, which is located downstream of Superior and upstream of Boyce Thompson Arboretum. Originally this flowing reach had been discounted because it receives effluent

discharge from the Superior Wastewater Treatment Plant. However, discussions within the Groundwater Modeling Workgroup suggested that a component of baseflow supported by regional aquifer discharge may exist in this reach as well. Regardless of whether baseflow directly enters the channel from the regional aquifer, substantial flow in this reach also derives from dewatering discharges from a small open-pit perlite mining operation, where the mine pit presumably intersects the regional aquifer (Garrett 2018e). Therefore, for several reasons, this reach was included as a potential GDE, with the potential to be impacted by regional groundwater drawdown.

The AGFD conducted surveys on this reach in 2017 and found that while flow fluctuated throughout the survey reach, aquatic wildlife and numerous other avian and terrestrial species use this habitat, and that aquatic species appeared to be thriving and reproducing (Warnecke et al. 2018).

Queen Creek also has perennial flow that occurs at Whitlow Ranch Dam and supports a 45-acre riparian area (primarily cottonwood, willow, and saltcedar). This location is generally considered to be where most subsurface flow in the alluvium along Queen Creek and other hydrologic units exits the Superior Basin. Queen Creek above and below Superior receives runoff from the area where the subsidence area would occur and therefore may also lose flow during runoff events. About 20 percent of the average

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Impacts Common to All Action Alternatives

EFFECTS OF THE LAND EXCHANGE

The land exchange would have effects on groundwater quantity and GDEs.

The Oak Flat Federal Parcel would leave Forest Service jurisdiction. Several GDEs were identified on the Oak Flat Federal Parcel, including Rancho Rio Canyon, Oak Flat Wash, Number 9 Wash, the Grotto (spring), and Rancho Rio spring. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Minerals Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources; this includes these GDEs. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources.

The offered lands parcels would enter either Forest Service or BLM jurisdiction. A number of perennial water features are located on these lands, including the following:

- Tangle Creek. Features of the Tangle Creek Parcel include Tangle Creek and one spring (LX Spring). Tangle Creek is an intermittent or perennial tributary to the Verde River and bisects the parcel. It includes associated riparian habitat with mature hackberry, mesquite, ash, and sycamore trees.
- Turkey Creek. Features of the Turkey Creek Parcel include Turkey Creek, which is an intermittent or perennial tributary to Tonto

Creek and eventually to the Salt River at Roosevelt Lake. Riparian vegetation occurs along Turkey Creek with cottonwood, locus, sycamore, and oak trees.

- Cave Creek. Features of the Cave Creek Parcel include Cave Creek, an ephemeral to intermittent tributary to the Agua Fria River, with some perennial reaches in the vicinity of the parcel.
- East Clear Creek. Features of the East Clear Creek Parcel include East Clear Creek, a substantial perennial tributary to the Little Colorado River. Riparian vegetation occurs along East Clear Creek, including boxelder, cottonwood, willow, and alder trees.
- Lower San Pedro River. Features of the Lower San Pedro River Parcel include the San Pedro River and several large, ephemeral tributaries (Cooper, Mammoth, and Turtle Washes). The San Pedro River itself is ephemeral to intermittent along the 10-mile reach that runs through the parcel; some perennial surface water is supported by an uncapped artesian well. The San Pedro is one of the few remaining free-flowing rivers in the Southwest and it is recognized as one of the more important riparian habitats in the Sonoran and Chihuahuan Deserts. The riparian corridor in the parcel includes more than 800 acres of mesquite woodlands that also features a spring-fed wetland.
- Appleton Ranch. The Appleton Ranch Parcels are located along ephemeral tributaries to the

Babocomari River (Post, Vaughn, and O'Donnel Canyons). Woody vegetation is present along watercourses as mesquite bosques, with very limited stands of cottonwood and desert willow.

- No specific water sources have been identified on the Apache Leap South Parcel or the Dripping Springs Parcel. Specific management of water resources on the offered lands would be determined by the agencies, but in general when the offered lands enter Federal jurisdiction, these water sources would be afforded a level of protection they currently do not have under private ownership.

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Alternative 2 – Near West Proposed Action

GROUNDWATER-DEPENDENT ECOSYSTEMS IMPACTED

Three GDEs would be directly disturbed by a tailings facility at the Near West site: Bear Tank Canyon Spring, Benson Spring, and Perlite Spring. All three of these GDEs are believed to be disconnected from the regional aquifers, relying on precipitation stored in shallow alluvium or fracture networks. Benson Spring is located near the front of the facility, potentially under the tailings embankment. Bear Tank Canyon Spring is located in the middle of the facility under the NPAG tailings, and Perlite Spring is located at the northern edge of the facility, near the PAG tailings cell.

Alternative 2 likely will impact 20 GDEs (see figure 3.7.1-9):

- Six springs are anticipated to be impacted from continued dewatering under the no action alternative.
- Two additional springs are anticipated to be impacted under the proposed action, because of the block-cave mining.
- Three springs and three ponds are directly disturbed by the subsidence area.
- Three springs are directly disturbed by the Alternative 2 tailings storage facility.
- One perennial stream (Devil's Canyon) is impacted by reduced runoff from the subsidence area.
- Two perennial stream reaches on Queen Creek are impacted by reduced runoff from both the subsidence area and the tailings.

CHANGES IN TAILINGS WATER BALANCE

The substantial differences in water balance between alternatives are directly related to the location and design of the tailings storage facility. There are five major differences, as shown in table 3.7.1-7:

- **Entrainment**. The tailings deposition method affects the amount of water that gets deposited and retained with the tailings. Alternative 2 entrains about the same amount of water as the other slurry tailings alternatives (Alternatives 3, 5, and 6), but substantially more than Alternative 4.
- **Evaporation**. The tailings deposition method also affects the amount of water lost through

evaporation, even among slurry tailings. Alternative 2 evaporates a similar amount of water as Alternatives 5 and 6, but substantially more than Alternatives 3 and 4.

- **Watershed losses**. Watershed losses from the capture of precipitation depend primarily on the location of the tailings storage facility and where it sits in the watershed. Surface runoff losses are summarized in table 3.7.1-5, and are analyzed in greater detail in Section 3.7.3, Surface Water Quantity.
- **Seepage.** Differences in seepage losses are substantial between alternatives. Three estimates of seepage are shown in table 3.7.1-7. The amount of seepage based on the initial tailings designs using only the most basic level of seepage controls is shown, and primarily reflects the type of tailings deposition and geology (WestLand Resources Inc. 2018b). After these initial designs, the engineered seepage controls were refined as part of efforts to reduce impacts on water quality from the seepage (Klohn Crippen Berger Ltd. 2019d). The estimated reduced seepage rates with all engineered seepage controls in place, both during operations and post-closure, are also shown in table 3.7.1-7. Alternative 2 loses more seepage than Alternatives 3 and 4, but less seepage than Alternatives 5 and 6. The effects of seepage on groundwater and surface water quality are analyzed in greater detail in Section 3.7.2, Groundwater and Surface Water Quality.

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While water flow, riparian ecosystems, and associated terrestrial and aquatic habitat would be maintained, there would still likely be a noticeable change in the overall environment that could affect wildlife, or the recreating public. The presence of infrastructure like wells and pipes near some natural areas could change the sense of place and nature experienced in these locations.

IMPACTS FROM MITIGATION ACTIONS

The mitigation actions identified would result in additional ground disturbance, though minimal. Mitigation for any given GDE would likely result in less than 1 acre of impact, assuming a well pad and pipeline installation, or installation of check dams. If all mitigations were installed as indicated in the plan, impacts could total 20 to 30 acres of additional ground disturbance.

MITIGATION EFFECTIVENESS AND IMPACTS OF VOLUNTARY MITIGATION MEASURES APPLICABLE TO GROUNDWATER QUANTITY AND GROUNDWATER-DEPENDENT ECOSYSTEMS

Appendix J contains mitigation and monitoring measures brought forward voluntarily by Resolution Copper and committed to in correspondence with the Forest Service. These measures are assumed to occur but are not guaranteed to occur. Their effectiveness and impacts if they were to occur are disclosed here; however, the unavoidable adverse impacts disclosed below do not take the effectiveness of these mitigations into account. No additional mitigation measures were voluntarily brought forward for groundwater quantity and GDEs.

OTHER POTENTIAL FUTURE MITIGATION MEASURES APPLICABLE TO GROUNDWATER QUANTITY AND GROUNDWATER-DEPENDENT ECOSYSTEMS

Appendix J contains several other potential future mitigation measures that the Forest Service is disclosing as potentially useful in mitigating adverse effects, but for which there is no authority to require. There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS.

Mitigation of effects of water level declines (PF-WR-03). The required measure above applied only to GDEs or wells located near the mine site, where dewatering impacts could occur. Similar concerns have been raised regarding drawdown from the Desert Wellfield, in the East Salt River valley. The permitting process for the wellfield will determine whether there are unavoidable impacts that may need mitigation, in which case Resolution Copper has indicated a willingness to consider additional measures.

UNAVOIDABLE ADVERSE IMPACTS

Given the effectiveness of mitigation, there would be no residual impacts on public water supplies near the mine site. All lost water supplies would be replaced.

For GDEs expected to be impacted by groundwater drawdown, the mitigation measures described would result in no net loss of riparian ecosystems or aquatic habitat on the landscape, although the exact nature and type of ecosystems would change to adapt to new water sources. However, impacts on the sense of place

and nature experienced at these perennial streams and springs, rare in a desert environment, would not be mitigated by these actions.

The mitigation plan would not mitigate any GDEs lost directly to surface disturbance, depending on the tailings alternative.

Impacts on water supplies in the East Salt River valley in the form of groundwater drawdown and reduction of regional groundwater supply would not be fully mitigated when only required mitigation is considered.

Other Required Disclosures

SHORT-TERM USES AND LONG-TERM PRODUCTIVITY

Groundwater pumping would last the duration of the mine life. At the mine itself, groundwater levels would slowly equilibrate over a long period (centuries). Groundwater drawdown from dewatering of the underground mine workings would constitute a permanent reduction in the productivity of groundwater resources within the long time frame expected for equilibrium. Groundwater in the vicinity of the Desert Wellfield would equilibrate more quickly, but there would still be an overall decline in the regional water table due to the Resolution Copper Project and a permanent loss of productivity of groundwater resources in the area.

Seeps and springs could be permanently impacted by drawdown in groundwater levels, as could the riparian areas associated with springs, but these impacts would be mitigated. GDEs or riparian areas

directly lost to surface disturbance would be a permanent impact.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF RESOURCES

Mine dewatering at the East Plant Site under all action alternatives would result in the same irretrievable commitment of 160,000 acre-feet of water from the combined deep groundwater system and Apache Leap Tuff aquifer over the life of the mine.

Changes in total groundwater commitments at the Desert Wellfield vary by alternative for tailings locations and tailings type. Alternative 4 would require substantially less water overall than the other alternatives (176,000 acre-feet, vs. 586,000 acre-feet for Alternative 2). Loss of this water from the East Salt River valley aquifer is an irretrievable impact; the use of this water would be lost during the life of the mine.

While several GDEs and riparian areas could be impacted by groundwater drawdown, these changes are neither irreversible nor irretrievable, as mitigation would replace water sources as monitoring identifies problems. However, even if the water sources are replaced, the impact on the sense of nature and place for these natural riparian systems would be irreversible. In addition, the GDEs directly disturbed by the subsidence area or tailings alternatives represent irreversible impacts.

3.7.2 Groundwater and Surface Water Quality

3.7.2.1 Introduction

The proposed mine could potentially impact groundwater and surface water quality in several ways. The exposure of the mined rock to water and

oxygen, inside the mine as well as in stockpiles prior to processing, can create depressed pH levels and high concentrations of dissolved metals, sulfate, and dissolved solids. After processing, the tailings would be transported for disposal into the tailings storage facility. Seepage from the tailings has the potential to enter underlying aquifers and impact groundwater quality. In addition, contact of surface runoff with mined ore, tailings, or processing areas has the potential to impact surface water quality.

This section contains analysis of existing groundwater and surface water quality; results of a suite of geochemical tests on mine rock; predicted water quality in the block-cave zone and potential exposure pathways, including the potential for a lake to form in the subsidence area; impacts on groundwater and surface water from tailings seepage; impacts on surface water from runoff exposed to tailings; impacts on assimilative capacity of perennial waters; impacts on impaired waters; whether chemicals added during processing would persist in the tailings storage facility; the potential for asbestiform minerals to be

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cells, while the NPAG tailings would be cycloned prior to placement. NPAG cyclone underflow (coarse material) would be used for embankment construction and NPAG cyclone overflow (fine material) would be thickened and placed behind the NPAG embankment. Details of the likely tailings operational sampling were explored by the Water Resources Workgroup (Wickham 2020).

3.7.2.4 Environmental Consequences of Implementation of the Proposed Mine Plan and Alternatives

No Action Alternative

Under the no action alternative, seepage would not develop from a tailings facility and contribute to chemical loading in downgradient aquifers or surface waters, and stormwater would not potentially contact tailings, ore, or process areas. Water quality in the block-cave zone and surrounding aquifers would continue to match current conditions.

Impacts Common to All Action Alternatives

EFFECTS OF THE LAND EXCHANGE

The land exchange would have effects on groundwater and surface water quality.

The Oak Flat Federal Parcel would leave Forest Service jurisdiction. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources; this includes water quality. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources.

The offered lands parcels would enter either Forest Service or BLM jurisdiction. A number of perennial water features are located on these lands and entering Federal management would offer additional protection for the water quality of these resources.

EFFECTS OF FOREST PLAN AMENDMENT

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 forest plan was conducted to identify the need for amendment due to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). A number of standards and guidelines (16) were identified applicable to management of water resources. None of these standards and guidelines were found to require amendment to the proposed project, either on a forest-wide or management area-specific basis. For additional details on specific rationale, see Shin (2020).

EFFECTS OF COMPENSATORY MITIGATION LANDS

None of the activities proposed on the compensatory mitigation lands would impact groundwater or surface water quality. Ground disturbance could generate small amounts of sediment, but standard stormwater controls and best management practices would be in place to minimize these effects. Overall,

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There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS.

Create and maintain public information repository (PF-WR-01). Maintaining a central location for monitoring data would allow the public to have access to reports submitted to regulatory agencies as conditions of permits. This would be beneficial for transparency, but overall would not reduce potential water quality impacts.

UNAVOIDABLE ADVERSE IMPACTS

The applicant-committed environmental protection measures for stormwater control would effectively eliminate any runoff in contact with ore or tailings. There are no anticipated unavoidable adverse effects associated with the quality of stormwater runoff under normal operating conditions, but under certain upset conditions and extreme storm events discharges from the seepage collection pond could occur, resulting in concentrations of contaminants in downstream waters above numeric water quality standards, though only for a certain distance until watershed flows dilute the discharge.

Seepage from the tailings storage facilities has several unavoidable adverse effects. In all cases, the tailings seepage adds a pollutant load to the downstream environment, including downstream aquifers and downstream surface waters where groundwater eventually daylights. The overall impact of this seepage varies by alternative. Alternatives 2, 3, and 4 all have anticipated impacts on water quality or have a high risk to water quality because of the extreme seepage control measures that must be

implemented, and the relative inflexibility of adding more measures as needed, given the proximity to Queen Creek.

Alternatives 5 and 6 are located at the head of larger alluvial aquifers with some distance downstream before the first perennial water (the Gila River). Adverse effects are not anticipated from these alternatives. These two locations offer more flexibility for responding to potential problems using additional seepage controls if needed. For all alternatives, some level of reduction in assimilative capacity of downstream waters (Queen Creek, Gila River) is unavoidable. For Alternatives 2, 3, and 4, discharge of additional contaminant load to designated impaired waters is also unavoidable.

Other Required Disclosures

SHORT-TERM USES AND LONG-TERM PRODUCTIVITY

The use of the alternative sites for tailings storage represents a short-term use, with disposal happening over the operational life of the mine. However, the seepage from the tailings facilities would continue for much longer, with potential management anticipated being required over 100 years in some cases. While seepage persists, the long-term productivity of the downstream aquifers and surface waters could be impaired for some alternatives.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF RESOURCES

The potential impacts on water quality from tailings seepage would cause an irretrievable commitment of water resources downstream of the

tailings storage facility, lasting as long as seepage continued. Eventually the seepage amount and pollutant load would decline, and water quality conditions would return to a natural state. This may take over 100 years to achieve in some instances.

While long lived, the impacts on water quality would not be irreversible, and would eventually end as the seepage and pollutant load declined.

* * *

Primary Legal Authorities and Technical Guidance Relevant to the Surface Water Quantity Analysis

- Clean Water Act (Section 404)
- Executive Order 11988—Occupancy and modification of floodplains; Executive Order 11990—Destruction, loss, or degradation of wetlands
- Pinal County Floodplain Management Ordinance

Existing Conditions and Ongoing Trends

REGIONAL HYDROLOGIC SETTING

The analysis area includes the Queen Creek, Devil's Canyon, Dripping Spring Wash, and Donnelly Wash drainages: all of these watercourses are tributaries of the Gila River, as shown in figure 3.7.3-1. Watershed characteristics of these drainages are summarized in table 3.7.3-1.

Table 3.7.3-1. Watershed characteristics

Watershed	Minimum Elevation (feet amsl)	Maximum Elevation (feet amsl)	Mean Elevation (feet amsl)	Average Slope (percent)	Area (square miles)
Devil's Canyon	2,240	5,610	4,240	36	36
Dripping Spring Wash	2,025	7,645	3,670	33	117
Queen Creek	2,135	5,610	3,225	31	143
Donnelly Wash	1,615	3,900	2,900	7	60

Note: Watershed characteristics derived from USGS StreamStats application (U.S. Geological Survey 2018c)

QUEEN CREEK AND DEVIL'S CANYON WATERSHEDS (SUBSIDENCE AREA AND

ALTERNATIVES 2, 3, AND 4)

The western part of the analysis area is drained by Queen Creek, which arises in the highlands around the Pinal Mountains and flows past Oak Flat and through the town of Superior. Queen Creek ultimately flows to Whitlow Ranch Dam, about 11 miles west of Superior. The dam is an ungated flood risk–management structure that was constructed in 1960 to reduce the risk of downstream flood damage to farmland and the communities of Chandler, Gilbert, Queen Creek, and Florence Junction. The dam includes a diversion structure to satisfy local water rights.

As discussed in Section 3.7.1, Groundwater Quantity and Groundwater-Dependent Ecosystems, Queen Creek is primarily ephemeral but exhibits perennial flow downstream of the town of Superior wastewater treatment plant, both from effluent and groundwater discharges from a nearby mine pit.

The ore body is located approximately 4,500–7,000 feet beneath Oak Flat in the upper Queen Creek basin. Devil's Canyon is located to the immediate east of Oak Flat with its headwaters located north of U.S. 60. Devil's Canyon cuts through the Apache Leap Tuff, forming a steep-sided canyon that flows in a southerly direction for approximately 9 miles. Devil's Canyon discharges into the reservoir of Big Box Dam. Mineral Creek, to the immediate east of Devil's Canyon, also discharges into the reservoir. Big Box Dam was constructed to divert flows from Devil's Canyon and Mineral Creek around the Ray Mine and into the Gila

River. As discussed in section 3.7.1, much of upper Devil's Canyon is ephemeral, where runoff is driven by rainfall events. However, there are several perennial reaches that are sustained either by shallow, recharged groundwater systems or a regional groundwater system that discharges to the surface via seeps and springs.

The subsidence area would affect portions of the watershed for Queen Creek and Devil's Canyon, and the tailings storage facilities for Alternatives 2, 3, and 4 would affect tributaries to Queen Creek.

GILA RIVER WATERSHED (ALTERNATIVES 5 AND 6)

Alternative 5 – Peg Leg would impact Donnelly Wash, which flows north to join the Gila River downstream of Mineral Creek. Donnelly Wash flows through an alluvial valley and has more gentle slope gradients, compared with the other watersheds. The main stem channel of Donnelly Wash is entirely ephemeral, with no known perennial reaches.

Alternative 6 – Skunk Camp would impact Dripping Spring Wash. Dripping Spring Wash is located in the eastern part of the analysis area. Dripping Spring Wash flows to the southeast for approximately 18 miles before discharging into the Gila River downstream of the Coolidge Dam. The main stem channel of Dripping Spring Wash is entirely ephemeral, with no known perennial reaches.

Both Alternatives 5 and 6 would also affect flow to the Gila River itself, which is perennial between Coolidge Dam and Florence.

CLIMATE CONDITIONS

The climate of the project area is generally arid to semi-arid. Topography influences the spatial distribution of precipitation, being lowest in the valley bottoms (average annual totals of approximately 13 inches in the vicinity of Whitlow Ranch Dam), and greatest in the upper elevations of the Queen Creek watershed (26 inches). There are two separate rainfall seasons. The first occurs during the winter from November through March, when the area is subjected to occasional storms from the Pacific Ocean. The second rainfall period occurs during the July and August "monsoon" period when Arizona is subjected to widespread thunderstorm activity whose moisture supply originates in the Gulf of Mexico and Pacific Ocean.

Precipitation typically occurs as high-intensity, short-duration storms during the summer monsoon, and longer term storms of more moderate intensity that occur during the winter months. Summer storms, coupled with relatively impervious land surfaces, sparse vegetation, and steep topographic gradients, result in rapid increases in streamflow. Winter rains tend to produce runoff events of longer duration and with higher maximum flows than summer rains. This is a result of higher rainfall totals and wetter antecedent moisture conditions that tend to prevail in the winter months due to a significantly lower evapotranspiration demand. These wetter conditions result in less near-surface storage capacity in the winter and a larger proportion of any given rain event runs off rather than infiltrating. Regional gaging stations indicate that a majority of runoff occurs

during the winter months (December to March) when evaporation rates are at a minimum.

ONGOING CLIMATIC TRENDS AFFECTING WATER BALANCE

Climate trends suggest that runoff could decrease in the future due to increased temperatures and reduced precipitation. Average temperatures in Arizona have increased about 2°F in the last century (U.S. Environmental Protection Agency 2016). In the Lower Colorado River basin, the annual mean and minimum temperature have increased 1.8°F–3.6°F for the time period 1900–2002, and data suggest that spring minimum temperatures for the same time period have increased 3.6°F–7.2°F (Dugan 2018).

Table 3.7.3-2. Watershed locations where changes in streamflow for the project EIS action alternatives were analyzed

Location	Drainage Area (square miles)	Action Alternative
Devil's Canyon – downstream of confluence with Hackberry Canyon, roughly DC-8.1C.	19.0	All
Devil's Canyon – confluence with Mineral Creek	35.8	All
Queen Creek – at Magma Avenue Bridge	10.4	All
Queen Creek – at Boyce Thompson Arboretum	27.9	All
Queen Creek – Upstream of Whitlow Ranch Dam	143.0	All
Potts Canyon* – confluence with Queen Creek	18.1	Alternative 4
Happy Canyon* – confluence with Queen Creek	4.2	
Silver King Wash* – confluence with Queen Creek	6.7	
Roblas Canyon† – confluence with Queen Creek	10.2	Alternative 2, Alternative 3
Bear Tank Canyon† – confluence with Queen Creek	4.9	
Unnamed Wash – confluence with Gila River	7.1	Alternative 5
Donnelly Wash – confluence with Gila River	59.9	
Gila River at Donnelly Wash	18,011	Alternative 5
Dripping Spring Wash – confluence with Gila River	117	Alternative 6
Gila River at Dripping Spring Wash	12,866	Alternative 6

Note: See process memorandum for more information on differences between analysis points (Newell and Garrett 2018d).
* Northern tributary impacted by Alternative 4 tailings storage facility.
† Northern tributary impacted by Alternative 2 and Alternative 3 tailings storage facility.

The total area of watershed removed from the system of each of the alternatives is summarized in table 3.7.3-3. These footprints reference the total watershed area where water losses would occur, either due to contact water being collected (tailings storage facilities or West Plant Site) or from the subsidence area.

Table 3.7.3-3. Watershed area lost for each mine component

Mine Component	Area of Watershed Lost (square miles)
Subsidence area – Queen Creek	1.76
Subsidence area – Devil's Canyon	0.94
West Plant Site	1.40
Near West tailings storage facility – Alternatives 2 and 3	6.90
Silver King tailings storage facility – Alternative 4	6.32
Peg Leg tailings storage facility – Alternative 5	11.88
Skunk Camp tailings storage facility – Alternative 6	12.15

Impacts Common to All Action Alternatives

EFFECTS OF THE LAND EXCHANGE

The land exchange would have effects on surface water quantity. The Oak Flat Federal Parcel would leave Forest Service jurisdiction. Several surface waters are located on the Oak Flat Federal Parcel, including Rancho Rio Canyon, Oak Flat Wash, and Number 9 Wash, and the parcel also is a portion of the watershed feeding both Queen Creek and Devil's Canyon. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources; this includes these surface waters. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources.

The offered lands parcels would enter either Forest Service or BLM jurisdiction. A number of ephemeral washes and perennial water features are located on these lands:

- Tangle Creek. Tangle Creek is an intermittent or perennial tributary to the Verde River and bisects the parcel. It includes associated riparian habitat with mature hackberry, mesquite, ash, and sycamore trees.
- Turkey Creek. Features of the Turkey Creek Parcel include Turkey Creek, which is an intermittent or perennial tributary to Tonto Creek and eventually to the Salt River at Roosevelt Lake. Riparian vegetation occurs along Turkey Creek with cottonwood, locus, sycamore, and oak trees.
- Cave Creek. Features of the Cave Creek Parcel include Cave Creek, an ephemeral to intermittent tributary to the Agua Fria River, with some perennial reaches in the vicinity of the parcel.
- East Clear Creek. Features of the East Clear Creek Parcel include East Clear Creek, a substantial perennial tributary to the Little Colorado River. Riparian vegetation occurs along East Clear Creek, including boxelder, cottonwood, willow, and alder trees.
- Lower San Pedro River. Features of the Lower San Pedro River Parcel include the San Pedro River and several large ephemeral tributaries (Cooper, Mammoth, and Turtle Washes). The San Pedro River itself is ephemeral to intermittent along the 10-mile reach that runs

through the parcel; some perennial surface water is supported by an uncapped artesian well. The San Pedro is one of the few remaining free-flowing rivers in the Southwest and it is recognized as one of the more important riparian habitats in the Sonoran and Chihuahuan Deserts. The riparian corridor in the parcel includes more than 800 acres of mesquite woodlands that also features a spring-fed wetland.

- Appleton Ranch. The Appleton Ranch Parcels are located along ephemeral tributaries to the Babocomari River (Post, Vaughn, and O'Donnell Canyons). Woody vegetation is present along watercourses as mesquite bosques, with very limited stands of cottonwood and desert willow.
- Small ephemeral washes and unnamed drainages are associated with the Apache Leap South Parcel or the Dripping Springs Parcel.

Specific management of surface water resources on the offered lands would be determined by the agencies, but in general when the offered lands enter Federal jurisdiction, these surface waters would be afforded a level of protection they currently do not have under private ownership.

EFFECTS OF FOREST PLAN AMENDMENT

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and

guidelines. Missions, goals, and objectives are applicable

* * *

UNAVOIDABLE ADVERSE IMPACTS

The primary impact described in the analysis (in this section, as well as section 3.7.1) is the loss of surface water flow to riparian areas (including xeroriparian vegetation along ephemeral washes) and loss of surface flow to any GDEs that are associated with these drainages. The conceptual mitigation proposed under the CWA would not be effective at avoiding, minimizing, rectifying, or reducing these impacts. Rather, the proposed conceptual mitigation would be effective at offsetting impacts caused by reduced surface water flows by replacing riparian function far upstream or downstream of project impacts.

As the subsidence area is unavoidable, the loss of runoff to the watershed due to the subsidence area is also unavoidable, as are any effects on GDEs from reduced annual flows. Return of water to Queen Creek would be highly effective at eliminating impacts from this water loss, though this mitigation is voluntary and not guaranteed to occur. The loss of water to the watershed due to the tailings facility (during operations, prior to successful reclamation) is unavoidable as well, due to water management and water quality requirements. Direct impacts on wetlands, stock tanks, and ephemeral drainages from surface disturbance are also unavoidable.

Other Required Disclosures

SHORT-TERM USES AND LONG-TERM PRODUCTIVITY

Desert washes, stock tanks, and wetland areas in the footprint of the subsidence area and tailings storage facility would be permanently impacted. In the short term, over the operational life of the mine, precipitation would be lost to the watershed. In the long term, most precipitation falling at the tailings facility would return to the watershed after closure and successful reclamation. There would be a permanent reduction in the quantity of surface water entering drainages as a result of capture of runoff by the subsidence area.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF RESOURCES

With respect to surface water flows from the project area, all action alternatives would result in both irreversible and irretrievable commitment of surface water resources. Irreversible commitment of surface water flows would result from the permanent reduction in stormwater flows into downstream drainages from the subsidence area. Changes to wetlands, stock tanks, and ephemeral drainages caused by surface disturbance would also be irreversible. Irretrievable commitment of surface water resources would be associated with additional temporary diversion, storage, and use of stormwater during active mining, but would be restored to the watershed after closure and reclamation.

* * *

Artificial lighting associated with the construction phase of the proposed project is less defined but is assumed to be less intense that associated with the operations phase, and to vary in location and intensity through the 1- to 9-year time period. Specific impacts would be similar to those described in the "General Operations Impacts" section; impacts on species groups are discussed in subsequent sections.

For species that utilize olfactory inputs to trigger part of their life cycle or habitat use, potential impacts from smells associated with construction activities could occur under all action alternatives. These potential impacts would be greatest for species that rely heavily on olfactory communication or cues.

General Operations Impacts

Potential impacts on wildlife and special status wildlife species during the operations phase of all action alternatives would be associated with subsidence; potential reduction in surface water flows and groundwater availability to support riparian habitats; habitat changes from ongoing noxious and invasive weed establishment and spread; and the ongoing presence of workers and equipment.

During the operations phase of the proposed mine, there would be impacts on wildlife and special status wildlife species from subsidence. Subsidence of the ground surface is anticipated to occur at approximately 6 years after initiation of mining activities and is anticipated to continue until 41 years after initiation of mining activities (see Section 3.2, Geology, Minerals, and Subsidence).

Within the cave limit, the development of a subsidence area would change the slope, aspect,

surface water flow direction and rate; surface elevation; and would impact habitat on approximately 1,342 acres. This could lead to mortality of wildlife species individuals within the subsidence area during caving/fracture events. Within the fracture limit (1,598 acres) the potential impacts would be similar to the cave limit; however, the intensity would be decreased as this area would have reduced surface impacts. The continuous subsidence limit (1,757 acres) would have limited potential for localized impacts on vegetation communities as it would have minimal surface impacts. The entire subsidence area would be fenced for public safety and would remove the subsidence area as habitat for some wildlife and special status wildlife species. Smaller species and avian species would be able to use the subsidence area as habitat.

Potential water usage associated with operation of all action alternatives would reduce water in the regional aquifer and may reduce surface water and groundwater levels downstream of the mine in Devil's Canyon and Queen Creek. Surface water amounts would be reduced, and timing/persistence of surface water would decrease. These potential decreases in groundwater and surface water would occur over a long period of time but could cause changes in riparian vegetation extent or health, and the potential reduction in streamflow could impact species that use these riparian areas during portions of their life cycle. Potential impacts may reduce or remove available habitat for wildlife and special status wildlife species and impact individuals in localized areas along Devil's Canyon and Queen Creek, or around springs. A reduction in spring and riparian habitats may require

species in the area to travel farther to find water, thus impacting their overall fitness due to increased metabolic expenditures. Section 3.7.3.4 addresses potential changes to water availability.

The proposed water usage associated with the project is not anticipated to affect flow regimes or riparian habitat along the Gila River (see section 3.7.1 for a more detailed discussion of impacts on GDEs and riparian areas).

We do not anticipate any impacts on wildlife or special status wildlife species from water quality impacts at any of the tailings locations during operations, as any stormwater that comes in contact with the tailings piles would be contained in the tailings facilities or in seepage ponds downstream. Water quality modeling for the proposed project indicates that water quality at the tailings pile area would not exceed

* * *

3.8.4.5 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Impacts on wildlife and wildlife habitat would primarily be short term and would include destruction of habitat for mine construction, disturbance from mining and associated activities, and direct mortality from increased mine-related vehicle traffic. Disturbance and direct mortality would cease at mine closure, and reclamation would eventually allow wildlife habitat to reestablish itself. However, this could take many decades or longer. Portions of the tailings storage facility landform may never return to

pre-mining conditions, and the effects of reduced quality of habitat would be long term or permanent. Impacts on wildlife and aquatic habitat due to drawdown that affects streams and springs would represent a permanent loss in productivity.

Irreversible and Irretrievable Commitment of Resources

The direct loss of productivity of thousands of acres of various habitat from the project components would result in both irreversible and irretrievable commitment of the resources that these areas provide for wildlife (i.e., breeding, foraging, wintering, and roosting habitat; animal movement corridors, etc.). Some habitat could reestablish after closure, which would represent an irretrievable commitment of resources, but portions of the tailings storage facility landform may never return to pre-mining conditions, and the effects of reduced quality of habitat would likely be irreversible.

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treasures of Arizona and our nation. The Arizona Trail experience provides opportunities for quality recreation, self-reliance, and discovery within a corridor of open space defined by the spectacular natural landscapes of the state (U.S. Forest Service 2018c).

The Arizona Trail is administered by the Forest Service in cooperation with other Federal agencies. The Forest Service is developing a comprehensive management plan for the Arizona Trail that establishes a 0.5-mile trail management corridor extending from the trail centerline (total 1-mile-wide

corridor) for the entire length of the trail. The management corridor is critical to the nature and purpose of the trail, and management plans for lands within the trail corridor will be developed or updated by the respective agencies after the Forest Service completes its comprehensive management plan.

Four trail "passages" are located within the analysis area, stretching from the Tortilla Mountains in the south to the Superstition Mountains in the north (see figure 3.9.3-1). The four passages of the Arizona Trail total approximately 84 miles of trail through the analysis area. These are Passage 15 – Tortilla Mountains; Passage 16 – Gila River Canyons; Passage 17 – Alamo Canyon; and Passage 18 – Reavis Canyon.

APACHE LEAP SPECIAL MANAGEMENT AREA

The Apache Leap SMA was established in 2017 (U.S. Forest Service 2017c) and straddles the Apache Leap escarpment, covering 839 acres (figure 3.9.3-5). This escarpment of cliffs and hoodoos visually dominates the eastern skyline from the basin below creating a scenic backdrop for the town of Superior and adjacent highways. The escarpment's eastern slopes include numerous drainages and canyons that lead to the Oak Flat area, located approximately 2 air miles away. The area offers dispersed recreation opportunities that emphasize nonmotorized and nature-based activities in a predominantly undeveloped setting.

The area was set aside in recognition of its unique natural and scenic character; for its bounty of life-sustaining natural resources, which include acorns, medicinal and other edible plants, wild game, and

water; and as a place of religious and cultural importance to the Apache people.

No mining activities are proposed within the SMA. However, authorized activities under PL 113-291 include installing seismic monitoring equipment, as well as signage and other public safety notices, and operating an underground tunnel and associated workings between the East Plant Site and West Plant Site, which would extend beneath the Apache Leap escarpment.

OAK FLAT CAMPGROUND

The Tonto National Forest manages the Oak Flat Campground, which provides approximately 20 campsites (available first come, first served) and two vault toilets (U.S. Forest Service 2018d). The campground is situated along the Gila-Pinal Scenic Road in the rolling hills near Devil's Canyon (figure 3.9.3-6) and hosts a large stand of mature oak trees that provide natural shade. The surrounding area is known for its numerous recreational bouldering opportunities. Families and individuals like to come to this site for its natural desert beauty and rock climbing. Oak Flat Campground is also an important birding destination and considered an eBird "hotspot," with approximately 183 different species reported by birders to eBird (Arizona Game and Fish Department 2018e). Oak Flat is a unique recreation setting for not only Tonto National Forest but the entire state of Arizona. Multi-year camera studies conducted from 2011 to 2019 indicated over 5,000 observances of users in various areas of Oak Flat (Featherstone and Alexander 2019; Featherstone et al. 2012).

* * *

3.9.4.2 Impacts Common to All Action Alternatives

Impacts that would occur under each of the action alternatives are presented in this section. Regardless of action alternative, the principal adverse impact on recreational users of public lands as a result of the proposed action or alternatives would be through closure of lands to public access, meaning both direct loss of recreational use of the lands themselves and potential loss of access to adjacent lands because movement across these areas would become prohibited (see "Loss of Federal Land Base" below). Other impacts on recreational users may occur through increased traffic, increased noise, changes to the scenery or visual qualities of certain areas, and other mine-induced effects. Such effects are noted in the following text and addressed in greater detail in the portions of chapter 3 relevant to each of those resources.

A number of existing Resolution Copper–owned properties in the recreation analysis area are, by and large, already closed to public access: these include the privately held portions of the East Plant Site, the West Plant Site, and the filter plant and loadout facility. Thus, in the impact analyses presented in the sections that follow, loss of access to or across these private lands is not considered as a change from current, existing conditions. However, potential expansion of any of these facilities onto Tonto National Forest or other public lands as a result of project approval is considered a change from current conditions and thus an impact. So, too, is potential development of new facilities or physical alteration of lands that would result in closure of lands to recreational use or through-access, such as construction at any of the

tailings storage facility locations or development of the anticipated subsidence area at Oak Flat.

The following project components that are common to all action alternatives are considered in the impact analyses: tailings storage facility including fence line boundary; subsidence area; East Plant Site expansion onto Tonto National Forest lands; MARRCO corridor; and conveyance of the Oak Flat Federal Parcel to Resolution Copper through the PL 113-291–mandated land exchange. It should be noted that tailings pipeline corridors and power transmission line corridors, though part of mine facilities under any alternative, may represent a change to recreation settings but are not considered in this analysis as precluding public crossing or other access.

Components or differing configurations of components that are unique to one or more alternatives are described and addressed in the portions of the analysis specific to each alternative.

Effects of the Land Exchange

The land exchange would have significant effects on recreation. The Oak Flat Federal Parcel would leave Forest Service jurisdiction, and with its myriad recreational opportunities currently available and used by the public. The Oak Flat bouldering area offers freestanding bounders and small cliff-lined canyons with over 1,000 documented boulder routes and problems. The area has held various bouldering and climbing competitions as recently as 2016 and the Phoenix Bouldering Contests and Phoenix Boulder Blasts through 2004; all climbing and bouldering areas would be lost when the Oak Flat Federal Parcel transfers out of Federal ownership. Additional

recreational activities that would be lost include camping at the Oak Flat Campground, picnicking, and nature viewing. The campground currently provides approximately 20 campsites and a large stand of native oak trees. It also is boasted as an important birding destination with approximately 183 different species reported by birders.

The offered lands parcels would enter either Forest Service or BLM jurisdiction. The eight parcels would have beneficial effects; they would become accessible by the public and would be managed by the Federal Government for multiple uses, which could include recreational activities. Some parcels, specifically Cave Creek, Tangle Creek, and Turkey Creek, all have trails leading directly into them. Under Federal management, these parcels could provide an extension of current recreational activities in those areas. Specific uses would be identified by the respective agency upon conduction of the land

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Community. Recreational use of Queen Creek is highly likely, given the proximity to trail systems and the new Castleberry Campground.

Effects of Recreation Mitigation Lands

The recreation mitigation lands are anticipated to affect recreation through the development of a planned recreation trail system on NFS lands. The existing roads and trails, as well as new planned routes, will provide opportunities for hikers, equestrians, mountain bicyclists, rock climbers, and OHV users. The planned trail system will better employ the currently underdeveloped recreation

opportunities of NFS lands located in close proximity to Superior and the Phoenix metropolitan area.

The recreation mitigation lands also are anticipated to reduce conflicts between recreational use and other uses of the Tonto National Forest or nearby private property. Trails were designed to reduce user motorized and nonmotorized group conflicts, to avoid trails near illegal and unauthorized shooting areas, and to eliminate private land crossing, including access to an existing mine operation not associated with the Resolution Copper Project.

Summary of Applicant-Committed Environmental Protection Measures

A number of environmental protection measures are incorporated into the design of the project that would act to reduce potential impacts on recreation. These are non-discretionary measures, and their effects are accounted for in the analysis of environmental consequences.

