

**REQUEST TO THE UNITED NATIONS
COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION**

**UNDER THE
EARLY WARNING AND URGENT ACTION PROCEDURE**

**SUBMITTED BY THE
SAN CARLOS APACHE TRIBE**

**IN RELATION TO THE
UNITED STATES OF AMERICA**

APRIL 3, 2024

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I. INTRODUCTION: URGENT SITUATION MERITING INTERVENTION BY THE COMMITTEE

This urgent matter concerns the United States authorizing the transfer of lands to a mining company, which will employ a mining method that will destroy the land. This land is part of the ancestral territory of Indigenous peoples who hold this land as sacred and fundamental to their religion.

The San Carlos Apache Tribe (sometimes hereinafter “San Carlos” or the “Tribe”), an Indigenous people located in the United States, hereby requests the Committee on the Elimination of Racial Discrimination (hereinafter “CERD” or the “Committee”) to urgently address acts by the United States that imminently threaten to violate the human rights of the Tribe and other Apache peoples within a historically-rooted pattern of racial discrimination. Specifically, the United States has authorized the development of a large scale mine that will irreparably destroy Oak Flat, a place sacred to the Tribe and other Apache peoples, known to them as Chí’chil Bıldagoteel (Apache for the place described as “a broad flat of Emory oak trees”).

The United States has adopted legislation authorizing the conveyance of Oak Flat to Resolution Copper, LLC, a joint venture of two mining giants, Rio Tinto and BHP. Resolution Copper’s mining method will destroy Oak Flat, which forms the foundation of Apache religious beliefs, in order to extract one of the largest deposits of copper ore in North America. Under the legislation, the land exchange shall occur within sixty days of the United States publishing a Final Environmental Impact Statement (“FEIS”) regarding the exchange and its consequences. The FEIS could be approved at any time, especially after the recent decision by the Ninth Circuit Court of Appeals ruling that United States laws on religious freedom do not protect Apache religious belief and practices around Oak Flat against the devastating effects of the planned mine.¹

The United States’ authorization of the mine and destruction of Oak is a violation of its international human rights obligations, including under the International Convention on the Elimination of All Forms of Racial Discrimination (the “Convention”). Accordingly, this imminent threat, and the lack of an adequate response by the United States to the Tribe’s concerns or an adequate judicial remedy domestically, merit the Committee’s urgent intervention.

II. THE SAN CARLOS APACHE TRIBE AND OTHER APACHE PEOPLES AFFECTED BY THE SITUATION

The San Carlos Apache Tribe, an Indian tribe recognized by the U.S. federal government,² is located in the southeastern part of the state of Arizona in the United States of

¹ Apache Stronghold v. United States of America, No. 21-15295, D.C. No. 2-cv-00050-SPL (9th Cir. March 1, 2024), <https://cdn.ca9.uscourts.gov/datastore/opinions/2024/03/01/21-15295.pdf>

² On the organization, powers, and federal recognition of Indian tribes and their governments, see section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).

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America. As of 2023, the Tribe had an enrollment of approximately 17,192 members. According to the 2018 U.S. census, roughly 10,815 enrolled members reside on the Tribe's reservation lands.³

The Tribe is one of several Western Apache tribes in the state of Arizona for whom Oak Flat is sacred. These include: the White Mountain Apache Tribe, Tonto Apache Tribe, Yavapai-Apache Nation, and the Fort McDowell Yavapai Nation. These tribes are the present-day configurations of the Apache peoples that historically lived in the area prior to arrival of the U.S. military and other outsiders. The Western Apache language is a southern Athabaskan language, which is part of the larger Na-Dené language family.⁴

The Western Apache occupied areas within what became the states of Arizona and New Mexico before the formation of the United States. They moved throughout these areas to hunt, gather, and farm; and lived in different locations within these areas seasonally.⁵ Despite the United States attempts to eradicate their culture and religion beginning in the late nineteenth century, the Western Apache cultural and spiritual connections with their ancestral lands, which includes Oak Flat, continue to the present.⁶

Among the Western Apache, the San Carlos Apache Tribe has especially strong ancestral ties to Oak Flat.⁷ The San Carlos Apache have lived, prayed, and died at Oak Flat for centuries, since long before the Resolution mine project that will destroy the sacred place was conceived.⁸ In February 1873, 1,200 Apache ancestors of the Tribe were tragically removed from Oak Flat and other areas, and forced by the 5th U.S. Cavalry to the military post of Fort Grant and then to Camp (Calvary Post) San Carlos,⁹ located 61 miles east of Oak Flat, where along with other Apaches they were forcibly confined.¹⁰ Apache confinement at Camp San Carlos and taking of their ancestral lands was part of a genocidal campaign advanced by the U.S. Cavalry operating in coordination with fiercely anti-Apache militias.¹¹

³ San Carlos Reservation, Arizona, United States Census Bureau, <https://www.census.gov/tribal/?st=04&aianihh=3355> (last visit March 2, 2023).