Applicant-committed environmental protection measures by Resolution Copper include the following:

- Developing traditional and sport climbing open to the public on Resolution Copper property outside of the mining footprint through agreement with Queen Creek Coalition. Further detail can be found on the Queen Creek Coalition website and the agreement with REI.
- Developing a concentrate pipeline corridor management plan to reestablish crossing on the Arizona Trail after construction. Further detail can be found in the Concentrate Pipeline

Corridor Management Plan (M3 Engineering and Technology Corporation 2019).

To prevent exposure of the public to geological hazards, Resolution Copper would use fencing, berms, locking gates, signage, natural barriers/steep terrain (25 to 30 percent or greater), and site security measures to limit access roads and other locations near areas of heavy recreational use.

General Setting

It is possible that users could be displaced or opportunities for public recreation activities could be diminished in portions of the action alternatives area where public access is restricted. The subsidence area (approximately 1,672 acres of NFS lands, prior to the land exchange) would be lost for public access in perpetuity. Based on current knowledge, the steep and unstable slopes of the subsidence area are projected to be unsafe for future public access. Adjacent and surrounding areas likely would experience increased recreational use displaced when Oak Flat becomes unavailable. This pressure could lead to overcrowding and overuse commensurate with future increases in recreation visitation.

The removal of covering vegetation during pre-mining and mining operations would have an indirect impact on adjacent recreational users in the analysis area from diminishing the quality of the recreational setting. The recreation setting would be changed as a result of the visual contrast these activities introduce to the existing landscape. Although the sight of mining activities may not affect some recreational users (e.g., hunting or OHV driving), those seeking the features of a natural setting may see the change to the

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There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS.

Voluntary achievement of "no net loss" of habitat (PF-WI-01). The acquisition of additional open space within the region would offer direct benefits to habitat, wildlife, and recreation.

Purchase lands in the "Preserve" (PF-RC-01). The acquisition of additional open space within the region would offer direct benefits to habitat, wildlife, and recreation.

Develop MARRCO corridor for tourism and reactivate rail (PF-RC-02). This mitigation would only be undertaken after study and resolution of potential safety and operational conflicts. If feasible, it would provide a new recreation opportunity in the town of Superior, which would be beneficial for socioeconomic development and tourism.

Fund extension of the LOST Queen Creek segment (PF-RC-03). This mitigation would add to recreational trail opportunities in the vicinity of the town of Superior, building on the suite of mitigation measures already being required (FS-RC-03). However, this use may not be compatible with the management of the Apache Leap SMA.

Unavoidable Adverse Impacts

Recreational use of the area would be permanently adversely impacted. Unavoidable adverse impacts on recreation include long-term displacement from the project area and the loss of public access roads

throughout the project area. These impacts cannot be avoided or fully mitigated.

3.9.4.10 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Recreation would be impacted in both the short and long term. Public access would be restricted within the perimeter fence until mine closure, which is considered to be a short-term impact. However, most of the tailings and subsidence area would not be available for uses such as OHV or other recreational use in the future, depending on the final stability and revegetation of these areas.

Irreversible and Irretrievable Commitment of Resources

In general, there would be irretrievable and irreversible impacts as a result of displaced recreational users and adverse effects on recreation experiences and activities as reported above under "Loss of Federal Land Base." There would be irretrievable impacts on recreation with all action alternatives. Alternatives 2, 3, and 5 would cross the Arizona Trail. Alternative 4 would require rerouting of the trail.

Each action alternative would result in the permanent removal of off-highway routes, resulting in a permanent loss of recreation opportunities and activities. Public access would only be permitted outside the mine perimeter fence. Although routes through the project area might be reestablished after closure of the East Plant Site, West Plant Site, filter plant and loadout facility, and the MARRCO corridor, routes through the subsidence area and tailings

storage facility would not be reestablished. Therefore, impacts on OHV routes are considered irretrievable for those that would be reestablished following mine closure, and irreversible for those that would be permanently affected.

Even after full reclamation is complete, the post-mine topography of the project area may limit the recreation value and potential for future recreation opportunities.

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Impacts Common to All Action Alternatives

Based on the preliminary GPO, potentially hazardous materials, including petroleum products, processing fluids, and reagents and explosives, would be transported to and stored within the boundaries of the mine in large quantities for use in various operational components of the mine (Resolution Copper 2016c). Hazardous and non-hazardous materials and supplies are included in section 3.9 of the GPO, "Materials, Supplies and Equipment." Transportation of hazardous materials as well as proposed mining activities have the potential to release these materials into the environment and affect the natural condition of soils, vegetation, wildlife, surface water and groundwater resources, and air quality within the analysis area. The issues considered in this section are (1) the use, storage, and disposal of hazardous materials within the project area; (2) the transportation of hazardous materials to the project area; and (3) the potential for those materials to enter the environment in an uncontrolled manner, such as by accidental spill.

An accidental release or significant threat of a release of hazardous chemicals into the environment could result in direct and indirect harmful effects on or threat to public health and welfare or the environment. The environmental effects of a hazardous chemical release would depend on the substance, quantity, timing, and location of the release. A release event could range from a minor diesel fuel spill within the boundaries of the mine, where cleanup would be readily available, to a major or catastrophic spill of contaminants into a stream or populated area during transportation. Some hazardous chemicals could have immediate destructive effects on soils and vegetation, and there also could be immediate degradation of aquatic resources and water quality if spills were to enter surface water. Spills of hazardous materials could potentially seep into the ground and contaminate the groundwater system over the long term.

EFFECTS OF THE LAND EXCHANGE

The land exchange would have an effect on the potential presence and use of hazardous materials on these lands.

The Oak Flat Federal Parcel would leave Forest Service jurisdiction. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources; this includes use of hazardous materials. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. No

hazardous materials are presently being used at the Oak Flat Federal Parcel; once the land exchange occurs, Resolution Copper could use hazardous materials on this land without approval. However, all other environmental laws regarding the use, storage, transport, and disposal of hazardous materials would still apply and need to be followed.

The offered land parcels would enter either Forest Service or BLM jurisdiction. This would provide a new level of control over the use of hazardous materials on these properties.

EFFECTS OF FOREST PLAN AMENDMENT

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

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towers; avoiding use of monopole transmission structures; avoiding "skylining" of transmission and communication towers and other structures (i.e., considering topography when siting transmission structures to avoid "skylining" of structures on high ridges in the landscape); and using air transport capability to mobilize equipment and materials for clearing, grading, and erecting transmission towers in areas of the highest visual sensitivity with difficult access. These measures would be effective at reducing

and minimize the scenery impacts and project contrast of mining operations in the surrounding landscape and impacts upon sensitive viewers. The power line corridors occur mainly on NFS lands, and the mitigation measures can be required within those areas, regardless of alternative.

Mitigation Effectiveness and Impacts of Voluntary Mitigation Measures Applicable to

Scenic Resources

Appendix J contains mitigation and monitoring measures brought forward voluntarily by Resolution Copper and committed to in correspondence with the Forest Service. These measures are assumed to occur but are not guaranteed to occur. Their effectiveness and impacts if they were to occur are disclosed here; however, the unavoidable adverse impacts disclosed below do not take the effectiveness of these mitigations into account. No additional mitigation measures were voluntarily brought forward for scenic resources.

Other Potential Future Mitigation Measures Applicable to Scenic Resources

Appendix J contains several other potential future mitigation measures that the Forest Service is disclosing as potentially useful in mitigating adverse effects, but for which there is no authority to require. There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS. No potential future mitigation measures were identified applicable to scenic resources.

Unavoidable Adverse Impacts

The subsidence area and residual tailings storage facility would constitute a permanent adverse impact that cannot be avoided or completely mitigated. While night brightness from mine facility lighting would be mitigated to a large degree, residual impacts would remain that are not avoidable and cannot be completely mitigated.

3.11.4.10 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Impacts on visual resources would be both short and long term. While impacts associated with processing plant buildings and structures such as utility lines and fences would cease when they are removed at closure, the subsidence area and tailings storage facility would permanently alter the scenic landscape and affect the scenic quality of the area in perpetuity. Impacts on dark skies from night lighting would cease after mine closure and reclamation.

Irreversible and Irretrievable Commitment of Resources

For all action alternatives, there would be an irretrievable loss of scenic quality from increased activity and traffic during the construction and operation phases of the mine. The size and extent of the tailings facilities would create losses of scenic quality until rock weathering and slope revegetation have reduced color, form, line, and texture contrasts to a degree that they blend in with the surrounding landscape; revegetation would occur relatively soon after closure, but weathering would take such a long time scale as to be considered permanent. Due to the

geological time frame necessary for these processes to occur, the loss of scenic quality associated with the tailings facilities would effectively be irreversible.

For each action alternative, the visual contrasts that would result from the introduction of facilities associated with the project would be an irretrievable loss of the undeveloped, semi-primitive setting until the project is closed and full reclamation is complete. Under all of the action alternatives, existing views would be irreversibly lost behind the tailings storage facility because of the height and extent of the piles.

There would be an irretrievable, regional, long-term loss of night-sky viewing during project construction and operations because night-sky brightening, light pollution, and sky glow caused by mine lighting would diminish nighttime viewing conditions in the direction of the mine. Impacts on dark skies due to night lighting would cease after mine closure and reclamation. Regional dark skies would continue to brighten due to other development factors in the region throughout the mine life. Therefore, it is unlikely that a return to current dark sky conditions would occur after mine closure.

* * *

3.12 Cultural Resources

3.12.1 Introduction

Cultural resources consist of the physical aspects of the activities of past or present cultures, including archaeological sites, historic buildings and structures, trails, roads, infrastructure, traditional cultural properties, and other places of traditional, cultural, or

religious importance. Cultural resources can be human-made or natural features and are, for the most part, unique, finite, and nonrenewable. Cultural resources are often discussed in terms of historic properties under the National Historic Preservation Act (NHPA); however, the term "historic properties" has a very specific definition that may omit other resources that are critical to NEPA analysis but do not qualify as historic properties. This analysis is designed to capture potential impacts on cultural resources within the project area; however, it focuses on the potential impacts on historic properties (i.e., cultural resources that are listed in or have been determined eligible for listing in the National Register of Historic Places (NRHP)) and cultural resources that have not been evaluated for their NRHP status. The numbers and types of historic properties and those resources that may be historic properties represent the best possible information about cultural resources that can be verified and quantified.

Overview

Applicable laws that oversee cultural resources management in the United States include the National Historic Preservation Act, Archaeological Resources Protection Act, and numerous other laws and regulations at various levels of government. Despite the host of laws in place to mandate and oversee the detailed cultural resources surveys undertaken on behalf of Resolution Copper, it is likely that some portion of currently buried or otherwise undetected prehistoric (Native American only) and historic (Native American and Euro-American) artifacts and resources could be lost to mine-related construction and operation. This is especially true in

areas such as Oak Flat, the Queen Creek watershed, and the Superior area, which have long histories of human habitation. Even those sites and artifacts that researchers have recorded and archived would be irrevocably altered.

3.12.1.1 Changes from the DEIS

Since the publication of the DEIS, surveys for cultural resources have been completed and reported on for the majority of the project area and alternatives; these data were compiled and used in the FEIS analysis. Design elements for project components, including alternatives, have been refined and are reflected in the analysis. Alternatives 5 and 6 now have only a single pipeline route to reach the tailings storage facility, as described in chapter 2. Additionally, we revised the Alternative 6 pipeline route, primarily to address potential impacts to habitat and resources along Mineral Creek. These changes are reflected in this section.

In response to comments on the DEIS, information and analysis on indirect or atmospheric impacts to the built environment of Superior, Globe, and Miami was added, as well as a discussion of the Section 106 area of potential effects (APE) and its relationship to the analysis area. Methods for the visual analysis have been brought more in line with those used in Section 3.11, Scenic Resources. Expanded background information on the Historic Euro-American period has been added. Mitigation discussions have been updated to reflect measures that were developed for the Section 106 PA in consultation with the tribes, local communities, the public, and cooperating agencies to resolve adverse effects; these measures are summarized in appendix J.

The cumulative effects analysis was revised for the FEIS to better quantify impacts. It is described I detail in chapter 4 and summarized in this section.

* * *

A complete listing and brief description of the legal authorities and agency guidance used in this cultural resources impacts analysis may be reviewed in Newell (2018a).

Compliance with Section 106 of the NHPA

The most pertinent law or regulation for the proposed project is Section 106 of the NHPA and its implementing regulations found at 36 CFR 800. Section 106 requires federal agencies to consider the effects of an undertaking on historic properties which are defined by 36 CFR 800.16(l)(1) as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP. An undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval (36 CFR 800.16(y)).

36 CFR 800 sets forth the procedures to be followed during the Section 106 process: initiation of the Section 106 process, identification of historic properties, assessment of adverse effects, and resolution of adverse effects. The following summarizes each step in the process and how the Forest Service has fulfilled its responsibilities as lead Federal agency for the undertaking.

During the initiation of the Section 106 process (36 CFR 800.3), the Federal agency establishes that there is an undertaking and determines that it has the potential to affect historic properties. The agency then ascertains whether other State or Federal agencies are involved, identifies the appropriate SHPO and/or Tribal Historic Preservation Officers (THPOs), identifies appropriate tribes and others consulting parties, and makes a plan for involving the public in the process. The Forest Service initiated consultation with the SHPO on March 31, 2017; with ACHP on December 7, 2017; and with 11 tribes on the prefeasibility exploration plan for the Resolution Copper Project via a letter dated June 6, 2008, for the land exchange via a letter dated August 4, 2015, and with four additional tribes on December 3, 2018.

The Forest Service determined that due to the complexity of the project, a PA would be needed to modify the Section 106 processing moving forward. The Forest Service has developed a PA in consultation with SHPO, ACHP, tribes, and other consulting parties; the final version of the PA circulated for signature can be found in appendix O. The PA outlines the roles and responsibilities of parties, the procedure for identification and evaluation of historic properties, assessment for effects, and each party's responsibilities under the Section 106 process. Several versions of the PA were sent out for review and comment to the consulting parties including the tribes. Comments were received and incorporated into each new draft of the PA. In addition, the Forest Service held meetings with the tribes to discuss the PA on October 28 and 29, 2019. The following processes

described below are in accordance with those described in the PA.

During the identification of historic properties (36 CFR 800.4), the Federal agency determines the APE in consultation with the SHPO/THPO, tribes, and other consulting parties, identifies resources that may be historic properties within the APE to the appropriate level of effort in consultation with the SHPO/THPO, tribes, and other consulting parties, and evaluates the historic significance of each resource through application of the NRHP criteria and determining whether a resource is eligible for the NRHP in consultation with the SHPO/THPO, tribes, and other consulting parties.

The Forest Service continuously consulted with the SHPO, tribes, and consulting parties regarding the APE. The APE has changed and been shaped by the input of these parties over time. We assert that this APE is expansive enough to account for direct, indirect, and cumulative effects of the project (see section 3.12.2.1 above for discussion of APE development).

For the APE for physical effects, the Forest Service directed the completion of pedestrian surveys across the majority of the physical APE where project-related ground-disturbing activities might occur (see below for an expanded discussion of these survey and their results). Areas surveyed include the Oak Flat Federal Parcel, GPO project components (East Plant Site, West Plant Site, MARRCO corridor, and filter plant and loadout facility), and the proposed tailings locations for Alternatives 2, 3, 4, 5, and 6. Results from these cultural resource inventories have been compiled into three reports and shared with the

SHPO, relevant land-managing agencies, and consulting tribes.

For the APE for auditory effects and the APE for visual effects, a Class I records search for archaeological sites and built environment resources was conducted of the entire APE (see below). The Forest Service also sought information on places of traditional and cultural importance to tribes through three measures: tribal consultations, compilation of an ethnographic and ethnohistoric report, and pedestrian surveys by tribal monitors of the APE for physical effects. Along with agency determinations on eligibility, survey results have been or will be shared with SHPO, land-managing agencies, and consulting tribes. Please note that some reports contain sensitive information provided by the tribes and therefore this information is shared in a summarized form as part of consultation.

During the assessment of adverse effects (36 CFR 800.5), the Federal agency, in consultation with the SHPO/THPO, tribes, and other consulting parties, applies the criteria of adverse effects on the historic properties in the APE and determines if the undertaking will result in an adverse effect on historic properties. If no adverse effects are found, then the undertaking may be implemented and the agency's Section 106 responsibilities have been fulfilled. If adverse effects on historic properties are found, the agency must consult with SHPO, tribes, and other consulting parties to resolve the adverse effects.

In consultation with SHPO, ACHP, tribes, and other consulting parties, the Forest Service determined that the project will have an adverse effect on historic properties. However, because of the

complexity of the project, all of the effects would not be known prior to implementation of the project. The processes for addressing these effects is outlined in the PA (see appendix O).

Resolution of adverse effects (36 CFR 800.6) involves the agency consulting with SHPO, tribes, and other consulting parties to develop strategies to avoid, minimize, or mitigate adverse effects on historic properties. This is done through the development and implementation of an agreement between the Federal agency, the ACHP, the SHPO, and tribes and other consulting parties. The development shall also include the public.

In accordance with 36 CFR 800.2(d)(3), the Forest Service intentionally relied on a NEPA public participation strategy to assist the Federal agencies in satisfying the public involvement requirements under Section 106. This strategy included involving interested parties in the NEPA process, providing project information to the public, giving them opportunities to comment on the project including Section 106 issues through five public scoping meetings held on April 4, 5, 6, March 31, and June 9, 2016; two alternatives workshops held on March 21 and 22, 2017; and DEIS public meetings on September 10, 12, 17, 19, and October 8 and 10, 2019. Specific workshops to hear public comments and concerns about Section 106 compliance and the PA were held on June 13, 14, and 15, 2018. A workshop for consulting parties to discuss the PA was held on December 11, 2019. Additionally, the Forest Service received public comments through the NEPA process on the PA as presented in the DEIS.

3.12.3.2 Existing Conditions and Ongoing Trends

Human occupation of east-central Arizona spans from the Paleoindian period to today, with the primary occupation in the project area vicinity from the Formative era to the Late Historic period. The following section is a brief overview to provide context for discussing potential impacts from the proposed project.

* * *

spread of polychrome pottery in southern Arizona. At the end of the Formative, a reorganization of Salado sites can be seen, with many villages abandoned in favor of a smaller number of larger settlements, possibly due to conflicts. The Salado went into decline likely due to environmental factors and population pressure, and by the end of the Formative period most Salado sites were abandoned.

PROTOHISTORIC AND HISTORIC NATIVE AMERICAN

The project area is within the traditional territories of the Western Apache, the Yavapai, and the Akimel O'odham or Upper Pima. The histories of the Western Apache—a group that includes ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache—tell of migrations into Arizona where they encountered the last inhabitants of villages along the Gila and San Pedro Rivers. The Western Apache practiced a mixed subsistence strategy of farming in the summer in the north, and hunting and gathering in the winter in the south. In the 1870s, the Apache were forced onto reservations, which curtailed much of their seasonal round. However, not all Apache stayed

on the reservations, and some continued to use the vicinity of the project area into the twentieth century. Like the Western Apache, the Yavapai practiced a mixed subsistence strategy with an emphasis on hunting and gathering. Yavapais had little contact with Euro-Americans until the 1860s, and also like the Apache, after silver was discovered in Arizona, they were forced onto reservations in the 1870s. The Akimel O'odham were primarily farmers who also practiced hunting and gathering of wild resources. They and other O'odham groups are the likely descendants of the Hohokam, and like the Hohokam, lived along the Gila River to the west of the project area. The year-round source of water allowed them to settle large villages and cultivate more crops with irrigation agriculture than some of the other O'odham groups in harsher areas of the desert while still gathering resources from the surrounding areas.

HISTORIC EURO-AMERICAN

Spanish, Mexican, and Euro-American settlers began to arrive in appreciable numbers in the eighteenth century. The ensuing period of historical exploitation was marked by mining, ranching, and homesteading interests. After the end of the Mexican–American War and the signing of the Treaty of Guadalupe in 1848, the United States acquired what was to become Arizona from Mexico.

The discovery of gold in California, the 1862 Homestead Act, and development of gold and silver mines in western and central Arizona heralded the arrival of a large number of Euro-American settlers. However, in the vicinity of the project area, the Apache presence prevented much settling of the area until they were forcibly removed by the U.S. Army and

several forts were established in the area. Mining became a significant industry by the late 1800s, with mines in Globe, Miami, Ray, and Superior. Some of these mines were exhausted quickly; others, like the Ray Mine, are still in operation today. Mining brought all sorts of people to the area looking for work, including Mexican Americans and Native Americans as well as Anglo miners and settlers. Ranchers also came to the area in the late 1800s, and several small ranches were established. These ranches remained small operations but often supplied food to local miners; ranchers also worked for the mines to supplement their income.

Concerns over environmental degradation in the area due to overgrazing and drought led to the establishment of the Tonto National Forest (then the Tonto National Reserve) in 1905 to protect the Salt River Watershed. Some of the Tonto National Forest was transferred to the Crook National Forest in 1908, but was eventually returned. During the Works Progress Administration era, a large erosion control project was conducted in the project area, as well as establishing the Oak Flat Campground. Nature-based tourism and recreation continues to play an important role in the area, enhancing the quality of life and economy of local communities.

* * *

Inventory of the Indirect Impacts Analysis Area

For the indirect impacts analysis area, SWCA Environmental Consultants (SWCA) conducted a Class I records search of the area. The cultural resources team searched AZSITE—the online cultural

resources database that contains records from the SHPO, BLM, and the ASLD—as well as records housed at the Tonto National Forest Phoenix Office, the BLM Tucson and Lower Sonoran Field Offices, and the Arizona State Museum, for all recorded archaeological sites within 2 miles of the direct analysis area. The NRHP database was also searched for historic properties listed within 2 miles of the direct analysis area.

Inventory of the Atmospheric Impacts Analysis Area

For the atmospheric impacts analysis area, SWCA conducted a Class I records search of the area. The cultural resources team searched AZSITE, the Tonto National Forest Phoenix Office records, Arizona State Museum, and the BLM Tucson and Lower Sonoran Field Offices records for resources (historic properties) eligible for the NRHP under Criteria A, B, and/or C. Previous built environment surveys for Superior, Globe, and Miami were consulted for properties eligible under Criteria A, B, and/or C. Personnel also searched the NRHP for resources listed under Criteria A, B, and/or C. Historic properties eligible for the NRHP under Criteria A, B, and/or C are more likely to be sensitive to impacts on setting than properties determined to be eligible under Criterion D.

Direct Analysis Area

ARCHAEOLOGICAL SITES

Within the direct impacts analysis area, 644 archaeological sites have been recorded. Of the 645 sites, 506 are recommended or determined eligible for the NRHP, 116 are recommended or determined not

eligible for the NRHP, 21 are undetermined, and one is exempt from Section 106 compliance.

The archaeological sites range in age from the Archaic to Historic periods and several sites have two or more temporal components. Cultural site components are attributed to Archaic peoples (12), Hohokam (64), Hohokam-Salado (48), Salado (311), Apache-Yavapai (18), Native American (91), Euro-American (151), and unknown (3). Archaeological sites found in the analysis area represent short- and long-term habitations, agricultural sites, resource procurement and processing sites, campsites, a historic-age campground, communication sites, ranching sites, mining sites, soil conservation, utilities, transportation (roads and trails), recreation activities, water management, and waste management.

TRADITIONAL CULTURAL PROPERTY

One NRHP-listed TCP is located within the direct analysis area: the *Chí'chil Biłdagoteel* Historic District. The *Chí'chil Biłdagoteel* Historic District was listed on the NRHP in 2016 as an Apache TCP and its boundaries contain 38 archaeological sites that contribute to the overall eligibility of the district, in addition to sacred places, springs, and other significant locations. See Section 3.14, Tribal Values and Concerns, for a more detailed discussion of the resource. Of the 38 archaeological sites within the TCP, six are found within the direct impacts analysis area.

HISTORIC BUILDINGS AND STRUCTURES

Twenty-eight historic buildings or structures have been recorded within the direct analysis area.

Seventeen of the historic buildings or structures are associated with the Magma Mine; however, all but three have been demolished as part of a reclamation plan. No formal recommendation or determination of eligibility has been made for the Magma Mine resources. The remaining eight resources are in-use

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Atmospheric Impacts

If the GPO is not approved, then none of the proposed mining facilities would be constructed, so no adverse indirect impacts on cultural resources would be anticipated from mining facilities. If the land exchange does not occur, no adverse indirect impacts on cultural resources would be anticipated.

3.12.4.2 Impacts Common to All Action Alternatives

Effects of the Land Exchange

The land exchange would have effects on cultural resources. The Oak Flat Federal Parcel would leave Forest Service jurisdiction. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS surface resources; this includes cultural resources. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. If the land exchange occurs, 31 NRHP-eligible archaeological sites and one TCP within the selected lands would be adversely affected. Under Section 106 of the NHPA

and its implementing regulations (38 CFR 800(a)(2)(vii)), historic properties leaving Federal management is considered an adverse effect, regardless of the plans for the land, meaning that, under NEPA, the land exchange would have an adverse effect on cultural resources.

The offered lands parcels would enter either Forest Service or BLM jurisdiction. Entering Federal management would offer additional protection for any cultural resources on these lands. Cultural resources surveys of the offered lands have identified 93 archaeological sites: 65 eligible and 28 not eligible. Of the 65 eligible sites, three have an Archaic component, 12 have a Hohokam component, 24 have a Hohokam/Salado or Hohokam/Pueblo component, seven have a Southern Sinagua component, four have a Salado component, two have a Sobaipuri or Sobaipuri/Apache component, four have a Native American not further specified component, 10 have a Euro-American component, and two components are Unknown. Native American sites consist of habitations, including hamlets, villages, pueblos, compounds, and a rockshelter; agricultural sites, including terraces, gridded fields, rock piles, and field houses; resource procurement and processing sites; and rock art. Euro-American sites consist of roads, homesteads and ranches, and mining sites.

Effects of Forest Plan Amendment

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are

applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 forest plan was conducted to identify the need for amendment due to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). A number of standards and guidelines (10) were identified as applicable to management of cultural resources. None of these standards and guidelines were found to require amendment to the proposed project, either on a forest-wide or management area-specific basis. For additional details on specific rationale, see Shin (2020).

Effects of Compensatory Mitigation Lands

Cultural resources surveys identified five archaeological sites on the compensatory mitigation lands: three eligible and two not eligible for the NRHP. The three eligible sites are a highway, a transmission line, and a resource processing and procurement site. The planned activities on the compensatory mitigation lands are focused on restoring riparian systems and, if sites are avoided during the restoration, would not have an effect on cultural resources.

Within the parcels slated for recreation mitigation, 14 NRHP-eligible or undetermined archaeological sites have been recorded. Three sites have a Hohokam component, one has a Salado component, five have Native American components, and six have Euro-American components. Prehistoric sites include habitation, field house, campsites, resource procurement and processing sites, and a rockshelter.

Historic sites include roads or trails, transmission lines, a townsite, and waste piles.

Effects of Recreation Mitigation Lands

The recreation mitigation lands are anticipated to have an adverse effect on cultural resources. While preliminary trail alignments and trailhead areas were surveyed for cultural resources that are eligible for the NRHP and trail designs were refined to reduce conflict with cultural resources, any ground disturbance is deemed to be an adverse effect on cultural and tribal resources.

Summary of Applicant-Committed Environmental Protection Measures

A number of environmental protection measures are incorporated into the design of the project (the GPO, not the land exchange) that would act to reduce potential impacts on cultural resources. These are nondiscretionary measures, and their effects are accounted for in the analysis of environmental consequences.

Applicant-committed environmental protection measures to reduce impacts on cultural resources are covered in the GPO. Specifically, Resolution Copper has committed to following the Section 106 process for the resolution of adverse effects on historic properties, including the development of a PA (see appendix O) and will design the footprint of the project to avoid resources to the maximum extent possible. Aspects of the PA are discussed in the "Mitigation Effectiveness" section below.

3.12.4.3 Alternative 2 – Near West Proposed Action

Direct Impacts

Under Alternative 2, 138 cultural resources would be impacted: 120 NRHP-eligible and 18 undetermined archaeological sites. Ninety-five percent (9,288 acres) of the total alternative has been surveyed at the time of this review. Table 3.12.4-1 presents the number of cultural resources that are listed in or eligible for the NRHP or that are of undetermined NRHP status within each project element. Some sites would be impacted by more than one project element; hence, the total numbers in the following tables are different from the total number of sites overall.

Of the site components present in Alternative 2, six can be attributed to the Archaic, 17 to the Hohokam, 21 to Hohokam-Salado, 49 to the Salado, 13 to the Apache-Yavapai, 12 to Native American, 13 to Euro-American, and one unknown. The Archaic components are represented by campsites. Formative period sites attributed to the Hohokam, Hohokam-Salado, or Salado are large and small habitation sites including one Hohokam village, campsites and resource processing sites, a Salado hilltop retreat, agricultural sites, and a lithic quarry. The Protohistoric-Historic Apache-Yavapai sites are campsites and one rockshelter. The Historic Euro-American sites consist of roads, trails, railroads and facilities, mineral exploration and exploitation, homesites, ranching sites, utility lines, and waste piles.

In addition, Alternative 2 would adversely impact one NRHP-listed TCP in the East Plant Site and undetermined historic buildings in the West Plant Site; this is true for Alternatives 2 through 6.

Table 3.12.4-1. Cultural resources directly impacted by Alternative 2

GPO Component	Number of NRHP-Listed or Eligible Sites	Number of NRHP-Undetermined Sites	Total
Oak Flat Federal Parcel	43	0	**43**
East Plant Site and subsidence area	24	0	**24**
West Plant Site	9	0	**9**
Tailings facility and corridor	20	16	**36**
Silver King Mine Road realignment	6	0	**6**
MARRCO corridor	38	2	**40**
Transmission line	15	0	**15**

Note: Some sites would be impacted by more than one project element; hence, total numbers in this table are different from the total number of sites overall.

Indirect Impacts

Within the indirect impact analysis area for Alternative 2, 62 cultural resources may be impacted: two listed, 41 eligible, and 19 unevaluated. Nine of those resources are within 2 miles of the tailings facility, one is within 2 miles of the East Plant Site and subsidence area (the *Chí'chil Biłdagoteel* Historic District), 38 are within 2 miles of the West Plant Site, one is within 2 miles of Silver King Mine Road, 12 are within 2 miles of the MARRCO corridor (including the Boyce Thompson Arboretum), and three are within 2 miles of the transmission line corridor. Of the 37 resources within 2 miles of the West Plant Site, 33 are buildings in Superior.

Indirect impacts to historic buildings in Superior, including those in the two potential historic districts, may occur from noise and vibration generated by increased traffic.

Atmospheric Impacts

Outside of the proposed project footprint for Alternative 2, there are 53 historic properties listed on or eligible for listing on the NRHP under Criterion A,

B, or C within 2 miles of the East Plant Site, the West Plant Site, the subsidence area, and the transmission line. Four resources are listed on the NRHP: *Chí'chil Biłdagoteel* Historic District, the Boyce Thompson Arboretum, the Devil's Canyon Bridge, and the Hotel Magma. The *Chí'chil Biłdagoteel* Historic District is less than 1 mile from the East Plant Site/subsidence area, the West Plant Site, and the Silver King to Oak Flat transmission line corridor. Other historic properties within 2 miles of the East Plant Site, the West Plant Site, the subsidence area, and the transmission line include 14 archaeological sites, two proposed historic districts in Superior, and 33 historic buildings. Many of the historic buildings are within the two proposed historic districts. If project components are visible from these properties, adverse visual impacts may occur.

For the Alternative 2 tailings, 54 historic properties listed on or eligible for the NRHP under Criteria A, B, and/or C are within 6 miles of the Alternative 2 tailings facility and within the scenic resources viewshed analysis area (see section 3.11). When plotted against the viewshed analysis for the tailings piles, the tailings pile would not be visible to three historic resources and not very visible to an additional 40, including the majority of buildings in Superior. The Superior Commercial District, as a whole, would have slightly better visibility, along with two archaeological sites. The tailings pile would be very visible from eight resources, including the TCP and the Boyce Thompson Arboretum.

* * *

The following actions were determined through the cumulative effects analysis process to be reasonably foreseeable, and have impacts that likely overlap in space and time with impacts from the Resolution Copper Project:

- LEN Range Improvements
- Pinto Valley Mine Expansion
- Ray Land Exchange and Proposed Plan Amendment
- Ripsey Wash Tailings Project
- Silver Bar Mining Regional Landfill and Cottonwood Canyon Road
- Superior to Silver King 115-kV Relocation Project

The cumulative effects analysis area for cultural resources is the APE, which has been determined through Section 106 consultation. The metric used to quantify cumulative impacts to cultural resources is the physical footprint of the RFFAs. Almost all projects result in disturbance of cultural sites, in many cases only after data recovery and mitigation activities. However, even if recorded and documented, loss of these cultural sites contributes to the overall impact to the cultural heritage of the areas. Often cultural sites are only known to be impacted if surveys have been conducted, which is not necessarily required on private land; physical footprint can serve as a proxy for the overall disturbance to cultural sites where no site-specific data exist.

The six reasonably foreseeable future actions above, combined with the Resolution Copper Project,

represent about 28,500 acres of the 730,000-acre cumulative effects analysis area, or about 3.9 percent. This represents the potential area in which cultural resources could be lost, which contributes to an overall loss of cultural heritage within the area. While the footprint of these projects is used as a proxy for impacts to cultural resources, effects on cultural resources extend beyond destruction by physical disturbance. The presence of activities nearby also can change the character of prehistoric and historic cultural sites.

3.12.4.9 Mitigation Effectiveness

Mitigation Identifier and Title	**Authority to Require**
FS-RC-04: Establish an alternative campground site (Castleberry) to mitigate the loss of Oak Flat Campground	Required – Forest Service and Programmatic Agreement
FS-CR-01: Implementation of Oak Flat HPTP	Required – Forest Service and Programmatic Agreement
FS-CR-02: GPO Research Design	Required – Forest Service and Programmatic Agreement
FS-CR-03: Visual, Atmospheric, Auditory, Socioeconomic, and Cumulative Effects Mitigation Plan	Required – Forest Service and Programmatic Agreement
FS-CR-07: Archaeological Database Funds	Required – Forest Service and Programmatic Agreement
FS-SO-01: Community Development Fund	Required – Forest Service and Programmatic Agreement

We developed a robust monitoring and mitigation strategy to avoid, minimize, rectify, reduce, or compensate for resource impacts that have been identified during the process of preparing this EIS. Appendix J contains descriptions of mitigation measures that are being required by the Forest Service and mitigation measures voluntarily brought forward and committed to by Resolution Copper. Appendix J also contains descriptions of monitoring that would be needed to identify potential impacts and mitigation effectiveness.

* * *

PA. Tribal monitors may participate in mitigation of adverse effects. The effectiveness of these future plans to reduce effects on historic property are assumed, but cannot be defined at this time.

Archaeological Database Funds (FS-CR-07). Resolution Copper will provide funding to the State of Arizona to assist in the development of a new database or upgrading the existing database of archaeological resources in Arizona. The database is intended to allow the State of Arizona to better manage archaeological resources on State lands. These funds would not prevent impacts to historic properties, but would assist in the ensuring the effectiveness of the treatment activities described under measures FS-CR-01 and FS-CR-02.

Community Development Fund (FS-SO-01). Resolution Copper will establish a foundation for the communities of Superior, Miami, Globe, Kearny, Hayden, and Winkelman for the rehabilitation of historic buildings. This measure would be effective at helping prevent the loss of historic properties within the Copper Triangle, preserving them for future generations, and preserving the historic mining heritage of these towns.

Mitigation Effectiveness and Impacts of Voluntary Mitigation Measures Applicable to Cultural Resources

Appendix J contains mitigation and monitoring measures brought forward voluntarily by Resolution Copper and committed to in correspondence with the Forest Service. These measures are assumed to occur but are not guaranteed to occur. Their effectiveness and impacts if they were to occur are disclosed here;

however, the unavoidable adverse impacts disclosed below do not take the effectiveness of these mitigations into account. No additional mitigation measures were voluntarily brought forward for cultural resources.

Other Potential Future Mitigation Measures Applicable to Cultural Resources

Appendix J contains several other potential future mitigation measures that the Forest Service is disclosing as potentially useful in mitigating adverse effects, but for which there is no authority to require. There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS. No potential future mitigation measures were identified applicable to cultural resources.

Unavoidable Adverse Impacts

Cultural resources and historic properties would be directly and permanently impacted. These impacts cannot be avoided within the areas of surface disturbance, nor can they be fully mitigated. The land exchange is also considered an unavoidable adverse effect on cultural resources.

3.12.4.10 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Physical and visual impacts on archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the historic properties that would be destroyed by project construction. The landscape, which is imbued with specific cultural attributions by

each of the consulting tribes, would also be permanently affected.

Irreversible and Irretrievable Commitment of Resources

The direct impacts on cultural resources and historic properties from construction of the mine and associated facilities constitute an irreversible commitment of resources. Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or tailings storage facility construction and affected by groundwater drawdown. Changes that permanently affect the ability of tribal members to use known TCPs for cultural and religious purposes are also an irreversible commitment of resources.

* * *

disclosed here. The unavoidable adverse impacts disclosed below take the effectiveness of these mitigations into account.

GDE and water well mitigation (FS-WR-01). This measure would replace water sources for any riparian areas associated with springs or perennial streams (groundwater-dependent ecosystems) impacted by drawdown from the mine dewatering and block caving. Though this measure could change the overall natural character of riparian areas, it would be effective at preserving riparian vegetation and aquatic habitats, which are of importance to recreational users of the Tonto National Forest. Preserving recreational opportunities is beneficial to the long-term socioeconomic stability of the Superior area.

Clean Water Act Section 404 Compensatory Mitigation Plan (FS-WR-02). The compensatory mitigation parcels would offer conservation of riparian habitat, as well as overall improvement in the health and stability of riparian habitats, by minimizing invasive non-native species and returning conditions to a more natural state. This measure would be effective at replacing xeroriparian habitat lost within the project footprint. Whether recreation would be specifically allowed on these lands would be determined later, if compatible with conservation easements put in place to protect waters and habitat. The Queen Creek parcel would likely be effective at improving recreational opportunities in the immediate vicinity of Superior, when considered in combination with the Castleberry campground (FS-RC-04), implementing the Tonto National Forest multi-use trail plan (FS-RC-03), and replacement of water in Queen Creek (FS-WR-04). Preserving and enhancing recreational opportunities is beneficial to the long-term socioeconomic stability of the Superior area.

Replacement of water in Queen Creek (FS-WR-04). This measure would replace the storm runoff in Queen Creek that otherwise would be lost to the subsidence area. It would be highly effective at minimizing the effects felt in Queen Creek caused by reduction in the watershed area, specifically impacts to surface water quantity and riparian habitat, which would prevent impacts to wildlife using this habitat. This would be effective at minimizing impacts to recreational users and birdwatchers drawn to riparian habitat in this area. Note that other stormwater losses would still occur under Alternatives 2, 3, and 4. Preserving and enhancing recreational opportunities

is beneficial to the long-term socioeconomic stability of the Superior area.

Access to Oak Flat Campground (FS-RC-02). Maintaining access to Oak Flat Campground, to the extent practicable with respect to safety, would be effective at reducing impacts caused by the loss of the Oak Flat area to subsidence. However, the user experience at the campground likely would not be the same, given the open space, trails, roads, and climbing opportunities that would no longer abut the campground. Preserving recreational opportunities is beneficial to the long-term socioeconomic stability of the Superior area.

Mitigation for adverse impacts to recreational trails (Tonto National Forest multi-use trail plan) (FS-RC-03). Implementation of this plan would replace over 20 miles of motorized and non-motorized trail on Tonto National Forest around Superior. The Oak Flat area is heavily used for recreation, and the loss of Federal land base due to the land exchange (and the tailings storage facilities for some alternatives) would put pressure on remaining recreation areas. This plan would be effective at expanding the motorized and non-motorized travel routes and recreational opportunities in a sustainable manner consistent with Tonto National Forest management direction. Replacing and enhancing recreational opportunities is beneficial to the long-term socioeconomic stability of the Superior area.

Establish an alternative campground site (Castleberry) to mitigate the loss of Oak Flat Campground (FS-RC-04). Establishing the replacement campground would be effective at

offsetting impacts caused by loss of dispersed camping opportunities on the Tonto National Forest, and the changes

* * *

the Superior area. However, this use may not be compatible with the management of the Apache Leap Special Management Area.

Mitigation for reduction in property values (PF-SO-01). This mitigation measure could include the continued purchase of properties in the vicinity of the tailings storage facility that would be impacted by the vicinity, water quality, water supply, noise, or air quality.

Commitment to continue and possibly expand existing apprenticeship program (PF-SO-02).