⁴ Curnow, Timothy Jowan, *The Athabaskan Languages: Perspectives on a Native American Language Family*, Language, Linguistic Society of America, vol. 79, no. 3, Sept. 2003.

⁵ Hopkins, Maren P., et al., *Ethnographic and Ethnohistoric Study of the Superior Area, Arizona* (2015), at 28. This original study includes detailed ethnographic and historical information about the Western Apache tribes, including the San Carlos Apache. Much of the information on religious practices and beliefs and on sacred locations is provided by Apache elders and is culturally sensitive. The Tribe will make this study available to CERD and its staff upon request and with conditions to be established.

⁶ *Id.* at 32-35.

⁷ *Id.*

⁸ *Id.*

⁹ Hutton, Paul Andrew, *The Apache Wars* (2016), at 187-207.

¹⁰ See U.S. General Crook, General Orders No. 10, Nov. 21, 1871; Territorial Governor Anson P.K. Safford, 1877 Territorial Address, included in Crook, George, *General George Crook, His Autobiography* (1946); Welch, John, "Earth Wind and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona 1859-1874," *Sage Open* (2017), <https://journals.sagepub.com/doi/full/10.1177/2158244017747016>.

¹¹ See *id.*

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Apache ancestors passed their spiritual knowledge to their descendants who are alive today on what is now the San Carlos Apache Reservation.¹² The original reservation was established, and subsequently diminished, by several U.S. presidential orders and acts of the U.S. Congress, including executive orders of November 9, 1871 and December 14, 1872 (establishing the White Mountain Apache Reservation and its San Carlos division); executive orders of August 5, 1873, July 21, 1874, April 27, 1876, October 30, 1876, January 26, 1877, and March 31, 1877 (diminishing the White Mountain Reservation and its San Carlos division). The Act of June 7, 1897, 30 Stat. 64, divided the White Mountain Reservation into the Fort Apache Reservation and the San Carlos Apache Reservation. The taking of Apache lands and the diminishment of their reservations was largely done in favor of outsiders' economic interests related to farming, logging, and mining.¹³

The Tribe's current socio-economic conditions consist of high unemployment,¹⁴ a high crime rate involving serious crimes,¹⁵ a lack of sufficient and adequate housing to meet the growing population of the Tribe,¹⁶ a lack of access to safe and reliably clean drinking water, poor roads, and a persistent need for infrastructure.¹⁷ Forty-four and a half percent of the Tribe's members live in poverty.¹⁸ These conditions are unquestionably a legacy of the racially discriminatory policies and actions that the United States historically inflicted upon the Tribe.

The planned mining activity that the United States has authorized is yet another assault on the San Carlos Apache people, their religion, and traditional territory – a form of discrimination that is incompatible with the Convention.¹⁹

¹² See Welch, John and Ramon Riley, "Reclaiming Land and Spirit in the Western Apache Homeland," *American Indian Quarterly* 25:5-6 (Winter, 2001), <https://muse.jhu.edu/article/237/pdf>.

¹³ See *id.* at 7; Welch, *supra note* 10.

¹⁴ Community Research, Evaluation and Development et al., *First Things First-San Carlos Apache Region*, <https://www.firstthingsfirst.org/wp-content/uploads/2022/08/Regional-Needs-and-Assets-Report-2020-San-Carlos-Apache.pdf>.

¹⁵ Rambler, Terry, Chairman, San Carlos Apache Tribe, Testimony to House Interior and Related Agencies Appropriations Subcommittee (March 7, 2017),

<https://www.congress.gov/116/meeting/house/109008/witnesses/HHRG-116-AP06-Wstate-RamblerT-20190307.pdf>.

¹⁶ Testimony of Chairwoman Kathleen W. Kitcheyan of the San Carlos Apache Tribe for the Field Hearing on Improving Housing Opportunities for Native Americans before the Subcommittee on Housing and Community Opportunity of the Financial Services Committee, U.S. House of Representatives, Tuba City, Arizona, May 3, 2004, <https://financialservices.house.gov/media/pdf/050304kk.pdf>.

¹⁷ Rambler, Terry, Chairman, San Carlos Apache Tribe, Testimony on Public Safety, Road, and Health Care Priorities, House Appropriations Subcommittee on Interior, Environment, and Related Agencies, American Indian and Alaska Native Public Witness Days (March 9, 2023), <https://docs.house.gov/meetings/AP/AP06/20230309/115413/HHRG-118-AP06-Wstate-RamblerT-20230309.pdf>.

¹⁸ See San Carlos Tribe Primary Care Area – 2021 Statistical Profile, <https://www.azdhs.gov/documents/prevention/health-systems-development/data-reports-maps/primary-care/gila/25.pdf>.

¹⁹ See Committee on the Elimination of Racial Discrimination, General Recommendation 23: Indigenous Peoples, para. 3.

III. THE FEDERAL LEGISLATION AUTHORIZING TRANSFER OF OAK FLAT TO RESOLUTION COPPER MINING, LLC.

The United States entered into a Treaty with the Apache in July 1852.²⁰ Pursuant to Article 11 of the Treaty, the United States agreed to “so legislate and act to secure the permanent prosperity and happiness” of the Apache people, including the people of San Carlos. However, the United States has done otherwise with Congress’s adoption of legislation that is included under §3003 of the National Defense Authorization Act for 2015 (“NDAA”).²¹ Before the legislation was adopted, the Tribe had opposed multiple prior versions of it.²²

The principle relevant provisions of the NDAA are as follows.²³ First, §3003 of the act requires the United States Department of Agriculture (“USDA”) to convey 2,422 acres of Tonto National Forest, which includes Oak Flat, to Resolution Copper in exchange for 5,344 acres currently owned by the company.²⁴ Included in the exchange are 740 acres referred to as the Oak Flat Withdrawal, a reference to the place of profound religious to the Apache people.

Second, §3003 of the NDAA includes certain safeguards. It requires the Secretary of Agriculture 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 [and] 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.²⁵

In the same vein, §3003 also requires that the Secretary and Resolution Copper must agree on “mutually acceptable measure” to “address the concerns of the affected Indian Tribes”

²⁰ Treaty with the Apache, 10 Stat. 979. (July 1, 1852), ratified Mar. 23, 1853, proclaimed Mar. 25, 1853, https://avalon.law.yale.edu/19th_century/apa1852.asp.

²¹ Carl Levin and Howard P. “Buck” McKeon 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), <https://www.govinfo.gov/content/pkg/PLAW-113publ291/pdf/PLAW-113publ291.pdf>

²² Testimony of Wendsler Nosie, Sr., Chairman of the San Carlos Apache Tribe, before the U.S. House of Representatives Natural Resources Committee Subcommittee on National Parks, Forests and Public Lands, concerning the Southeast Arizona Land Exchange and Conservation Act of 2007 – Hearing of November 1, 2007, <https://www.govinfo.gov/content/pkg/CHRG-110hhrg38773/html/CHRG-110hhrg38773.htm>; Testimony of Terry Rambler, Chairman, San Carlos Apache Tribe, Testimony before House Committee on Natural Resources Subcommittee on Energy and Mineral Resources, Legislative Hearing on H.R. 687, Southeast Arizona Land Exchange and Conservation Act of 2013, <https://naturalresources.house.gov/uploadedfiles/ramblertestimony03-21-13.pdf>.

²³ A description of the relevant provisions of the NDAA that is entirely consistent with the one here is provided by the Ninth Circuit Court of Appeals in *Apache Stronghold v. United States*, *supra* note 1, at 16-19.

²⁴ Codified at 16 U.S.C. §539p(b)(2), (c)

²⁵ Codified at 16 U.S.C. §539p(c)(3)(A)-(B).

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and “minimize the adverse effects on the affected Indian tribes resulting from mining and related activities.”²⁶

Further, §3003 requires that the Secretary “prepare a single environmental impact statement [“EIS”] under the National Environmental Policy Act of 1969” (“NEPA”) (45 U.S.C. §4321 *et seq.*).²⁷ Under §3003, the land transfer will occur within 60 days after the United States government publishes the final EIS (“FEIS”) regarding the planned mine.²⁸ Before the exchange can take place, however, the U.S. Secretary of Agriculture must make an appraisal of the land, or summary thereof, available for public review demonstrating that the land exchanged by the Forest Service and the value of the land exchanged by Resolution is equal.²⁹

As of the date of this request to the Committee, none of these safeguards has been adequately or fully implemented by the United States. An initial FEIS was published in the last few days of former President Trump’s administration, on January 15, 2021.³⁰ On March 1, 2021, the FEIS was withdrawn by the current Biden administration, which reinitiated consultations with the concerned tribes.³¹ However, as with prior consultations with the tribes about the land exchange and planned mining activities, this more recent round of consultations has been flawed and has not led to agreement or the consent of the tribes in relation to effects on them of the land exchange or mining activity. In the absence of such consent, development of a revised FEIS is well in progress, and with its final publication, which could happen at any time, the land transfer could occur within days.

IV. THE FLAWED CONSULTATIONS; NO FREE, PRIOR, AND INFORMED CONSENT

To date, the United States has not sought or obtained the San Carlos’s nor any of the other affected Apache tribes’ consent to the land transfer and mining of the area. In fact, nineteen of

²⁶ *Id.*

²⁷ Codified at 16 U.S.C. §539p(c)(9).

²⁸ Codified at 16 U.S.C. §539p(c)(10).

²⁹ Codified at §539p(c)(4).

³⁰ See Forest Service, Resolution Copper Update, USDA Forest Service <https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166>; Scheyder, Ernest, Trump to approve land swap for Rio Tinto’s Resolution Copper project, Reuters, January 4, 2021, <https://www.reuters.com/article/us-usa-mining-resolution/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project-idUSKBN2992GT>.