Resolution Copper has committed on a corporate level to local hiring and use of local services; however, this is dependent on an appropriate labor pool. This program would potentially create training pipeline that would enhance the labor pool and allow more local hiring.

Unavoidable Adverse Impacts

Loss of jobs in the local tourism and outdoor recreation industries cannot be avoided or fully mitigated. Likewise, loss in property values for property close to the mine would constitute an impact that cannot be avoided or fully mitigated. The applicant-committed measures would be effective at expanding the economic base of the community and improving resident quality of life, and could partially offset the expected impacts, although many of the

current agreements would expire prior to full construction of the mine. Many of the mitigation measures that would contribute to the recreational economy of the Superior area are required and these impacts would be offset, and recreational opportunities may even be enhanced. Many of the mitigation measures that would directly offset socioeconomic effects in the area are voluntary only. These mitigation measures would effectively offset impacts, but cannot be guaranteed to take place.

3.13.4.5 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Socioeconomic impacts are both positive and negative and are primarily short term. The project would provide increased jobs and tax revenue from construction through final reclamation and closure. However, this would be offset by potential impacts on local tourism and outdoor recreation economies, and a decrease in nearby property values. As these effects are largely the result of the tailings storage facility, which is a permanent addition to the landscape, they could persist over the long term.

The long-term continued population and economic growth in areas of the Copper Triangle with existing copper mines indicates that these impacts are in the magnitude of being decades long and would not be permanent.

Irreversible and Irretrievable Commitment of Resources

Some changes in the nature of the surrounding natural setting and landscape would be permanent, including the tailings storage facility and the

subsidence area. The action alternatives would therefore potentially cause irreversible impacts on the affected area regarding changes in the local landscape, community values, and quality of life.

3.14 Tribal Values and Concerns

3.14.1 Introduction

This project would occur across a landscape that is important to many tribes, has been for many generations, and continues to be used for cultural and spiritual purposes. Tonto National Forest has consulted regularly with 11 federally recognized tribes that are culturally affiliated with the lands that would be affected and have had the opportunity to be active in the consultation, review, and comment processes of the project. No tribe supports the desecration/destruction of ancestral sites. Places where ancestors have lived are considered alive and sacred. It is a tribal cultural imperative that these places should not be disturbed or destroyed for resource extraction or for financial gain. Continued access to the land and all its resources is necessary and should be accommodated for present and future generations. Participation in the design of this destructive activity has caused considerable emotional stress and brings direct harm to a tribe's traditional way of life; however, it is still deemed necessary to ensure that ancestral homes and ancestors receive the most thoughtful and respectful treatment possible.

By law, Federal agencies must consult with Indian Tribes about proposed actions that may affect lands and resources important to them, in order to comply with the NHPA for NRHP-listed historic properties (see Section 3.14.3, Affected Environment, for the list

of laws and regulations). Section 3003 of PL 113-291 also requires that the Secretary of Agriculture engage in government-to-government consultation with affected tribes concerning issues related to the land exchange. The Secretary of Agriculture authorized the Forest Supervisor, Tonto National Forest, to consult with Resolution Copper to seek mutually acceptable measures to address the concerns of the affected tribes and minimize the adverse effects from mining and related activities on the conveyed lands.

Beginning in 2015, the Tonto National Forest began consultation with 11 tribes regarding the proposed mine, the land exchange, and the development of alternate tailings locations. Tonto National Forest also consulted the tribes regarding the management of the Apache Leap SMA, as directed by Section 3003 of PL 113-291.

Government-to-government consultations are ongoing between Tonto National Forest and the Fort McDowell Yavapai Nation, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, Pueblo of Zuni, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe. The four O'odham tribes (the Four Southern Tribes Cultural Committee) are represented by the Salt River Pima-Maricopa Indian Community and the Gila River Indian Community. The BLM identified four tribes that may be affected if the alternative on BLM land is selected: the Ak-Chin Indian Community, Fort Sill Apache Tribe, Pascua Yaqui Tribe, and Tohono O'odham Nation. See Chapter 5, Consulted Parties, for a full account of consultation to date.

Tribal values and concerns regarding the land exchange and the proposed GPO include resources with traditional or cultural significance, some of which are also described in Section 3.12, Cultural Resources. Resources of traditional or cultural significance can be traditional cultural properties (TCPs) as defined by National Register Bulletin 38, "Guidelines for Documenting and Evaluating Traditional Cultural Properties" (Parker and King 1998); sacred places; and traditional knowledge places (TKPs)—including burial locations, landforms, viewsheds, and named locations in the cultural landscape; water sources; and traditional resource-gathering locations for food, materials, minerals, and medicinals.

Overview

In accordance with long-established agency practice and the requirements of the NHPA, the Tonto National Forest regularly conducts government-to-government consultation with tribes in Arizona and elsewhere in the Southwest that may be affected by Federal decision-making. The Resolution Copper Project and Land Exchange has a very high potential to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource-gathering localities, burial locations, and other places of spiritual value to tribal members. This section describes the interactions to date between the Tonto National Forest and the 11 Indian Tribes actively participating in consultation related to the project.

3.14.1.1 Changes from the DEIS

Several changes were made to the "Tribal Values" section from the DEIS. We received numerous

comments from tribal members about the sacredness and importance of Oak Flat to them, their lives, their culture, and their children. Many expressed their sadness and anger that their sacred place would be destroyed and that they would lose access to their oak groves and ceremonial grounds. In response, we added information on the history of Oak Flat and its significance to the tribes; expanded the plant resources list with information gathered by the tribal monitors; included tribal monitor survey results conducted since the DEIS for special interest areas; and disclosed information from the ethnographic report while respecting the sensitive nature of that data. To demonstrate in their own words the heartbreak and pain caused by this project to tribal members, we also included excerpts from Congressional testimony of Wendsler Nosie Sr., Chairman Terry Rambler, and Naelyn Pike, as well as personal perspectives and comments from tribal members collected during the DEIS comment period.

3.14.2 Analysis Methodology, Assumptions, and Uncertain and Unknown Information

3.14.2.1 Analysis Area

The direct, indirect, and atmospheric analysis areas for tribal values and concerns are the same as for cultural resources, found in section 3.12.2. The direct analysis area for the proposed project is defined by several factors: the acreage of ground disturbance expected for each mine component described in the GPO and the acreage of land leaving Federal stewardship as a result of the land exchange. The direct analysis area for the proposed action (GPO and land exchange) is approximately 39,272 acres and

consists of the following, which includes access roads and other linear infrastructure:

- 1,861-acre East Plant Site and subsidence area, including the reroute of Magma Mine Road;
- 2,422-acre Oak Flat Federal Parcel, which is NFS land to be exchanged with Resolution Copper;
- 953-acre West Plant Site and Silver King Road realignment;
- 6.96-mile Silver King to Oak Flat transmission line;
- 685-acre MARRCO railroad corridor and adjacent project components;
- 553-acre filter plant and loadout facility;
- Alternatives 2–6 tailings storage facilities and tailings corridors; and
- Mitigations to reduce recreational impacts and compensatory mitigation associated with a 404 permit.

The indirect analysis area consists of a 2-mile buffer around all project and alternative components and is designed to account for impacts on resources not directly tied to ground disturbance and outside the direct analysis area.

* * *

3.14.2.2 Analysis Approach

The Forest Service worked collaboratively with the tribes to gather information on tribal values and resources via an ethnographic study (Hopkins et al.

2015) and through ongoing consultation. Resolution Copper funded the collection of cultural resources information important to tribal members through Class I records searches and Class III pedestrian surveys. During consultation, several tribes requested the inclusion of tribal monitors in the archaeological survey to record areas of special interest. To honor that request, the Forest Service arranged for the archaeological contractors to employ tribal monitors.

Impact Indicators

Direct impacts on resources of traditional cultural significance (archaeological sites; burial locations; spiritual areas, landforms, viewsheds, and named locations in the cultural landscape; water sources; food, materials, mineral, and medicinal plant gathering localities; or other significant traditionally important places) would consist of damage, loss, or disturbance that would alter the characteristic(s) that make the resource eligible for listing in the NRHP or sacred to the respective cultural group(s). The loss might be caused by ground disturbance, loss of groundwater or surface water, or by the erection of facilities that alter the viewshed. Indirect impacts would consist primarily of visual impacts from alterations to setting and feeling, auditory impacts, or inadvertent disturbance.

Impact indicators for this analysis include the following:

- Loss, damage, or disturbance to historic properties, including TCPs listed in or eligible for listing in State or Federal registers, that are significant to Native American tribes.

- Loss, damage, or disturbance to burial sites; spiritual areas and viewsheds; cultural landscapes; sacred places; springs and other water resources; food and medicinal plants; minerals; and hunting, fishing, and gathering areas.
- Loss of access to burial sites; spiritual areas and viewsheds; cultural landscapes; sacred places; springs and other water resources; food and medicinal plants; minerals; and hunting, fishing, and gathering areas.
- Alterations to setting, feeling, or association of historic properties significant to Native American tribes, including TCPs where those characteristics are important to their State or Federal register eligibility.

Assuming the land exchange occurs, as mandated by Congress in Section 3003 of PL 113-291, the selected lands would be conveyed to Resolution Copper no later than 60 days after the publication of the FEIS, and the Oak Flat Federal Parcel would become private property and no longer be subject to the NHPA or Forest Service management that provides for tribal access. Under Section 106 of the NHPA and its implementing regulations (38 CFR 800), historic properties leaving Federal management is considered an adverse effect regardless of the plans for the land, meaning that as analyzed under NEPA, the land exchange will have an adverse impact on resources significant to the tribes. Adverse impacts on historic properties would be avoided, minimized, or mitigated through the Section 106 process of the NHPA and through Tonto National Forest's consultations with Resolution Copper in accordance with Section 3003 of

PL 113-291. Adverse impacts on resources that may not be historic properties under Section 106 would be avoided, minimized, or mitigated through steps outlined in the FEIS and ROD.

3.14.3 Affected Environment

The primary legal authorities and agency guidance relevant to this analysis of anticipated project-related impacts on tribal resources are shown in the accompanying text box.

Primary Legal Authorities and Technical Guidance Related to the Effects Analysis for Tribal Values and Concerns

- National Historic Preservation Act of 1966 (54 U.S.C. 300101 et seq.)
- Archaeological Resources Protection Act (16 U.S.C. 470aa–470mm)
- American Indian Religious Freedom Act (AIRFA) of 1978 (42 U.S.C. 1996)
- Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.)
- Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 (25 U.S.C. 3001–3013)
- U.S. Forest Service Region 3 First Amended Programmatic Agreement Regarding Historic Property Protection and Responsibilities (executed December 24, 2003)
- Executive Order 12898 (February 16, 1994), "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations"
- Executive Order 13007 (May 24, 1996), "Indian Sacred Sites"
- Executive Order 13175 (November 6, 2000), "Consultation and Coordination with Indian Tribal Governments"
- Bald and Golden Eagle Protection Act of 1940 (16 U.S.C. 688–688d)
- Endangered Species Act (16 U.S.C. 1531–1543)
- Migratory Bird Treaty Act (16 U.S.C. 703–711)
- National Environmental Policy Act (42 U.S.C. 4321 et seq.)
- Programmatic Agreement among the USDA Forest Service Tonto National Forest, Arizona State Historic Preservation Officer, The Advisory Council on Historic Preservation, Regarding Compliance with the National Historic Preservation Act on the Resolution Copper Project and Southeast Arizona Land Exchange Near Superior, Arizona

A complete listing and brief description of the regulations, reference documents, and agency guidance used in this effects analysis may be reviewed in Newell (2018i).

3.14.3.1 Existing Conditions and Ongoing Trends

Resolution Copper funded cultural resources surveys of the proposed project area and tailings alternatives, as outlined in section 3.12. Tribal monitors resurveyed or accompanied archaeological survey crews in those areas to identify areas of tribal interest to four cultural groups with ties to the area (Puebloan, O'odham, Apache, and Yavapai), to include springs and seeps, plant, animal, and mineral resource collecting areas, landscapes, and landmarks. All springs and seeps are considered sacred by all the consulting tribes.

Tonto National Forest conducted tribal monitor resource identification survey training sessions in January 2018, October 2018, and September 2019, as described in Section 5.7.1, Tribal Monitor Program. The method for identifying places of importance consisted of four steps (King and Shingoitewa 2020). First, tribal monitors walked the survey areas looking for areas of interest which were defined as Special Interest areas. The special interest areas were loosely grouped into categories: Settlement Areas, Resource-gathering Areas, Agricultural Areas, and Natural Resources Areas. Second, if a special interest area was deemed to be particularly important, it was further recorded as a TKP. Then, the Tonto National Forest staff would present the TKP to the THPO or the designated tribal representative as a potential TCP. Finally, the TKP would be evaluated by tribal elders, THPOs, and/or other designated tribal representative through field visits. Resulting TCP requests from the tribes would then be shared with Tonto National Forest staff for evaluation under the NHPA.

As a result of completing the tribal monitoring program resource identification surveys, more reports have been made available for consideration in the FEIS analysis. These reports include: the final Tribal Monitor report for Alternative 5 – Peg Leg; and the draft Tribal Monitor reports for the Oak Flat Federal Parcel, Near West (Alternatives 2 and 3), and Silver King (Alternative 4). For the Skunk Camp (Alternative 6), and the Peg Leg pipeline and power line corridor surveys, all fieldwork is complete and the data collected are presented and analyzed in this document.

In 2015, the Tonto National Forest, in partnership with the San Carlos Apache Tribe, composed a nomination for Oak Flat, the area originally known as *Chí'chil Biłdagoteel*, to be listed in the NRHP as a TCP (Nez 2016). This effort consisted of extensive literature research and interviews with tribal members.

In addition, an ethnographic study was completed titled "Ethnographic and Ethnohistoric Study of the Superior Area, Arizona" (Hopkins et al. 2015). The study consisted of archival and existing literature review and compilation, as well as oral interviews and field visits with tribal members to collect oral history and knowledge. Tribal members accompanied research staff to important places throughout the study area and shared information about those places. Members of the San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, Fort McDowell Yavapai Nation, Yavapai-Prescott Indian Tribe, Gila River Indian Community, Salt River Pima-Maricopa Indian Community, Hopi Tribe, and Pueblo of Zuni

contributed to the study. This study was used in the FEIS analysis.

History of Oak Flat

The concept of a cultural landscape must drive how we analyze the impacts of the proposed project (King 2003; National Park Service 2020; U.S. Forest Service 2015b). According to the National Park Service, a cultural landscape is "a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person, or exhibiting other cultural or aesthetic values" (National Park Service 2020). For tribes, a cultural landscape encompasses all of the places, resources, features, archaeological sites, springs, etc., that are associated with their history and way of life. Each of the tribes associated with the project area has their own way of defining and understanding their cultural landscape which are described briefly below; however all the tribes share some places or resources that they feel are vital and sacred parts of their landscapes. Places like springs, ancestral (archaeological) sites, plants, animals, and mineral resource locations are sacred and should not be disturbed or disrupted.

The Oak Flat Federal Parcel slated to be transferred to Resolution Copper was once part of the traditional territories of the Western Apache, the Yavapai, the O'odham, and the Puebloan tribes of Hopi and Zuni. They lived on and used the resources of these lands until the lands were taken by force 150 years ago.

The following briefly describes their historic connection to the land and how they were removed from it and confined by the U.S. government.

WESTERN APACHE

Apache oral tradition recounts that the first Western Apache clans emerged from the First World into what is now the Southwest (Goodwin 1994). The world was defined by the four cardinal directions and their associated mountains and winds (Goodwin 1994). The Apache call themselves Nde or "the People." The term "Western Apache" is used to refer to Apache groups that historically have lived in Arizona (Goodwin 1935), composed of the San Carlos Apache, the White Mountain Apache, the Cibecue Apache, and the Tonto Apache, according to Basso (1983). The San Carlos Apache ranged through the Pinal, Apache, Mescal, and Catalina Mountains and along the San Pedro River (Basso 1983; Hilpert 1996). The White Mountain Apache ranged from the White Mountains to the Pinaleño Mountains. The Cibecue Apache ranged from the Salt River north to the Flagstaff area; the Tonto Apache lived from around the Verde River north to the San Francisco Mountains (Basso 1983).

Each Western Apache group ranged across their territory gathering seasonal resources and moving camp as resources became available (Basso 1970; Buskirk 1949; Hilpert 1996). Mescal was gathered in the spring and summer and roasted in large pits (Basso 1983; Hilpert 1996; Watt 2004). Later in the spring, they would plant corn in canyons returning periodically to check on the corn and water it (Basso 1971; Hilpert 1996). In the late summer and fall, the Apache gathered acorns and harvested the corn (Basso 1971).

When foods were scarcer from December to March, the Apache would focus on raiding for supplies and livestock (Basso 1983, 1971).To the Apache, raiding was different from warfare: raiding was an economic activity designed to obtain goods, while warfare was to kill enemies (Basso 1971). The Apache often raided the O'odham, as well as Mexican ranchers (Brooks 2016). They occasionally raided Yavapai groups but more often would ally with them against the O'odham. The O'odham raided the Apache and Yavapai in retaliation. The area around Superior-Globe was a meeting place for Apache and Yavapai who were headed south to raid the O'odham (Basso 1971).

The Spanish were the first Anglo people to encounter the Apache; however, the Spanish did not have much influence north of the Gila River (Sheridan 1995). After the signing of the Treaty of Guadalupe in 1848—which ended the Mexican–American War and ceded the Southwest to the United States—Euro-American settlers began arriving in Western Apache lands in search of mineral wealth and ranching lands. Repeated conflicts between settlers and Apache prompted the U.S. government to build forts on Apache lands (Basso 1983, 1971; Hilpert 1996; Thrapp 1967). The presence of these forts and their troops had a devastating effect on the Apache, as soldiers killed Apache they saw as a threat and the Apache retaliated (Basso 1971). Several massacres of Apache by soldiers and civilians occurred from the 1850s through the 1870s, including the reported events at Apache Leap. In the 1870s, the Apache were forced off their lands and onto reservations: Fort Apache, Camp Verde, Camp Grant (and later San Carlos), and Ojo Caliente (Basso 1983, 1971). This effort was led by General

George Cook, who assumed command of the army in Arizona in 1871. In 1874, the U.S. government further embarked on a program to move the Western Apache, Chiricahua Apache, and Yavapai onto San Carlos with the idea that this would make them easier to control and would facilitate their transition to farming and ranching (Basso 1971). However, the different groups did not know one another, which led to friction, the settled agricultural life was the opposite of their lifeway, and they were not provided with adequate resources. Conflicts between the U.S. Army and Apache who escaped the reservations or had refused to go continued until 1890.

A reservation was eventually established in the lands of the Cibecue and White Mountain Apache in 1897. Apache and Yavapai who left San Carlos to return to the Verde Valley or the Payson area found they did not have land there as promised. A reservation at Camp Verde for Apache and Yavapai was established in 1937, which later became the Yavapai-Apache Nation in 1992. A small reservation was established in 1972 for the Tonto Apache in Payson. All these communities lost large portions of their homelands, including Oak Flat, and today live on lands that do not encompass places sacred to their cultures.

For the Western Apache, history and place-naming are an integral part of the cultural landscape (Basso 1996). Place names were originally spoken by the ancestors and invoke past events that occurred at that location (Basso 1996). History for the Apache is "written" across the landscape through place names; names can evoke those events so that they are also, in a sense, happening when they are being spoken of.

Knowing these places is vital to understanding Apache history and, therefore, identity. For the Western Apache, "the people's sense of place, their sense of the tribal past, and their vibrant sense of themselves are inseparably intertwined" (Basso 1996:35).

The Apache landscape is imbued with diyah, or power (Basso 1996). Diyah resides in natural phenomenon like lightning, in things like water or plants, and in places like mountains. Gáán, or holy beings, live in important natural places and protect and guide the Apache people (Hilpert 1996). They come to ceremonies to impart well-being to Apache, to heal, and to help the people stay on the correct path.

YAVAPAI

The Yavapai once ranged a huge area from Flagstaff in the north, to the Colorado River to the west, to the Salt and Gila Rivers to the south, and the Tonto Basin to the east (Khera and Mariella 1983). Yavapai people belong to one of four groups, each with its own lands: the Tolkepaya (Western People), Kwevkepaya (Southeastern People), Wipukepa (Northeastern People), and Yavapé (Northwestern People) (Braatz 2007; Khera and Mariella 1983).The Kwevkepaya lived in and around the analysis area (Gifford 1932). The Yavapai have occupied these lands from the beginning. According to their oral history, the Yavapai emerged from the underworld into the current world on the first maize plant from Montezuma's Well (Khera and Mariella 1983).

Like the Apache, the Yavapai traveled across the landscape to take advantage of seasonally available resources, as well as some farming (Braatz 2007; Gifford 1932). Among the many plant resources that

the Yavapai sought were acorns (Khera and Mariella 1983). Also like the Apache, the Yavapai would raid their neighbors for supplies and they sometimes joined with the Apache to raid the O'odham (Basso 1971; Braatz 2007).

After the signing of the Treaty of Guadalupe, the influx of Euro-American settlers began to impact the Yavapai way of life as they were forced off their lands. The Yavapai generally avoided conflicts with the newcomers; however, by the 1860s, they began to have conflicts as more settlers invaded their lands (Khera and Mariella 1983). In 1865, a group of Yavapai were settled on a reservation near the Colorado River but did not have enough resources to survive. Other attempts to settle Yavapai on reservations were also unsuccessful until the early 1870s when General Crook ordered that they be moved to the newly established Rio Verde Reservation (Khera and Mariella 1983); however, this policy led to a horrible massacre. In December of 1872, the U.S. Army, which had been tasked with rounding up the Yavapai, killed a group of Kewevkapaya in the Salt River Canyon (Thrapp 1967). The Yavapai were moved onto the Rio Verde Reservation by 1873; however, just 2 years later in the winter of 1875 they were moved again to the San Carlos Reservation along with the Apache. Conditions along the 180-mile route to San Carlos were very harsh and over 100 Yavapai died during the march (Khera and Mariella 1983).

* * *

The Western Apache territory stretches from the San Francisco Peaks just north of Flagstaff south to the Rincon Mountains southeast of Tucson. The

western border of the Western Apache area is just east of the Verde River along the Mazatzal Mountains down to the Gila River at Winkelman and south to the Rincon Mountains. To the east, the border runs from the San Francisco Peaks southeast across the Colorado Plateau along the Little Colorado River to the San Francisco Mountains and the New Mexico border and then roughly southwest to the Rincon Mountains.

The Pima-Maricopa territory (Akimel O'odham) consists of all of the Phoenix Valley (Gila and Salt River basins) and extending to the east to the Pinal Highlands, south to Avra Valley, west to the Gila Bend Mountains, and north to Lake Pleasant.

The Yavapai territory stretches from just south of the San Francisco Peaks at the north to just east of the Colorado River at the west, then east along the border of the Pima-Maricopa territory to north of Phoenix. It then extends southeast between the Pima-Maricopa and the Western Apache almost to the Gila River.

3.14.3.3 Direct Analysis Area

Archaeological Sites

In section 3.12, we discuss the 645 archaeological sites recorded to date in the direct analysis area. Eighteen of those sites have components attributed to Apache/Yavapai peoples; 423 are attributed to Hohokam, Hohokam/Salado, or Salado. The remaining sites or components are attributed to Archaic, Native American, or Euro-American peoples.

Traditional Cultural Properties and Cultural Landscapes

A portion of the direct analysis area is within the *Chí'chil Biłdagoteel* Historic District, which is listed in the NRHP as an Apache TCP. Apache Leap, Oak Flat, and 38 archaeological sites that contribute to the eligibility of the district are within the *Chí'chil Biłdagoteel* Historic District. Apache Leap is within the indirect analysis area, but access to the Protohistoric/Historic Apache village at its summit is through the direct analysis area.

Consistent with the direction in the land exchange legislation, the Tonto National Forest set aside Apache Leap, a sacred landscape for the Apache and Yavapai and other tribes, as a special management area totaling 839 acres (Apache Leap SMA). The Tonto National Forest was also directed in PL 113-291 Section 3003 to develop a management plan in consultation with the tribes. Meetings were held individually with tribes, with cultural groups, and an all-tribes meeting to discuss the management options for this sacred landscape. Tribes made the following requests regarding the Apache Leap SMA:

1. Leave it in its natural state;
2. Guarantee access, including possibly developing a new road, so that tribal members can reach the top to perform ceremonies once the current access route is closed due to subsidence;
3. Do not renew or reissue the extant grazing permits; and

4. Allow day-use only (no overnight camping), and do not permit any rock-climbing.

These requests were integrated into the management plan as part of the environmental assessment of the SMA. A final decision notice, special area management plan, and corresponding forest plan amendment were issued December 26, 2017. When a new access route is designed, it will require an environmental review to determine whether the route poses any adverse effects on cultural and/or tribal resources.

Places of Traditional and Cultural Importance

Additional resources (special interest areas or resources) were recorded during the ethnographic study within the analysis areas (Hopkins et al. 2015) and by the tribal monitor surveys.

During their surveys, the tribal monitors recorded 594 special interest areas in the direct analysis area. Of the 594, 523 are described as cultural resources, 66 as natural resources, and 5 as both cultural and natural resources. The cultural resources generally correspond to prehistoric archaeological sites and were categorized by the tribal monitors as cultural areas, settlement areas, resource gathering areas, resource processing areas, agricultural areas, and other. The natural resources areas are landforms, rockshelters, springs, water sources, vantage points, plant resources areas, and mineral resources areas. Special interest areas that are categorized as both cultural and natural resources include rockshelter, plant resources and processing areas, a tinaja with plant processing areas, and a quarry. Please note that information regarding special interest areas is

sensitive data and will only be discussed in general terms.

Research conducted for the ethnographic study identified seven places of traditional and cultural importance within the direct analysis area (Hopkins et al. 2015). The places include springs, canyons, an archaeological site, a rock art site, and Oak Flat.

Springs

Up to 15 springs or seeps (Bitter, Bored, Hidden, McGinnel Mine, McGinnel, Walker, Grotto, Rancho Rio, KP Reservoir, Benson, Bear Canyon, Perlite, Iberri, DC-6.6W, and Kane) and three ponds (Above Grotto, SS-1, and Anxiety Fault Pond) are located within the direct analysis area that could be directly disturbed or impacted by dewatering (see section 3.7.1). Springs are sacred to all the consulting tribes. These are springs with known persistence that have been monitored in the field and either would be directly disturbed or potentially dewatered by drawdown in the regional aquifer. Other springs and seeps have been mapped in the area from a variety of sources; many of these are likely to be seasonal and not associated with regional groundwater.

Plant and Mineral Resources

One hundred fifteen plant species of special interest have been identified to date within the direct impacts analysis area (table 3.14.1). Several of these plants have been identified as a component of natural resources special interest areas.

Common Name	Scientific Name	In a Special Interest Area (Y/N)
Agave	*Agave* sp.	N
Aloe vera	*Aloe vera*	N
Arizona juniper	*Juniperus arizonica*	Y
Arizona lupine	*Lupinus arizonicus*	N
Arizona thistle	*Cirsium arizonicum*	Y
Banana yucca	*Yucca baccata*	Y
Barberry	*Mahonia fremontii*	N
Barrel cactus	*Ferocactus acanthodes*	N
Beargrass	*Nolina microcarpa*	Y
Blue bonnet	*Lupinus texensis*	N
Blue palo verde	*Parkinsonia florida*	N
Soaptree yucca	*Yucca elata*	N
Sotol	*Dasylirion wheeleri*	Y
Staghorn cholla	*Cylindropuntia versicolor*	Y
Sunflower	*Helianthus* sp.	Y
Sweetbush	*Bebbia juncea*	N
Tansy mustard	*Descurainia pinnata*	N
Teddybear cholla	*Cylindropuntia bigelovii*	Y
Thorn-apple	*Datura* sp.	N
Three awn grass	*Aristida purpurea*	N
Timber oak	*Quercus* sp.	N
Triangle bur ragweed	*Ambrosia deltoidea*	N
Turpentine bush	*Ericameria* sp.	N
Velvet mesquite	*Prosopis velutina*	N
White tackstem	*Calycoseris wrightii*	N
Whitethorn acacia	*Vachellia constricta*	Y
Wild spinach	*Chenopodium* sp.	Y
Wild onion	*Allium maropetalum*	N
Willow	*Chilopsis linearis*	Y
Wire lettuce	*Stephanomeria pauciflora*	N
Wolfberry	*Lycium berlandieri*	Y
Woodsorrel	*Oxalis* sp.	N
Yellow palo verde	*Parkinsonia microphylla*	Y
Yucca	*Yucca* spp.	Y

Eight minerals or types of minerals important to tribal groups were identified in the direct impacts analysis area: Apache tear obsidian, caliche, mica, red ore, polishing stones, quartz crystals, iron sand deposits, and schists.

3.14.3.4 Indirect Analysis Area

A portion of the *Chí'chil Biłdagoteel* Historic District TCP is within the indirect analysis area outside of the direct analysis area. Specifically,

Apache Leap to the west of Oak Flat is adjacent to the direct analysis area. Ten places of traditional and cultural importance have been identified in the ethnographic report within the indirect analysis area.

One hundred forty-seven springs or surface water sources are found in the indirect analysis area. These springs and water sources are within the Queen Creek watershed, Devil's Canyon watershed, and the Gila River watershed.

3.14.3.5 Atmospheric Analysis Area

Tonto National Forest's consultations and ethnohistoric study of the general area around Oak Flat have identified many named Western Apache locations and special interest areas, as well as Yavapai band traditional territories. This applies particularly to the areas within the U.S. 60 corridor—for example, the Superstition Mountains, Picketpost Mountain, Apache Leap, and Devil's Canyon are all named sacred locations. A portion of the *Chí'chil Biłdagoteel* Historic District is within the atmospheric analysis area. The ethnographic report identified 13 places of traditional and cultural importance to tribes within the atmospheric analysis area. These places include springs, ridges, mountains and mountain ranges, resource collection sites, and archaeological sites.

The atmospheric analysis area also contains prehistoric sites and resources of interest to the tribes that are related to the prehistoric occupation of the area— descendant communities comprise the Gila River Indian Community, the Hopi Tribe, the Salt River Pima-Maricopa Indian Community, and the Pueblo of Zuni.

3.14.4 Environmental Consequences of Implementation of the Proposed Mine Plan and Alternatives

3.14.4.1 Alternative 1 – No Action

Direct Impacts

Under the no action alternative, the Forest Service would not approve the GPO, current management plans would remain except for the development of a new forest plan, and Resolution Copper would continue current activities on private property and previously permitted activities on the Tonto National Forest. As described in section 2.2.3, the no action alternative analysis analyzed the impacts of (1) the Forest Service's not approving the GPO, and (2) the land exchange's not occurring.

If the Forest Service does not approve the GPO, the mining operation as defined in the GPO would not occur; if the land exchange does not occur, the selected lands would remain under Forest Service management. Under either scenario, no direct impacts are anticipated to archaeological sites, TCPs, springs, or other resources significant to the tribes, including loss of access to resources.

Indirect and Atmospheric Impacts

If either the land exchange does not occur or the GPO is not approved, no adverse indirect or atmospheric impacts are anticipated to resources other than to some springs. With or without the land exchange, the continued dewatering of mine shafts on private land would occur, lowering the water table in the area, which may have adverse indirect impacts on

six springs. See section 3.7.1 for more information on dewatering and its potential effects on area resources.

3.14.4.2 Impacts Common to All Action Alternatives

Under all action alternatives, the Oak Flat parcel will be adversely impacted by the proposed mining operation. Extraction of the ore via block caving will eventually lead to the subsidence of the parcel; access to Oak Flat and the subsidence zone will be curtailed once it is no longer safe for visitors. Oak Flat is a sacred place to the Western Apache, Yavapai, O'odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples. The following is the testimony of tribal members describing the spiritual significance of Oak Flat and what its loss would mean to their culture, especially Apache culture, in their own words. The first section contains portions of the congressional testimony by members of the San Carlos Apache Tribe; the second section is a selection of representative comments on the DEIS, which emphasize the cultural importance of Oak Flat to Native peoples.

Congressional Testimony

WENDSLER NOSIE SR. CONGRESSIONAL TESTIMONY

Wendsler Nosie Sr., Chairman of the San Carlos Apache Tribe from 2006 to 2010, gave testimony before Congress several times beginning in 2007. Mr. Nosie testified to the importance of Oak Flat and Apache Leap to the Apache peoples, stating, "These lands are holy and sacred places." He reiterated the sacredness of these places each time he testified to Congress. The

following excerpts are illustrative of the statements made during these hearings.

November 1, 2007, U.S. House Natural Resources Committee, National Parks, Forests, and Public Lands Subcommittee:

> Well before Oak Flat, Apache Leap, and Devil's Canyon were appreciated for their unique habitat and features by hikers, bird watchers, off-road enthusiasts, and rock climbers, these Lands were home to the Apache People. In our native language Oak Flat is called *Chí'chil Biłdagoteel*, and it lies in the heart of T'is Tseban country. The Oak Flat area is bounded in the east by Gan Bikoh or Crown Dancers Canyon, and in the north by Gan Diszin or Crowndancer Standing. These canyons are called "Devil's Canyon" and "Queen Creek Canyon" by non-Indians.
>
> For as long as may be recalled, our People have come together here. We gather the acorns and plants that these lands provide, which we use for ceremonies, medicinal purposes, and for other cultural reasons. We have lived throughout these lands, and the Apache People still come together at Oak Flats and Apache Leap to conduct religious ceremonies and to pray or take rest under the shade of the ancient oak trees that grow in the area. The importance of these lands has not changed. These are holy, sacred, and consecrated lands which remain central to our identity as Apache People.

> In the nearby area called Devil's Canyon, we have placed marks, which are symbols of life on Earth, on the steep ledges and canyon walls that rise high above the stream that has carved deep into the Canyon, and we buried our ancestors in the Canyon's heart. The escarpment of Apache Leap, which towers above nearby Superior, is also sacred and consecrated ground for our People for a number of reasons, many of which are not appropriate to discuss here. You should know, however, that at least seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom when faced with overwhelming military force from the U.S. Calvary which would have required them to surrender as prisoners of war. (Nosie Sr. 2007)

June 17, 2009, U.S. Senate Energy and Natural Resource Committee, Public Lands and Forests Subcommittee:

> Apache spiritual beings, our Gaan, exist within the three sacred sites of Oak Flat, Gaan Canyon and Apache Leap affected by S. 409. These sites become RCM property and subject to its proposed mine. Yet, to Apache, the Gaan live and breathe in those sites. The Gaan are the very foundation of our religion; they are our creators, our saints, our saviors, our holy spirits. Imagine if this same type of mine as proposed by RCM lay 7,000 feet beneath the National Cathedral here in Washington, D.C.

> Imagine further that the mine was affected by a major subsidence, one that shook and swallowed the National Cathedral. Everyone would be outraged. Every person of every faith would fight to their last breath to prevent that mine from happening. Every American understands that the desecration of anyone religion affects all religions, and that such an act even threatens the free exercise protections afforded under the First Amendment of the Constitution. (Nosie Sr. 2009)

March 12, 2020, House Committee on Natural Resources, Indigenous Peoples of the United States Subcommittee (regarding the DEIS):

> The analysis of the Tribal Values and Concerns focuses the impacts of the proposed Land Exchange and Resolution Copper Mine on the past without recognizing the current presence of religious and cultural practices that have endured at Oak Flat for centuries. This erasure of Native Americans in contemporary terms perpetuates the genocidal history of America. What was once gunpowder and disease is now replaced with bureaucratic negligence and a mythologized past that treats we Native people as something invisible or gone. We are not.
>
> We are still a vibrant and vital part of our Nation's fabric despite repeated attempts to relegate our cultures as artifacts in museums or blubs in history books. However, the permanent damage that will

be caused by the Resolution Copper Mine is something that will contribute to this genocidal narrative continuing now and well into the future. It is disappointing that the cumulative effects analyzed in the Oak Flat DEIS do not look at the present or future of impacted Native peoples.

Chí'chil Biłdagoteel (also known as Oak Flat) is a Holy and Sacred site for our Apache people and many other Native Americans. It is a place where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. It is important to understand that we have never lost our relationship to *Chí'chil Biłdagoteel*. Despite the violent history of the U.S. Government's exile, forced march and imprisonment of Native people on reservations, and the efforts by the U.S. Government to discourage, impede, or fully disallow us from coming to this holy area, we have our own legacy of persistence and never letting go of this place. *Chí'chil Biłdagoteel*'s religious value to our prayers, our ceremonies, and in our family histories cannot be overstated. Native religion was the first religion practiced in this area. And for over five years now, we have established an encampment to protect the Holy Ground at *Chí'chil Biłdagoteel* with its four crosses, which represent the entire surrounding Holy and Sacred area, including its water, animals, oak trees, and other plants central

to our tribal identity. It is important to note that *Chí'chil Biłdagoteel* is listed on the National Park Service's National Register of Historical Places ("NRHP") as a Historic District and Traditional Cultural Property ("TCP"). Emory oak groves at Oak Flat used by tribal members for acorn collecting are among the many living resources that will be lost along with more than a dozen other traditional plant medicine and food sources. Other unspecified mineral and plant collecting locations and culturally important landscapes will also be affected. Development of the Resolution Copper Mine would directly and permanently damage *Chí'chil Biłdagoteel*, the designated TCP that is vital to us, which is why we strongly oppose this operation.

The impacts that will occur to Oak Flat will undeniably prohibit the Apache people from practicing our ceremonies at our Holy site. Construction of the mine would temporarily cut off access and once the mine has been completed, the ongoing safety concerns of subsidence will create a permanent barrier preventing Apache ceremonies from taking place. Our connections to the Oak Flat area are central to who we are as Apache people. Numerous people speak of buried family members. Most of them include childhood memories. Everyone speaks to the deep spiritual and religious connection that Apaches have to the land, water, plants and animals that would be permanently

> destroyed by this proposed action. The destruction to our lands and our sacred sites has occurred consistently over the past century in direct violation of treaty promises and the trust obligation owed to Indian tribes. Tribes ceded or had taken hundreds of millions of acres of our homelands to help build this Nation. In return, the United States incurred obligations to protect our lands from harm, and to respect our religion and way of life. Despite these obligations, the U.S. Government has consistently failed to uphold these promises or too often fails to act to protect our rights associated with such places like *Chí'chil Biłdagoteel.* (Nosie Sr. 2020)

TERRY RAMBLER CONGRESSIONAL TESTIMONY

Terry Rambler, Chairman of the San Carlos Apache Tribe from 2010 to the present, also gave testimony before Congress about the impacts on Apache culture and spirituality by the proposed project.

February 9, 2012, U.S. Senate Committee on Energy and Natural Resources, prepared statement excerpt:

> Throughout our history, Oak Flat continues as a vital part of the Apache religion, traditions, and culture. In Apache, our word for the area of Oak Flat is *Chí'chil Biłdagoteel* (a "Flat with Acorn Trees"). Oak Flat is a holy and sacred site, and a traditional cultural property with deep

religious, cultural, archaeological, historical and environmental significance to Apaches, Yavapais, and other tribes. At least eight Apache Clans and two Western Apache Bands have documented history in the area. Apache clans originated from this area and Apaches on the Reservation have ancestors who came from the Oak Flat area before they were forced to Old San Carlos. Tribal members' ancestors passed their knowledge about Oak Flat to their descendants who are alive today.

A number of Apache religious ceremonies will be held at Oak Flat this Spring, just as similar ceremonies and other religions and traditional practices have been held for a long as long as Apaches can recall. We do so because Oak Flat is a place filled with power, a place Apaches go: for prayer and ceremony, for healing and ceremonial items, or for peace and personal cleansing. The Oak Flat area and everything in it belongs to powerful Diyin (Medicine Men) who we respect, and the home of a particular kind of Gaan—powerful Mountain Spirits and Holy Beings on whom Apaches depend for our well-being. The Oak Flat area is bounded on the west by portions of the large escarpment known as Dibecho Nadil (Apache Leap), to the east by Gaan Bikoh (Crown Dancer's, Mountain Spirit's, or Gaan Canyon, and known as Devil's Canyon), and is intersected to the north by Gaan Daszin (Crown Dancer's or Mountain Spirits

Standing, and known as Queen Creek Canyon).

In the Oak Flat area, there are hundreds of traditional Apache species of plants, birds, insects, and many other living things in the Oak Flat area that are crucial to Apache religion and culture. Some of these species are among the holiest of medicines—medicines that are only known and harvested by gifted Apache spiritual or healing practitioners. Only the species within the Oak Flat area are imbued with the unique power of this area. The ancient oak groves provide an abundant source of acorns that for many centuries and today serve as an important traditional food source for the Apache people.