³¹ See Forest Service, Resolution Copper Update, <https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166>. In the Tribe’s view, the withdrawn FEIS was deeply flawed, riddled with incomplete data, poorly assembled analyses, inaccurate models, false statements, and a clear bias in favor of Resolution Copper. Worse, there was no meaningful consideration of the direct, indirect, and cumulative impacts of the mine and its alternatives, especially with respect to hydrological, environmental impacts and mining alternatives. A June 2022 Bureau of Land Management special report supports this view, as do numerous environmental advocates. See Lisa Dubas et al., Bureau of Land Management Review of the Hydrology Aspects of the Resolution Copper Project (2022), <https://www.dropbox.com/s/pq9z96vrz0c35fm/BLM%20Hydrology%20Review%20of%20USFS%20Resolution%20Copper%20Project%20FEIS%5B71%5D.pdf?dl=0>.

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the 22 American Indian tribes in Arizona are on the record opposing the mine,³² with the backing of the Inter Tribal Council of Arizona and the National Congress of American Indians.³³ The United States is therefore in contravention of international standards as articulated, inter alia, in the United Nations Declaration on the Rights of Indigenous Peoples, article 19, which requires that consultations with indigenous peoples be in “good faith ... in order to obtain their free, prior and informed consent”; and the Committee’s General Recommendation on Indigenous Peoples, which calls upon States, as part of their obligations under the Convention, to “[e]nsure ... that no decision relating to their rights and interests are taken without their free, prior and informed consent.”³⁴

The San Carlos Apache Tribe was never even consulted by the United States when legislation to authorize the land exchange for the benefit of mining project was initially introduced in the relevant committees of the U.S. Senate and House of Representatives. From the beginning the Tribe has made clear to the United States its opposition to the land transfer because of the block cave mining method to be employed that will irreparably destroy sacred Oak Flat.³⁵

The Tribe traveled to Washington, D.C. to testify before the House and Senate committees about its concerns with the land transfer legislation. The Tribe’s own members presented testimony on their experiences practicing their religion at Oak Flat by performing certain ceremonies, such as the Apache woman coming of age ceremony.³⁶

As a result of the Tribe’s efforts, the legislation to convey Oak Flat to Resolution Copper was never approved by U.S. Senate or House committees, or by the full Congress as stand-alone legislation. Instead, at the last minute, the U.S. Senate inserted the land transfer legislations into the 2015 National Defense Authorization Act (“NDAA”), which was adopted.

Consultations initiated with the Tribe and other Apache peoples after NDAA was adopted have likewise been flawed. The U.S. Forest Service, which is responsible for the consultations required by §3003 of the NDAA, has not engaged with the affected tribes in

³² See San Carlos Tribe Chairman condemns any plan by Biden Administration to advance proposed Resolution Copper Mine as a human rights violation, Gila Herald, April 7, 2023 (discussing opposing to the mine by San Carlos and other tribes in Arizona), <https://gilaherald.com/san-carlos-apache-tribe-chairman-condemns-any-plan-by-biden-administration-to-advance-the-proposed-resolution-copper-mine-as-a-human-rights-violation/>.

³³ National Congress of American Indians, Res. No. MSP-15-001, Support for Repeal of Section 3003 of the FY15 National Defense Authorization Act, the Southeast Arizona Land Exchange (2015), <https://www.ncai.org/resources/resolutions/support-for-repeal-of-section-3003-of-the-fy15-national-defense-authorization-act-the-southeast-arizona-land-exchange>.

³⁴ Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, para. 4(d).

³⁵ See Testimony of San Carlos Apache Tribe Chairman Rambler, in United States Department of Agriculture, Tonto National Forest, Final Environmental Impact Statement, vol. 6(2013), at Appendix R, at R-14; Chairman Rambler, Comment on DEIS, December 23, 2019, Appendix R, at R-12.

³⁶ *Id.*

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a manner aimed at obtaining their free, prior, and informed consent. Rather, its engagement with the tribes concerned was pro forma and premised on a predetermined outcome.

The United States' form of consultation has entailed meeting by virtual electronic means with tribes to describe the project in general terms. When the United States' representatives visited the San Carlos Reservation during a Council meeting, the U.S. officials would not address or respond to the Tribe's concerns about the mining project. Instead, the officials took the position that they had no authority to stop the transfer because of the federal legislation that requires it.

Notably, the Advisory Council on Historic Preservation, a statutory body, sent a March 2021 letter to the United States Department of Agriculture ("USDA"), of which the Forest Service is part, detailing how the additional consultation requirements of Section 106 of the National Historic Preservation Act were ignored.³⁷ To the Tribe's knowledge, the USDA has not responded to the Advisory Council's detailed concerns.

In all, consultations have been wholly inadequate and fall short of the United States international human rights obligations. No genuine effort has been made to obtain the consent of the Western Apache tribes for the land exchange and planned mining, as required by the Convention and the United Nations Declaration on the Rights of Indigenous Peoples.

V. THE THREAT OF IRREVERSIBLE HARM TO APACHE RELIGION

A. Oak Flat and its Sacred Character

Oak Flat, which is included on the National Register of Historic Places,³⁸ lies within the Tonto National Forest and encompasses a 6.7-square-mile plot of plains, oak groves, and rocky cliffs that sit around 4,000 feet above sea level.³⁹ The area is cradled within four mountains sacred to Apache: Dził Cho (San Francisco Peaks) to the north, Nchaa Sí'án Dził Łigai Sí'án [Mount Baldy] to the east, Dził Nchaa Sí'án [Pinalaño Range] to the south, and Tséghá Tsik'ed [Superstition Range] or Dził Ntęęł [Sierra Ancha] to the west.

³⁷ Advisory Council on Historic Preservation, Letter to Tom Vilsac, U.S. Secretary of Agriculture, March 29, 2021, <https://www.dropbox.com/s/wiw9j2kx6oohr9/Letter%20to%20Secretary%20Vilsack%20Resolution%20Copper%20Project%2020210329.pdf?dl=0>.

³⁸ See Federal Register, Notification of Extension of Comment Period for Pending Nomination of Chí'chil Bıldagoteel (Oak Flats) Historic District, 81 FR 10276 (Feb. 29, 2016), <https://www.federalregister.gov/documents/2016/02/29/2016-04373/national-register-of-historic-places-notification-of-extension-of-comment-period-for-pending>; see also National Trust for Historic Preservation, Most Endangered Historic Places for 2015, <https://savingplaces.org/stories/announcing-americas-11-most-endangered-historic-places-for-2015>.

³⁹ See Project Map, <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-map-package.pdf>.

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For hundreds of years, Oak Flat has been a place of cultural and religious significance to the Western Apache;⁴⁰ however, the practice of traditional Apache religion was largely kept secret by Apache until recently for fear of persecution.⁴¹ Oak Flat is where one of the Apache's Ga'an—powerful mountain spirits that the Apache revere as their creators, saints, saviors, and holy spirits that bestow blessings on the Apache people—lives and where the Apache can communicate with these spirits.⁴² It is the home to specific Diyin (Apache Holy beings), including the Gáán Lichíí (Red Mountain Spirits).⁴³ Flatis th'e goíí' (home) of Apache's diyí'n (sacred power) exists in Oak Flat, which is visited by ga'an (spiritual beings) who endow the waters with healing and spiritual services.

Oak Flat is a place of particular importance as it is the central location of the Apache creation story and is a physical manifestation of the spirit world. It is a place where the Apache people hold ceremonies integral to their Apache identity,⁴⁴ ceremonies such as the Holy Ground and the Sunrise Dance⁴⁵ that celebrates a young woman's coming of age.⁴⁶ And Oak Flat is place to gather medicines and ceremonial items, and to seek and obtain peace and personal cleansing.⁴⁷

The waters of Oak Flat and its surrounds are considered sacred by those who practice traditional Apache religion.

Springs and spring-fed streams are the basis for all life and for Apache spirituality. We pray to and through water. Nobody uses regular water, especially from the tap, for Ceremony. The rivers used to be fine for us to use, but now almost everything is contaminated. You can't use polluted water for Ceremony, is it disrespectful. It has to be totally pure, like uncorrupted by humans. We use only spring water straight from the Earth. We use it with ochre, to make the *leesh* [mixture of Holy Water and Minerals] in the painting ceremony that is important in the Nah'í'ez [Sunrise Dance], where the girl is coated in a protective layer of Earth.⁴⁸

⁴⁰ Testimony of T.J. Ferguson, Maren P. Hopkins, and Chip Colwell, Anthropological Research, LLC, Oak Flat is an Important Cultural Site for Nine Tribes – The Resolution Copper Mine will Impact Hundreds of Tribal Traditional Cultural Properties, before the U.S. House of Representatives Natural Resources Committee, Subcommittee on Indigenous Peoples of the United States, April 13, 2021, <https://docs.house.gov/meetings/II/II24/20210413/111424/HHRG-117-II24-20210413-SD013.pdf>.

⁴¹ Welch, J.R., White Eyes' Lies and the Battle for Dzil Nchaa Si An. *American Indian Quarterly* 27(1):75–109 (1997), <https://doi.org/10.2307/1185589>.

⁴² Ferguson et al. *supra* note 40 at n. 43.

⁴³ Hopkins, *supra* note 5, at 52.

⁴⁴ Ferguson et al, *supra* note 40.

⁴⁵ Testimony of Naelyn Pike, <https://democrats-naturalresources.house.gov/news/videos/watch/ms-naelyn-pike-testimony-resolution-copper-mining-at-oak-flat>.

⁴⁶ *Id.*

⁴⁷ Testimony of Terry Rambler, *supra* note 22, at 3–6.