Any mining on Oak Flat will adversely impact the integrity of the area as a whole—both as a holy and religious place and as a place of continues traditional and cultural importance to Apaches and other tribal people. There are no human actions or steps that can ever make this place whole again or restore to the Apache what will be lost. Mining on Oak Flat will desecrate our Gaan's home and could greatly diminish the power of this place, as well as our ability to most effectively conduct our ceremonies. The destruction of Oak Flat will add to the many problems and sufferings that our community already faces. We will become vulnerable to a wide variety of illness, and

> our Apach spiritual existence will be threatened. (Rambler 2012)

March 21, 2013, U.S. House Committee on Natural Resources, Energy and Mineral Resources Subcommittee:

> The San Carlos Apache Reservation is bordered on the west by the Tonto National Forest. The Oak Flat area is 15 miles from our Reservation. The Forest and the Oak Flat area are part of our and other Western Apaches' aboriginal lands and it has always played an essential role in the Apache religion, traditions, and culture. In the late 1800s, the U.S. Army forcibly removed Apaches from our lands, including the Oak Flat area, to the San Carlos Apache Reservation. We were made prisoners of war there until the early 1900s. Our people lived, prayed, and died in the Oak Flat area. At least eight Apache Clans and two Western Apache Bands document their history in the area. Since time immemorial, Apache religious ceremonies and traditional practices have been held at Oak Flat. Article 11 of the Apache Treaty of 1852, requires the United States to "so legislate and act to secure the permanent prosperity and happiness" of the Apache people. Clearly, H.R. 687 fails to live up to this promise. The Oak Flat area, as well as other nearby locations, are eligible for inclusion in, and protection under, the National Historic Preservation Act of 1966, as well as many other laws, executive orders and policies.

> Today, the Oak Flat area continues to play a vital role in Apache ceremonies, religion, tradition, and culture. In Apache, the Oak Flat area is *Chí'chil Biłdagoteel* (a "Flat with Acorn Trees"). The Oak Flat area is a place filled with power—a place where Apaches today go for prayer, to conduct ceremonial dances such as the sunrise dance that celebrates a young woman's coming of age, to gather medicines and ceremonial items, and to seek and obtain peace and personal cleansing. The Oak Flat area and everything in it belongs to powerful Diyin, or Medicine Men, and is the home of a particular kind of Gaan, which are mighty Mountain Spirits and Holy Beings on whom we Apaches depend for our well-being.
>
> Apache Elders tell us that mining on the Oak Flat area will adversely impact the integrity of the area as a holy and religious place. Mining the Oak Flat area will desecrate the Gaan's home and would diminish the power of the place. Without the power of Gaan, the Apache people cannot conduct our ceremonies. We become vulnerable to a variety of illnesses and our spiritual existence is threatened. There are no human actions or steps that could make this place whole again or restore it once lost. (Rambler 2013a)

November 20, 2013, U.S. Senate Committee on Energy and Natural Resources, Public Lands, Forests, and Mining Subcommittee:

At least eight Apache Clans and two Western Apache Bands have documented history in the area. Apache clans originated from this area and Apaches on the Reservation have ancestors who came from the Oak Flat area before being forced to Old San Carlos. Tribal members' ancestors passed their knowledge to their descendants who are alive today. Our people lived, prayed, and died in the Oak Flat area for decades and centuries before this mining project was conceived.

For centuries, Apache religious ceremonies and traditional practices have been held at Oak Flat. Article 11 of the Apache Treaty of 1852 requires the United States to "so legislate and act to secure the permanent prosperity and happiness" of the Apache people. S. 339 would directly abrogate this promise. The Oak Flat area, as well as other nearby locations, is eligible for inclusion in and protection under the National Historic Preservation Act of 1966 and under other laws, executive orders and policies.

Today, the Oak Flat area continues to play a vital role in Apache religion, tradition, and culture. The ceremonies conducted at Oak Flat are part of a centuries-old continuum of ceremony and everyday life. The Oak Flat area is a place filled with power—a place where Apaches today go for prayer, to conduct ceremonies such as Holy Ground and the Sunrise Dance that celebrates a young woman's coming of age, to gather

medicines and ceremonial items, and to seek and obtain peace and personal cleansing. The Oak Flat area and everything in it belongs to powerful Diyin, or Holy Beings, and is the home of a particular kind of Gaan, which are mighty Mountain Spirits and Holy Beings on whom we Apaches depend for our well-being.

Apache traditions and practices mean that we are responsible to respect and to take care of our relatives, which in our culture includes all living things. On my mother's side, I am Túgain, (Whitewater Clan). I am related to the eagles and hawks, yellow corn, and a plant called iya'aiyé (wild tarragon). On my father's side, I am Nadots'osn (Slender Peak Clan) and related to the roadrunner, side-oats grama grass, and black corn. These animals and plants thrive at Oak flat and elsewhere. Our lives are closely intertwined with these living things as the power of the Holy Beings provide the plants, corn and animals to sustain life and for use in our ceremonies and prayers. The Apache way of life is to take care of these relatives and their habitats. The Tonto National Forest's own website states that it works closely with tribes in the area to ensure that we can continue to practice our religious and traditional activities there and to protect tribal archeological, historical, and cultural areas. (Rambler 2013b)

NAELYN PIKE CONGRESSIONAL TESTIMONY

Naelyn Pike, a member of the San Carlos Apache Tribe, testified before the U.S. House Natural Resources Committee Indigenous Peoples of the United States Subcommittee, on March 12, 2020, about her experiences at Oak Flat during her Sunrise Dance:

> Oak Flat is one of the sacred areas where Apaches hold the coming of age Sunrise Ceremony for girls to mark their entrance into womanhood. The ceremony begins when a girl goes to the sacred land and builds a wikkiup, which becomes their new home for the journey ahead.
>
> On the first day of my ceremony, I made the four Apache breads for the medicine man and my godparents. My godmother helped me dress in my traditional clothing and stayed with me throughout the ceremony. On the second day of the ceremony, I woke up when the sun started to rise. I danced and prayed with my godmother, godfather, and my partner by my side. I danced to the sun, the Creator. I hit the ground hard with my cane in time with the drumbeat to wake up the sacred mountain, the spirits, and the Gaans, also known as Angels, bringing them back to life.
>
> Without the power of the Gaans, the Apache people cannot conduct our ceremonies. I awoke the Gaans and danced beside them, tears streaming down my face. On the third day, my partner and I danced underneath

the four sacred poles. This day is when I became the white-painted woman. My godfather and the Gaans painted me with the Glesh. In our creation story, the white-painted woman came out of the earth, covered with white ash from the earth's surface. Being painted with the Glesh represents the white-painted woman and her entrance into a new life. The paint molds and glues the prayers and blessings from the ceremony onto me. With my face completely covered, my godmother wiped my eyes with a handkerchief. Once my eyes opened, I looked upon the world not as a little girl, but as a changed woman. At the end of my dance, my family and friends congratulated me. We all cried because I was no longer a girl; I was now a woman. On the last day of my ceremony, my grandmother undressed me and took me to the stream so I could bathe. While she washed my hair, a small green hummingbird flew right in front of us and hovered about before it flew toward the sky. I knew this was a great blessing. I dressed in my everyday clothes, and we went back to the camp. I had become a woman and followed in the footsteps of Apache girls that have come before me. My ceremony is just one part of an Apache way of life. It is our religious right to be able to practice these ceremonies in these sacred places. 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? (Pike 2020)

Ms. Pike also described her family's visits to Oak Flat to gather acorns and other plants:

> Through my entire existence, I was consistently brought back to Oak Flat. My family would come together for prayer and ceremony. When the red berries and the acorn were in season, I was taken to Oak Flat to gather our traditional foods. With the food we collected, we were able to feed our families. Through this practice, I was able to learn my role as an Apache girl and to live our culture. The acorn, berries, and medicinal plants can never be replaced. Nor can they ever be relocated to a different area. Usen has planted these plants and herbs there for a reason. To me, Oak Flat is home, and it will always be home. (Pike 2020)

Personal Statements from DEIS comments

Many Apache people provided personal statements about the importance of Oak Flat to their culture and religion. The following statements attest to the role Oak Flat has in Apache religious belief, ceremonial practice, and resource gathering:

> *Chí'chil Biłdagoteel* (also known as Oak Flat) is a Holy and Sacred site for our Apache people and many other Native Americans. It is a place where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. We

have never lost our relationship to *Chí'chil Biłdagoteel*. Despite the violent history of the U.S. Government's exile, forced march and imprisonment of Native people on our reservations and the efforts by the U.S. Government to discourage, impede, or fully disallow us from coming to this holy area, we have our own legacy of persistence and never letting go of its religious value in our prayers, in our ceremonies, and in our family memories. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

The Gaan people (Crown Dancers) are angels, Apache spiritual beings. Our Gaan exist within the three sacred sites of *Chí'chil Biłdagoteel* (Oak Flat), Gaan Canyon and Apache Leap. The Gaan live and breathe in these sites. The Gaan are the very foundation of our religion. They are our Creator, our Saints, our Saviors, and our Holy Spirits. This mine endangers our Holy Spirits and this was not considered in the impacts. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

We have lived throughout these lands since time immemorial. For as long as may be recalled, our people have come together here. The Apache People continue to come together at Oak Flats and Apache Leap to conduct religious ceremonies and to pray or take rest under the shade of the ancient oak trees that grow in the area. These are holy, sacred, and consecrated lands which remain

central to our identity as Apache People. Cultural significance is displayed largely in the historic social practices of a group. The Religious value of a current ongoing connection to the area is not addressed. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

In the nearby area called Devil's Canyon, the marks (petroglyphs) that exist are symbols of life on earth. They exist on the steep ledge and canyon walls that rise high above the stream that has carved deep into the Canyon. This loss of our written history is not considered in the impacts. . . . We buried our ancestors in the Canyon's heart. The loss of our Sacred Burial Ground is mentioned in passing.– Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold The escarpment of Apache Leap, which towers above nearby Superior, is also sacred and consecrated ground for our People for a number of reasons, many of which are not appropriate to discuss here. As you know, however, that at least seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom when faced with overwhelming military force from the U.S. Calvary which would have required them to surrender as prisoners of war. The escarpment of Apache Leap, which towers above nearby Superior, is also Sacred and consecrated ground for

our People. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

Although the DEIS has set aside Apache Leap as a Special Management Area, it does not discuss the spiritual and religious connection the desecration of *Chí'chil Biłdagoteel* will have on Apache Leap. They are of the same body and connected in every way. Creating the Apache Leap Special Management Area does not protect the Holy, Sacred, spiritual and religious nature of this consecrated ground. The protection of Apache Leap from subsidence is not conclusive. The impacts of the loss of this land form to Apache people has not been addressed. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

My children have been going to Oak Flat since they were born. I have three children and they are all directly connected to the land and the environment. My nine year old daughter dreams about having her Apache Sunrise dance ceremony at Oak Flat. The Apaches see Oak Flat differently—it is a church, a place for worship and the practice of our traditional religion. It is the center of our most sincerely held, religious beliefs, where diyf'(sacred power) can be called upon via prayers. Oak Flat is the goiff'(home) of our diyi'n, visited by our ga 'an (spiritual beings) who provide us with healing and spiritual services. It is also a place that speaks to the very essence of tribal culture. Covering 4,309 acres, Oak Flat lies within

the traditional territory of the T'iis Tseban (the "cottonwood trees gray among rocks people"), also known as the "Pinal Band" of Apaches, and is closely associated with the related Tse Binesti 'e (the "surrounded by rocks people"), also known as the Aravaipa Band. At least eight Apache clans have direct ties to this location. Tribal members continue to visit Oak Flat for prayer and a wide range of traditional needs and practices. – Terry Rambler

Apache Sunrise dance is a womanhood ceremony for a young girl and we hope she will have the opportunity to choose to have her ceremony there on our traditional homelands. My seven year old son has five different forts at Oak Flat and every time we go to Oak Flat he runs to check on all his forts. He says I have to make sure they have not destroyed my forts yet. This is a disheartening statement for a mother to hear, because my son knows Resolution Cooper is trying to destroy our holy place. I pray my son will have the opportunity to sweat at Oak Flat for the first time, when he becomes a young man. We have gone to many Apache spiritual ceremonies (Sunrise dances and Holy ground ceremonies) at Oak Flat and we know the land personally. – Lian Bighorse

The memories I have there when visiting there is praying, picking acorn, visiting the spring, going hiking, playing tag, participating with my cousin sunrise dance

ceremony, having my massage ceremony at Oak Flat. Oak Flat means so much because of the memories but also because it where my ancestor use to live and rom free. It's where our sacred Red Guan came from another holy place to go to Oak Flat. I believe Oak Flat is sacred. I believe it because when you are there you can feel it, it's in the wind, the rocks, the dirt, the spring, it's just all around you. – Baase Pike

I've been to the holy grounds and puberty ceremonies at Oak Flat. I do healing ceremonies for people who are needing prayer there. . . . When I was younger, we would go through Oak Flat on the way to Casa Grande. It was part of different tribes competing. At the time, those rocks caught my eye. It brings be [sic] back to my ancestors who walked the canyon. You can hear their prayers and songs. see the human figures. Before the turn off to the campground there is a shape of a skill like a Gaan dancer. You can still see that. – Jerry Thomas

Even to my people (Un'k Akimel O'odham) Oak Flat is a sacred holy place. It is mentioned in our traditional songs that my ancestors would meet and pray there because of the direct connection to the holy spirit Juhwertamahkai (earth doctor). – Esteban Lopez

I went to Oak Flats when I was a kid with my parents. We used to always go out there to pick acorn, herbs, spices. And just to get

> away from home at a place where we could go to picnics. Learning my history about Oak Flats, I have family that is buried there. So it became a memorial place where me and my family can go pay our respects to the people who have died there. I have family that are buried there. It's been basically a big part of my life growing up. Introducing my kids the place and to the environment, I did what my parents did for me. Take them out there and enjoy what I enjoyed as a kid. To teach them at a young age, learning how to gather and hunt was a big issue when I was growing up to teach the younger generation, which I tend to do all the time. I got involved in running. It's been a journey, going every year. I'm trying to show my siblings, my sons and daughters, how important it is to me why I go up there. It's important to me to get them involved, knowing that it's a place where we go to gather acorns. It's also a place for me to teach them about our bloodlines and where they're buried there. – Andrew Victor Tarango

Comments regarding the Sunrise Dance:

> My family, my ancestors come from Oak Flat. I grew up there, praying, picking the medicine, picking the acorn, going to the springs, gaining the teachings of my role as an Apache woman so I can pass it down to my daughters. Those teachings through the songs and prayers still exist, and I and many others have passed it on to our

children. I have 3 daughters which my two younger daughters had their coming of age Ceremony for our girls who become women there at Oak Flat. My daughter, Nizhoni, held her Ceremony at Oak Flat in October 2014. As a Mother and as a family, we prepare our daughters from the day they take their first breath onto this world until the day their ceremony starts. All the elements of the wind, fire, water, and land go into the Ceremony for my daughter. Everything Usen (Creator, God) has created has a significant role in the Ceremony got the 4 days that she prays, dances, connects with all the elements, connected to our ancestors, connected to the Holy Spirit. On the 3rd day of the Ceremony she is painted white with the white clay that is provided from Mother Earth, and that paint blesses all living beings, followed by the next day, the last day of the ceremony, she has to wash the paint off and give it back to the earth. . . . The exact springs she went to wash her paint off is being affected by Resolution Copper Mine already by dewatering the springs. You are already tampering with her life. My daughter, Nizhoni was reborn from a young girl into a beautiful strong Apache woman at Oak Flat. Her feet touched the ground as the beat of the drum is the heart beat of Mother Earth. Her tears hit the ground having Mother Earth feel her love for the land, the water, and all creations. She prayed to our Holy people and entered the spirit world to pray

for all people in this world and all that is created for she/we believe that everything is alive.

– Vanessa Nosie

Our granddaughter, Nizhoni had her sunrise dance there at Oak Flat. . . . When someone has there dance, they have to be ready. They have to know as they're growing up the different things they need to know as a women. She would have to pick what she wanted to be on her buckskin, what would be her representation. And those things that she loves about Oak Flat were the butterflies and the hummingbird and so in her emblems on her buckskin, those were where those representations of nature were on her own dress. After her dance was over, she would have to be washed of all the ashes. So, we took her to the spring there and as we took her to the spring, all the butterflies came to meet her. We were going up toward the spring and there were groups of butterflies, black monarchs and yellow ones. The followed us all the way there. It was very special. And during her dance, there were times when hummingbirds actually came to the ceremony to where she was. Those things are very important to her and to me as a grandmother. Coming of age there is always going to hold reverence in her life and her kid's lives and her grandchildren's lives, the same it does with me. There are is connected to her and is connected to me through life, through

practices, through ceremony, through prayers. – Theresa Nosie

The Sunrise ceremony places Apache women's bodies into the ground where the ceremony exists. They build their homes, physically and spiritually, where they are called to have their ceremony. As several people who gave testimonial, the location of a Sunrise ceremony is one that each girl must arrive to herself and in their own understanding of a spiritual connection. – Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

This is about our Apache way of life and concern for Oak Flat, which is a holy place for me. I witness ceremonies like Sunrise Dances, and a Holy Ground Song, I hear, Chanting Songs, and bells from Ga'an in dances, such as bull-roaring. So it means a lot to any Apache who stops there hears things and feelings. – Linda Thomas

For at least a half millennium through to the present day, members of our Tribe have utilized the Oak Flat area for traditional religious ceremonies, such as the Sunrise Dance, where we celebrate the event of a girl's maturation from puberty over four days, through dance, drumming, song and prayer, and the visitation of Crown Dancers. It is a place where Apache Holy Ground rituals occur, where we commune with and sing to our Creator God, and celebrate our holy spirits, including our mountain spirits, the Ga'an. It is a place filled with rock

paintings and petroglyphs, what some may describe as the footprints and the very spirit of our ancestors, hallmarks akin to the art found in gothic cathedrals and temples, like the Western Wall in Jerusalem, St. Peter's Basilica in Vatican City, or Angor Wat in Cambodia. This is why I call Oak Flat the Sistine Chapel of Apache religion. – Terry Rambler

I have a cousin who had her coming of age ceremony at Oak Flat. It was a time where she became a woman. The amazing thing about the ceremony is that it brought together family and we did what we do as Apache people. At this time I was a young girl. We came together and I wanted to someday have my ceremony just like her. To think that a mine would come and destroy the area of where my cousin had her ceremony breaks my heart. – Kellieann Goseyun

My daughter runs to Oak Flat. She wanted to have her Sunrise Ceremony at Oak Flat. We got all of the materials for the ceremony from Oak Flat, the plants the yucca sticks, and branches for the Ga'an Dancers. A week before the dance it snowed. When I went to check the dance grounds, everything was covered in snow. It worried me, but kept on doing what we were doing to prepare for the dance. When we got there the dance grounds were clear of snow and dry. Everything was ready for the ceremony. That was very spiritual to us that the grounds were ready.

To me Oak Flat is very spiritual. Her house is still up at Oak Flat. That was in March, and it is still up today, She goes and checks on it every chance she gets. – Matonth Brown

Oak Flat is a special place to my family and the Apache people. Our ancestors prayed and dance there. Our medicine, water and food comes from there. When you are in the presents of Oak Flat you can feel the strength, struggle and resistance of our ancestors. This is where my daughter and nieces made their journey to womanhood through the coming of age ceremony. The houses they built with their own two hands still stands strong in Oak Flat a place they call home where they can revisit and still feel the power of the songs and prayers. – Sinetta Lopez

I just recently had my coming of age ceremony at Oak Flat and being there meant a lot to me to have my ceremony in a place where all my ancestors used to be. If the Resolution Copper mine continues with destroying Oak Flat, then I will never have a sacred place to come back to or to show my kids where our ancestors gathered. I have many memories of Oak Flat of our family when we would sing our traditional songs. Our elders would tell us the history of Oak Flat. – Gouyen Brown-Lopez

The reason why Oak Flat is so important to me is because I have a very strong connection with the land. Oak Flat gives me

> connection with my family and my past ancestors. A place for me to dance with people that I love including my closest cousin and my sister who had their Sunrise Dances there which I was able to be a big part of. Because of all the dances I have done there it became my home. Whenever I am there the nature around me makes me feel free and I am able to rethink past mistakes and also the land makes me think of the future and how I can make my life better. With all the dances I was able to learn more about my culture and things I am supposed to do as a person and when I get older I know what I can pass on to the next generation. – Waya Brown

Comments about acorn and resource gathering at Oak Flat:

> Oak Flat is also a place where our members still conduct traditional harvesting of plants important to our diet, such as acorns from Emory oaks, and healing plant-based medicines for a wide range of ailments. – Terry Rambler

> We gather the acorns and plants that these lands provide for ceremonial and medicinal purposes and for other cultural reasons. The numerous natural elements, that come from these Holy Sites, are used as tools to conduct Religious Ceremonies, spiritual sweats, and Sunrise Ceremonies. The loss of these natural elements, fundamental to our religion, was not considered in the impacts.

– Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold

We pick acorn. I forgot what that plant medicine is called, My families pick the plant medicine to heal themselves, like wild tea. It is a sacred and spiritual place for me and my family the ones that are traditional and they don't want anything to be built there. We would like to keep it to be sacred. – Melissa Irving

We pick them up in acorn, and then we grind it, and we put it into a soup. We make dumpling, squash, corn, mixed together, and then we just— we do a lot of things with it. We eat, mostly— the elderlies love to pick acorn, and I am the one that love to pick acorn. And I have spent four days doing this, and it takes a lot of hard work, but if it's—if you guys do something about it and destroy it, there will be nothing. There will be nothing. So I just want you to know that it's very, very important. – Geraldine Kitcheyan

We have concerns about Oak Flat. There shouldn't be a mine there, because it's our acorns, squaw berries and we use squaw berries stem to make burden basket and it is our Apache Kool-Aid. Acorn we have been picking for our food and the acorn is Apache food when Geronimo was here in San Carlos that is his favorite food. And there's 3 ways of acorn soup that we do. I'm 67 years old and that's where I find my acorn and squash berries. Our families (Victor) have been

picking acorn there and for us to have lunch there too. – Leopha Victor Chatlin

He used to go up over the mountain with my mom and she would collect acorn. And we were always stopping by over there [Oak Flat]. There are so many acorn trees. My Aunt Marie, she would go there and pick acorns. Out there she would smash hem on the rocks and put them in a blanket. She'd shake it and then blow the hard ones away. She would grind it on a wheel and then we'd take it home and make acorn soup. My mom used to pick the berries—in Indian it's called, everyone called it Kool Aid. At that time everybody talked Apache. So that's what I know to call those berries. She would make that for us at home. I don't see people make that as much anymore. But Oak Flat is where she used to get it. – Imogene Brown

My great grandmother Dott Crockett, born in 1882 and passed away in 1981 at the age of 99 years old. . . . She told me stories of camping at the Oak Flats and praying while there, how they collected medicinal plants, also acorn which was the staple back then. She talked about the Red Berries they would pick and use as Koolaid to drink, she also talked about 'noos.' I never found its original name.

– Brenda Schildt

Effects of the Land Exchange

Assuming that the land exchange occurs, as mandated by Congress in the Southeast Arizona Land

Exchange Act, the selected lands would be conveyed to Resolution Copper no later than 60 days after the publication of the FEIS, and the Oak Flat Federal Parcel would become private property and no longer be subject to the NHPA. Under Section 106 of the NHPA and its implementing regulations (38 CFR 800), historic properties leaving Federal management is considered an adverse effect regardless of the plans for the land, meaning that as analyzed under NEPA, the land exchange would have an adverse effect on resources significant to the tribes.

The Oak Flat Federal Parcel contains 31 NRHP-eligible historic properties, and one NRHP-listed TCP. Distinctive features of the TCP include an Emory oak stand that Apache and Yavapai use to harvest acorn, and a nearby campground, constructed by the Civilian Conservation Corps, that provides a convenient place for family gatherings. All of these resources would be adversely affected by leaving Federal management. In particular, as described above, the loss of the ceremonial area and acorn collecting area in Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes, because healthy groves are few and access is usually restricted unless the grove is on Federal land. Four of the places of traditional and cultural importance identified in the ethnographic report are found within the Oak Flat Federal Parcel; they are all part of the TCP. Two additional places of traditional and cultural importance are found within the East Plant Site of the GPO.

Effects of Forest Plan Amendment

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for

management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 forest plan was conducted to identify the need for amendment due to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). A number of standards and guidelines (10) were identified applicable to management of tribal resources. None of these standards and guidelines were found to require amendment to the proposed project, on either a forest-wide or management area-specific basis. For additional details on specific rationale, see Shin (2020). No standards and guidelines were identified that are strictly applicable to tribal resources; however, a great number of standards and guidelines are related to resources considered important or sacred by tribes, including wildlife, water resources, and scenic resources. The need for a forest plan amendment for these resources is discussed in the appropriate section.

Effects of Compensatory Mitigation Lands

The compensatory mitigation lands are intended for conservation and overall improvement of riparian areas and are not anticipated to have any impact on tribal values or concerns. One compensatory mitigation land is located on tribal lands and is being undertaken in cooperation with the Gila River Indian Community.

Effects of Recreation Mitigation Lands

The recreation mitigation lands are anticipated to have an adverse effect on tribal values. Although preliminary trail alignments and trailhead areas were surveyed for impacts to cultural resources that are eligible for the NRHP and trail designs were refined to reduce conflict with cultural resources, the trails would be visible from known TCPs, and any ground disturbance is deemed to be an adverse effect on cultural and tribal resources.

Summary of Applicant-Committed Environmental Protection Measures

A number of environmental protection measures are incorporated into the design of the project that would address the loss of resources of tribal value and concern. These are non-discretionary measures, and their effects are accounted for in the analysis of environmental consequences. Many of these are related to other resources, such as minimizing ground disturbance or loss of habitat, and are not reiterated here. Measures to reduce impacts on tribal resources that are covered in detail in the PA (see appendix O) are described in the "Mitigation Effectiveness" section.

3.14.4.3 Alternatives 2 and 3 – Near West

Direct Impacts

Under Alternatives 2 and 3, the land exchange would occur and the Forest Service would approve the GPO. For both alternatives, there are variations of the footprint and the type of storage facility proposed in the modified GPO location; however, the direct effects would be the same for both. Section 3.12.4.2 contains a description of the location of the 138 prehistoric and

historic archaeological sites (18 of which have eligibility yet to be determined) that would be impacted by these alternatives and their associated mine operation areas (East Plant Site, subsidence area, West Plant Site, tailings facility and corridor, Silver King Mine Road, MARRCO corridor, and roads) (see table 3.12.4-1).

Twenty-three special interest areas were recorded in the tailings facility and corridor proposed for Alternatives 2 and 3; all of the special interest areas are cultural and are categorized as settlement or cultural areas. Several special interest areas are deemed to be related and are grouped together into three larger areas of importance. Each of these incorporates an active spring and archaeological sites. The area also contains many plants and minerals of use to tribes. Specifically, 67 plant species are found within the tailings facility; 17 of those are found in special interest areas. All alluvial deposits would be removed to expose bedrock for the tailings storage facility, so all of these soil and vegetation resources would be destroyed by construction and use of the facility. Resources in the direct analysis area may be lost completely because of ground disturbance, or tribes may lose access to those resource once they are part of the mine.

Eight persistent springs are anticipated to be dewatered by mine drawdown. In addition, three springs and three ponds within the subsidence area and three springs in the Alternative 2 and 3 tailings facility footprint will be directly disturbed.

Indirect Impacts

For both alternatives, a portion of the *Chí'chil Biłdagoteel* Historic District TCP found outside the project area may be indirectly impacted from inadvertent damage from construction activities in the area. In addition, 10 places of traditional and cultural importance identified in the ethnographic report are within the indirect impacts analysis area. Fifty springs or other water sources are within the indirect analysis area. Either tailings storage facility configuration would adversely reduce and affect the flow of water into Queen Creek; the long-term effects on groundwater quality due to tailings seepage are discussed in section 3.7.2.

Atmospheric Impacts

The tailings location for Alternatives 2 and 3 is located directly opposite Picketpost Mountain, a mountain sacred to Western Apache bands, and the presence of the nearly 500-foot-high tailings would constitute an adverse visual effect on the landscape.

Plotting the visual effects buffers against the results of the ethnographic study, two identified places of traditional and cultural importance are within 1 mile of the MARRCO corridor, eight are within 2 miles of the GPO mine facilities (i.e., East Plant Site, West Plant Site, etc.), and five are within 6 miles of the tailings facility. Adverse visual effects are expected for these places.

3.14.4.4 Alternative 4 – Silver King

Direct Impacts

This alternative contains a total of 147 prehistoric and historic archaeological sites that would be

adversely impacted by the combined areas of the mine; two of these archaeological sites have eligibility yet to be determined (see table 3.12.4-2). As noted earlier in this section, impacts on resources on Oak Flat would be the same for Alternative 4 and Alternatives 2 and 3. Resources in the direct analysis area may be lost completely because of ground disturbance, or tribes may lose access to those resources once they are part of the mine.

Thirty-three special interest areas were recorded in the Silver King tailings facility and corridor: 28 are cultural resources areas and five are natural resources areas. The cultural resource areas consist of settlement areas, resource processing areas, cultural areas, and agricultural areas. One of the natural resource areas was a mineral source; there is no information available on the other four. Several of the cultural areas are grouped into two larger areas of interest; an additional area consisting of a spring, riparian area, and grinding features was also defined. In addition, 70 plant species are found within the Silver King tailings alternative; 16 of these species are found within special interest areas. Eight persistent springs are anticipated to be dewatered by mine drawdown. In addition, three springs and three ponds within the subsidence area and one spring in the Alternative 4 tailings facility footprint will be directly disturbed.

Indirect Impacts

Like Alternatives 2 and 3, a portion of the *Chí'chil Biłdagoteel* Historic District TCP outside the project area may be indirectly impacted from inadvertent damage from construction activities. In addition, the same 10 places of traditional and cultural importance

are located in the indirect impacts analysis area. Sixty springs, seeps, or other water sources are within the indirect impacts analysis area. A tailings storage facility at the Alternative 4 location would reduce the surface area of the local watershed and have long-term effects on local groundwater quality within the Queen Creek watershed due to tailings seepage (see sections 3.7.2 and 3.7.3).

* * *

areas include springs and other water sources, plant resource areas, and a rockshelter. Two special interest areas are classified as both cultural and natural resource areas; they are both plant processing locations.

In addition, 62 plant species are found in the Alternative 6 tailings facility and pipeline; four of these species can be found in special interest areas. These resources may be lost completely because of ground disturbance, or tribes may lose access to these resources once they are part of the mine facility.

Direct impacts to water sources in the subsidence crater are the same as Alternatives 2–5. The surface area of the watershed would be reduced due to the permanent tailings storage facility (see section 3.7).

Indirect Impacts

Indirect impacts to the TCP are the same as for Alternatives 2–5. Indirect impacts to places of traditional and cultural importance are the same as Alternatives 2–5. One-hundred six springs or other water sources are within the indirect impacts analysis area for Alternative 6. The Alternative 6 tailings

facility is within the Dripping Springs watershed, which would reduce the surface area of the local watershed and may also have long-term effects on local groundwater quality within the Dripping Springs watershed due to tailings seepage (see sections 3.7.2 and 3.73).

Atmospheric Impacts

Plotting the visual effects buffers against the results of the ethnographic study, two identified places of traditional and cultural importance are within 1 mile of the MARRCO corridor, and eight are within 2 miles of the GPO mine facilities. Adverse visual effects are expected for these places.

3.14.4.7 Cumulative Effects

Full details of the cumulative effects analysis can be found in chapter 4. The following represents a summary of the cumulative impacts resulting from the project-related impacts described in Section 3.14.4, Environmental Consequences, that are associated with tribal values and concerns, when combined with other reasonably foreseeable future actions.

The following actions were determined through the cumulative effects analysis process to be reasonably foreseeable, and have impacts that likely overlap in space and time with impacts from the Resolution Copper Project:

- Pinto Valley Mine Expansion
- Ray Land Exchange and Proposed Plan Amendment
- Ripsey Wash Tailings Project

- Silver Bar Mining Regional Landfill and Cottonwood Canyon Road

The cumulative effects analysis area for tribal concerns and values is considered to be the ancestral homelands of the affected tribes, which is assumed to be the southwestern United States. The metric used to quantify cumulative impacts to tribal values and concerns is the physical footprint of the projects. Given the long time period in which tribal members have occupied these lands, and their religious and community connections to the landscape, there are many areas on the natural landscape that represent sacred sites for tribal members, or for which general disturbance of the natural landscape represents an impact to their tribal values. These types of impacts are difficult to quantify. Physical footprint is used as a proxy for the level of disturbance occurring to the natural landscape, assuming that effects on tribal values would stem from these disturbances.

* * *

Mitigation Effectiveness and Impacts of Required Mitigation Measures Applicable to Tribal Values and Concerns

Appendix J contains mitigation and monitoring measures being required by the Forest Service under its regulatory authority or because these measures are required by other regulatory processes (such as the PA or Biological Opinion). These measures are assumed to occur, and their effectiveness and impacts are disclosed here. The unavoidable adverse impacts disclosed below take the effectiveness of these mitigations into account.

Measures FS-RC-04 (Castleberry campground), FS-CR-01 (Oak Flat HPTP), FS-CR-02 (GPO Research Design), FS-CR-03 (Visual, Atmospheric, Auditory, Socioeconomic, and Cumulative Effects Mitigation Plan), FS-CR-07 (Archaeological Database Funds), and FS-SO-01 (Community Development Fund) were all described in Section 3.12, Cultural Resources. These measures have in common that they are primarily aimed at mitigating historic properties. While these measures are effective at reducing, but not preventing, impacts associated with destruction of historic properties, it is important to note that historic properties are not synonymous with tribal values and concerns.

According to the tribes consulted, adverse impacts on TCPs, special interest areas, and other places or resources of significant interest to tribes cannot be mitigated; therefore, mitigation strategies for tribal resources are designed to provide benefits to affected tribes. The mitigation strategies will have, and are having, positive impact on tribal communities such as providing jobs, funding tribal visits for evaluation of special interest areas, and increasing access to Emory oak resources. Specific mitigations include the following.

Resource salvage (FS-SV-01). This measure allows for tribal access for salvage of culturally-important resources within the mine footprint prior to disturbance. This measure would not replace those areas lost to cultural resource collection in perpetuity, but would be effective at preventing loss of all of these resources.

GDE and water well mitigation (FS-WR-01). This measure would replace water sources for any

riparian areas associated with springs or perennial streams (groundwater-dependent ecosystems) impacted by drawdown from the mine dewatering and block caving. Springs are considered sacred to many tribes. Though this measure would replace water, it may not replace the significance of the springs in the overall cultural landscape.

Access to Oak Flat Campground (FS-RC-02). Maintaining access to Oak Flat Campground, to the extent practicable with respect to safety, would be effective at reducing impacts caused by the loss of the Oak Flat area to subsidence. However, this represents only a small portion of Oak Flat, and would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape due to the subsidence area.

Increase size of Apache Leap Special Management Area (FS-CR-04). The addition of acreage to the Apache Leap SMA would help expand this protected area and reduce management conflicts. This would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape of Oak Flat due to the subsidence area.

Emory Oak Collaborative Tribal Restoration Initiative (FS-CR-05). In partnership with the Tonto National Forest, Resolution Copper will fund the Emory Oak Collaborative Tribal Restoration Initiative, a multi-year restorative fieldwork program for Emory oak groves located in the Tonto National Forest and the Coconino National Forest. The program is designed to restore and protect Emory oak groves that are accessed by Apache communities for traditional subsistence gathering and ensure their sustainability for future generations. This would

replace one culturally important resource, but would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape of Oak Flat due to the subsidence area.

Tribal Cultural Heritage Fund (FS-CR-06). Resolution Copper will establish a cultural heritage foundation for consulting Native American Tribes for long-term funding of cultural heritage projects. While not preventing the impacts to cultural heritage caused by the mine, these projects could be effective at preventing impacts from other projects, or preserving aspects of tribal cultural heritage that otherwise would be jeopardized.

Tribal Education Fund (FS-CR-08). Resolution Copper will establish a fund dedicated to funding scholarships for tribal members pursuing post-high school education, at a college, university, vocational school, or accredited 2-year program. Scholarships will be awarded based upon a committee's review of applicants. These scholarships would be effective at reducing economic impact to tribal members, but would not directly offset any of the impacts to tribal values disclosed.

Establish foundations for long-term funding, including the Tribal Monitor Program (FS-SO-02).

Resolution Copper will establish a foundation or foundations for funding the continuation of the Tribal Monitor Program, long-term maintenance and monitoring of the Emory Oak Collaborative Tribal Restoration Initiative, and development of a Tribal Youth Program in partnership with the Forest Service and consulting tribes. This measure would be effective

at enhancing these other measures, as it would ensure that these programs have a long-term base of financial support, rather than short-term funding that would be eventually exhausted.

Mitigation Effectiveness and Impacts of Voluntary Mitigation Measures Applicable to Tribal Values and Concerns

Appendix J contains mitigation and monitoring measures brought forward voluntarily by Resolution Copper and committed to in correspondence with the Forest Service. These measures are assumed to occur but are not guaranteed to occur. Their effectiveness and impacts if they were to occur are disclosed here; however, the unavoidable adverse impacts disclosed below do not take the effectiveness of these mitigations into account.

Increase size of Apache Leap Special Management Area (RC-CR-04). The addition of acreage to the Apache Leap SMA would help expand this protected area and reduce management conflicts. This would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape of Oak Flat due to the subsidence area.

Other Potential Future Mitigation Measures Applicable to Tribal Values and Concerns

Appendix J contains several other potential future mitigation measures that the Forest Service is disclosing as potentially useful in mitigating adverse effects, but for which there is no authority to require. There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS. No potential future mitigation measures

were identified applicable to tribal values and concerns.

Unavoidable Adverse Impacts

Significant tribal properties and uses would be directly and permanently impacted. These impacts cannot be avoided within the areas of direct impact, nor can they be fully mitigated.

3.14.4.9 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Physical and visual impacts on TCPs, special interest areas, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed by project construction and operation. The landscape, which is imbued with specific cultural attributions by each of the consulting tribes, would also be permanently affected.

Irreversible and Irretrievable Commitment of Resources

The direct impacts on TCPs and special interest areas from construction of the mine and associated facilities constitute an irreversible commitment of resources. 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.

* * *

All communities experienced an increase in their unemployment rate between 2010 and 2018. San Tan Valley CDP experienced the smallest change in unemployment rate, with an increase of 0.2%, while Queen Valley CDP had the largest change, with an increase of 10.6% between 2010 and 2018.

Other Environmental Justice Considerations

Recently, local governments, State governments, and the Federal government have attempted to bring attention to under-reported and unreported violent crimes perpetrated on indigenous women (Arizona House Bill 2570; EO 13898). These violent crimes come in various forms of which the most egregious have become collectively referred to as Missing and Murdered Indigenous Women and Girls (MMIWG). The general dearth of information and reporting of these crimes results in a lack of awareness regarding MMIWG. Recent studies have attempted to understand the scope of the issues, but still lack accurate estimates to the extent of the crisis (Lucchesi and Echo-Hawk 2018). Additionally and potentially exacerbating the problem of MMIWG, the U.S. Department of State has acknowledged that internationally as well as domestically there is a link between extractive industries and sex trafficking of exploited women and girls, including Native American

women (U.S. Department of State 2017). Within the United States, at least 506 cases have been identified. The Southwest has the highest number of regionally identified cases, at 157 (Lucchesi and Echo-Hawk 2018). Arizona has the third highest number of identified cases of MMIWG (54).

Quality of life is another impact partially captured in the analysis of environmental justice. Quality of life of residents within and near communities that could potentially be affected by the construction and operation of the proposed mine facilities is a combination of multiple resource impacts. This includes resource impacts that, by themselves, do not rise to a level of concern. Some aspects, such as impacts on property values, local services, tourism, noise levels, and traffic, are analyzed quantitatively in respective sections of chapter 3. Other aspects, such as impacts to scenic quality or dark skies, recreation access, or rural character are qualitatively analyzed. Analysis in this section reflects only high and adverse impacts to environmental justice communities, in compliance with available guidance. We recognize that changes in quality of life may also result from lesser but combined impacts. This is particularly true within the town of Superior. Because of the physical proximity to the East Plant Site and West Plant Site, many resource impacts occur within the town of Superior, even if not rising to levels of concern on an individual basis.