⁴⁸ Basso, Ketih H., *The Gift of Changing Woman*, Bureau of American Ethnology Anthropological Papers, 196:119–173, Smithsonian Institution (1997).

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There are 46 springs in the area of Oak Flat.⁴⁹ The mine will destroy springs and places known to traditional Apache for generations. These include Hashbidi Bitu'é – Quail Spring, a place where men prepared for warfare and ceremonies considered to be associated with the Gáán, or holy beings;⁵⁰ Tséyaa Gogeschin is a large overhang with images carved and painted on the wall. Each of these images has special meaning to the Apache diyin (Medicine People);⁵¹ Tú Łitsogí, known as “Yellow Water Spring”;⁵² and Tú Nahikaadi, a “dripping seep in a cave, which is directly tied to the power of Changing Woman, a place of healing and prayer”.⁵³

The United States has acknowledged the religious significance of Oak Flat and its surrounding areas to the Apaches. Its own Advisory Council on Historic Preservation has confirmed the religious significance of Oak Flat and the devastation that will result from the Resolution mine including the destruction of the sacred site.⁵⁴ In a March 29, 2021 letter, the Advisory Council cautioned, “the historic significance of Oak Flat cannot be overstated, and neither can the enormity of the adverse effects that would result to this property from the (Resolution mine) undertaking . . . in addition, hundreds of other historic properties would be destroyed or otherwise adversely affected by the undertaking.”⁵⁵ Importantly, United States courts, despite failing to protect Apache religion, have accepted that the Apache have strong religious and cultural ties to Oak Flat.⁵⁶

B. The Desecration of Oak Flat as a Result of the Planned Mining

Resolution Copper’s planned mine will irreparably damage Oak Flat, causing irreversible harm to the religion of the Tribe and other the Western Apache peoples.⁵⁷ As found by a federal district court, even while denying legal protection to Apache religion in relation to Oak Flat, “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.”⁵⁸ Block cave mining, the technique Resolution

⁴⁹ Hopkins, *supra* note 5.

⁵⁰ *Id.* at 75.

⁵¹ *Id.*

⁵² *Id.* at 92.

⁵³ *Id.* at 93.

⁵⁴ Advisory Council on Historic Preservation Letter, *supra* note 36.

⁵⁵ *Id.*

⁵⁶ Apache Stronghold v. United States, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021), *aff’d* No. 21-15295, D.C. No. 2-cv-00050-SPL (9th Cir. March 1, 2024), online version at:

https://narf.org/nill/bulletins/federal/documents/apachestronghold_v_us.html; Apache Strong hold v. United States (9th Cir.), *supra* note 1, at 14.

⁵⁷ The location of Oak Flat in relation to the mine is represented in the Map on page 3 of Testimony of T.J. Ferguson, Maren P. Hopkins, and Chip Colwell, Anthropological Research, LLC, Oak Flat is an Important Cultural Site for Nine Tribes – The Resolution Copper Mine will Impact Hundreds of Tribal Traditional Cultural Properties, before the U.S. House of Representatives Natural Resources Committee, Subcommittee on Indigenous Peoples of the United States, April 13, 2021, <https://docs.house.gov/meetings/II/II24/20210413/111424/HHRG-117-II24-20210413-SD013.pdf>.

⁵⁸ Apache Stronghold v. United States (District Ct.), *supra* note 56, at 607.

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Copper plans on utilizing,⁵⁹ is defined as “an underground hard rock mining method that involves undermining an ore body, allowing it to progressively collapse under its own weight,” where “a large section of rock is undercut, creating an artificial cavern that fills with its own rubble as it collapses,” and then the “broken ore falls into a pre-constructed series of funnels and access tunnels underneath the broken ore mass.”⁶⁰ In the process of extracting ore, the block cave mining method will swallow and destroy Oak Flat and its immediate environs,⁶¹ an area of historic, religious, and cultural significance to the Western Apache.

This destruction will cause permanent and irreparable injury to the Tribe, the Western Apache, and the Apache religion itself. For example,

It is anticipated that subsidence will destroy Tú Nahikaadi [the sacred dripping cave at Oak Flat], and this will have a devastating and irreparable spiritual, psychological, emotional, and physical effect on the Apache people. Tú Nahikaadi is associated with holy beings, and ceremonies and prayers have been performed here. The Apache people believe that this site needs to remain undisturbed for those ceremonies and prayers to remain active and effective.⁶²

The physical destruction of Oak Flat and its environs will permanently prevent all Apache people who hold this area of land sacred from practicing an important component of their religion. The destruction will prevent the full and free exercise of Apache traditional religion, prevent the harvesting of cultural foods and medicines, and forever foreclose access to sites that have been an integral part of Apache life for time immemorial.