3.15.4 Environmental Consequences of Implementation of the Proposed Mine Plan and Alternatives

3.15.4.1 Alternative 1 – No Action Alternative

Under the no action alternative, adverse impacts on environmental justice populations would not occur, as the current land use would remain unchanged and opportunities for disproportionate adverse impacts would not exist.

3.15.4.2 Impacts Common to all Action Alternatives

Under all action alternatives, potential impacts on environmental justice populations resulting from the proposed mine facilities including the East Plant Site and West Plant Site, subsidence area, and from auxiliary facilities for the East Plant Site and West Plant Site (such as transmission lines, pipelines, and roads) would be similar.

For detailed differences between alternatives by resource, see the respective resource analyses in the "Environmental Consequences" parts of each resource section, or the summary in appendix I. For many resources (e.g., geology, wildlife, and soils and vegetation), potential adverse impacts resulting from the action alternatives would be generally limited to the immediate project footprint. The analysis also investigated potential indirect impacts, such as impacts to scenic resources, GDEs and groundwater quantity, transportation resources, noise impacts, and socioeconomic impacts that may disproportionately affect the environmental justice populations within the town of Superior.

Effects of the Land Exchange

The land exchange would have effects on some environmental justice communities.

The Oak Flat Federal Parcel would leave Forest Service jurisdiction and no longer be open to public use to those communities in the vicinity. The offered lands that would enter either Forest Service or BLM jurisdiction would be beneficial to nearby communities of each parcel.

Native American communities would be disproportionately affected by the land exchange because Oak Flat would be conveyed to private property and would no longer be subject to the NHPA (see sections 3.12 and 3.14). Loss of the culturally important area of Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes. The land exchange would have a disproportionally adverse effect on Native American communities as a result of the effects on tribal values and concerns and cultural resources.

Effects of the Forest Plan Amendment

The Tonto National Forest Land and Resource Management Plan (1985b) provides guidance for management of lands and activities within the Tonto National Forest. It accomplishes this by establishing a mission, goals, objectives, and standards and guidelines. Missions, goals, and objectives are applicable on a forest-wide basis. Standards and guidelines are either applicable on a forest-wide basis or by specific management area.

A review of all components of the 1985 forest plan was conducted to identify the need for amendment due

to the effects of the project, including both the land exchange and the proposed mine plan (Shin 2020). No standards and guidelines were identified as applicable to environmental justice. For additional details on specific rationale, see Shin (2020).

Effects of Recreation Mitigation Lands

The recreation mitigation lands are anticipated to affect environmental justice communities. The town of Superior has been identified as an environmental justice community and would be positively impacted by the proposed trail system via the economic benefits from long-term sustainable recreation and ecotourism.

Summary of Applicant-Committed Environmental Protection Measures

A number of environmental protection measures are incorporated into the design of the project that would act to reduce potential impacts on environmental justice communities. These are non-discretionary measures, and their effects are accounted for in the analysis of environmental consequences. Because they cover a variety of resources (see table 3.15.4-1), these measures are not repeated here.

* * *

change in landscape form, line, color, and texture and the dominance of new landscape features in the view. In addition, the magnitude of the increase in sky brightness that would occur as a result of the West Plant Site and auxiliary facilities would be disproportionally experienced by adjacent residences. Given the proximity of residences to the West Plant

Site, it is unlikely that compliance and/or mitigation would substantially relieve the disproportionality of the impacts on affected community members.

Impacts on cultural resources and tribal concerns and values would have a disproportionally adverse impact on Native American communities. Other environmental justice communities (with the exception of Native American communities) would not experience adverse impacts as a result of the proposed project because they would be located outside the geographic area of influence for most resources. The town of Superior would experience disproportionately high and adverse impacts under all alternatives primarily because the West Plant Site and associated facilities would be located directly north of and adjacent to the town.

The tribal values and concerns resource section (see section 3.14) indicates that during consultation with Native American tribes, the tribes requested that tribal monitors resurvey a number of geographic areas to identify traditional cultural properties of importance to the four cultural groups with ties to the region (Puebloan, O'odham, Apache, and Yavapai). Traditional cultural properties can include springs and seeps, plant and mineral resource collecting areas, landscapes and landmarks, caches of regalia and human remains, and sites that may not have been recognized by non-Native archaeologists. Representatives of the Yavapai and Apache tribes have identified a number of areas that may be directly or indirectly affected by all alternatives as sacred landscapes and/or TCPs. Additionally, all of the consulting tribes consider all springs and seeps sacred, and all of the tribes strongly object to the development

of a mine and placement of tailings in any culturally sensitive area. Although the physical boundaries of the reservations of the consulting tribes are not within the project area boundaries, disturbance of the sites would result in a disproportionate impact on the tribes, given their historical connection to the land. Additionally, the potential impacts on archaeological and cultural sites (see section 3.12) are directly related to the tribes' concerns and the potential impacts on cultural identity and religious practices. Given the known presence of ancestral villages, human remains, sacred sites, and traditional resource-collecting areas that have the potential to be permanently affected, it is unlikely that compliance and/or mitigation would substantially relieve the disproportionality of the impacts on the consulting tribes.

Impacts on potential environmental justice populations that could result from the proposed tailings storage facilities are discussed by alternative in the following text. Impacts on resources that would not be disproportionately high and adverse are not discussed.

3.15.4.3 Alternatives 2 and 3 – Near West

Effects from the tailings storage facility and auxiliary facilities under Alternatives 2 and 3 that are anticipated to have disproportionately high and adverse impacts on environmental justice communities include cultural resources and tribal values and concerns. For these resources, impacts would be similar to those described in Section 3.15.4.2, Impacts Common to All Action Alternatives.

The proposed location of the Alternatives 2 and 3 tailings storage facilities contains culturally

important areas (see section 3.14), as well as a number of archaeological sites that would be adversely impacted by either alternative (see section 3.12). In addition, these alternatives are located in proximity to an identified sacred site, and the presence of the tailings storage facility would constitute an adverse visual effect on the landscape (see sections 3.11 and 3.14). This alternative would result in disproportionately high and adverse impacts on cultural resources and tribal values and concerns.

* * *

Resolution Copper social investment program (RC-SO-04). This program is designed to help create a diverse local business community and focuses on projects that help build a healthier and safer community, including parks/pool facilities and schools. These projects would be effective at developing projects that would offset potential socioeconomics impacts associated with the mine that are not yet identified, including education and quality of life. This would be effective at reducing the potential for disproportionate effects on environmental justice communities.

Continue funding Community Working Group (RC-SO-05). Continued funding of the Community Working Group ensures that a diverse set of viewpoints from the local community are engaged in issues related to the mine, which would be effective at identifying potential adverse impacts and potential remedies. This would be effective at reducing the potential for disproportionate effects on environmental justice communities.

Agreement with Town of Superior to cover direct costs (RC-SO-06). Increased tax revenue is projected as a result of Resolution Copper's business impacts on the Town of Superior, driven mainly through increased sales taxes from Resolution Copper employees and contractors, and to a lesser extent property and sales tax increases benefiting the Town through Pinal County and State apportionments. Resolution Copper has historically paid the Town for more public safety coverage than a standard level of service requires at a mine site. Resolution Copper is committed to public safety and will continue to work with the Town to agree annually on projected net direct costs that will be Resolution Copper's responsibility. This measure would be effective at offsetting some of the economic costs borne by the Town due to the presence of the mine, but the amount may not cover all costs, as it would depend on future negotiations and agreements.

Other Potential Future Mitigation Measures Applicable to Environmental Justice

Appendix J contains several other potential future mitigation measures that the Forest Service is disclosing as potentially useful in mitigating adverse effects, but for which there is no authority to require. There is no expectation that these measures would occur, and therefore the effectiveness is not considered in the EIS.

Commitment to continue and possibly expand existing apprenticeship program (PF-SO-02). Resolution Copper has committed on a corporate level to local hiring and use of local services; however, this is dependent on an appropriate labor pool. This program would potentially create a training pipeline

that would enhance the labor pool and allow more local hiring. This could be effective at reducing the potential for disproportionate effects on environmental justice communities.

Unavoidable Adverse Impacts

The change in scenery and dark skies for the town of Superior cannot be avoided or fully mitigated. Similarly, the disproportionately high and adverse impacts on cultural resources and tribal values and concerns cannot be avoided or fully mitigated. Many of the mitigation measures that would directly offset socioeconomic effects in the area are voluntary only; these mitigation measures would effectively offset impacts, but cannot be guaranteed to take place.

3.15.4.9 Other Required Disclosures

Short-Term Uses and Long-Term Productivity

Environmental justice impacts are expected only for the town of Superior, and tribes with cultural, social, or religious ties to the project area would be affected permanently from direct, permanent impacts on these sites and values. The loss of these values would be long term.

* * *

Resource	Spatial Analysis Area for Cumulative Effects Analysis	Impact Metrics and Rationale
Cultural Resources	The direct and indirect analysis areas for cultural resources is identical to the area of potential effects (APE) which has been determined through Section 106 consultation. The cumulative effects analysis area for cultural resources is identical, as it would be these same areas in which cultural resources would be present that could be affected by other projects.	**Metric:** Historic properties impacts [number]; in lieu of this, physical footprint can be used as a proxy for disturbance of sites [acres] **Rationale:** Smaller projects, like exploration projects, generally can identify and avoid cultural sites. Projects covering a large area generally result in disturbance of cultural sites, in many cases only after data recovery and mitigation activities. However, even if recorded and documented, loss of these cultural sites contributes to the overall impact to the cultural heritage of the areas. Impacts to cultural sites are known if surveys were conducted, which is not necessarily required on private land. Physical footprint can serve as a proxy for the overall disturbance to cultural sites where no site-specific data exist.
Socioeconomics	The direct and indirect analysis area for socioeconomic effects is the area encompassing Maricopa, Pinal, Gila, and Pima Counties. The cumulative effects analysis area for socioeconomic effects is identical, as the economic changes caused by other projects would affect these same towns, economies, and public services.	**Metric:** Overall change in labor workforce from baseline levels [percent]; overall effect on local housing and local community services, including emergency services. Where these metrics do not exist, a qualitative discussion of the cumulative impacts would be used. **Rationale:** Industrial, commercial, and residential development has positive and negative impacts. These become cumulative mostly where residents see impacts from multiple projects on their communities, such as housing stock, housing prices, or services such as schools, ambulance, fire department, or police services.
Tribal Values and Concerns	The direct and indirect analysis area for tribal values and concerns is identical to the cultural resource analysis area. However, the effects on tribes can extend over much larger areas, and projects can impact tribal values independent of proximity. The cumulative effects analysis area for tribal concerns and values is considered to be the ancestral homelands of the affected tribes, which is assumed to be the southwestern United States.	**Metric:** Physical footprint of RFFAs [acres] **Rationale:** Given the long time period in which tribal members have occupied these lands, and their religious and community connections to the landscape, there are many areas on the natural landscape that represent sacred sites for tribal members, or for which general disturbance of the natural landscape represents an impact to their tribal values. These types of impacts are difficult to quantify. Physical footprint is used as a proxy for the level of disturbance occurring to the natural landscape, assuming that effects on tribal values would stem from these disturbances.
Environmental Justice	Due to the project's large scale, the direct and indirect analysis area for environmental justice is the state of Arizona. However, the analysis ultimately focuses only on those communities found to have adverse, high, and disproportionate impacts. The cumulative effects analysis area for environmental justice is an area that encompasses both the project facilities and these communities.	**Metric:** Communities defined as environmental justice communities and experiencing disproportionately high and adverse impacts from the project, also being impacted by RFFAs [number] **Rationale:** A number of environmental justice communities were identified in the project area, and some of these communities experience disproportionately high and adverse impacts associated with the project. Cumulative effects would occur if these same communities experienced similar impacts from other RFFAs, even if by themselves those impacts were not considered disproportionately high or adverse.

* * *

4.3.3.17 Tribal Values and Concerns

The following actions were determined through the cumulative effects analysis process to be reasonably foreseeable, and overlap in space and time with project impacts to tribal values and concern (figure 4.3.3-17):

- Pinto Valley Mine Expansion

- Ray Land Exchange and Proposed Plan Amendment
- Ripsey Wash Tailings Project
- Silver Bar Mining Regional Landfill and Cottonwood Canyon Road

Three others RFFAs identified in the screening as pertinent to tribal values and concerns fell outside the cumulative effects analysis area: Southline Transmission Project, SunZia Southwest Transmission Project, and Verde Connect project.

The metric used to quantify cumulative impacts to tribal values and concerns is the physical footprint of the RFFAs. Given the long time period in which tribal members have occupied these lands, and their religious and community connections to the landscape, there are many areas on the natural landscape that represent sacred sites for tribal members, or for which general disturbance of the natural landscape represents an impact to their tribal values. These types of impacts are difficult to quantify. Physical footprint is used as a proxy for the level of disturbance occurring to the natural landscape, assuming that effects on tribal values would stem from these disturbances.

The cumulative effects analysis area for tribal values and concerns is approximately 729,680 acres, the Resolution Copper Project preferred alternative footprint within the cumulative effects analysis area is approximately 15,117 acres, and the combined physical disturbance area of the four RFFAs within the cumulative effects analysis area is approximately 13,371 acres. The cumulative effect of the Resolution Copper Project and the RFFAs listed above would

result in approximately 28,488 acres of physical disturbance within the cumulative effects analysis area, or 3.9 percent of the total area.

As described in section 3.14 in chapter 3, impacts to tribal values and concerns are inadequately expressed through percentages and numbers. As disclosed in that section, the impacts of the Resolution Copper Project alone are substantial and irreversible due to the changes that would occur at Oak Flat. The other projects listed have not been identified as exhibiting the same level of tribal concern; however, the combined disturbance across a wide region contributes to an overall disruption of the landscape and erosion of traditional places important to tribes.

* * *

government relationship between the United States and Indian Tribes. In addition, PL 113-291 requires consultation with affected Indian Tribes concerning issues of concern related to the land exchange.

The Tonto National Forest has been conducting tribal consultation related to various Resolution Copper projects, the land exchange, and the Apache Leap SMA environmental assessment. This consultation has included formal and informal meetings, correspondence, sharing information, site visits, and documentation of tribal comments and concerns by the Forest Service. Consultations are ongoing and will continue through the end of the project. The following tribes are involved in the consultation process:

- Fort McDowell Yavapai Nation

- Gila River Indian Community
- Hopi Tribe
- Mescalero Apache Tribe
- Pueblo of Zuni
- Salt River Pima-Maricopa Indian Community
- San Carlos Apache Tribe
- Tonto Apache Tribe
- White Mountain Apache Tribe
- Yavapai-Apache Nation
- Yavapai-Prescott Indian Tribe

Additional tribes were included in consultation with the introduction of the Peg Leg alternative location. These tribes, included at the BLM's request, are as follows:

- Ak-Chin Indian Community
- Fort Sill Apache Tribe
- Pascua Yaqui Tribe
- Tohono O'odham Nation

Consultation records include formal and informal communications between the Tonto National Forest and the tribes. A listing of communications occurring from the project initiation through FEIS publication is documented in appendix S.

5.6 Section 106 Consultation

Section 106 consultation was initiated by the Tonto National Forest and the SHPO on March 31, 2017, and the ACHP on December 7, 2017. A Programmatic Agreement (PA) was drafted and revised based on

interested stakeholder comments, including the Tonto National Forest, Arizona SHPO, ACHP, Resolution Copper, ASLD, BLM, USACE, and tribes. The final version of the PA circulated for signature is included in appendix O. This document is a legally binding agreement that describes the process to ensure cultural and historical resources are identified, protected, and managed in a predetermined manner with those involved.

* * *

- March 2019. "Process Memorandum to File – Review of Stakeholder Analysis of Alternative Mining Techniques" (Garrett 2019a). This document summarizes the review of additional material submitted to the Tonto National Forest in December 2018, purporting to demonstrate the viability of mining techniques other than block caving. This document looks at the technical aspects explored by Dr. Kliche as well as other considerations based on regulatory guidance.
- July 2019. "Process Memorandum to File – Summary of Process Steps taken during Review of Alternative Mining Techniques" (Garrett 2018f). This document lists the process steps that occurred during the project up through July 2019 related to the evaluation of alternative mining techniques.
- January 2020. "Response to "Comments on the Resolution Copper Draft Environmental Impact Statement," dated October 28, 2019 by Dr. David M. Chambers" (Kliche 2020). This

document, authored by Dr. Kliche, reviews the public comments on the draft EIS (DEIS) analysis. Many of these comments were submitted by Dr. David Chambers, as an attachment of the Arizona Mining Reform Coalition comment letter.

- September 2020. "Process Memorandum to File – Post-DEIS Review of Alternative Mining Techniques" (Garrett 2020i). This document summarizes the process steps taken after receipt of public comments to revisit the potential for using alternative mining techniques, including Dr. Kliche's further review as well as investigations by the Geology and Subsidence Workgroup into alternative mining techniques.

Alternative Mining Techniques

Substantial public comments were received concerning Resolution Copper's proposed panel caving mining technique (panel caving is a form of block caving), in particular requesting that alternative mining techniques be considered or required. Public comments asked for alternatives considering the following items:

- use of traditional mining methods, including less-mechanized forms of mining,
- investigation of alternatives that would result in minimal surface disturbance, and
- use of alternative mining methods to reduce the volume of tailings produced.

The proposed panel caving mining method is seen as having two major drawbacks. First, panel caving

results in the creation of a subsidence area at the surface, which impacts a variety of resources. Second, because panel caving does not leave any opening or cavity belowground, there is no opportunity to backfill tailings as a potential disposal alternative. The Forest Service agreed that if an alternative mining method were found to be reasonable, it could reduce certain resource impacts, and the agency undertook an investigation into the technical and economic feasibility of using alternative mining techniques.

OPEN-PIT MINING

Open-pit mining was considered but eliminated from detailed analysis because it would result in surface disturbances greater than those in the proposed action (panel caving), causing unnecessary environmental harm. Specifically:

- The footprint of the open pit would need to be approximately 10,000 acres, which is eight times larger than the projected maximum disturbance from subsidence (approximately 1,200 acres).
- The resulting pit would involve the total removal of Oak Flat, all of Apache Leap, approximately 4 miles of U.S. Route 60, approximately 3 miles of Queen Creek, and approximately 3 miles of Devil's Canyon.
- The pit would have a stripping ratio (waste rock to ore) of 35:1 and would result in approximately 205 billion tons of waste rock. This represents more than 100 times more volume than the projected volume of tailings under the General Plan of Operations (GPO). The waste rock generated from mining would

> need to be disposed of at some surface location, and a tailings impoundment would still be required.

ALTERNATIVE UNDERGROUND MINING TECHNIQUES

The term “stope” used in mining simply indicates an underground excavation or room, and the term “stoping” refers to any underground mining technique that removes ore from these areas. A spectrum of underground mining techniques was assessed, including naturally supported stoping methods (open stoping, open stoping with pillars), artificially supported stoping methods (shrinkage stoping, overhand and underhand cut-and-fill), other caved stoping methods aside from panel caving (sub-level caving), and other stoping methods like vertical crater retreat. These alternative underground mining techniques are described in detail in the “Resolution Copper Project and Land Exchange Environmental Impact Statement Final Alternatives Evaluation Report” (SWCA Environmental Consultants 2017a). Each of these stoping methods is suited to certain characteristics of an ore body, including ore and host rock strength, the depth and type of overburden or cap rock, and the size and shape of the ore body. As shown in table F-1, very few of these underground stoping methods have characteristics that are well suited to the Resolution copper deposit, even though technically these methods could be used.

Table F-1. Summary of underground stoping methods and their applicability to the Resolution Copper Mine ore deposit

Underground Stoping Method	Ideal Ore Body Characteristics	Ideal Ore Strength	Ideal Host Rock Strength	Backfill with Tailings Materials
Resolution Copper Mine Deposit	*Low grade, massive, thick*	*Weak–Moderate*	*Weak–Moderate*	*No*
Cut-and-fill	High grade, irregular, narrow to wide	Strong	Weak*	Yes
Open stoping	Small	Strong	Strong	Possible
Open stoping with pillar support	Low grade, horizontal or flat dipping	Strong	Strong	Possible
Shrinkage stoping	Fairly high grade, narrow to wide (4 to 100 feet) thick	Strong	Moderate*	Possible
Vertical crater retreat stoping	>40 feet thick	Strong	Strong	Possible

* Indicates a match with the characteristics of the Resolution Copper Mine ore deposit

While there are other underground stoping techniques that could physically be applied to the Resolution copper deposit, each of the alternative underground mining methods assessed was found to have higher operational costs than panel caving. Higher operations costs would result in a shift in the "cutoff grade" of ore that could be profitably mined. The cutoff grade (given as a percentage) is the lowest grade of copper for a ton of ore that equals the cost of stripping, drilling, blasting, mining, hauling, crushing, and processing the ore (as well as administrative costs, taxes, and other overhead costs), given the current price and mill recovery.

The current cutoff grade as proposed by Resolution Copper is a greater-than-1-percent copper shell, which would result in the greatest potential volume of ore from within the deposit that can be profitably mined. The alternative underground techniques considered would shift the cutoff grade much higher an substantially reduce the amount of ore that could be profitably mined. As shown in table F-2, at a percent cutoff grade, it is estimated that less than 20 percent of the deposit identified by Resolution Copper could be

mined. At a 3 percent cutoff grade, it is estimated that less than 1 percent of the deposit could be mined. For comparison, the average grade of ore removed from the historic Magma Mine has been reported to be 5 percent. This higher grade of ore was able to support a cut-and-fill mining technique.

Table F-2. Estimated volume of Resolution Copper Mine deposit at various cutoff grades

Cutoff Grade	Estimated Volume (tons)	Percentage of Volume Proposed to Be Mined in GPO (%)	Source	Average Grade of Ore above the Cutoff Grade
1%	1,969,000,000	100	Resolution Copper	1.54%
2%	386,437,500	19.6	Independent estimate from Resolution Copper data	Unknown
3%	7,545,919	0.4	Extrapolation from first two data points	Unknown
4%	1,478,469	0.08	Extrapolation from first two data points	Unknown
5%	289,676	0.02	Extrapolation from first two data points	Unknown

Post-DEIS Analysis of Alternative Mining Techniques

Additional investigation was undertaken after receipt of public comments on the DEIS to evaluate whether the analysis of alternative mining techniques was reasonable and appropriate. Many comments received on alternative mining techniques were generic in nature, either expressing that the Tonto National Forest did not evaluate other techniques (which is not correct, as demonstrated in this appendix) or prioritized profitability over environmental protection (which is also not correct, as discussed below).

Substantive technical comments on alternative mining techniques focused on the following:

- That Resolution Copper did not make data available to the NEPA team, and that the data

were insufficient for the NEPA team to evaluate alternative mining techniques.

- That inappropriate or outdated references were used in the assessment.
- That incorrect ore grade terminology was used in the assessment.

Dr. Kliche clarified a number of aspects of his analysis (Kliche 2020). Dr. Kliche clarified that adequate information was available to him to conduct the required review. Dr. Kliche also evaluated the results if updated per-ton mining costs were used in the analysis, and found no substantial change. Dr. Kliche and the Geology and Subsidence Workgroup also both provided updated industry-standard references for selection of mining techniques. When applied to the site-specific characteristics of the Resolution Copper project, all of the mining method techniques arrived at similar conclusions, with block caving identified as the preferred mining method. Additional investigation was also conducted as to the appropriateness of in-situ mining methods (M3 Engineering and Technology Corporation 2020).

Reasonableness of Alternative Mining Techniques

The Forest Service recognizes and acknowledges scoping comments that suggest the use of mining techniques other than panel caving could substantially reduce impacts on surface resources, both by reducing or eliminating subsidence and by allowing the potential of backfilling tailings underground. For this reason, the potential for using alternative mining techniques was investigated

explicitly during the alternatives development process.

In the end, alternative mining techniques as applied specifically to the Resolution Copper Mine deposit were not found to be reasonable, with the following rationale:

1. Panel caving is a standard mining method used in the industry and is commonly used for deposits with the grade, size, depth, and geological characteristics of the Resolution Copper Mine deposit. All industry-standard guidance reviewed arrived at similar conclusions that block caving is an appropriate method to be applied.

2. While several underground stoping techniques could physically and technically be applied to the deposit, the ore and host rock characteristics typically favorable for these techniques differ from the characteristics of the Resolution Copper Mine deposit. While physically feasible, it is unlikely that any of these techniques would be chosen as a reasonable technique for a similar deposit.

3. Use of any of these alternative underground stoping techniques would result in higher per-ton mining costs, and as a result the cutoff grade for the deposit would need to be higher to be economically feasible. An increase in the cutoff grade from 1 percent to 2 percent removes an estimated 80 percent of the tonnage of the deposit from consideration for development. The tonnage is likely to be even lower at a 2 percent cutoff grade, as many of these areas of

> high-grade ore are not contiguous or continuous. Accepting this level of reduction to accommodate an alternative mining technique is not economically feasible and would not be reasonable.

This threshold of reasonableness is consistent with guidance contained in the Forest Service minerals and geology manual (Forest Service Manual [FSM] 2800) (U.S. Forest Service 2006):

> The claimant has the right to see or otherwise dispose of *all locatable minerals*, including uncommon varieties of mineral materials, on which the claimant has a valid claim. (FSM 2813.12, emphasis added)
>
> In managing the use of the surface and surface resources, the Forest Service should attempt to minimize or prevent, mitigate, and repair adverse environmental impacts on National Forest System surface and cultural resources as a result of lawful prospecting, exploration, mining, and mineral processing operations, as well as activities reasonably incident to such uses. This should be accomplished by imposition of reasonable conditions *which do not materially interfere with such operations*. (FSM 2817.02, emphasis added)

The Forest Service found the substantial decreases in ore development that would result by requiring an alternative mining technique would not meet the definition of reasonable, would not allow Resolution Copper to dispose of all locatable minerals on which it has valid claims, and would materially interfere with

its operations. For the above reasons, alternative mining techniques were considered but eliminated from detailed analysis.

Many public comments stated a concern that the Forest Service decision to eliminate alternative mining techniques from detailed analysis in the EIS prioritized profitability over environmental protection. This is not the case. The Forest Service did not calculate the profitability of Resolution Copper's mining plan and did not factor profitability into the analysis. The analysis focuses on appropriateness and reasonableness. The analysis is underpinned by the basic assumption that using a technique with higher per-ton mining costs requires a higher ore grade; it is this basic tradeoff that results in the potential loss o 80 percent of the ore deposit if an alternative mining technique were to be employed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Official Court Reporter: Elva Cruz-Lauer, RMR, CRR
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Proceedings Reported by Stenographic Court Reporter

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* * *

WITNESSES

PLAINTIFFS WITNESSES:	Direct	Cross	Redirect
John R. Welch, Ph.D.	22	35	39
Naelyn Pike	40		
Wendsler Nosie, Sr., Ph.D.	54	75	

EXHIBITS

PLAINTIFF'S EXHIBITS:	Pg.
No. 1 (Map 1 – Declaration of John W. Welch, Ph.D.)	22
No. 2 (Map 2 – Declaration of John R. Welch, Ph.D.)	22
No. 3 (Detail (enlarged) of Map 2)	22
No. 4 (Photos - Declaration of Naelyn Pike)	22
No. 5 (Photos - Declaration of Wendsler Noise, Sr., Ph.D.)	22
No. 6 (Images of expected Oak Flat subsidence crater from USFS/Resolution Final EIS Vol. 1)	22
No. 6A (Image of the Barringer Arizona Meteor Crater (for comparative scale reference.)	22

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

PROCEEDINGS

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

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

Please announce your presence for the record.

THE COURT: Plaintiffs, please announce.

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

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

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

MR. LEVENSON: Your Honor, to my right –

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

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

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

THE COURT: Good morning.

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

THE COURT: Good morning.

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

THE COURT: Good morning to you as well.

Defense.

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

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

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

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

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

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

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

And I have document number 1, which is the jury trial demand 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.

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

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

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

And I had hoped to have them in on Monday as I represented to the Court's deputy clerk. Unfortunately, that was not possible. I can get them into the court before close of business today. I just have a few things to clarify and make clear, and so I beg the Court's indulgence and grace on that.

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

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

MR. NIXON: Mr. Nixon.

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

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

MR. NIXON: Yes, Your Honor. And I take that very seriously and fully understand, as a former judge's clerk and a judge who was also a commanding general of the state Air National Guard at the time, I certainly would never want to disappoint, much less frustrate, any judge, and it's the first time in my career that I have ever missed a deadline. And I sincerely apologize.

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

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

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

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

And plaintiffs, you have ten minutes.

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

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

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

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

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

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

MR. NIXON: The other housekeeping note is in regards to our reply memo. We misconstrued the

dissent in the Hobby Lobby case and the Little Sisters of the Poor case, Your Honor, and its regard of the Third Circuit's test that was used by the Third Circuit in that case.

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

So may it please the Court, RFRA does not define substantial burden. RFRA being the Religious Freedom Restoration Act. The Supreme Court has defined the term by stating that a governmental action which substantially burdens a religious exercise is one where --

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

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

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

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

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

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

And that is from Judge Alito's concurring opinion in Little Sisters.

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

That case defines substantial burdening as, quote, the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs. That's a quote from Pennsylvania versus President of the U.S., which I will refer to as "Pennsylvania case," 930 F.3d 543 at 572, which was reversed on other grounds in Little Sisters just last year in May.

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

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

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

The Navajo Nation's test relies solely on the two pre-Smith cases of Sherbert v. Verner and Wisconsin v. Yoder. And the Smith cases are -- the Smith case is the Oregon Employment Division versus Smith, which was the case decided a couple years after Lyng versus Northwest Indian Cemetery Protective Association.

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

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

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

That's Hobby Lobby at 714.

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

If the Court were to follow Navajo Nation here, it would be perpetuating the use of the ossified cases, as

the Supreme Court characterized them, to narrow religious protections that the Supreme Court admonished against.

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

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

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

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

There a Catholic priest was recorded in one of his sacraments he performed with a prisoner by a jailer. While Mockaitis was a First Amendment free exercise

of religion case, it further justifies the Pennsylvania Little Sisters of the Poor test.

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

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

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

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

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

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

Defendants argue that the land exchange, especially as to those lands that are within the historic

district, does not substantially burden plaintiff's members ability to exercise their religious beliefs.

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

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

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

THE COURT: Mr. Nixon, thank you very much. Mr. Schifman, do you want to the utilize your 10 minutes?

MR. SCHIFMAN: Yes. This is Ben Schifman for the federal defendants. I will speak shortly in response. Your Honor, plaintiff has not established entitlement to the extraordinary injunctive relief that it seeks.

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

Plaintiff waited more than six years after the law was passed to bring suit, and yet any mining on the property is still years away. But most significantly,

plaintiff has not demonstrated a chance of success on the merits of their legal claim.

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

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

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

However, the Supreme Court has held in the Lyng case, L-Y-N-G, that plaintiff has not discussed today, that the government's management of its own property cannot as a matter of law constitute a substantial burden of plaintiff's religious exercise, which is not the case, Your Honor.

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

THE COURT: Just one -- Mr. Schifman, just one moment.

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

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

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

But go ahead, Mr. Schifman.

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

So, Your Honor, the Supreme Court's Lyng decision has been repeatedly affirmed, and that's a decision concerning the federal government's management of its own property not being a substantial burden to anyone else's religious exercise. That has been repeatedly affirmed. It has been reaffirmed in circuits throughout the country, and, of course, in this circuit as well.

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

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

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

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

Plaintiffs must identify either a forced choice between practicing religion or receiving a government benefit, or between practicing religion and facing a criminal sanction. Plaintiff has alleged neither, and this is fatal to the plaintiff's RFRA claim.

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

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

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

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

So -- and to be clear about how it falls into the framework, that is how the Hobby Lobby case

concerned an entity, the Hobby Lobby company having to choose between its religious exercise and receiving a benefit or facing a penalty. In Hobby Lobby, the contraceptive mandate that was at issue in that case forced the company to pay what the Court called an enormous sum of money, as much as $475 million per year if they essentially did as they thought was complying with their religious exercise.

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

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

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

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

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

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

law was passed also indicates that perhaps this isn't as imminent as they are now claiming.

Turning very briefly now to the equities.

THE COURT: Counsel. Counsel. Mr. Schifman, you have 30 seconds. Go ahead.

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

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

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

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

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

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

MR. NIXON: No, Your Honor.

THE COURT: They are all received as well.

(Defendants' Exhibits 101 through 103 are received.)

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

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

THE COURT: Thank you very much.

Mr. Levenson, go ahead, please, sir.

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

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

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

THE COURT: Dr. Welch, go ahead and have a seat there. Mr. Levenson, you may begin direct examination.

MR. LEVENSON: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. LEVENSON:

Q. Good morning, Dr. Welch.

A. Good morning.

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

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

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

A. I am.

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

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

Q. Thank you, sir.

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

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

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

And then went to work for the federal government itself, first for the Bureau of Land Management in Safford, Arizona, and then for the Bureau of Indian Affairs in White River, Arizona, at which time I was also the historic preservation officer from 1996 to 2005 for the White Mountain Apache tribe.

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

Q. Thank you, Doctor.

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

A. I have.

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

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

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

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

A. That's correct. There were no tribes in 1852 in any formal sense. There were coalitions of leaders and Magnas ascended to replace predominant and transcendent importance in terms of the span of his authority and allegiance, I guess I'll say, on the part of his followers to the place where he could sign on behalf

of all of the Apaches -- by "Western Apaches," in this context, Your Honor, I am referencing the Apaches who live to the west side of the Rio Grande. The western bands, and so, yes, no tribes. Yes, leaders representing dozens of groups of tribes -- dozens of groups of Apaches, excuse me.

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

A. It is ambiguous in the Treaty.

Your Honor, in fact, the Treaty makes multiple references, as you are probably aware, to "treaty territory" Apache territory, and Apache territories, referencing the fact there's different Apache groups with different territory. The territory of the Western Apaches certainly extended to include the Pinal Mountains, the entirety of the Tonto National Forest, and areas even to the west of that. So the short answer is yes. That territory is included in the provisions of the Treaty, but it's not – it doesn't specifically say, yes, you know, the Pinal Mountains or the area including Oak Flat is part of this Treaty.

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

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

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

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

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

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

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

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

Are you familiar with those discussions?

A. I am.

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

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

THE COURT: Mr. Levenson, my apologies for interrupting you, sir. Dr. Welch, I want to point your attention to Defense Exhibit Number 1, which is the Treaty. I am sure the lawyers have a copy of that in front of you. And I want you to read Article 9.

Do you all have that? Defense Exhibit 1?

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

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

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

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

Dr. Welch, take your time.

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

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

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

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

THE WITNESS: Article 9, thank you.

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

THE WITNESS: Okay. Article 9: Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apaches that the Government of the United States shall at its earliest convenience designate, settle, and adjust their

territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

That's the end of Article 9.

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

Apache leaders were famous for their broad cognizance of the comings and goings within their lands, and they were disturbed to find -- well, let me back up for one minute.

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

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

Beginning shortly after the Treaty of Guadalupe

Hidalgo in 1848, however, the Apaches had misgivings because the original arrangement between the Apaches and the United States deteriorated on the basis of incoming miners and people doing things in their territory that they did not condone or approve of.

And the Apaches were also cognizant of the fact that military forces of the United States would very

often support those uncondoned activities. They wanted to bring that to a close. And they were appealing to the federal government to recognize these territories, to make it so that they could not be violated any further.

The United States agreed to do that, and, in fact, in the years immediately following this Treaty, the United States set out precisely to do that and initiated through the next governor of the territory of New Mexico, a fellow named David Meriwether, a variety of negotiations with multiple tribes, both eastern Apaches on the east side of the Rio Grande and western Apaches, to do just that, to designate and settle the territories.

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

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

They had pressure from the civilian and the military authorities on them to settle down and get on their territories. And when they tried to do that, they were prevented from doing so. This led to what gets called the Apache wars. Mangas Coloradus was

murdered, you know, basically while in care of the United States Army in 1863.

Later that same year -- well, no, excuse me -- not too different of a time in that same year, another principal leader, Cochise, was also kept hostage and mistreated by the federal government, even as he was effectively enacting this Treaty, abiding by this Treaty, by protecting the Butterfield Stagecoach line across southern Arizona and southern New Mexico.

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

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

Mr. Levenson, please continue, sir.

MR. LEVENSON: Thank you.

DIRECT EXAMINATION

BY MR. LEVENSON:

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

A. No.

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

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

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

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

A. It is.

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

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

Q. Do the actions that Apache Stronghold seeks to enjoin taken by the defendants, do those actions

impose a substantial burden on Apache religious practice at Oak Flat?

A. I would think that they --

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

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

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

THE COURT: That's overruled.

You may answer.

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

MR. LEVENSON: Thank you, Doctor. I will try to

rephrase the question.

BY MR. LEVENSON:

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

A. The religious practices of the Western Apache people, and especially the Western Apache people who make use of, pray to and through Oak Flat, have already been disturbed and encumbered by the United States in just preparing for and doing the initial drilling for prospecting for this ore body, and certainly

the unfolding of the mine involves an incalculable burden, a huge burden, yes.

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

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

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

Q. Thank you, Doctor.

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

THE COURT: You are very welcome.

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

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

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

MR. SCHIFMAN: Okay. I apologize, Your Honor. I am speaking into my cell phone. It's not on speaker or

anything of that nature, and I will just send a thought to the Verizon infrastructure and hope that it carries my voice as clearly as possible, and I will speak slowly.

CROSS-EXAMINATION

BY MR. SCHIFMAN:

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

A. That's correct.

Q. And you did not attend law school?

A. I did not.

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

A. I am not a trained legal researcher.

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

A. I am not trained to provide that interpretation.

Q. You are not trained to provide legal interpretation of treaties passed by Congress and signed by the President; is that correct?

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

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

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

Q. I said, "adjudicate" property disputes.

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

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

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

BY MR. SCHIFMAN:

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

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

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

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

Q. Okay, thank you.

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

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

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

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

MR. SCHIFMAN: Thank you, Your Honor.

THE COURT: You are very welcome.

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

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

THE WITNESS: Uh-huh. Okay.

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

BY MR. SCHIFMAN:

Q. Yes, that's correct.

A. Okay.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. I reviewed this document, yes.

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

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

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

Q. Okay. Thank you, Doctor.

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

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

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

A. Yes.

Q. Okay.

MR. SCHIFMAN: I have no further questions.

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

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

REDIRECT EXAMINATION

BY MR. LEVENSON:

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

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

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

A. Emphatically, yes.

Q. Okay. And just one more question. You -- the plaintiffs submitted your declaration as an attachment to their motion for a preliminary injunction. Is that declaration -- is there anything in there that you'd correct, or is that still true and correct to the best of your knowledge?

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

Q. All right.

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

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

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

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

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

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

NAELYN PIKE, PLAINTIFF'S WITNESS, SWORN

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

DIRECT EXAMINATION

BY MR. NIXON:

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

A. First (speaking in Apache).

Thank you for hearing our voice.

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

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

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

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

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

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

A. So Chi'chil Bildagoteel, that land, and that land around it, is a spirit. So in Apache religion, we believe that Usen, the Creator, has given life to the plants, to the animals, to the land, to the air, to the water. And even what's underneath it is a living being.

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

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

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

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

And so the prayer is from my ancestors, from when they were free -- to my ancestors that were prisoners of war, to us being able to leave the reservation, and to me, that is a place where it has that same exact spirit. And so my prayers go up and they get heard by the Creator. Everything that I was able to do and that my family and my sisters were able to do, have that spirit.

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

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

Q. Thank you. Is it because of that, which is related to Oak Flat and everything there as it is, is that why you can't do any of that anywhere else, like what if there

is an Oak Tree next to the cathedral in downtown Phoenix, isn't that adequate?

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

When we go to Oak Flat, it is like a corridor, so we enter it, in a good way. And we go and we pick it. We go to the tree, and we talk to it and say, thank you (speaking Apache) for giving me this so that I can feed my family, and we talk to the spirit of Oak Flat. Thanking it for offering it to us and giving it to us so that we can give it to our family. And that's what brings that good medicine. That's what brings the spirit into our homes, into our hearts, into our mind and our soul, is the spirit within the acorn, within the (speaking Apache) within the rope of the yucca, within the cedar, within it all. It is all there, but it is provided through the spirit of Chi'chil Bildagoteel, Oak Flat.

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

A. Yes, deeply.

Q. Would you consider that a penalty?

A. Yes. Without Chi'chil Bildagoteel --

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

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

THE WITNESS: Thank you, Your Honor.

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

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

I have -- my mom has four girls. I am the oldest of three younger sisters. My sister Nizhoni had her Sunrise Ceremony there. Our Sunrise Ceremony is our coming of age ceremony. So when we have our first menstrual, it means that we can have children, and it also represents the creation story of the white painted woman.

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

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

And so when we talk about Oak Flat being gone, it's cutting a tie to my sister's life and to all of the girls' past, present, who have had their Sunrise Ceremony there. The connection to Chi'chil Bildagoteel is gone. It is taken away from them, stripped away from them, and that's only that. That's not including our stories, our medicine, our connection, everything will put a burden -- the wind is so important to our Apache tradition. And 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.

The people, that real life, that soul, that spirit, everything that is given to us by our Creator is taken away from us. It's gone. And that's why we have to fight so hard, because it is our people, our generation past, present, and future, that's going to be taken away.

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

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

A. Okay.

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

THE COURT: Mr. Nixon, one moment.

Are you using my hard copies of the exhibits?

MR. NIXON: No, Your Honor.

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

Thank you very much.

BY MR. NIXON:

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

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

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

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

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

MR. NIXON: Okay. Certainly.

BY MR. NIXON:

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

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

Because in this moment, Nizhoni is starting to connect her soul and her spirit to the mountain, to Oak Flat. And that is the start-off and the kick-off of the beginning of the ceremony where she's not my sister

no more, she's the changing woman. She's becoming what we said, how she resembles the white painted woman, our creation story.

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

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

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

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

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

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

A. In this one, the medicine man, who is in front of my sister, is praying to her and talking to her about what she is going to be doing and the role she is going to take because she blesses the people. Her and the spirit that is within her. They bless and they provide for the people.

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

THE COURT: Mr. Nixon, just one moment.

Go ahead, sir.

BY MR. NIXON:

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

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

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

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

And when -- the favorite part of mine is her eyes are closed throughout this whole process when they

paint her. And when the God -- at the last song, the Godmother will have a handkerchief and wipe her eyes. And in that moment when she opens her eyes, she's a new woman, she's a new girl. That spirit is in her. That's why she is and that's why she will be for the rest of her life. It is that confirmation to the world that she took her imprint at Chi'chil Bildagoteel and on the world. And so that's what that represents.

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

Defense counsel, do you have that handy?

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

MR. NIXON: Thank you, Your Honor.

BY MR. NIXON:

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

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

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

So in this photo, they are dancing in a line waiting, because what happens is that the Ga'an will come and

do their prayers, and then when they are done finishing their prayers, the girls will come up behind them and we in a sense shadow them, we follow them, and this is all a part of our ceremony that happened at Oak Flat.

Q. So one last question. When you mention the Ga'an and you refer to them as the Ga'an or the spirit dancers or the crown dancers, are those actual spirits?

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

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

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

A. Yes.

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

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

And so what the settlers would say, you know, when they would try to come in is, oh, those are devils, and they would be afraid, and that was Devil's Canyon.

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

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

Hold on just one second.

(Discussion held between Court and courtroom deputy.)

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

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

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

Mr. Nixon, please continue.

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

THE COURT: Yes.

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

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

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

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

THE WITNESS: I just wanted to say thank you.

THE COURT: You are very welcome.

Mr. Nixon, please call your next witness.

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

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

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

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

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

THE COURT: Sir, welcome to our courtroom. Lisa, if you would please swear the witness.

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

THE COURT: Go ahead, Mr. Nixon.

DIRECT EXAMINATION

BY MR. NIXON:

Q. Dr. Nosie, could you please introduce yourself in terms of your education and your position with Apache Stronghold?

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

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

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

Q. And where are you currently living?

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

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

A. Well, as a tribal chairman at that time, and also being involved with the argument on day one, was the NEPA, the National Environment Policy and our

argument to ask the United States to follow the NEPA process. And for several years, you know, we did have the Tonto National Forest agreeing with the tribe, that it was very -- that the land was very important to the Apaches, not until the rider that gave exemptions to Resolution Copper that the whole tide turned.

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

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

And so as a young six, seven-year-old, telling my uncles that one day I will return -- and they used to cry and laugh and say, you know, when you do, we will go with you.

And being a Chiricahua, you know, they were talking about these treaties that were made. And my grandfather – my great-grandfather was one that argued the point about these areas of indigenous lands

of holiness to the people. So I grew up in that arena, in that era, and was totally affected by how our people were being treated.

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

THE COURT: I'm sorry, Doctor. My apologies for interrupting you. Can you give me some examples of how -- you just made a comment that -- socially seeing our people not developing the way they should be developing -- what do you mean by that?

A. Well, what I mean by that is it was a new change, a change came. And if you can imagine a way of life coming to a complete stop and not knowing what the next day was to be and how it was formenting. And from -- say an economic base, a social base, and a religious base. These were all being affected by a -- just like a car coming to a complete stop, and not being really informed and well informed what our people was facing. And so it really created a lot of social illness to where, how do we deal with this?

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

And so since a lot of our people grew up like that, in the fear -- because our parents still had the fear of

military presence, and they felt that with Indian health and BIA because at that time, in the '60s, they could still dress up in military uniform. So there was a suppressed way of life still happening to them.

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

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

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

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

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

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

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

THE WITNESS: Everything that they were was that they could communicate with the world. They could communicate with what was spiritual, from the wind to the trees to the earth to what was underneath. And they knew how the spirituality tied to everything to make us who we are. And that was important because that created the integrity and the character of the people.

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

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

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

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

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

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

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

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

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

And so this place is very important. So as a tribal leader, as a tribal member, it's -- and just being who I am, it's always been spiritual. And we had been told that one of the last things that will probably be taken from us would be our religion.

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

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

BY MR. NIXON:

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

A. Yes.

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

I am not going to introduce it into evidence, Your Honor. And defense counsel, please excuse me. Just if you would indulge me for a moment, I will place this in the proper order in terms of a point of order for the courtroom, Your Honor.

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

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

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

Q. How thick is that book?

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

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

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

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

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

THE COURT: Just one moment, please.

MR. NIXON: Okay.

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

THE WITNESS: Yes, it was.

THE COURT: You may approach.

Go ahead, Mr. Nixon.

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

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

MR. NIXON: Thank you, Your Honor.

THE COURT: You're welcome. Please continue.

BY MR. NIXON:

Q. When you refer to the Forest Service having known about these things, did you mean also before the National Defense Authorization Act was passed in

December of 2014, were they told anything or did they know anything, in your opinion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. What was that again?

Q. The latter half of the 19th Century, the 1800s and into the early part of the 20th Century, the early 1900s?

A. Yes.

Q. Okay, thank you.

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

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

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

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

And so forgive me and Naelyn, you know, we are giving you a lot more than anybody has ever gotten, and that's what I am doing today. But it does hurt me, because it's like our religion is being on trial. And it goes back to what our prophecy would say to us, that one day we will be put on trial, and this is not right. But I will do my best.

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

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

But this is the (speaking Apache) for the men. And as Naelyn spoke, the question of the Ga'an people.

Well, with the Ga'an people, the men have to go through a purification in order to do that sacred dance, that holy dance. And in the very end, they come together as one, the spirit and the human. And those are the ones that bless at the Sunrise Ceremony.

But this (speaking Apache) is a very important part of the ceremony. I mean, it is not just one thing. It is so many things that is within that time period of when the ceremony is going to take place.

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

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

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

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

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

If you could describe for the Court's benefit and for defense counsel what that is a photograph of?

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

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

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

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

And then the marking on his body also describes the identity of who this person is. And it's really tough to put it out there, because the way things are today, there's animals being killed, and it referenced a certain species, and it's scary to really put it out there, because we see them being killed, and we don't want to put a whole lot of information out there.

But these are spirit people, that is the buffer between heaven and earth, and they are the communicators to us. And they bring the message

through the Creator, and that's why they are the ones that do all of the blessings.

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

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

And -- but this, what we are talking about here, you know, is -- this deity, you know, resides in the area, and that's what my granddaughter was saying, it's the red deity that is there. And this is what we're saying that it's going to be totally annihilated by the collapse of this place if Resolution continues to move forward and get what they want.

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

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

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

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

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

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

And one stopped by and said to me, you better check, because the first thing they are going to attack is the Emory Oak. They are going to cut all of the oak trees. If they can kill all the oak trees, then they solve the Indian problem, the Indian people won't be there.

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

And I stand there with all of the pressure of the government, Resolution Copper, and trying to defend them off so that our people can have what is rightfully

theirs, the ceremony for their families, for their children, for the world.

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

Q. Thank you, Dr. Nosie.

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

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

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

A. It's going for $60.

Q. Thank you.

MR. NIXON: No further questions.

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

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

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

THE COURT: Yes.

MR. SCHIFMAN: Okay. Thank you.

CROSS-EXAMINATION

BY MR. SCHIFMAN:

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

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

THE COURT: Yes.

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

BY MR. SCHIFMAN:

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

A. No, I am not here -- my document does show the concurrence of the tribal chairman on all of the work that the Apache Stronghold has been doing. Thank you.

Q. Okay.

MR. SCHIFMAN: No further questions, Your Honor.

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

MR. NIXON: No, Your Honor.

THE COURT: Do you have any additional witnesses?

MR. NIXON: No, Your Honor.

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

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

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

THE COURT: Mr. Schifman, do you have any witnesses you plan to present?

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

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

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

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

First question is, why isn't the Western Apache tribe named as a plaintiff?

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

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

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

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

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

THE COURT: You are correct.

MR. NIXON: We didn't believe it was necessary, Your Honor, especially in light of the Supreme Court's

recent decision in McGirt versus Oklahoma, where an individual asserted and vindicated his entire tribe's treaty rights to a vast part of the state of Oklahoma.

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

There is no sovereign immunity at issue in that case because -- or in this case because we are talking about land and land rights, which would be subject to the immovable property rule, and therefore sovereign immunity does not withstand the power and the effect of the immovable property rule, which was recently the subject of a Supreme Court case, an argument in the Upper Skagit Tribe versus Lundgren, a case that was remanded to the Washington State Supreme Court, because that issue was first presented in that case after certiorari was granted and at oral argument at briefing before the Supreme Court. And that case subsequently settled.

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

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

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

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

MR. NIXON: Well, as Dr. Welch made a point of clarifying, there were no such things as tribes. That's an artificial construct created later by the American Government to try to develop an organizational system or even to be able to classify these different groups of people, these nations of native peoples.

The title of --

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: That is correct.

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

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

MR. NIXON: If I may, Your Honor?

THE COURT: Yes, please, Mr. Nixon.

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

THE COURT: Correct.

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

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

So just having a meeting is often listed by the U.S. Forest Service, not just in this case, but regularly, it's kind of a pattern of practice, a meeting with Indians or anybody will equal consultation for their purposes

of satisfying consultation requirements under NEPA, the National Historic Preservation Act, or specialized statutes such as the National Defense Authorization Act.

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

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

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

MR. NIXON: Because that FEIS making available to the public and we do not concede it was published under the law as the law requires or defines publication for -- and again, we are not here under the Administrative Procedure Act, but constitutionally, for terms of adequate effective notice and due process in regards to the consequential effect of that act of so-called publishing, it began the march of a 60-day mandate, which will then result in an attempted conveyance of this land whose ownership is in serious question.

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

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

THE COURT: Just one moment.

Olivia.

(Discussion held between Judge and Law Clerk.)

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

MR. SCHIFMAN: We -- so as to the R-F-R-A, RFRA claims, we do not contest plaintiff's standing to bring that. That's not needing to be asserted on behalf of the tribe. And the same goes for plaintiff's free exercise of religion claim.

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

MR. SCHIFMAN: Yes, that's correct, Your Honor. I believe you are referring to the -- I am going to

struggle to pronounce this, so I won't do it, but the first of the cases that we cite in our brief on page 6, Golden Hill Paugussett, which I might not be pronouncing correctly, that was a Nonintercourse claim, if I remember them correctly, and I believe that some of the other cases were.

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

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

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

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

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

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

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

MR. NIXON: Absolutely not. That's incorrect. I can give the point of clarification with regards to the Little Sisters of the Poor and the underlying reasoning in the Third Circuit that we were spotlighting for you, if I may?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And that's polygon like 689, I believe, and that's what's identified as the Western Apaches territory as interpreted by Charles Royce. He, like I, as an anthropologist and as the defense pointed out, we are not judges, this was his interpretation based on the records that he reviewed in the 1880s, and I am adopting that as my best interpretation of what the United States and the parties to the 1852 treaties would have agreed to as the time as being Western Apache's treaty -- treaty territory, yes.

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

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

THE WITNESS: Yes.

MR. NIXON: How so?

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

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

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

MR. NIXON: No, Your Honor. The trust relationship, the trust duty and responsibility, the fiduciary duty to which we are referring is a basic principle of constructive trust based on the behavior of the United States Government in usurping that land and based on the nature of the relationship per the law of the land in federal Indian law in America tracing back to Justice Marshall's opinion in Johnson v. McIntosh, whereby Indian nations are considered to be domestic dependent nations and essentially a ward of the United States in that perspective.

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

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

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

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

There's a Second Circuit case just from the results of the COVID-related pandemic strictures on churches and synagogues in New York City, which tracks along with this. And it may or may not end up in the Supreme Court; it remains to be seen.

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

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

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

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

And what we are attacking is the law as applied. It is a very gigantic undertaking, Your Honor, to launch a case like this. And we have three lawsuits right now in this district that have appeared, ours -- a few days before the FEIS got published, and two immediately thereafter.

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

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

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

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

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

MR. NIXON: Just this morning, Your Honor, you heard directly from Dr. Nosie himself who in various capacities, as an individual, as member of Apache Stronghold, and in his prior official capacities as tribal councilman and tribal chairman, presented repeatedly before the introduction of the National Defense Authorization Act Section 3003 rider, about the central religious importance of this place, Oak Flat.

And the government, Congress, when it passed that law -- you can't read in that law. We recognize the central religious importance -- there's no deliberate regard of it, much less an utterance that there's a compelling government interest to have some

Australian and English copper mining companies take the copper ore out of here and take it overseas and make some copper wire out of it. There's nothing like that, and so that's why.

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

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

MR. SCHIFMAN: Your Honor, I would like to make one brief clarification as to the questions about title and the United States' ownership of the land that plaintiff's counsel has just brought up, just very briefly.

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

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

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

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

MR. NIXON: Your Honor, if I may?

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

MR. NIXON: That's very presumptive, you know, and certainly, for one thing, it would violate a trust responsibility to make such a declaration. Certainly in this case.

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

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

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

MR. NIXON: Thank you, Your Honor.

THE COURT: You're welcome.

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

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

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

MR. NIXON: Point of clarification, Your Honor?

THE COURT: Yes.

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

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

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

THE COURT: You're very welcome. Is there anything else from the plaintiffs?

MR. NIXON: No, Your Honor.

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

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

MR. SCHIFMAN: Nothing from the federal defendants,

Your Honor.

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

(Proceedings conclude at 12:02 p.m.)

CERTIFICATE

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

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

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

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

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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, Forest Service, USDA, Neil Bosworth, Supervisor, Tonto National Forest, USDA, and Tom Torres, Acting Supervisor, Tonto National Forest, USDA, Defendants.	No. CV-21- ________ **DECLARATION OF CRANSTON HOFFMAN JR.**

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

1. I, Cranston Hoffman Jr, am an enrolled member of the San Carlos Apache Tribe.

2. I was born on May 31,1952 in San Carlos, Arizona.

3. I am of the Tanasgizin Clan ("Washed People") on my mother's side and born for the Tiis tu ayeh Clan ("Cottonwood Sticking in the Water") on my father's side.

4. I am a Veteran. I served in Desert Storm in the Persian Gulf.

5. I am an Apache Traditional Practitioner and Medicine Man who conducts the Apache Holy Grounds Ceremony.

6. I was raised by parents who taught me and my siblings about the Apache way of life.

7. When I was a child, I remember early memories of Chi'Chil Biłdagoteel ("Oak Flat") when my family stopped to pick acorn at Oak Flat. I also remember picking medicine in the area too. My family and I drove around in the nearby Pinto Creek where there were plenty of cottonwood and acorn trees along the creek. This whole region we visited at different seasons of the year.

8. Chi'Chil Biłdagoteel ("Oak Flat") is a holy place. It is part of Western Apache lands. Today there are living descendants of our ancestors whose clans come from this territory. Many of the living descendants are enrolled tribal members from the San Carlos Apache Tribe. In early history, the United States Government prevented us from freely roaming through these lands

because the lands were rich in natural resources. During this time and for many years, the Government also restricted Apaches from freely practicing their traditional ceremony, both on and off the reservation. Instead of stopping our religious practices we had our ceremonies in secluded areas. The Government laws were strict and our ceremonies were hidden but we kept conducting them, even at Chi'Chil Biłdagoteel.

9. I was taught and learned the ways of the Holy Ground ceremony from the Hoffman side of my family. The stories, songs, and prayers from the Holy Ground ceremony have been passed down for many generations within my family line. In return I am teaching the next generation so they will be able to teach the future generations about the Holy Grounds ceremony.

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

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

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

Respectfully submitted,

/s/ Cranston Hoffman Jr.
Cranston Hoffman Jr.

Dated: January 10, 2021

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**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, Forest Service, USDA, Neil Bosworth, Supervisor, Tonto National Forest, USDA, and Tom Torres, Acting Supervisor, Tonto National Forest, USDA, Defendants.	No. 2:21-cv-00050-CDB **DECLARATION OF CLIFFORD LEVENSON**

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

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

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

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

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

Respectfully submitted,

/s/ Clifford Levenson
Clifford Levenson

Dated: January 13, 2021

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Attorneys for Plaintiff

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

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

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

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

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

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

Naelyn Pike (Photo: Apache Stronghold).

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

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

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

religious freedom now, and in the future, as it was given to us by Usen.

7. Just the other day, the Forest Service publicly stated for the first time that the Forest Service will publish the Final Environmental Impact Statement ("Final EIS" or "FEIS") for the Southeast Arizona Land Exchange and Resolution Copper Mine ("SALE-RCM") on this coming Friday, January 15, 2021.[1]

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

---

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

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

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

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

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

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

12. We believe that the place the ceremony takes place is the life thread forever connecting the place and the girls who have their ceremony there, and their direct connection to the land. The destruction of Oak Flat will not only destroy the land, water, plants, animals, cultural history, historical artifacts, and Apache religious beliefs seated there, but it will also harm these girls' life and their connection to their rebirth.

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

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

13. True unity is accepting one another's diversity, because each and every one of us is beautiful as the Creator has made us in His image. We all have a story. I have my own story. My mom has her story. Those before us have a story. This mine will not allow the

future to have a story. But, as long as we understand each other's stories and we accept that beautiful diversity in all people, because we are human beings in this world, the one thing we can understand is that we all have one issue on which we can relate: living in peace together.

Traditional Apache Religious 'Changing Woman' Sunrise Dance Ceremony at Chi'Chil Biłdagoteel ("Oak Flat")
(Photograph with family permission.
© Robin Silver Photography).

Respectfully submitted,

/s/Naelyn Pike
Naelyn Pike

Date: January 10, 2021

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

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

I, Wendsler Nosie, Sr., under the penalties of perjury and in accordance with the laws of the United States of America, hereby declare:

1. Chi'Chil Biłdagoteel ("Oak Flat") is Apache sacred land and a Western Apache traditional cultural property and religious ground where my religious beliefs are seated and are freely exercised, as it has been for Western Apaches since time immemorial. It is still Western Apache land by the 1852 Treaty of Santa Fe and belongs to all Western Apaches. Oak Flat does not belong to the United States of America and so the United States has no authority to sell it, exchange it, or otherwise convey it or give it away.

2. Even though the United States has tried to steal Oak Flat away from us, we have never given up or sold that Treaty land. Our traditional Apache religion does not even allow us to do such a bad thing as that. Oak Flat is ours and always has been since time immemorial, long before the United States of America ever existed.

Wendsler Nosie, Sr. standing alongside an Apache ceremonial sweat lodge frame at Chi'Chil Biłdagoteel ("Oak Flat") (Photo by Eli Imadali, Arizona Republic).

3. I was born in July 1959, on the San Carlos Apache Reservation. I was raised in a traditional Apache way of life. I graduated from the Globe High School in May 1978 and attended Merritt College in Oakland, California, attended Phoenix College in Phoenix, Arizona, and completed the State of Arizona Banking Academy. On February 26, 2016, I received my title as AUSN Professor in the Practice of indigenous Knowledge from the American University of Sovereign Nations and on June 13, 2018 received my PhD, a Doctorate in Bioethics, Sustainability and Global Public Health from the American University of Sovereign Nations.

4. I am the son of the late Elvera Ward Nosie and the late Paul Nosie Sr. My mother, Elvera Nosie was born in Old San Carlos as a Prisoner of war. Her father was George Ward and her mother Maria Galvan. My grandfather George Ward, the son on Hiram Ward and Altisa were among the first Yavapai prisoners at Old San Carlos, driven from the Pinal Mountains and Oak Flat area, and Camp Verde areas to Old San Carlos. My father Paul Nosie Sr. was the son of William Nosie and April Logan, the descendants of Chief John Nosie of the Chiricahuas. April Logan was the Daughter of Walter and Ella Mary Logan, the family of Abraham Logan, the keeper of the Holy Ground in Seven Mile, San Carlos.AZ My clan is Stiniye and I am a descendent of the Bedonkohe band of Apaches, the band of Geronimo.

5. Naelyn Pike is my granddaughter. I have read her Declaration in this case and I adopt it and incorporate her words here into my Declaration, too. We have come a long way together through this struggle to protect our ancestral homelands, and I am

thankful for her never-ending support and courage, especially during the most difficult times. Her powerful voice and determination to help protect the things we hold dear are a constant reminder that we must do so for future generations as Apache people.

6. I have been elected and served in the government of the San Carlos Apache Tribe as a Councilman (1989-92; 2004-2006; 2010-2012; 2012-2016) and as Chairman (2006-2010).

7. I am the co-founder and spokesperson of Apache Stronghold, a 501(c)(3) not-for-profit organization registered in Arizona, and headquartered in the town of San Carlos in the San Carlos Apache Tribe's reservation land, bordered by the White Mountain Apache Tribe, the Navajo Tribe, the State of Arizona, and some federally-managed lands of the United States.

8. For over a decade our Tribe fought to stop the Southeast Arizona Land Exchange ("Land Exchange"), a proposal to transfer approximately 2,422 acres of our ancestral homelands in the Tonto National Forest ("TNF") to foreign mining conglomerates, Rio Tinto and BHP, to dig a questionable and vast copper mine beneath lands we hold as sacred. Thanks to the vocal opposition of more than 400 Native Nations and tribal organizations the House of Representatives pulled the Land Exchange from floor consideration twice during the 113th Congress (January 3, 2013, to January 3, 2015) due to lack of support.

9. Despite this nationwide opposition, the Land Exchange was buried on page 1,103 of a 1,700-page National Defense Authorization Act ("NDAA") that was unveiled on December 13, 2014, just minutes prior

to midnight, the evening before votes.[1] This despicable action is the antithesis of democracy and has threatened to forever destroy our way of worship and life, yet the United States and its Forest Service leaders persist, now rushing this week to publish a Final Environmental Impact Statement ("FEIS") so it can trigger the provision in Section 3003 of the NDAA that allows the Forest Service to immediately do the Land Exchange to transfer ownership to Resolution Copper.

10. This past week, as we suddenly learned without any prior official notice—even though we have been actively involved in the process directly with the U.S. Forest Service and the other federal agencies working with the Forest Service on the proposed Oak Flat Land Exchange, such as the President's Advisory Council on Historic Preservation ("ACHP")—that as the Forest Service publicly stated to a news reporter[2] that they will publish the FEIS this Friday, January 15, 2021,

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[1] "Senate passes spending bill, ends government shutdown threat," By David Lawder and Amanda Becker, Reuters (December 13, 2014) https://www.reuters.com/article/us-usa-congress-budget/senate-passes-spending-bill-ends-government-shutdown-threat-idUSKBN0JR0I820141214. See also, "Crowd protests copper mine on sacred lands," Apache Messenger/Indianz.com (December 22, 2014) https://www.indianz.com/News/2014/015978.asp.

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

setting up the stage for the Land Exchange of Oak Flat—which could then happen the very same day as the publication of the FEIS.

11. There is nothing mandating that the Forest Service must publish the FEIS on January 15, 2021, or even any day this month or next. In fact, there is no FEIS publication date mandated in the NDAA at all.

12. If the Land Exchange is permitted to move forward through finalization of a flawed Draft Environmental Impact Statement ("DEIS") process, the mining corporation and TNF, both acknowledge that the mine will cause a vast subsidence in the earth, destroying our Sacred Oak Flat, our religion, and with that, destroying our ability to have and preserve our traditional Apache way of prayers, our religious beliefs and ceremonies, and our religious Apache way of life.

13. We said for years, Resolution Copper's mining operations will have devastating impacts on our history, our culture, our religious practices, and the natural resources and environment of this area, especially the region's water supply. For years, proponents of Resolution Copper ignored these harsh realities and insisted that the benefits of jobs, which were greatly exaggerated and fluctuated frequently, were worth the toll to the environment and life of the surrounding communities. Yet, the DEIS confirmed in large part the permanent damage and losses we already knew would occur to the broader physical environment, and our places of religious worship and cultural reverence should the project be allowed to proceed

14. The proposed mine would directly, adversely and permanently affect and destroy numerous

cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource gathering localities, burial locations, and other places of high spiritual value to tribal members.

15. The analysis of the Tribal Values and Concerns focuses the impacts of the proposed Land Exchange and Resolution Copper Mine on the past without recognizing the current presence of religious and cultural practices that have endured at Oak Flat for centuries. This erasure of Native Americans in contemporary terms perpetuates the genocidal history of America.[3]

16. What was once gunpowder and disease is now replaced with bureaucratic negligence and mythologized past that treats us, as Native people, as something invisible or gone. We are not. We are still a vibrant and vital part of our Nation's fabric despite repeated attempts to relegate our cultures as artifacts in museums or blubs in history books. However, the permanent damage that will be caused by the Resolution Copper Mine is something that will contribute to this genocidal narrative continuing now and well into the future.

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[3] See, e.g., "Earth, Wind and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874," Welch, John R., Sage Open Journal, vol.7, no.4 (October-December 2017). Available online at https://journals.sagepub.com/doi/full/10.1177/215824401774701.

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

17. It is important to understand that we have never lost our relationship to Chi'Chil Bildagoteel. Despite the violent history of the U.S. Government's exile, forced march and imprisonment of Native people on reservations, and the efforts by the U.S. Government to discourage, impede, or fully disallow us from coming to this holy area, we have our own legacy of persistence and never letting go of this place.

18. Chi'chil Bildagoteel's religious value to our prayers, our ceremonies, and in our family histories cannot be overstated. Native religion was the first religion practiced in this area.

19. We have established an encampment to protect the Holy Ground at Chi'chil Bildagoteel with its four crosses, which represent the entire surrounding Holy and Sacred area, including its water, animals, oak trees, and other plants central to our Western Apache tribal identity.

20. It is important to note that Chi'chil Bildagoteel is listed in the National Park Service's National Register of Historical Places ("NRHP") as a Historic District and Traditional Cultural Property ("TCP").[4] Emory oak groves at Oak Flat used by tribal members for acorn collecting are among the many living resources that will be lost along with more than a dozen other traditional plant medicine and food sources. Other unspecified mineral and plant collecting locations and culturally important landscapes will also be affected.

21. Development of the Resolution Copper Mine would directly and permanently damage Chi'chil Bildagoteel, our sacred holy ground that is vital to us, which is why we strongly oppose this operation. The impacts that will occur to Oak Flat will undeniably

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[4] U.S. Department of Agriculture Tonto National Forest (2015) National Register nomination for the Chi'chil Biłdagoteel National Historic District, Pinal County, Arizona (U.S. National Park Service, National Register of Historic Places, approved March 4, 2016). Retrieved from http://bloximages.chicago2.vip.townnews.com/tucson.com/content/tncms/assets/v3/editorial/8/b1/8b10c3b0-77ed-560b-bd5f-bc0552df7e7c/56e363c6b87ba.pdf.pdf.

prohibit the Apache people from practicing our ceremonies at our Holy site. Construction of the mine would cut off access and once the mine has been completed, the destruction will create a permanent barrier preventing Apache ceremonies from taking place.

22. Our connections to the Oak Flat area are central to who we are as Apache people. Numerous people speak of buried family members. Most of them include childhood memories. Everyone speaks to the deep spiritual and religious connection that Apaches have to the land, water, plants and animals at Oak Flat that would be permanently destroyed by this proposed action.

23. The destruction to our lands and our sacred sites has occurred consistently over the past century in direct violation of treaty promises and the trust obligation owed to Indian tribes.

24. Please keep in mind that the Land Exchange was achieved through a backroom agreement, literally at midnight the evening before attaching it to the NDAA. We would not be in this position today had the Land Exchange gone through regular order and been subject to meaningful and honest debate.

25. It always has been told and taught to us for generations by our parents, our elders, our traditional Apache religious leaders —and it is embedded in our way as passed down from our Apache ancestors—that this place, Oak Flat, is special and holy and sacred. This is a unique and special sacred place as we believe in the spiritual forces of God the Creator that he put there for us and for us to protect and honor in the

humble exercise of our traditional Apache religious lives.

26. When our families gather at Oak Flat to celebrate our religious beliefs, we are no different than our Christian brothers and sisters who gather at their respective churches on Sundays and other holy days. The only difference is our permanent place of prayer and worship is under attack and will be destroyed if the FEIS is published this Friday, January 15, and the transfer of possession of Oak Flat to Resolution Copper takes place.

27. This case is for the survival and protection of our Apache religion, and the Forest Service must be stopped from publishing that FEIS this Friday, January 15, because there is no compelling reason for them to do that so suddenly and right now.

28. The publication of the FEIS on January 15, 2021, would violate our Due Process rights under the Fifth Amendment to the U.S. Constitution which guarantees us the right to have adequate and effective notice of government acts that will affect our legal rights. Ten (10) days' notice is utterly inadequate for such a momentous decision having such catastrophic adverse effects on our First Amendment Rights to our religious beliefs and the free exercise of our Apache religion, and prejudices and harms our First Amendment Rights to Petition the Government for Redress of Grievances and the corresponding Right to Remedy included within the Petition Clause of the First Amendment.

29. Oak Flat is Apache land and we must be allowed to protect our land and our religious beliefs and religious freedom rights before the harms increase

and accelerate with the Forest Service's publication of the FEIS this coming Friday, just four (4) days from now.

30. Neither Apache Stronghold, nor myself or any Apache officials received direct or adequate notice that the Forest Service has suddenly decided to make the publication of the FEIS on January 15, 2021 until it was revealed to us only by us seeing that online news report by Reuters the other day. This FEIS publication is also a precursor genocidal act and this Court must not allow it.

Wendsler Nosie, Sr., at Chi'Chil Biłdagoteel ("Oak Flat") (Photo by Adriana Zehbrauskas for The New York Times)

Respectfully submitted,

/s/ Wendsler Nosie
Wendsler Nosie, Sr., Ph.D.

Dated: January 11, 2021

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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, Forest Service, USDA, Neil Bosworth, Supervisor, Tonto National Forest, USDA, and Tom Torres, Acting Supervisor, Tonto National Forest, USDA, Defendants.	No. CV-21- ________ **DECLARATION OF JOHN R. WELCH, Ph.D.**

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

1. I, John R. Welch, am a tenured full professor, jointly appointed in the Department of Archaeology and in the School of Resource and Environmental Management, at Simon Fraser University, British Columbia, Canada. I also direct research and outreach activities in my capacities and the director of the nonprofit Archaeology Southwest's Landscape and Site Preservation Program.

2. I have a lifelong interest in the natural and human history, geography, and management of the American Southwest and earned my graduate degrees in anthropology (MA, 1985; PhD, 1996) from the University of Arizona, Tucson.

3. I am a registered professional archaeologist (RPA 10027) and, over the last 36 years, have been employed by private consulting firms, by the University of Arizona, by the U.S. Department of the Interior, by the White Mountain Apache and San Carlos Apache Tribes, by Archaeology Southwest, and by Simon Fraser University.

4. I began working with Western Apache (Ndee) lands and leaders in 1984, while a graduate student, and from 1992 to 2005 served as the archaeologist and historic preservation officer for the White Mountain Apache Tribe. My work during this period included documenting, assessing the significance of, and protecting archaeological and cultural resource sites, training crews of Apache foresters and resource technicians to do the same, and assisting in the planning and implementation of land alteration and forest treatment projects. I also advised Apache

elected and cultural leaders regarding their participation in the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). I also advised Apache leaders in their consultations with federal agencies, including the U.S. Forest Service and the Tonto National Forest, as those agencies attempted to comply with the National Historic Preservation Act and the National Environmental Policy Act.

5. My work on Western Apache archaeology and land use has involved close collaborations with recognized Western Apache experts in history and culture. Those collaborations have allowed me to acquire knowledge of changes in the use, occupation, and management of Western Apache ancestral lands, including the area containing Chí'chil Biłdagoteel ("Emory Oak Extends on a Level," widely known as "Oak Flat"). I have endeavored to translate the privileges flowing from my collaborations with Western Apache people and their lands into useful and informative publications about regional history, archaeology, and persistent Apache interests in their lands and places within and beyond reservation boundaries. A full chronicle of these publications and my employment and research funding histories are presented in my curriculum vitae, which is attached hereto and incorporated herein by this reference.

6. In February 2018, relying on the same expertise I outlined above, I gave sworn expert testimony on behalf of the San Carlos Apache Tribe before the Arizona Department of Environmental Quality in Administrative Hearing No. 17-001-WQAB.

7. Reviewing all of the information presented herein, including the history of the 1852 Treaty between the Apache Nation and the United States, the proceedings of the Indian Claims Commission, and all relevant federal executive orders and agency decisions, I have reached an opinion regarding tenure of the land now known as Oak Flat. That opinion is that Oak Flat is Western Apache ancestral land contained within the Western Apaches' Treaty Territory and cannot be owned by the United States of America or any other entity or person. The information that I have relied on is the kind of information that an archaeologist and historian would rely on to determine the opinions that I have formed here

8. I have, over the decades, heard stories from many Western Apache leaders and colleagues to the effect that U.S. Army forces attacked the camps of their forebears, killing their families, evicting them from most of their ancestral lands, and concentrating the survivors at San Carlos and Fort Apache. The results of my 2017 peer-reviewed study on this deeply disturbing facet of Arizona history are freely available as "Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874" (Sage Open [October-December]:1-19).[1]

9. That research into the Pinal Apache Genocide and related aspects of Western Apache-U.S. relations prompted further inquiry into the use and tenure of Western Apache ancestral lands not included within the U.S. Government-designated boundaries of

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[1] Available online at: https://journals.sagepub.com/doi/full/10.1177/2158244017747016

Western Apache tribal trust lands (i.e., the Camp Verde, San Carlos, Tonto, and White Mountain Apache reservations).

10. In later 2018 and continuing through 2020, I took a particular interest in the 1852 Treaty between the U.S. and the Apache Nation of Indians (sometimes referenced as the Treaty of Santa Fe), (herein "1852 Treaty"). That 1852 Treaty was signed by representatives of Apache peoples living both to the east of the Rio Grande (that is, Eastern Apaches—the Plains and Mescalero Apache) and west of the Rio Grande (that is, the Western Apaches—the Chiricahua and Western Apache).[2] The 1852 Treaty was duly ratified by the U.S. Senate and proclaimed by President Pierce on March 25, 1853. I did not find evidence that the 1852 Treaty was ever amended or rescinded. This research has resulted in a draft manuscript being prepared by me for professional, peer-reviewed publication.

11. My research investigated the articles of that 1852 Treaty, the boundaries of the Apache lands covered by that agreement, which I refer to as the Western Apaches' Treaty Territory, and the Treaty's signatories, application, and enforcement. My review of the 11 articles of the 1852 Treaty identified found several articles that recognize Apache territory through direct and indirect references. Article 7 of the 1852 Treaty affirms that the "people of the United States of America shall have free and safe passage through the territory of aforesaid Indians." In Article

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[2] Kappler, Charles J., Compiler and Editor (1904). *Indian Affairs: Laws and Treaties*, Vol. II (Treaties). Washington DC: Government Printing Office, pages 598-600.

8, the parties agree that, "to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate." Article 9 affirms "that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians." In Article 11, the parties agree the "Treaty shall be binding [and] … the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians."

12. My investigation of the 1852 Treaty found that the U.S. Smithsonian Institution, Bureau of American Ethnology, mapped and published what I refer to as the Western Apaches' Treaty Territory to encompass most of the southern half of New Mexico Territory (present day New Mexico and Arizona) west of the Rio Grande (Figure 1, Map Area 689).[3] Map 1, below shows cropped portions of two maps, "Arizona 1" and "New Mexico 1" conjoined to depict the 1852 Western Apaches' Treaty Territory (central greenish area "689"). The red arrow points to the approximate location, within the Western Apaches' Treaty

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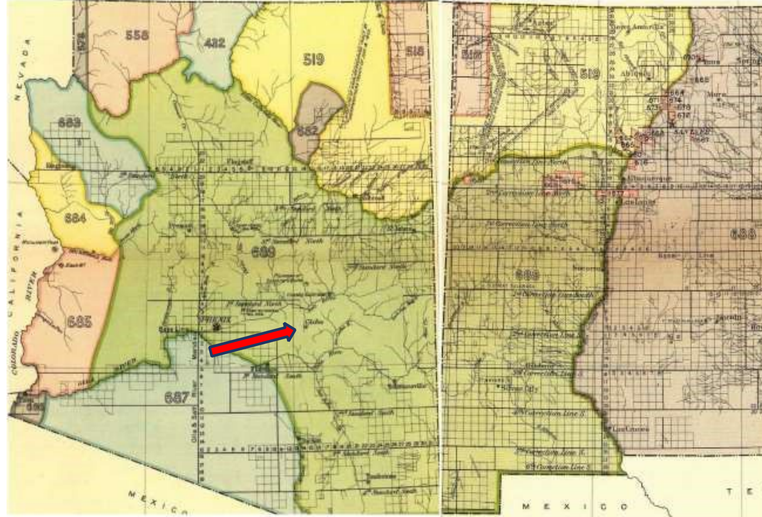
[3] Royce Charles C. (1899). *Indian land cessions in the United States* (Arizona and New Mexico map No. 1, pp. 922-923) (Eighteenth annual report of the Bureau of American Ethnology). Washington, DC: Smithsonian Institution. From https://lccn.loc.gov/13023487, accessed October 20, 2020.

Territory, of the Apache place known as Chí'chil Biłdagoteel (Oak Flat).



MAP 1

13. My research has also included a review of U.S. Federal Government actions—including those of the Legislative, Executive, and Judicial branches—purporting to alter or transfer ownership or control of the Western Apaches' Treaty Territory. I found dozens of such actions affecting millions of acres within the Western Apaches' Treaty Territory. I have yet to discover a single instance in which the legal authority for the action by the United States—whether act of Congress, executive order, or court decision—explicitly recognizes either the 1852 Treaty or the effect and apparent impingement of those Federal actions on the Treaty and the Western Apaches' Treaty Territory and associated Treaty rights.

14. I investigated the proceedings of the Indian Claims Commission for Docket 22, addressing claims to compensation for lands taken by the United States

from tribes representing Apache, Yavapai, and Navajo plaintiffs. The Docket 22 records are scattered, and the Indian Claims Commission ultimately partitioned Docket 22 into multiple proceedings, but I examined Docket 22 materials in libraries and the U.S. National Archives Record Group 279. I gave particular attention to the following: testimonies provided by tribal elders, reports of subject matter experts regarding claimant tribes' histories and land uses, and Findings of Fact and legal decisions of the Indian Claims Commissioners. I followed these related lines of inquiry to learn where and under what circumstances the Federal Government, through the Indian Claims Commission, may have attempted to "quiet" Apaches' reserved treaty rights or aboriginal land title, principally through providing compensation for or refusing to provide compensation for aboriginal lands, defined by the Indian Claims Commission as lands subjected to "exclusive tribal use and occupation from "time immemorial.""[4]

15. I found no evidence, in the proceedings of the Indian Claims Commission or elsewhere, of any change or diminishment in the Apaches' reserved treaty rights to the Western Apaches' Treaty Territory. I found no evidence that the United States

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[4] United States Indian Claims Commission (1979). *Final Report, August 13, 1946-September 30, 1978*. U.S. Government Printing Office: 1979-271-733 (the quotation appears on page 10). The map of aboriginal land areas adjudicated by the Indian Claims Commission is available at https://pubs.er.usgs.gov/publication/70114965, accessed April 1, 2020. For an account of aspects of the adjudication of Docket 22, see Lieder, Michael, and Jake Page (1997). *Wild Justice: The People of Geronimo Vs. the United States*. New York, Random House.

compensated the Apache treaty rights holders for Chí'chil Biłdagoteel (Oak Flat). Oak Flat is Apache land, as it has been for centuries and is not owned by the United States of America or any other entity or person.