C. The Threatened Infringement of the Tribe’s Religious Freedom and the Ongoing Discrimination Against the Tribe and Its Members, in Violation of the Convention

It is highly unlikely that this very same mining project would have been approved by Congress were it proposed to occur beneath or near a place of deep religious significance to a Christian religious denomination. Indigenous peoples in the United States, having historically been discriminated against, do not wield political power as do practitioners of majority religions and their leaders. Further, while majority religions have repeatedly been protected by United States courts, including the United States Supreme Court,⁶³ Indian tribes have not once prevailed

⁵⁹ Mining Method, Resolution Copper, <https://resolutioncopper.com/mining-method>.

⁶⁰ Geoengineering.org, “Block caving: A new mining method arises,” Jul. 25, 2018, <https://www.geoengineer.org/news/block-caving-a-new-mining-method-arises>.

⁶¹ Apache Stronghold (9th Cir.), *supra* note 1, at 18-19.

⁶² Hopkins, *supra* note 5, at 95-96.

⁶³ *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (expanding the ministerial exception to include teachers at religious schools); Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2251, 2262-63 (2020) (holding that denying financial aid to religious schools under a state constitution violated the Free Exercise Clause); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372 (upholding administrative religious exemptions to the contraceptive mandate of the Affordable Care Act); Am.

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in their several efforts in U.S. courts to achieve protection of their sacred places from desecration.⁶⁴ Such denial of protection of indigenous peoples' religion to the same extent as non-indigenous peoples' religion amounts to racial discrimination.

The present situation arises at the intersection of the denial of religious freedom and racial discrimination, an intersectionality that is the legacy of colonial oppression.⁶⁵ The planned destruction of Oak Flat is an infringement of the Tribe's right to religious practice and belief, and is the continuation of a historical pattern of racial discrimination against the Tribe and Indigenous peoples more generally in the United States, in violation of the Convention.⁶⁶ There is no other place in the world the Tribe or the Western Apache could go that would be a substitute for Oak Flat. It is integral to their identity, their culture, and their religion. The United States, under the Convention, has a duty to shed the legacies of racial discrimination and to respect and protect the religious freedom of the Tribe and other Western Apache, including in association with Oak Flat.

Article 5(d)(vii) of the Convention affirms that a fundamental obligation of State parties to the Convention is to protect the "right to freedom of thought, conscience and religion" without discrimination.⁶⁷ This right to practice religion free from discrimination is reiterated in other human rights instruments such as the International Covenant on Civil and Political Rights ("ICCPR") in its article 18.⁶⁸ As a party to these human rights treaties, the United States has an obligation to guarantee the right to religion to everyone "without distinction as to race, color, or national or ethnic origin." This freedom of religion without discrimination must extend to the Tribe and the Western Apache as a whole.

The human rights of Indigenous peoples at the intersection of their rights to freedom of religion and to be free from racial discrimination are articulated in the United Nations Declaration on the Rights of Indigenous Peoples (the "Declaration").⁶⁹ While the Declaration does not grant Indigenous Peoples new or unique rights, it does explain how the rights

Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (upholding use of public funds to maintain a memorial that was in the form of a cross as constitutional under the First Amendment); Masterpiece Cake, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724, 1732 (2018) (upholding a religious baker's refusal to serve gay customers on narrow grounds).

⁶⁴ See Carpenter, Kristen A., "Living The Sacred: Indigenous Peoples and Religious Freedom," Harvard Law Review, Vol. 134, No. 6 (2021) (discussing U.S. court cases deny protection of Native American religions), <https://harvardlawreview.org/print/vol-134/living-the-sacred-indigenous-peoples-and-religious-freedom/>

⁶⁵ See Akande, Rabiati, "An Imperial History of Race-Religion in International Law," American Journal of International Law," Vol. 118, No.1 (2024).

⁶⁶ See generally CERD General Recommendation No.23, supra note 34. para. 3 ("in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular they have lost their land and resources ... Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.").

⁶⁷ Convention Art 5(d)(vii).

⁶⁸ ICCPR Art. 18.

⁶⁹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Sept. 13, 2007, U.N. Doc. A/RES/61/295.

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immortalized in human rights instruments like the Convention and the ICCPR apply to Indigenous peoples such as the San Carlos Apache Tribe. Of particular importance, article 8 of the Declaration states that Indigenous Peoples have a right to not be subject to the destruction of their culture. Articles 11 and 12 affirm that Indigenous Peoples have a right to practice their cultural traditions and ceremonies, and have to maintain, protect, and have access to their religious and cultural sites. Articles 24, 25, 26 state that Indigenous Peoples have the right to the conservation of their traditional medicines, the right to maintain and strengthen their spiritual relationship with their traditional territories, and the right to use lands they have traditionally owned. Finally, as a safeguard for these rights, article 19 specifies that States have an obligation to “consult and cooperate in good faith” with Indigenous Peoples, “in order to obtain their free, prior, and informed consent, before adopting and implementing legislative or administrative measures that may affect them.” Considering the actions of the United States toward authorizing the Resolution Copper mine, it is evident in light of these provisions that the religious and human rights of the Tribe, and right of the Tribe and its members to be free from racial discrimination, are in imminent threat of being infringed in violation of the Convention.