16. With specific reference to the proposed Resolution Copper mine and the land area slated for mechanical, hydrological, and atmospheric impacts (see Map 2, below), I learned that Western Apache and Yavapai people living in the period prior to sustained contact with Americans (that is, during the Pinal Apache Genocide, 1859–1874) agreed on at least two fundamental aspects of land tenure history.

17. First, they agreed that the crest of the Mazatzal Mountains and Pinal Mountains constituted a general dividing line between the Western Apache and Yavapai ancestral territories.

18. Second, they agreed that line of division was permeable. The generally peaceful relations between the two peoples allowed family groups to cross that boundary whenever it was convenient or useful for them to do so, even without permission from those on the other side of the divide. These crossings typically occurred as Apache and Yavapai family groups pursued seasonally and spatially distributed concentrations of wild plant foods, including cactus fruits and nut masts. Apache and Yavapai groups, especially those groups located close to the Mazatzal-Pinal boundary, shared information and land use, also occasionally intermarrying, camping nearby, and cooperating in defense of their territories.

19. These agreed-upon facts from the Indian Claims Commission Docket 22 proceedings are

further affirmed in results from investigations and tribal consultations undertaken by the U.S. Forest Service concerning the proposed Resolution Copper Mine, as required by federal environmental and historic preservation laws and by Section 3003 of the National Defense Authorization Act of 2015.[5]

20. The two maps, included below, show that the impact area for the proposed Resolution Copper mine extends across westerly portions of the Western Apache (Docket 22-D) aboriginal lands, as judicially established by the Indian Claims Commission (ICC map areas 140 and 141, see Map 2), and across easterly portions of Yavapai (Docket 22-E, ICC area 146) and Pima-Maricopa (Docket 228, ICC area 147) aboriginal lands. Map 2 provides a regional view; Map 3 provides a more detailed view of the Resolution Mine potential impact area, with Chí'chil Biłdagoteel (Oak Flat) at the center of the impacts.[6]

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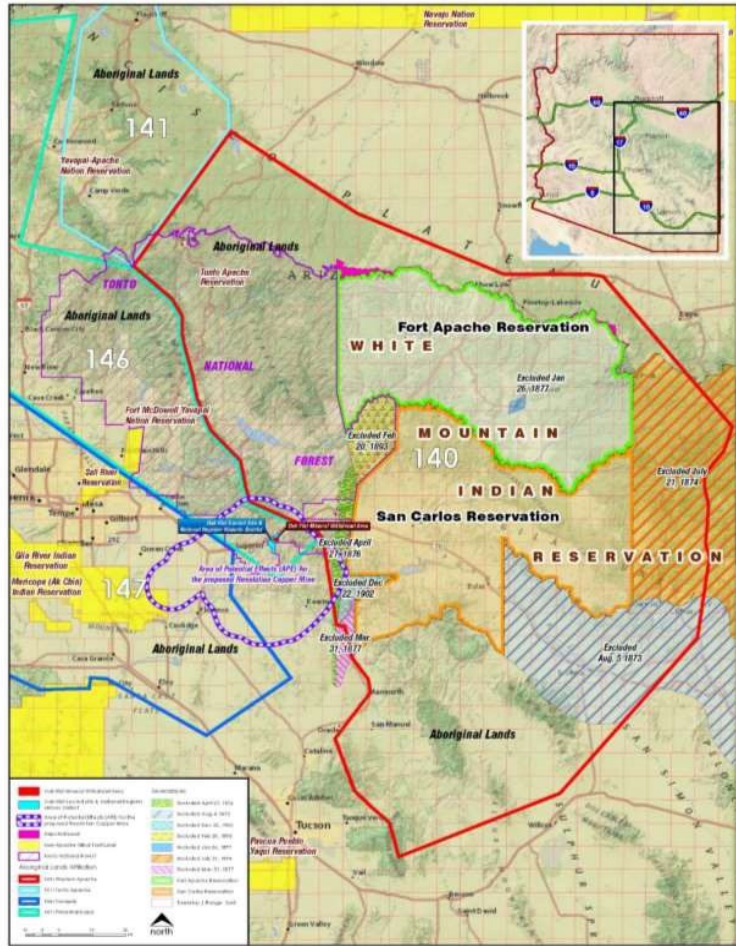
5 In particular, see Maren P. Hopkins, Chip Colwell, T.J. Ferguson, and Saul L. Hedquist (2015) Ethnographic and Ethnohistoric study of the Superior area, Arizona, prepared for Resolution Copper Mining by Anthropological Research, L.L.C.

6 Professional cartographers prepared Map 1 and Map 2 under the direction of John R. Welch using information from the U.S. Forest Service and spatial data publicly available through national cartographic data bases.



MAP 2

21. Map 2 depicts the original "White Mountain Reservation," the San Carlos Reservation and Fort Apache Reservation divisions (1897) of that original reservation, and the various tracts excluded from those reservations by unilateral U.S. Federal Government actions, none of which reference or comport with the articles of the 1852 Treaty. Map 2 and Map 3 both show the conjoined turquoise blue and

red lines depicting most of the boundary between the Western Apache and Yavapai lands along the crest of the Mazatzal and Pinal Mountains and the area of concern, Chí'chil Biłdagoteel (Oak Flat), on the west side of that boundary, near the southern edge of Yavapai aboriginal lands (Docket 22-E, ICC map area 146, delineated in turquoise blue). These two maps also show that the impact area for the proposed Resolution Copper mine affects Western Apache, Yavapai, and Pima-Maricopa aboriginal lands and a tract south and southeast of Yavapai and Western Apache aboriginal lands. Because the rules adopted by the Indian Claims Commission prohibited the recognition of tracts used by multiple Indian peoples as the aboriginal lands of any single claimant group, the Commission did not identify this tract aboriginal lands. No Tribe received compensation for the "every man's lands" south of Yavapai aboriginal lands.[7]

22. The Indian Claims Commission proceedings in Docket 22-D resulted in compensation to the San Carlos and White Mountain Apache Tribes for the taking by the U.S. of millions of acres of Apache lands. The lands for which the Western Apache tribes received compensation did not include Chí'chil Biłdagoteel (Oak Flat) or other lands for which the Yavapai tribes apparently received compensation pursuant to Docket 22-E.

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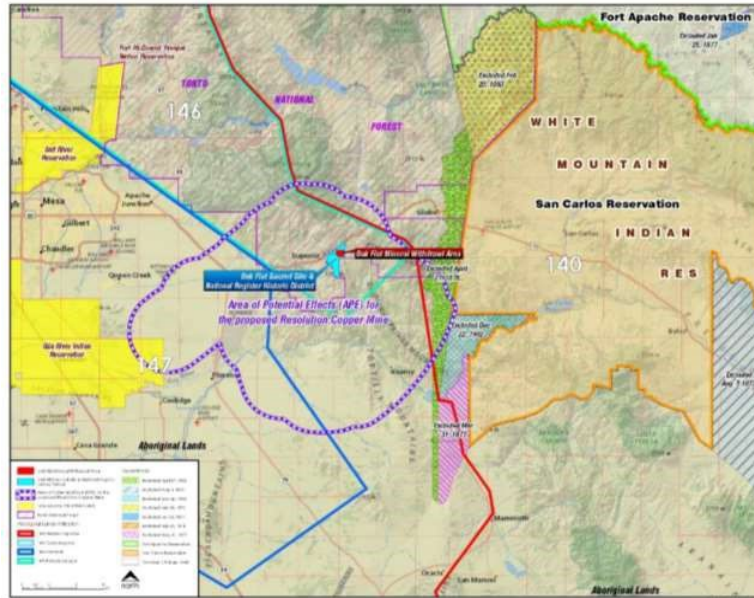
[7] U.S. Indian Claims Commission (1965). Findings of Fact in Docket 22-E (15 Ind. Cl. Comm., March 3, 1965), Records Group 279, Entry 11UD. Washington, DC: National Archives. U.S. Indian Claims Commission (1969). Findings of Fact in Docket 22-D (21 Ind. Cl. Comm., June 27, 1969), Records Group 279, Entry 11UD. Washington, DC: National Archives.



MAP 3

23. The cartographic, documentary, and archaeological materials that I have investigated are part of the information that form the basis of my expert opinions that (a) Western Apaches retain reserved treaty rights to Chí'chil Biłdagoteel (Oak Flat); (b) Indian Claims Commission decisions in Docket 22-D (San Carlos and White Mountain [Western Apache] Tribes) and Docket 22-E (Yavapai Tribes) never affected or otherwise diminished Western Apaches' reserved treaty rights, including those of the San Carlos Apache Tribe and its members created by the 1852 Treaty, and (c) because of the evidence presented in Indian Claims Commission Docket 22 proceedings and in the nomination of Chí'chil Biłdagoteel to the U.S. National Register of Historic Places (see below), the Indian Claims Commission should not have recognized Chí'chil

Biłdagoteel (Oak Flat) as land exclusively used and occupied by Yavapai. Yavapai and Apache customary practice includes the sharing of food gathering areas. Yavapai and Apache oral traditions include specific references to sharing acorn gathering areas and Oak Flat. The Chí'chil Biłdagoteel National Register District includes abundant archaeological evidence of Apache use and occupation of the Chí'chil Biłdagoteel District.

24. Chí'chil Biłdagoteel is a place of extraordinary and axiomatically unique importance in Western Apache culture, spirituality, and history, with special reference to the Pinal Apache Genocide.

25. While my academic training, research interests, and expertise do not extend to or include Apache religion or spiritual practice, many breakthroughs in my understanding of Apache archaeology and land use have come from intently listening to Western Apache cultural practitioners explain the importance of places and their roles in Western Apache history, spirituality, and metaphysics.

26. Four lessons from my listening to Western Apache knowledge keepers are pertinent to this declaration: (a) Western Apache conceptions of time, space, power, history, and human interrelations with these are distinct from Western conceptions (including those I was brought up with); (b) Western Apache people perceive, learn from, and act with profound respect in relation to places, including the big places often referenced as landscapes, in ways that are both culturally shared and intensely personal; (c) Non-Apaches, myself included, should generally leave it to knowledgeable Western Apache people to

interpret or comment upon Western Apache religious places in general, and upon specific places, like and including Chí'chil Biłdagoteel, that are known to be holy places; and (d) Notwithstanding these concerns, there are occasional appropriate roles for non-Apaches to offer technical support (for example, archaeological or cartographical) and external comments as means to bridge the vast chasms between Western Apache and non-Apache regard for and treatment of place and places.[8]

27. Specifically, the lovely, 40-acre grove of old-growth Emory oaks most widely known as Oak Flat, is a primary activity area for a much larger cultural landscape. Apache cultural experts, knowledge holders representing other regional tribes, and professional archaeologists from diverse backgrounds have recognized as Oak Flat a local hub for at least 10 centuries of residence, food gathering, and ceremonial activity.[9] Pottery fragments, engravings on boulders and cliff faces, roasting areas, and remnants of diverse house structures and other activity areas surround the grove and contribute to Chí'chil Biłdagoteel historical significance, sense of place, and what I refer to here as potency.

28. Converging lines of evidence from multiple tribes' oral histories, historical documents, and

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[8] The essential book corroborating these points is Basso, Keith H. (1996). *Wisdom Sits in Places: Landscape and Language Among the Western Apache*. Albuquerque: University of New Mexico Press.

[9] Hopkins, Maren P., Colwell, Chip, Ferguson, T. J., & Hedquist, Saul L. (2015). Ethnographic and Ethnohistoric study of the Superior area, Arizona. Prepared for Resolution Copper Mining. Tucson, AZ: Anthropological Research, L.L.C.

archaeological studies obliged the U.S. Forest Service to nominate, and the Keeper of the U.S. National

Register to list, Chí'chil Biłdagoteel in the National Register of Historic Places. Chí'chil Biłdagoteel's landforms, springs, woodlands, canyons, and religious sites collectively embody and define a 4,309-acre cultural landscape of past and ongoing use by and high significance to Western Apache people.[10]

29. The 4,309-acre National Register District encompasses the entirety of the 2,422-acre parcel of the Western Apaches' Treaty Territory and Western Apache ancestral land proposed for the land exchange. The Chí'chil Biłdagoteel in the National Register District is essential both in the practice of Western Apache religion and in the implementation current proposal for the Resolution Copper mine.

30. As to the question of cultural and religious significance of Chí'chil Biłdagoteel, only Western Apache people with Western Apache religious beliefs and who conduct Western Apache religious practices are fully qualified to answer. I will say, nonetheless and with utmost deference, that many Western Apache people view the desecration, or even disrespect, of holy places, most especially in pursuit of profit or other individual gain at others' cost, as an affront to all that is right and good. Many Western

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[10] U.S. Department of Agriculture Tonto National Forest (2015) National register nomination for the Chi'chil Biłdagoteel national register historic district, Pinal County, Arizona (U.S. National Park Service, National Register of Historic Places, approved March 4, 2016). Retrieved from http://bloximages.chicago2.vip.townnews.com/tucson.com/content/tncms/assets/v3/editorial/8/b1/8b10c3b0-77ed-560b-bd5f-bc0552df7e7c/56e363c6b87ba.pdf.pdf

Apache people also view such reckless behavior as extremely dangerous intrusions of secular concerns into highly sensitive and sacred domains of limitless natural and supernatural forces.

31. The late Nick Thompson, a Western Apache resident of Cibecue, White Mountain Apache Tribe lands, and a knowledgeable authority on Western Apache places, culture, and religion, made this point in an interview many years ago with Keith H. Basso using terms I would never attempt to improve upon: "If you hurt one of these holy places, it's very, very bad. You will hurt yourself and all your people if you do that. You must always show respect and take care of those holy places. Each one helps us in some way. We depend on them to help us live right, to live the way we should. So we leave them alone except when we really need them. We pray to them to help us. If we hurt them they would stop helping us – and we would only know trouble."[11]

Respectfully submitted,

/s/ John R. Welch
John R. Welch, Ph.D.

Dated: January 11, 2021

[11] Hon. Terry Rambler (2019). Comment on behalf of San Carlos Apache Tribe on the Draft Environmental Impact Statement for the Resolution Copper Project and Land Exchange, submitted to U.S. Department of Agriculture Tonto National Forest, December 23, 2019, pp. 12-13.

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EDUCATION

- 1996 Ph.D. Anthropology, University of Arizona, Tucson, U.S.
- 1985 M.A. Anthropology, University of Arizona, Tucson, U.S.
- 1983 A.B. Anthropology (Honors), Spanish, Hamilton College, Clinton, New York, U.S.

INTERESTS

- *Sovereignty-driven cultural and biophysical heritage stewardship and research* Keywords: Sovereignty-driven research; Community-based conservation; Customary law and practice; Cultural resources management; Historic preservation; Indigenous archaeology; Activist archaeology; Resistance; American Southwest and British Columbia

- *Western Apache archaeology, history, and human ecology in the Arizona uplands* Keywords: Apache archaeology; Trail archaeology; Sacred sites protection; Land claims; Heritage tourism and culturally appropriate economic development; Indigenous management models

COURSE PORTFOLIO

- *Archaeological Resource Management*
- *Cultural Heritage Crime*
- *Co-Management with Indigenous Peoples*
- *Heritage Resource Management Law & Policy*

EMPLOYMENT

April 2005 – Current

- **Professor & Director of the Professional Graduate Program in Heritage Resource Management**, jointly appointed in the Department of Archaeology and School of Resource and Environmental Management, Simon Fraser University

February 2018 – Current

- **Director, Landscape and Site Preservation Program**, Archaeology Southwest, Tucson. Lead collaborative, preservation-focused, management, advocacy, and tribal and public engagement initiatives.

January 2005 – Current

- **Advisor, Consulting Historian, and Expert Witness**, White Mountain Apache Tribe, Whiteriver, Arizona & San Carlos Apache Tribe, San Carlos, Arizona. Assist in redeveloping the Fort Apache Historic District, reclaiming lands erroneously excluded from the reservation, repatriating cultural items, and protecting sacred sites

September 2008–Current

- **Associate Faculty**, Archaeology, Arizona State Museum, University of Arizona, Tucson

April 2010–July 2013

- **Faculty Mentor**, White Mountain Apache – University of Arizona Western Apache Ethnography and GIS Field School

September 1998–June 2005

- **Visiting Scholar**, Department of Anthropology, University of Arizona, Tucson

September 1992–June 2005

- **Archaeologist**, U.S. Bureau of Indian Affairs (BIA), Fort Apache Agency, Whiteriver, Arizona
- Provided cultural heritage protection, planning, and compliance services for the federal agency administering White Mountain Apache Tribe trust lands

November 1996–Jan 2005

- **Tribal Historic Preservation Officer**, White Mountain Apache Tribe, Whiteriver, Arizona
- Established the Fort Apache Heritage Foundation 501(c)3; Managed research, intergovernmental consultation, environmental protection, and repatriation initiatives in support of White Mountain Apache heritage conservation and economic and community development

May 1996–September 2002

- **Archaeologist**, U.S. Dept of Interior, Emergency Rehabilitation Team. Cultural resource lead on interdisciplinary team that created treatment plans for wildfire-impacted federal and Indian lands

January 1998–May 2001

- **Associate Faculty** and chair of the Heritage Preservation Curriculum Committee, Northland Pioneer College, Holbrook, Arizona

September 1990–May 1991

- **Associate Faculty**, Human Sciences, Pima Comm. College, Tucson

August 1990–Dec 1993

- **Assistant Project Director**, Statistical Research Inc, Tucson
- Directed study of Tonto Basin and Verde River agricultural ecology and ethnohistory under contract to the U.S. Bureau of Reclamation

April 1992–October 1992

- **Gila Resource Area Archaeologist**, Safford District, U.S. Bureau of Land Management, Arizona
- Provided heritage preservation, research, and interpretation services

May 1990–August 1990

- **Archaeologist**, International Archaeological Research Institute Inc.
- Assisted with excavation and survey on island of Moloka'i, Hawaii

August 1983–Dec 1989

- **Teaching Assistant** and **Assistant Director**, Archaeological Field School, Anthropology, University of Arizona, Tucson

August 1988–June 1989

- **Archaeologist in Residence**, Fenster School, Tucson

FUNDING FOR RESEARCH AND RELATED SCHOLARLY PURSUITS

1. **Grant:** Mitacs Accelerate Internship Cluster Grant **Period:** 2019–2021 **Project Title:** Expanding Cultural Heritage Stewardship Knowledge and Capacity with Nlaka'pamux Nation Tribal Council and Teck Highland Valley Copper Operations **Funding:** Mitacs **Total:** $105,000 **Involvement:** Project Director **Collaboration:** I am recruiting HRM Professional Program students and matcing them with SFU faculty supervisors and one of the seven funded research internships to optimize Nlaka'pamux capacity building and research impacts from the Teck HVC operations.

2. **Grant:** Community Listening Foundations for District-Scale Interpretation of the Fort Apache and Theodore Roosevelt School National Historic Landmark **Period:** 2020–2021 **Funding:** Arizona Humanities Council **Total:** $10,000 **Involvement:** Project Director **Collaboration:** I will work with Cline Griggs, fellow Fort Apache Heritage Foundation Board, to plan and facilitate about 20 focus group sessions to learn what Apache community members regard as the desired future for Fort Apache and what stories they want to be told, and how, during the next phase of property interpretation and presentation.

3. **Grant:** Conservation Assessment Program for Fort Apache and Theodore Roosevelt School National Historic Landmark **Period:** 2019–2020 **Funding:** American Institute for Conservation **Total:** $20,000 **Involvement:** Project Director **Collaboration:** I planned and facilitated an

interdisciplinary review by five established professionals of the 26 historic buildings and associated collections that constitute the Fort Apache Historic Park, resulting in a detailed assessment of conservation issues to serve as the plan for the next phase of property preservation and presentation.

4. **Grant:** Interdisciplinary Workshop Grant **Period:** 2018–2019 **Project Title:** Cultural Heritage Crime and Forensic Sedimentology: Global Theoretical and Local Tactical Responses to Thwart and Prosecute Heritage Destruction and Theft **Funding:** Wenner-Gren Foundation for Anthropological Research **Total:** $20,000 **Involvement:** Project Director **Collaboration:** I planned and facilitated a workshop at Fort Apache to focus theoretical perspectives and practical tools on the prevention, investigation, and prosecution of heritage Resource Crime.

5. **Grant:** SSHRC Research Connections Grant **Period:** 2018–2020 **Project Title:** A Knowledge Creation Plan for Advancing Stó:lō Collaborative Resource Stewardship and Shared Land-Use Decision-Making in Southwest British Columbia **Total:** $45,676 **Involvement:** Co-Principal Investigator **Collaboration:** I support David M. Schaepe (Sto:lo Research and Resource Management Centre) and Natasha Lyons (Ursus Consulting & SFU Archaeology) in convening a workshop and preparing a white paper to guide the first-ever Sto:lo Nation research plan.

6. **Contract:** Research and Consulting Contract **Period:** 2018–2022 **Project Title:** Technical Assistance in Heritage Site Restoration and

Preservation **Funding**: U.S. Bureau of Indian Affairs **Total:** $875,000 **Involvement:** Principal Investigator **Collaboration:** I am a principal in Archaeology Southwest's assistance to BIA in preventing and investigating archaeological resource crime, in repairing damages to affected sites, and in creating training and outreach materials.

7. **Grant:** Graduate Research Fellowship Grant **Period:** 2017–2018 **Project Title:** Climate Change Adaptation Planning in Two Indigenous Conservation Organizations. **Funding:** Pacific Institute for Climate Studies **Total:** $5000 **Involvement:** Project Director **Collaboration:** I direct and support master's research by Vivian Gauer with the Fort Apache Heritage Foundation and the Stolo Research and Resource Management Centre.

8. **Grant:** Open Educational Resource Development Grant (SFU) **Period:** 2016–2017 **Project Title:** OER Assessment and Development for a New Breadth-Humanities Course, Heritage Stewardship in Global Context (ARCH 286) **Funding:** SFU Library OER Fund **Total:** $3000 **Involvement:** Project Director **Collaboration:** Facilitate collaborations among Erin Hogg, Hope Power, and other SFU colleagues in identifying and refining OERs for ARCH 286.

9. **Grant:** Publication Grant **Awarded:** 2016 **Period:** 2016–2017 **Project Title:** Digital Publication of the SFU Archaeology Press Catalogue **Funding:** SFU Scholarly Digitization Fund **Total:** $4960 **Involvement:** Principal

Investigator **Collaboration:** Facilitate creation of a comprehensive online compendium of the 31 books published by SFU Archaeology Press.

10. **Grant:** Research Grant **Period:** 2016 **Project Title:** 'Ground Truthing' of Ancestral Pueblo Settlement of the Southern and Western Flanks of Arizona's White Mountains, White Mountain Apache Tribe Lands, Arizona. **Funding:** Arizona Archaeological and Historical Society **Total:** $500 **Involvement:** Project Director **Collaboration:** I led seven colleagues on a mobile symposium to visit and boost documentation for 16 Ancestral Pueblo villages.

11. **Contract:** Professional Consulting Services **Period:** 2016 **Project Title:** San Carlos Apache Strike Team **Funding:** San Carlos Apache Tribe, Arizona **Total:** $19,650 **Involvement:** Cultural heritage consultant **Collaboration:** I supported the Apache Strike Team's opposition to the Proposed Resolution Copper Mine by conducting historical research and preparing strategic assessments of documents and plans prepared by the mining company, U.S. Forest Service, and their consultants.

12. **Contract/Grant:** Research and Exhibition / Outreach **Period:** 2015–2016 **Project Title:** Scowlitz Virtual Museum Companion Project **Funding:** SFU Community Engagement Fund **Total:** $10,000 **Involvement:** Co-Principal Investigator **Collaboration:** I support Kate Hennessey (SFU SIAT) and David Schaepe in developing and installing twin exhibits—in the SFU Museum of Archaeology and Ethnology and

the Sto:lo Research and Resource Management Centre—to expand the reach of the Virtual Museum of Canada website dedicated to the Scowlitz ancestral village site.

13. **Contract/Grant:** Professional Consulting Services **Period:** 2015–2016 **Project Title:** A Cultural Heritage Program for the San Carlos Apache **Funding:** Resolution Copper Mining Corporation, Arizona **Total:** $10,578 **Involvement:** Cultural heritage consultant **Collaboration:** I supported Statistical Research Inc. Foundation and Apache colleagues in creating a values-based program to protect and perpetuate Apache cultural heritage in the face of changing social, economic and biophysical environments.

14. **Grant:** Curriculum Development Research **Period:** 2015–2016 **Project Title:** Assessment of a Required Graduate Course, *Social Science of Resource Management: Theories of Cooperation* (REM 601) **Funding:** SFU Teaching and Learning Center **Total:** $5000 **Involvement:** Project Director **Collaboration:** I worked with Soudeh Jamshidian and other SFU colleagues to survey students and refine REM 601, the social science core course in the Master's of Resource Management (MRM) program.

15. **Grant:** Curriculum and Credential Development **Period:** 2015–2016 **Project Title:** A Professional Online MA Program in Heritage Resource Management (HRM) **Funding:** SFU Professional Online Scholarship and Training (POST) grant **Total:** $100,000 **Involvement:** Program Director **Collaboration:** I facilitate and direct SFU and

HRM industry colleagues in creating and delivering a new Master's program, starting fall 2016.

16. **Grant:** Research Grant **Period:** 2014–2017 **Project Title:** Trails of the Apache **Funding:** SSHRC Small Institutional **Total:** $6950 **Involvement:** Principal Investigator **Collaboration:** I direct landscape-scale efforts to document ancient Apache activity hubs using least-cost path GIS analyses to identify trails and the residential, agricultural, and foraging localities they connect.

17. **Grant:** Research and Internet Publication Grant **Period:** 2013–2015 **Project Title:** People of the River: Sq'éwwets **Funding:** Virtual Museums of Canada **Total:** $193,000 **Involvement:** Collaborator **Collaboration:** I support the team led by David Schaepe and Natasha Lyons in facilitating virtual repatriation to the Scowlitz community of all information and other materials relating to their most important ancestral village site.

18. **Grant:** Publication Grant **Awarded:** 2013 **Period:** 2013–2014 **Project Title:** Digital Publication of Documents on the History and Management of White Mountain Apache Lands, Arizona **Funding:** SFU Scholarly Digitization Fund **Total:** $5000 **Involvement:** Principal Investigator **Collaboration:** I helped Ian Song (SFU Library) and students develop a text-searchable archive of documents relating to (mis)management of Apache lands.

19. **Contract:** Contract **Awarded:** 2012 **Period:** 2012–2013 **Project Title:** History of the Northern Boundary Dispute, White Mountain Apache Reservation **Funding:** U.S. Bureau of Indian Affairs **Total:** $17,380 **Involvement:** Principal Investigator **Collaboration:** I supported Robert D. Brauchli (White Mountain Apache Legal Department) in prosecuting a White Mountain Apache claim to lands erroneously excluded from their reservation.

20. **Grant:** Management grant **Awarded:** 2012 **Period:** 2012–2013 **Project Title:** Digitizing FAIRsite, the Fort Apache Indian Reservation heritage site inventory **Funding:** The Digital Archaeological Record (tDAR) **Total:** $2680 **Involvement:** Principal Investigator **Collaboration:** I supported Frank McManamon (Arizona State U and Digital Antiquity), Matt Peeples (Archaeology Southwest), and Mr. Mark Altaha (White Mountain Apache Tribe) in designing and trialing a system to incorporate existing site files into a permanent records repository, complete with a digital index to enable heritage site research and conservation.

21. **Grant:** Research Grant **Awarded:** 2011 **Period:** 2011–2014 **Project Title:** CNH: Long-term vulnerability and resilience of coupled human-natural ecosystems to fire regime and climate changes at an ancient Wildland Urban Interface **Funding:** National Science Foundation Grant 1114898 **Total:** $1,498,027 **Involvement:** Co-Investigator **Collaboration:** I supported Tom Swetnam (U Arizona), Chris Roos (Southern

Methodist U), T.J. Ferguson (U Arizona) in integrating dendrochronology, archaeology, and ethnography in pursuit of recommendations for forest, fuels and fire management in the upland Southwest U.S.

22. **Grant:** Research and Curriculum Development Grant **Awarded:** 2011 **Period:** 2012–2014 **Project Title:** Tribal Historic Preservation Officer Toolkit: Essential Guide for Tribal Programs **Funding:** U.S. National Park Service **Total:** $39, 634 **Involvement:** Project Consultant **Collaboration:** I supported John Brown (Narragansett Tribe), D. Bambi Kraus (National Association of Tribal Historic Preservation Officers), and an advisory team by conducting surveys, compiling comparable toolkits, and facilitating consultations to build a curriculum to train tribal officials in the functions of tribal historic and cultural preservationists.

23. **Grant:** Research Grant **Awarded:** 2010 **Period:** 2010–2013 **Project Title:** Western Apache Ethnography and GIS Research Experience for Undergraduates **Funding:** National Science Foundation Grant 1004556 **Total:** $254,694 **Involvement:** Joint Investigator **Collaboration:** I supported Karl Hoerig (White Mountain Apache Cultural Center) and T.J. Ferguson (U Arizona) in running a community-based field school that maps traditional use sites across Western Apache homelands.

24. **Grant:** Internship Grant **Awarded:** 2010 **Period:** 2011–2013 **Project Title:** Community land-use planning on First Nations reserves and the

influence of land tenure: A case study with the Penticton Indian Band **Funding:** MITACS Accelerate **Total:** $30,000 **Involvement:** Co-Preceptor **Collaboration:** Murray Rutherford (SFU School of Resource and Environmental Management), the Penticton Indian Band Development Corporation, and I supervised intern Marena Brinkhurst's study of how different forms of land tenure influence the process and results of land use planning on Penticton Indian Band lands.

25. **Contract:** Contract **Awarded:** 2010 **Period:** 2010–2012 **Project Title:** History of the Northern Boundary Dispute, White Mountain Apache Reservation **Funding:** U.S. Bureau of Indian Affairs **Total:** $9950 **Involvement:** Principal Investigator **Collaboration:** I supported Robert D. Brauchli (White Mountain Apache Legal Department) in prosecuting a White Mountain Apache claim to lands illegally excluded from their reservation.

26. **Grant:** Publication Grant **Awarded:** 2010 **Period:** 2010–2011 **Project Title:** Documenting the Management History of White Mountain Apache Tribe Lands, Arizona **Funding:** SFU Scholarly Digitization Fund **Total:** $5000 **Involvement:** Principal Investigator **Collaboration:** Ian Song (SFU Library) and I engaged students to build a digital archive of documents relating to federal (mis)management of White Mountain Apache lands.

27. **Contract:** Contract **Awarded:** 2010 **Period:** 2010–2011 **Project Title:** Intergovernmental protocol for Heritage Site Protection, Tla'amin

Territory **Funding:** City of Powell River **Total:** $3770 **Involvement:** Principal Investigator **Collaboration:** I facilitated efforts by First Nation, City, and Provincial officials to improve consultation and protection for heritage sites threatened by proposed land use changes.

28. **Grant:** Internship Grant **Awarded:** 2010 **Period:** 2010–2011 **Project Title:** An Evaluation of Cultural Heritage as a Basis for First Nations Land Use Planning **Funding:** MITACS Accelerate **Total:** $30,000 **Involvement:** Preceptor **Collaboration:** David Schaepe (Stó:lo Research and Resource Management Centre), Ch-ihl-kway-ukh Forest Limited officials, and I supervised an intern Karen Brady's development of land use planning tools grounded in Stó:lo cultural precepts and site-specific knowledge.
29. **Contract:** Contract **Awarded:** 2010 **Period:** 2010 **Project Title:** Archaeological Site Inspection, Savary Island Dock Enhancement, Tla'amin First Nation Territory, British Columbia **Funding:** Powell River Regional District **Total:** $6970 **Involvement:** Principal Investigator **Collaboration:** Megan Caldwell (U Alberta), Chris Springer (SFU) and I conducted pre-project heritage site identification surveys and project monitoring to avoid dock expansion impacts to heritage sites.
30. **Grant:** Management grant **Awarded:** 2009 **Period:** 2010–2011 **Project Title:** Pilot Assessment of the Archaeological Sensitivity of the Surface of the Fort Apache and Theodore Roosevelt School Historic District, Arizona **Funding:** Fort Apache Heritage Foundation **Total:** $7100

Involvement: Principal Investigator **Collaboration:** I guided student crews led by Jenifer Lewis in gathering detailed data to identify significant areas within the 300-acre fort and residential school site.

31. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2011 **Project Title:** Community forests as a new model for forest management in British Columbia **Funding:** Social Sciences and Humanities Research Council **Total:** $136,820 **Involvement:** Joint Investigator **Collaboration:** I supported Evelyn Pinkerton's (SFU) interdisciplinary assessments of ecological, economic, cultural, and policy issues to promote community forests as alternatives to industrial timber management models.

32. **Grant:** Major Collaborative Research Initiative **Awarded:** 2007 **Period:** 2008–2016 **Project Title:** Intellectual Property in Cultural Heritage **Funding:** Social Sciences and Humanities Research Council **Annual:** $400,000 **Total:** $2,500,000 **Involvement:** Joint Investigator **Collaboration:** I support and am a Steering Committee member and working group co-chair for George Nicholas' (SFU) major collaborative research initiative (MCRI) examining relationships among past legacies and contemporary assertions of cultural and intellectual property rights and interests.

33. **Contract:** Consultant contract **Awarded:** 2008 **Period:** 2008–2009 **Project Title:** Tribal Engagement in Fort Lowell Master Plan **Funding:** Pima County and City of Tucson, Arizona **Total:** $8900 **Involvement:** Principal Investigator

Collaboration: I served as tribal liaison in the planning efforts and contributed to draft and final reports.

34. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2010 **Project Title:** Ancestral Knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites **Funding:** Copper Fox Metals, Inc. **Total:** $15,000 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.
35. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2009 **Project Title:** Tourism Development By and For the White Mountain Apache Tribe **Funding:** Coastal Rainforest Alliance and Harvard University Project on American Indian Economic Development **Total:** $800 **Involvement:** Principal Investigator
36. **Grant:** Strategic Research Grant **Awarded:** 2007 **Period:** 2008–2011 **Project Title:** Sovereignty and stewardship: Expanding First Nations conservation and collaborative capacities **Funding:** Aboriginal Research Program, Social Science and Humanities Research Council **Total:** $219,000 **Involvement:** Principal Investigator **Collaboration:** I coordinated participant-driven research with Tla'amin, Tahltan, Scowlitz and Katzie First Nations to create and implement plans to advance stewardship-based sovereignty.
37. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008 **Project Title:** Ancestral knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites. **Funding:** Fortune Minerals, Inc.

Total: $500 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.

38. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008 **Project Title:** Ancestral knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites **Funding:** Copper Fox Metals, Inc. **Total:** $10,000 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.

39. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2009 **Project Title:** Evaluating ecological, economic, and social trade-offs of managing for valued species **Funding:** BC Forest Science Program **Total:** $80,000 **Involvement:** Joint Investigator **Collaboration:** I supported Evelyn Pinkerton's (SFU) interdisciplinary assessment of the value spectra linked to non-timber forest flora. Other team members included K. Lertzman and M. Rutherford (SFU), U Toronto (S. Kant), and Kamloops First Nation (J. McGrath).

40. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008 Community Resistance as a Window into Customary Conservation Policy and Practice **Funding:** Social Sciences and Humanities Research Council **Total:** $4950 **Involvement:** Principal Investigator **Collaboration:** I compiled oral and documentary histories in support of R. Ewing's MA thesis and repatriation studies. Non-SFU partners: Arizona State Museum (U Arizona); Peabody Museum, Harvard; Glenbow Museum, White Mountain Apache Tribe, Tohono O'odham Nation, Hopi Tribe.

41. **Grant:** Equipment Grant **Awarded:** 2004 **Period:** 2005–2008 **Project Title:** First Nations Cultural and Environmental Resource Management Equipment Infrastructural Development **Funding:** Canada Foundation for Innovation, BC Knowledge Fund, SFU Matching Funds **Total:** $312,000 **Involvement:** Principal Investigator

42. **Grant:** Research Grant **Awarded:** 2005 **Period:** 2005–2007 **Project Title:** A Survey of First Nations Heritage Stewardship **Funding:** SFU President's Research Grant **Total:** $10,000 **Involvement:** Principal Investigator

43. **Grant:** Research Grant **Awarded:** 2005 **Period:** 2005–2007 **Project Title:** Seals of Fate **Funding:** SFU Discovery Parks **Total:** $5000 **Involvement:** Principal Investigator

44. **Grant:** Operating Grant **Awarded:** 2002 **Period:** 2003–2006 **Project Title:** Preservation Plan Implementation, Kinishba Ruins National Historic Landmark **Funding:** Save America's Treasures Program, White House Millennium Council, Washington, DC **Total:** $383,000 **Involvement:** Principal Investigator **Collaboration:** Arizona State grant ($100,000) provided matching funds to provide stabilization treatments for the entire site.

45. **Grant:** Research Grant **Awarded:** 2003 **Period:** 2003–2005 **Project Title:** Cultural Affiliation Assessment, White Mountain Apache Tribal Lands **Funding:** National NAGPRA Office, U.S. National Park Service **Total:** $75,000 **Involvement:** Principal Investigator **Collaboration:** I facilitated intertribal collaboration resulting in the repatriation of

collections and a guide to the groups affiliated with tribal lands.

46. **Grant:** Research Grant **Awarded:** 2002 **Period:** 2003–2005 **Project Title:** The Battle of Cibecue: Investigation and Preservation Planning for the Fight that Changed the Apache World **Funding:** American Battlefield Protection Program, U.S. National Park Service **Total:** $24,000 **Involvement:** Principal Investigator **Collaboration:** Chip ColwellChanthaphonh (Center for Desert Archaeology, Tucson) and I developed and published a study.

47. **Grant:** Operating Grant **Awarded:** 1998 **Period:** 1998–2005 **Project Title:** White Mountain Apache Tribe Historic Preservation Office **Funding:** U.S. National Park Service **Total:** $480,000 **Involvement:** Principal Investigator

48. **Grant:** Operating and Training Grant **Awarded:** 2001 **Period:** 2002–2004 **Project Title:** Undergraduate Research Experience in Native American Archaeology and Heritage Preservation: A Cooperative Project of the University of Arizona and the White Mountain Apache Tribe (co-PI with Barbara J. Mills) **Funding:** U.S. National Science Foundation Research Experiences for Undergraduates **Total:** $221,999 **Collaboration:** Mills directed the U Arizona field school and research agendas Welch directed the White Mountain Apache stewardship agenda.

49. Strategic Grant **Awarded:** 2002 **Period:** 2002–2003 Organization Development for the Fort Apache Heritage Foundation **Funding:** National Trust for Historic Preservation Locals Initiative

Total: $2500 **Involvement:** Principal Investigator

50. **Grant:** Operating Grant **Awarded:** 2001 **Period:** 2001–2003 **Project Title:** Exterior Restoration, Fort Apache Officers Quarters no. 205 **Funding:** Heritage Fund, Arizona State Parks **Total:** $91,100 **Involvement:** Principal Investigator
51. **Grant:** Operating Grant **Awarded:** 2001 **Period:** 2001–2003 **Project Title:** Nohwiki'i Nohwanane' (Bringing Home the Ancestors): The Western Apache Repatriation Working Group **Funding:** NAGPRA Program, U.S. National Park Service **Total:** $71,381 **Involvement:** Principal Investigator **Collaboration:** I supported Western Apache Repatriation Working Group consultations with and visits to major U.S. museums.
52. **Grant:** Operating Grant **Awarded:** 1999 **Period:** 1999–2002 **Project Title:** Preservation Treatments to the Fort Apache Historic District **Funding:** Save America's Treasures Program, White House Millennium Council, Washington, DC **Total:** $313,000 **Involvement:** Principal Investigator
53. **Grant:** Operating Grant **Awarded:** 1998 **Period:** 1998–2000 **Project Title:** Rehabilitation of Fort Apache Officers Quarters no. 203. **Funding:** Heritage Fund, Arizona State Parks **Total:** $82,572 **Involvement:** Principal Investigator
54. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–2000 **Project Title:** Stabilization and Rehabilitation of Grasshopper Ruins **Funding:** University of Arizona Research Fund **Total:** $33,420 **Involvement:** Principal Investigator

55. **Grant:** Research Grant **Awarded:** 1997 **Period:** 1997–1999 **Project Title:** Western Apache Placenames Survey **Funding:** Historic Preservation Fund Grants to Indian Tribes, U.S. National Park Service **Total:** $49,900 **Involvement:** Principal Investigator **Collaboration:** I facilitated participation by representatives from Arizona's five Apache tribes in the documentation of toponyms.
56. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–1999 **Project Title:** Rehabilitation of Fort Apache Officers Quarters no. 207 **Funding:** Heritage Fund, Arizona State Parks **Total:** $101,190 **Involvement:** Principal Investigator
57. **Grant:** Research Grant **Awarded:** 1997 **Period:** 1997–1998 **Project Title:** Fort Apache Rehabilitation Planning **Funding:** U.S. Department of the Interior **Total:** $145,000 **Involvement:** Principal Investigator
58. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–1998 **Project Title:** Fort Apache Restoration Cost Assessment **Funding:** World Monuments Fund/American Express Foundation **Total:** $80,000 **Involvement:** Principal Investigator
59. **Grant:** Operating Grant **Awarded:** 1996 **Period:** 1996–1998 **Project Title:** Rehabilitation of Cibecue's Oldest Church **Funding:** Heritage Fund, Arizona State Parks **Total:** $34,775 **Involvement:** Principal Investigator
60. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1994–1998 **Project Title:** Nohwiki'i Nohwanane': Establishment of the Western Apache Repatriation

Working Group **Funding:** NAGPRA Program, U.S. National Park Service **Total:** $55,000 **Involvement:** Principal Investigator

61. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1995–1997 White Mountain Apache Tribe Museum Director Salary **Funding:** AZ Commission on Arts **Total:** $15,000 **Involvement:** Principal Investigator

62. **Grant:** Research Grant **Awarded:** 1995 **Period:** 1995–1996 **Project Title:** Needs Assessment for the White Mountain Apache Historic Preservation Office **Funding:** Historic Preservation Fund Grants to Indian Tribes, U.S. National Park Service **Total:** $30,000 **Involvement:** Principal Investigator

63. **Grant:** Research Grant **Awarded:** 1994 **Period:** 1994–1996 **Project Title:** Architectural Preservation and Visitor Use Planning for Kinishba Ruins National Historic Landmark **Funding:** Heritage Fund, Arizona State Parks **Total:** 22,532 **Involvement:** Principal Investigator

64. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1994–1994 **Project Title:** Emergency Stabilization, Sole Surviving Cavalry Stables at Fort Apache National Register District **Funding:** Heritage Fund, Arizona State Historic Preservation Office **Total:** $5000 **Involvement:** Principal Investigator

65. **Contract:** Contract **Awarded:** 1991 **Period:** 1991–1992 **Project Title:** Factors Affecting Agricultural Sustainability in Tadla, Morocco **Funding:** U.S. Agency for International

Development **Total:** $16,000 **Involvement:** Principal Investigator

FUNDING PROPOSALS UNDER ADJUDICATION

1. **Grant:** Research Grant **Period:** 2021–2022 **Project Title:** Intersectional analysis of the experiences of Canadian archaeologists **Funding:** Social Sciences and Humanities Research Council (Small SSHRC) **Total:** $7,000 **Involvement:** Principal Investigator, in collaboration with the Canadian Archaeological Association's Working Group on Equity and Diversity
2. **Grant:** Archives Management Grant **Period:** 2020–2022 **Project Title:** Inventory, Conservation, and Management Planning for the White Mountain Apache Tribe National Archives **Funding:** Mellon Foundation **Total:** $100,000 **Involvement:** Principal Investigator
3. **Grant:** Designer-Led Place-Making **Period:** 2021–2023 **Project Title:** Engaging Apache Cultural Preferences and Community Creativity in Site Presentation and Visitor Experience Planning for the Fort Apache and Theodore Roosevelt School National Historic Landmark, Arizona **Funding:** National Endowment for the Arts **Total:** $100,000 **Involvement:** Principal Investigator

CONTRIBUTIONS

Peer-Reviewed Journal Articles, Books, and Book Chapters

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26. Welch, J.R., and T.J. Ferguson (2016) Preservation Spotlight: Apache, Hopi, and Zuni Perspectives on Kinishba History and Stewardship—This Place is Protected. *Archaeology Southwest* 30(1): 2627.

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28. Welch, J.R., Karl Hoerig, and Stephen Grede (2016) *Visitor Guide to Kinishba*. White Mountain Apache Tribe Heritage Program, Fort Apache, Arizona (revised edition).

29. Welch, J.R. (2015) From the Garbage Czar, with Love (and apologies to the "real" Uncle Willy). *Arizona Anthropologist* (Centennial Edition):120-121.

30. Welch, J.R. (2014) Cultural Heritage: What is it? Why is it important? Fact Sheet Presented by the Intellectual Property Issues in Cultural Heritage Project (IPinCH). http://www.sfu.ca/ipinch/sites/default/files/resources/fact_sheets/ipinch_chfactsheet_final.pdf.

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35. Welch, J.R. (2013) IPinCH and Golder Associates Host Lively Forum on IP and Benefits-Sharing

Issues in International Cultural Resources Management. IPinCH Digest: 2013, Volume 4 (April 2013):1. http://www.sfu.ca/ipinch/news/ipinch-news/ipinch-and-golder-associates-host-livelyforum-ip-and-benefits-sharing-issues-inter.

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37. Welch, J.R., Rudy Ethelbah, and Larry Ethelbah (2013) Freda Ethelbah: Apache Living Treasure, Mickey Free Granddaughter. *Fort Apache Scout*, July 12, 2013, pages 1, 3.

38. Welch, J.R. (2012) Review of *Indigenous Peoples and the Collaborative Stewardship of Nature: Knowledge Binds and Institutional Conflicts***,** by Ross, Anne, Kathleen Pickering Sherman, Jeffrey G. Snodgrass, Henry D. Delcore, and Richard Sherman (Left Coast Press, Walnut Creek, California, 2011), *Journal of Anthropological Research* 68:129–130.

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43. Lewis, Jennifer, and J.R. Welch (2011) Historic Property Identification and Documentation Survey of Portions of the Fort Grant Prison, Arizona. Submitted to Arizona Department of Corrections.

44. Welch, J.R. (2011) Review of *From Cochise to Geronimo: The Chiricahua Apaches, 1874–1886*, by Sweeney, Edwin R. (University of Oklahoma Press, 2010) *Journal of Arizona History* 52:393– 395.

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46. Welch, J.R., Eric McLay, Michael Klassen, Fred Foster, and Robert Muir (2011) A Database of Unauthorized Heritage Site Alterations. *The Midden* 43(1):2–3.

47. Caldwell, Megan, Dana Lepofsky, John R. Welch, Chris Springer, and Nyra Chalmer (2011). Tla'amin-SFU Field School in Archaeology & Heritage Stewardship 2010 Field Report and 2011 Prospectus. Submitted to the Sliammon First Nation.

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50. Welch, J.R. (2010) Review of *Opening Archaeology: Repatriation's Impact on Research and Practice*, edited by Thomas W. Killion (School for Advanced Research Press, 2008) *American Antiquity* 75:201-202.

51. Lewis, Jennifer, and J.R. Welch (2010) Fort Apache-Theodore Roosevelt School (FA-TRS) Survey 2010, Fort Apache Historic Park, Arizona. Submitted to the Fort Apache Heritage Foundation.

52. Ewing, Robyn, T.J. Ferguson, and J.R. Welch (2009) Repatriation and Reburial Bibliography, http://tinyurl.com/cput3r, RefShare, Simon Fraser University, Burnaby, BC.

53. Jackley, Julia, Dana Lepofsky, John R. Welch, Megan Caldwell, Chris Springer, Morgan Ritchie,

Craig Rust and Michelle Washington (2008) Tla'amin-SFU Archaeology and Heritage Program 2009. *The Midden* 41(4):5–7.

54. Welch, J.R. (2009) Review of *Shadows at Dawn: A Borderlands Massacre and the Violence of History,* by Karl Jacoby (The Penguin Press, New York, 2008). *Journal of Arizona History* 50(4):403–404.

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55. Lepofsky, Dana, and John R. Welch (2009) Herring Archaeology in Tla'amin Territory. *Midden* 41(3):3.
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57. Johnson, Sarah, Dana Lepofsky, John R. Welch, Craig Rust and Michelle Washington (2008) Field School Update: Tla'amin-SFU Field School in Archaeology & Heritage Stewardship, *The Midden* 40(3):8–9.
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59. Welch, J.R., Mark Altaha, and Nicholas Laluk (2008) Decolonizing Kinishba Ruins National Historic Landmark. In *American Indian Places*, edited by Frances Kennedy, pp. 208–209. Houghton Mifflin Press, New York.
60. Welch, John R., and Karl A. Hoerig (2008) The White Mountain Apache Tribe. In "Nature-Based

Tourism and Tenuring Strategy," prepared by Peter W. Williams, Aaron Heidt, Jen Reilly, and Sydney Johnsen. Coastal First Nations Rainforest Solutions Project.

61. Welch, J.R. (2008) Review of *Zuni Origins: Toward a New Synthesis of Southwestern Archaeology*, edited by David A. Gregory and David R. Wilcox (University of Arizona Press, 2007) *Canadian Journal of Archaeology* 32:289–292.

62. Welch, J.R. (2008) Review of *Chiricahua Apache Enduring Power*, by Trudy Griffin-Pierce (University of Alabama Press, 2006) *American Anthropologist* 110(1):108–109.

63. Lepofsky, Dana, John R. Welch, Sarah Johnson, Craig Rust, and Lisa Wilson (with Michelle Washington, Georgia Combes, Hugh Prichard, and the 2008 students) (2008) Tla'amin-SFU Field School in Archaeology & Heritage Stewardship: 2008 Season Report and 2009 Prospectus. Department of Archaeology, Simon Fraser University.

64. Asp, Vera J., Knut Fladmark, John R. Welch, Robert Muir, and George Kauffman (2007) Tahltan and Tanzilla Villages. Ancestral Knowledge, Ethnohistory, and Archaeology of Two Tahltan Villages: Report on 2007 Fieldwork. Department of Archaeology, Simon Fraser University.

65. Welch, J.R., David V. Burley, Michael Klassen, and George P. Nicholas (2007) New Options for a Professional Preparation Curriculum at Simon Fraser University. *The Midden* 39(4):16–19.

66. Welch, J.R. (2007) Peer Review of Ndee: The Apache Experience, exhibit planning grant submitted by the Heard Museum, Phoenix, Arizona to the National Endowment of the Humanities.

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70. Welch, J.R., Karl A. Hoerig, and Raymond Endfield, Jr. (2005) Enhancing Cultural Heritage Management and Research through Tourism on White Mountain Apache Tribe Trust Lands. *The SAA Archaeological Record* 5(3):15–19.

71. Welch, J.R., Chip Colwell-Chanthaphonh and Mark Altaha (2005) Triangulating Perspectives on the Battle of Cibecue. *Glyphs* 56(6):7–8.

72. Welch, J.R., and T.J. Ferguson (2005) Cultural Affiliation Assessment of White Mountain Apache Tribal Lands (Fort Apache Indian Reservation). Final Report, prepared in fulfillment of a National NAGPRA Documentation and Planning Grant,

National Park Service. Historic Preservation Office, White Mountain Apache Tribe, Arizona.

73. Hoerig, Karl A., and J.R. Welch (2005) *Fort Apache Walking Tour Guide*. White Mountain Apache Tribe Heritage Program, Fort Apache, Arizona.
74. Welch, J.R., Karl Hoerig, and Stephen Grede (2005) *Visitor Guide to Kinishba Ruins*. White Mountain Apache Tribe Heritage Program, Fort Apache, Arizona.
75. Welch, J.R. (2004) Final Report: Kinishba National Historic Landmark Boundary Study. Report prepared under Contract for the National Park Service, Southwestern Regional Office, Santa Fe.
76. Welch, J.R. (2002) The Rodeo-Chediski Fire and Cultural Resources. *Arizona Archaeological Council Newsletter* 26(3):1–3.
77. Welch, J.R. (2001) The End of Prehistory. *Anthropology News*, May 2001, pp. 9–10.
78. Welch, J.R. (2000) Old Fort Apache: A Tribe's Struggle to Take the Best Parts of the Past into the Future. *Heritage Matters*, October 2000, pg. 6.
79. Welch, J.R. (2000) The New Battle for Old Fort Apache. *White Mountain Magazine* 46:22–23, 116–117 (Summer).
80. Welch, J.R., with George Pinter, Nancy Mahaney, Ngozi Robinson, and Bambi Kraus (2000) *Ndee La'ade: Gathering of the People*. White Mountain Apache Tribe, Whiteriver, Arizona.
81. Welch, J.R., Nancy Mahaney, and Ramon Riley (2000) The Reconquest of Fort Apache: The White

Mountain Apache Tribe Reclaims its History and Culture. *CRM* 23(9):16–19.

82. Welch, J.R., and Ramon Riley (1998) The Reconquest of Apachería: Apaches Reclaim their History and Culture. *Ciencia Hoi*.

83. Welch, J.R. (1998) White Mountain Apache Heritage Program Operations and Challenges. *Bulletin, Society for American Archaeology* 16(1):8–11.

84. Welch, J.R. (1998) *Arch-Bark*: Smokescreen or Shortcut? *Glyphs* 49(2):14

85. Welch, J.R. (1997) Did Archaeoastronomy Begin at the Sabino Canyon Ruin? *Old Pueblo Archaeology* 10:1–5.

86. Welch, J.R. (1997) Origins of the White Mountain Apache Heritage Program. *Bulletin, Society for American Archaeology* 15(5):26–28.

87. Welch, J.R. (1996) Archaeological Measures and Social Implications of Agricultural Commitment. Doctoral dissertation, Department of Anthropology, University of Arizona. University Microforms, Ann Arbor, Michigan.

88. Welch, J.R. (1992) Book Note: The Fite Ranch Project, by Yvonne R. Oakes, *Kiva* 57(1):281.

89. Welch, J.R. (1989) Early Investigations at the Sabino Canyon Ruin. Archaeology in Tucson, *Institute for American Research Newsletter*, Summer 1989, pp. 4–6.

90. Welch, J.R. and Aamir Rashid Mufti (1983) Structuralism and Systems of Folk Classification.

Northeastern Anthropological Association Newsletter, Fall, pp. 1–4.

Selected Conference Presentations and Invited Lectures, Colloquia, Seminars

1. Welch, J.R, and the Archaeology Southwest-BIA ARPA Initiative Team (2020) 2020 Perspectives and Tools for Addressing Archaeological Resource Crime in Indian Country: Prevention, Detection, Investigation, Remediation. Webinar invited by the Arizona State Site Stewards, November 12, 2020.
2. Welch, J.R. (2020) A Tale of Two Cities: Casa Malpais, Kinishba, and the Elusive Promise of Archaeological Tourism. Archaeology Southwest Café, May 5, 2020, https://www.archaeologysouthwest.org/event/why-you-should-experience-casa-malpais-and-kinishba/
3. Welch, J.R. (2019) The White Mountain Experiment in Community-Based Site Protection.Archaeology Southwest Tea Series, May 6, 2019, https://www.youtube.com/watch?v=lmTIrcN5PYo

   4. Welch, J.R. (2018) Landscapes, Consultations, Archaeologies, and the Promise of Full-Spectrum Heritage Resource Management. Invited keynote. Annual meeting of the Federal Columbia River Power System Cultural Resource Program, Kalispell, Montana, November 8, 2018

5. Welch, J.R. (2018) Fort Apache: Conflict, Conservation, and (Re)Conciliation(?) in Indian Country. Haffenreffer Museum 2018 Shepard

Krech III Lecture, Brown University, April 5, 2018. https://www.youtube.com/watch?v=qCj_xKgVUNc &index=1&list=PL031FD246CE1CDC15&t=0s

6. Lyons, Natasha, Lisa Hodgetts, Kisha Supernant, John R. Welch (2018) What Does #MeToo Mean for Archaeology? Paper presented in "Unsettling Archaeology" symposium at the 51st Annual Meeting of the Canadian Archaeological Association, Winnipeg, Manitoba May 3, 2018

7. Welch, J.R., David Burley, Erin Hogg, Kanthi Jayasundera, David Maxwell, George Nicholas, Janet Pivnick, Christopher D. Dore, and Michael Klassen (2017) Digital bridges across disciplinary, practical and pedagogical divides: An Online Professional Master's Program in Heritage Resource Management. Paper presented in "The 'Other Grand Challenge': Archaeological Education & Pedagogy in the Next 50 Years," Chacmool Conference, Calgary, Alberta, November 9, 2017.

8. Welch, J.R. (2017) Fort Apache: Pasts, Presents, Futures. Summer Public Lecture Series, Fort Vancouver, Washington, July 20. http://www.friendsfortvancouver.org/archeology-lecture-seriesjuly-2017/

9. Welch, J.R. (2017) Open Eyes, Open Minds, Open Arms, and Open Hearts Open Archaeology. Paper presented at the Society for American Archaeology Annual Meeting, Vancouver, April 1.

10. Welch, J.R., Francis Vigil, and Rachel A. Loehman (2015) Toward a Sovereignty-Driven Paradigm for Transdisciplinary Research on Social-Ecological Systems. Paper presented at the Society for

American Archaeology Annual Meeting, San Francisco, California, April 17.

11. Welch. J.R. (2015) Tribal Historic Preservation Officer Toolkit Training Workshop: Quick Start Guide—Essential Guide for Tribal Programs. Full-day workshop presented to 20 tribal government officials at the National Tribal Preservation Conference, Laguna Pueblo lands near Albuquerque, New Mexico, August 17.
12. Schaepe, David M., Bill Angelbeck, John R. Welch, and David Snook (2015) Archaeology as Therapy: Linking Community Archaeology to Community Health. Paper presented at the meeting of the Society for Applied Anthropology, Pittsburgh, Pennsylvania, March 28.
13. Welch, John R. (presenter and discussant) (2015) Sovereignty-Driven Research Ethics: Beyond Baseline Compliance, Consent and Limitation of Liability. Panel discussion, Indigenous Research

    Ethics conference, Vancouver, February 19. https://indigenousresearchethics2015.wordpress.com/
14. Welch. J.R. (2015) Tribal Historic Preservation Officer Toolkit Training Workshop: Essential Guide for Tribal Programs. Full-day workshop presented to 22 tribal government officials at the National Tribal Preservation Conference, Milwaukee, Wisconsin, September 11.
15. Welch, John R. (presenter) (2014) Fire and Humans in Resilient Ecosystems. Curriculum development workshop for teachers, Laboratory for

Tree-Ring Research and College of Education, University of Arizona, Tucson, June 23.

16. Welch, John R. (organizer and moderator) (2014) CRM-ology: Toward a Research Design for Improving the Dominant Form of Archaeological Practice. Forum, Society for American Archaeology Annual Meeting, Austin, Texas, April 25.

17. Hogg, Erin A., and John R Welch (2014) What does Collaborative Archaeology Mean to You? Community-Engagement in Field Schools, Research Projects, and Consulting. Poster presented at the meeting of the Society for American Archaeology, Austin, Texas, April 25.

18. Ruth Aloua and John R. Welch (2014) Closing the Gap Between Management Practice and Policy at a National Historical Park in Hawai'i. Paper presented in the invited symposium, Society for Applied Anthropology, Albuquerque, New Mexico.

19. Hogg, Erin, and John R. Welch (2013) Do you Collaborate? Community Engagement in Field Schools, Research, and Consulting Projects. Poster presented at the meeting of the Canadian Archaeological Association, Whistler, B.C, May 17, 2013.

20. Welch, John R., and Ian Lilley (organizers and moderators) (2013) Beyond the Equator

    (Principles): Community Benefit Sharing in Relation to Major Land Alteration Projects and Associated Intellectual Property Issues in Cultural Heritage. Forum, Society for American Archaeology Annual Meeting, Honolulu, Hawaii. April 5.

21. Welch, John R., and Karl A. Hoerig (2013) Fort Apache Heritage Foundation. Presentation in symposium, Bellwhether Nonprofits of the Southwest. Society for American Archaeology Annual Meeting, Honolulu, Hawaii. April 4.
22. Atalay, Sonya, Lee Rains Clauss, Randall H. McGuire, and John R. Welch (organizers) (2013) Archaeology, Relevance, and Activism. Seminar, Amerind Foundation, Arizona. February 27 - March 3.
23. Welch, John R. (2013) Placemaking and Displacement at Fort Apache and the Theodore Roosevelt School. Archaeology Café public lecture, sponsored by Archaeology Southwest, available at http://www.archaeologysouthwest.org/event/archaeology-cafe-tucson-placemaking-anddisplacement-at-fort-apache-and-theodore-roosevelt-school/.
24. Welch, John R. (2012) Home, Home at the Fort: A Millennium of Place Making and Displacement at Fort Apache and TR School National Historic Landmark, Arizona. Environmental Science Program Seminar, Thompson Rivers University, Kamloops, British Columbia.
25. Welch, John R., and Neal Ferris (2011) Making a Sustainable Archaeology. Society for American Archaeology Annual Meeting, Sacramento, California.
26. Ferris, Neal, John R. Welch, and Aubrey Cannon (2011) Capacities for a Sustainable Archaeology. Sustainable Archaeology Workshop, Taipei, Taiwan.

27. Lepofsky, Dana, John R. Welch, and Michelle Washington (Siemthlut) (2011) The Tla'amin-SFU Field School in Archaeology and Heritage Stewardship. People of the River Conference, May 2011.

28. Welch, J.R., Dana Lepofsky, and Michelle Washington (Siemthlut) (2010) Assessing Collaboration with the Sliammon First Nation in a Community-Based Heritage Research and Stewardship Project, in "Perspectives on the Ethical Engagement of Indigenous Peoples In Archaeological Practice" symposium organized by Kerry Thompson, annual meeting of the Society for American Archaeology, St. Louis, Missouri.

29. Speller, C., D. Lepofsky, A. Benson, M. Washington, M. Caldwell, J.R. Welch, D. Yang. (2010) Reconstructing Past Abundance, Diversity, and Use of Herring in the Pacific Northwest of North America, International Council for Archaeozoology, 11th Annual Conference, Paris, France, August 23–28.

30. Welch, J.R., Siemthlut (Michelle Washington) and Dana Lepofsky (2009) *Getting to 100*: Harmonizing Community, Research, and Societal Interests Through the Tla'amin First NationSimon Fraser University Field School in Archaeology and Heritage Stewardship, in "Practicing Public Archaeology: Contemporary Issues of Engagement and Action" symposium organized by Paul Thacker, annual meeting of the Society for Applied Anthropology, Santa Fe, New Mexico.

31. Laluk, Nicholas C. and J.R. Welch (2008) Interpretation and Indigenation of Place: Fort

Apache, Arizona, in "Archaeology of the Recent Indigenous Past" symposium organized by Nina Swidler, annual meeting of the Society for Historical Archaeology, Albuquerque, New Mexico.

32. Welch, J.R., Vera J. Asp and George Kaufmann (2008) Linking Documentary and Material Histories Through Community-Based Archaeology in Tahltan Territory, British Columbia, in "Ways of Becoming Athapaskan" symposium organized by H. Kory Cooper, B. Sunday Eiselt, and J.R. Welch, annual meeting of the Society for American Archaeology, Vancouver.

33. Ewing, Robyn and J.R Welch (2008) Seeking Middle Ground: Repatriation's Roles in the Negotiation of New Relationships among Indigenous Communities, Museums and Archaeologists, annual meeting of the Society for American Archaeology, Vancouver.

34. Washington, Michelle, J.R. Welch and Dana Lepofsky (2008) Digging Common Ground: The Tla'amin-Simon Fraser University Field School in Archaeology and Heritage Stewardship, September meeting of the Archaeological Society of British Columbia, Vancouver.

35. Welch, J.R., Dana Lepofsky and Siemthlut (Michelle Washington) (2008) Getting to 100: Harmonizing Community, Research, and Societal Interests through Archaeology and Heritage Stewardship, seminar, Vancouver Island University, Powell River, British Columbia.

36. Asp, Vera J., J.R. Welch and George Kaufmann (2008) A Cultural Landscape Approach to the Integration of Documentary and Material

Histories in Tahltan Territory, British Columbia, Northwest Archaeological Conference, Victoria, British Columbia.

37. Welch, J.R. and Karl Hoerig (2007) Archaeology, Ndee Identity, and Tribal Sovereignty, in "Archaeologists as Gatekeepers of American Indian Identity" symposium organized by Sonya Atalay and Randy McGuire, annual meeting of the Society for American Archaeology, Austin, Texas.

38. Welch, J.R. (2006) Of, By, and For the Ndee: Archaeology, Heritage Stewardship, and White Mountain Apache Sovereignty, in "Decolonizing Archaeology" symposium, Chacmool Conference, Calgary, Alberta.

39. Welch, J.R. (2005) Ancient Masonry Fortresses of the Upper Salt River, Arizona, September meeting of the Archaeological Society of British Columbia, Vancouver.

40. Welch, J.R. (2005) Panellist, "Anthropologist as Expert Witness," organized by Sylvia Rodriguez.

41. Welch, J.R., Mark Altaha and Nicholas Laluk (2004) Apache? "The Protohistoric Period in the Southern Southwest" symposium, Arizona Archaeological Council, Tucson.

Works in Press

1. Roos, Christopher, J.R. Welch (2021) Native American Fire Management at an Ancient WildlandUrban Interface in the Southwest US. *PNAS* 2020-18733R In press.

2. Hogg, Erin A., Chelsea H. Meloche, George P. Nicholas, and John R. Welch (2021) Whose Rights?

Whose Heritage?: Policy Changes in Canada. In press

3. Welch, J.R., (2020) Archaeology Law and Policy in the United States. In *Open Archaeology: An Introduction to the Field*, edited by Katie Kirakosian (accepted).
4. Hogg, Erin A., and John R. Welch (2020) Archaeological Evidence in the Tsilhqot'in Decision. *Canadian Journal of Archaeology* (in press)

Works in Preparation and Under Review

1. Welch, J.R. (2019) 'The only prompt, economical, and humane process': The Pinal Apache Genocide and other Legacies of Industrial Mining in Central Arizona. (in preparation)
2. Hogg, Erin A., and John R. Welch (2020) Expert Witnesses' and Lawyers' Perspectives on the Use of Archaeological Data as Evidence in Aboriginal Rights and Title Litigation. *BC Studies: The British Columbian Quarterly*.
3. Welch, J.R. (2019) *Fort Apache: Places and Displacements at a Frontier Icon in Indian Country*, University of Arizona Press (in preparation, with approved book proposal)

TRAINING AND SUPERVISION

* * *

SERVICE

Academic (External)

2020: External Reviewer for Tenure and Promotion Case: University of British Columbia

2017–2019: Registrar, Register of Professional Archaeologists

2017: External Reviewer for Tenure and Promotion Case: Harvard University

2015–2020: Member, Editorial Board, *Advances in Archaeological Practice*

2014–2020: Co-Chair, Amity Pueblo Task Force, Society for American Archaeology

2013–2016: Member, Government Affairs Committee, Society for American Archaeology

2013: External Reviewer for Tenure and Promotion Cases: Southern Methodist University, Ft. Lewis College

2011–2013: Chair, Continuing Professional Education Committee, Register of Professional Archaeologists

2003–Life: Trustee, Josephine H. Miles Testamentary Trust, benefiting the Colorado Historical Society and three American Indian schools in Wyoming and Montana

2003–2010: Member, Government Archaeology Committee, Society for American Archaeology

2006–2009: Co-Chair, Continuing Professional Education Committee, Register of Professional Archaeologists

2003–2007: Institutional Grant Administrator, *Doo Aniina' Agot'eehi Baa Nohwii Nagoshd'* (I'll Tell You About How it Was): Programming Endowment Challenge Grant,U.S. National Endowment for the Humanities

2003–2006: Humanities Scholar, The San Pedro Ethnohistory Internet Project, U.S. National Endowment for the Humanities and Southwest Foundation grant to Center for Desert Archaeology, Tucson

2003–2005: Member, Board of Directors, Ocotillo Literary Endeavors, Tucson 2002–2005 Project Advisor, Ndee Bike' (Footprints of the Apache) and The Fort Apache Legacy, U.S. National Endowment for the Humanities Interpretation Program Implementation grant to Nohwike' Bagowa White Mountain Apache Tribe Cultural Center and Museum

1998–2005: Founding Member of Board of Directors, U.S. National Association of Tribal Historic Preservation Officers, Washington, DC

2003–2004: Project Advisor, Guide to Historic Sites of American Indians and the U.S. Military, U.S. Department of Defense

2002–2004: Member of Project Review Panel, American Indian Treaty Rights and Historic Preservation, U.S. Department of Defense

2002–2003: Project Humanities Scholar, Our Apache Books, Arizona Humanities Council

1997–1999: Member of Board of Directors, Arizona Archaeological Council

SFU (Senate, University-Wide, Faculty, and Departmental)

2017–2018: Member, Tenure & Promotion / School of Resource and Environmental Mgmt.

2015–2019: Director, Professional Graduate Programs in Heritage Resource Management

2012–2016: Member, Tenure & Promotion / Department of Archaeology

2015–2017: Member, Pacific Water Research Center Steering Committee

2013–2014: Chair, Graduate Studies Com./ School of Resource and Environmental Mgmt.

2013–2014: Member, Graduate Studies Committee / Department of Archaeology

2013: Member, Design Committee Environmental Resource Mgmt. Major (BENV)

2012–2013: Member, Tenure & Promotion / School of Resource and Environmental Mgmt.

2011–2013: Member, Senate Committee on International Activities

2011–2012: Chair, Undergraduate Studies Committee/ Department of Archaeology

2011–2014: Member, two President's Super Colloquia Steering Groups: *Toward a Theory of Global Justice* (Spring 2013) and *Protecting Indigenous Heritage* (Fall 2014)

2011: Member, Community Teaching Fellows Proposal Adjudication Committee

2010–2011: Chair, Student Awards / School of Resource and Environmental Management

2007–Current: Member, Museum of Archaeology and Ethnology Collections Committee

2007–2010: Member, Grad. Studies / School of Resource and Environmental Management

2006–2011: Member, First Nations Studies Advisory Committee

2005–2007: Member, First Nations University-Wide Coordinating Committee

2006–2008: Member, Tenure & Promotion / School of Resource and Environmental Mgmt.

2005–08, 2010–14: Member, Tenure & Promotion / Department of Archaeology

2005–2006: Member, Harassment, Equity and Ethics Com. / Resource and Environ. Mgmt.

2005–2006: Member, Student Awards / Department of Archaeology

Community

2007–2019: Member and Board Secretary, Fort Apache Heritage Foundation Board of Directors

2015–2016: Advisory Committee member, *Tribal Preservation Planning Needs in Case of Emergency*, project developed by the National Association of Tribal Historic Preservation Officers (NATHPO) with support from the U.S. Federal Emergency Management Agency.

2005–2012: Archaeology Department liaison, SFU United Way Campaign

2005–2011: Archaeology and REM School liaison, SFU United Way Campaign

2007–2010: Member, Public Education Committee, Archaeological Society of British Columbia

2007–2009: Member, Fort Apache Master Plan Revision Team, White Mountain Apache Tribe

1998–2007: Founding Board Member (ex officio), Secretary, Executive Director (protempore), Fort Apache Heritage Foundation, Fort Apache, Arizona

2003–2005: Member, Board of Directors, Arizona Wilderness Coalition

2002: Judge, Miss White Mountain Apache Queen Committee, White Mountain Apache Tribe

AWARDS AND HONORS

2005–15: **Title:** Canada Research Chair (Tier 2) **Type:** Research **Organization:** Social Sciences and Humanities Research Council **Details:** Academic appointment to address indigenous heritage stewardship

2007: **Title:** Fellow **Type:** Service **Organization:** Society for Applied Anthropology **Details:** Endorsement by SfAA Board of the nomination by Shelby Tisdale

1999: **Title:** Governors Award **Type:** Service **Organization:** State of Arizona **Details:** For individual achievement in historic preservation

1992: **Title:** Appreciation Award **Type:** Service **Organization:** Arizona Archaeological and Historical Society **Details:** For contributions to preservation and public education

1991: **Title:** Comins Fellowship **Type:** Fellowship **Organization:** University of Arizona **Details:** Support for dissertation preparation

1983: **Title:** Undergraduate Essay Prize **Type:** Research **Organization:** Northeastern Anthropological Association **Details:** Annual prize for the best student essay submittal

1983: **Title:** Harold C. Bohn Anthropology Prize **Type:** Scholarship **Organization:** Hamilton College

Details: Award to the best graduate anthropology major

OTHER

Manuscript and Proposal Refereeing (Last Five Years)

American Antiquity

Journal of Social Archaeology

Roman & Littlefield

University of Hawaii Press

University of Utah Press

Journal of Environmental Education Research

Social Science and Humanities Research Council of Canada

Canadian Journal of Archaeology

Journal of Archaeological Science

Environment and History

University of Arizona Press

Research Council of Norway

Left Coast Press

Memberships

Az Archaeological and Historical Society (1983–life)

BC Assn Professional Archaeologists (2010–current)

Society for Applied Anthropology (2003–2013)

Register of Professional Archaeologists (1998–current)

Society for American Archaeology (1984–current)

World Archaeological Congress (2006–current)

Archaeological Society of BC (2005–current)

Canadian Archaeological Assn (2005–current)

Amer. Anthropological Assn (1986–2016)

PAUL E. SALAMANCA
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United States Department of Justice
Environment and Natural Resources Division

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THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

Apache Stronghold, *Plaintiff*, v. United States of America, *Defendants*.	Civil No. 2:21-cv-00050-CDB **DECLARATION OF TRACY PARKER**

I, Tracy V.L. Parker, state as follows:

1. I am the Southwest Regional Director for Lands and Minerals for the United States Department of Agriculture, Forest Service ("Forest Service"). I have held this position since 2014. I have 30 years of experience with the Forest Service. I have held positions at all levels of the organization, with increasing levels of responsibility with the Lands and Minerals Program, including working at the National Headquarters in Washington, D.C.

2. In my role as Regional Lands and Minerals Director, I oversee the delivery of the Forest Service's Southwest Region's Lands program, which includes implementation of the Southeast Arizona Land Exchange and Conservation Act, set forth in Section 3003 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, signed into law on December 19, 2014, as Public Law (P.L.) 113-291; 14 and codified at 16 U.S.C. § 539p ("Act").

3. I make this declaration based on my personal knowledge, my experience working for the Forest Service, and information made available to me in my official capacity.

4. I am familiar with the above-captioned lawsuit and the Motion for Temporary Restraining Order and Preliminary Injunction filed by Plaintiff. I am also familiar with the Resolution Copper Project and Land Exchange ("Project"), including the land exchange mandated by Congress pursuant to the Act.

5. On January 15, 2021, the Forest Service published the Final Environmental Impact Statement ("FEIS") for the Project.

6. After publication of the FEIS for the Project, the Secretary of Agriculture, acting by and through the Forest Service, is directed by the Act to convey all right, title, and interest of the United States in and to the Federal land, as defined in the Act, to Resolution Copper.

7. Due to the several steps left to close on the land exchange, including but not limited to, executing a land exchange agreement, receiving the appraisal for the Federal land, reviewing the Federal land

appraisal, and drafting detailed escrow instructions, Resolution Copper and the Forest Service will not exchange deeds to the Federal and non-Federal lands, as defined in the Act, any sooner than 55 days after the publication of the FEIS.

8. Additionally, with respect to subsidence effects to the surface of the exchange parcel caused by underground mining activities, the FEIS at ES-3.2 states that "[t]he subsidence zone at the Oak Flat Federal Parcel would break through the surface at mine year 6 . . ." *(i.e.,* the FEIS effects analysis projects that a surface crater will start to appear six years after active mining commences).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of January, 2021.

/s/ Tracy Parker
Tracy Parker

Tonto National Forest

Arizona

(Second Proclamation)

By the President of the United States of America

A Proclamation

WHEREAS, it appears that the public good would be promoted by adding to the Tonto National Forest certain lands, within the Territory of Arizona, which are in part covered with timber, and by also including therein the area heretofore reserved and set apart as the Pinal Mountains National Forest;

Now, therefore, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," do proclaim that the Tonto National Forest is hereby enlarged to include the said additional lands, and that the boundaries of the aforesaid National Forest are now as shown on the diagram forming a part hereof;

Excepting from the force and effect of this proclamation all lands which arc at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, if I he statutory period within which to make entry or filing of record has not

expired; and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose with which this reservation for forest uses is inconsistent: Provided, that these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made, or unless the reservation or withdrawal with which this reservation is inconsistent continues in force; not excepting from the force and effect of this proclamation, however, any part of the National Forest hereby enlarged which may have been withdrawn to protect the coal therein, but this proclamation does not vacate any such coal land withdrawal; and provided that these exceptions shall not apply to any land embraced in any selection, entry, or filing, which may have been permitted to remain of record subject to the creation of a permanent reservation; and provided also that since the withdrawal made by this proclamation and any withdrawal heretofore made for national irrigation works are consistent, both shall be effective upon the land withdrawn, but the withdrawal for national irrigation works shall be the dominant one and may, when necessary, be changed to a withdrawal for irrigation from such works.

Warning is hereby given to all persons not to make settlement upon any of the lands reserved by this proclamation, unless and until they are listed by the Secretary of Agriculture and opened to homestead settlement or entry by the Secretary of the Interior under the Act of Congress, approved June eleventh, nineteen hundred and six, entitled, “An Act To provide for the entry of Agricultural lands within forest

reserves:" Provided that lands heretofore restored to settlement or entry under the provisions of the foregoing act shall be excepted from the force and effect of this proclamation.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

[SEAL.]

Done at the City of Washington on this 13th day of January, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

THEODORE ROOSEVELT

By the President:
Elihu Root
Secretary of State

[No. 795.]

TONTO NATIONAL FOREST
ARIZONA
GILA AND SALT RIVER MERIDIAN AND BASE
FOREST SERVICE U.S. DEPT. OF AGRICULTURE
1907

NATIONAL FOREST BOUNDARY
ADDITION FROM PUBLIC LANDS
FORMERLY IN PINAL MOUNTAINS NATIONAL FOREST

[DIAGRAM FORMING A PART OF PROCLAMATION
DATED JANUARY 13, 1908.]

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

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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*

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

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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.

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."

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

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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-caveblast-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-blastaboriginal-owners-fear-fortescue-plans-20201012-p564az.html.

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.

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, inassuring 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,

/s/ Wendsler Nosie, Sr. Ph.D.
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).

* * *

WHITE MOUNTAIN APACHE
CULTURAL CENTER
P.O. BOX 507, FORT APACHE, AZ 85926

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 Ab0riginal traditional owners. Rio Tinto is working hard to do the same thing here. Their plan is to damage 35,000 acres (more than 50 square miles) of our beautiful ancestral lands and to make a toxic soup out of billions of gallons of precious clean water. Our homelands will never be the same....

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

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

I know we all need funding to support language and culture programs, of course, but let's not take this blood money now. Let's stand together and fight these foreign corporate invaders! Let's support the San Carlos Apache Tribe to stop the Resolution Copper

Mine and protect our sacred ancestral land as our ancestors did for centuries.

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

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

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

Respectfully,

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

WHITE MOUNTAIN APACHE
CULTURAL CENTER
P.O. BOX 507, FORT APACHE, AZ 85926

November 9, 2020

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

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

I am an elder and culture bearer for the Apache people and it is my duty to tell the truth and defend our Apache lands, culture, language, and lifeways. I have tried for the last two decades to explain to the Federal Government, to various mining company officials, and to others of the clear duty to protect the Chí'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 Chí'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 Chí'chil Biłdagoteel.

Chí'chil Biłdagoteel, including all 4,309 aces of public lands managed by the Tonto National Forest as the Chí'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 Chí'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. Chí'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 Chí'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 Chí'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 Acom 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 Chí'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 Chí'chil Biłdagoteel. Let's work together to save this natural and cultural wonderland!

I urge careful attention to the religious and cultural significance of Chí'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 Chí'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 Chí'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,

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

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 wellbeing 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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Mona Polacca is the President of the International Council of the Thirteen Indigenous Grandmothers, Co-Secretariat of an Indigenous World Forum on Water and Peace. She served as the focal point for the Indigenous Peoples program of the World Water Forum: Citizen's Process 2018. She works with Indigenous Peoples in addressing access to clean safe drinking water and drafting Water Statements and Water Declarations.