VIII. THE URGENCY OF THE SITUATION AND THE NEED FOR URGENT ACTION AND EARLY WARNING MEASURES

As emphasized throughout this request, there is an urgent need for intervention in the situation at Oak Flat. The relevant federal legislation stipulates that, once the Final Environmental Impact Study is published, the land exchange must be completed within 60 days.⁷⁰ Thus, the transfer could occur on the day of the FEIS being released. While the federal government decided to reconsider the FEIS it initially proposed, the release of the new FEIS may be imminent. Additionally, while there is proposed legislation to repeal the land exchange provision of the NDAA,⁷¹ progress on the bill has been paused and there is no guarantee that it will continue to be considered. If nothing is done to protect Oak Flat, irreversible damage will be done to all Western Apache people including the Tribe. Therefore, the Tribe is asking that the Committee act immediately as the threat of harm is imminent.

The Tribe has filed a lawsuit in federal district court against the United States Forest Service, arguing that the land transfer violates U.S. environmental laws and the Tribes’ members’ right to religion under the First Amendment of the United States Constitution and the federal Religious Freedom Restoration Act (“RFRA”).⁷² However, the Tribe’s religious freedom claim is almost certain to fail because of the recent decision of the federal Ninth Circuit Court of Appeals in related litigation.⁷³

In a case brought by Apache Stronghold, an Apache NGO, the Ninth Circuit relied on prior precedent by the United States Supreme Court restricting claims under U.S. laws protecting

⁷⁰ 16 U.S.C. 539p(c)10.

⁷¹ See Save Oak Flat Act, H.R. 1884, 117th Cong. (2021).

⁷² Religious Freedom Restoration Act, 107 Stat 1488, 42 U.S.C. § 2000bb et seq.

⁷³ See Apache Stronghold v. United States of America (9th Cir.), *supra* note 1.

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freedom of religion. According to that precedent, government action only infringes religious freedom under the First Amendment and RFRA when that action constitutes a “substantial burden” on religion, and the meaning of “substantial burden” is restrictively construed to depart from the plain meaning of that term. Applying that precedent, the Ninth Circuit Court of Appeals rejected the religious freedom claims by Apache Stronghold upon finding that the United States’ conveyance of Oak Flat – in order for it to be mined and hence destroyed – would not “substantially burden” Apache religion. According to the court “a disposition of governmental real property does not impose a substantial burden 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.’”⁷⁴ Remarkably, the court found none of these present in the destruction of Oak Flat despite acknowledging that the mining will destroy the sacred place. To date, no U.S. court has ever ruled in favor of a tribe attempting to defend places of religious significance. Thus, it is virtually guaranteed, based on the *Apache Stronghold* decision and United States jurisprudence generally, that the San Carlos Apache Tribe will not successfully obtain a judgement on the religion claim that will stop the land transfer to Resolution mine and the destruction of Oak flat. Whatever the correctness of the Ninth Circuit’s decision under United States law, it only serves to demonstrated the vulnerability of the Tribe’s religious freedom as guaranteed by international law, including the Covention on the Elimination of All Forms of Racial Discrimination.

VII. CONCLUSION AND REQUEST

This request demonstrates the immediate, racially discriminatory threat to the Tribe and other Western Apache face from a mine in the process of being authorized by the Unites States, a mine that would destroy Oak Flat, a sacred place. The United States is violating and threatening to further violate the human rights of the Western Apache tribes guaranteed to them in international human rights instruments, including the Convention on the Elimination of All Forms of Racial Discrimination. The risk of harm to the Tribe and all Western Apache is imminent; the destruction of Oak Flat will result in irreparable damage to Apache religion, culture, and spiritual well-being. It would mean the impairment of the Apache people’s ability to practice important components of their religion and to connect with their ancestors and spirit world. The San Carlos Apache Tribe, therefore, urges this Committee to respond immediately and use its good offices in an effort to halt the racially discriminatory acts and omissions of the United States that are on course to culminate in irreparable harm.

The San Carlos Apache Tribe respectfully requests that the Committee call upon the United States to:

- a) Withhold any permission to Resolution Copper LLC to proceed with the planned mining activity that would destroy Oak Flat;

⁷⁴ *Id.* at 27.

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- b) Refrain from transferring Oak Flat to Resolution Copper LLC;
- c) Ensure that the no federal or private action threatens the cultural and religious sites essential to the Western Apache religion;
- d) Open discussions with the leaders of the Western Apache people with a view to finding solutions acceptable to them and that would comply with the United States' obligations under the Convention on the Elimination of All Forms of Racial Discrimination.
- e) Work with the Tribe to develop and implement consent-based consultation procedures to ensure that any federal action taken that implicates the traditional lands or religion of the Western Apache be done with their involvement at the earliest possible opportunity.

Respectfully submitted,

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