

RESEARCH ARTICLE

## Fighting for Oak Flat: Western Apaches and American Religious Freedom

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doi:[10.1017/jlr.2024.3](https://doi.org/10.1017/jlr.2024.3)

### Abstract

This article foregrounds the Western Apache fight to save the sacred site of Chi'chil Bildagoteel, or Oak Flat, which at this writing is threatened by a proposed copper mine. Like many other Native peoples, Western Apaches have historically resisted colonial suppression by reconfiguring ancestral traditions to make them legible to authorities as religion. In their current struggle, Western Apaches are restoring and repairing their relationships with the sacred landscapes of their ancestral homelands. The controversy over Oak Flat also demonstrates how US religious freedom law continues to impose an implicitly Christian model for religion and how Western Apaches today are pushing back against that model even as they necessarily use it to claim the protected status that religion enjoys in the United States. Chi'chil Bildagoteel thus illuminates the ongoing paradoxes of US religious freedom law, the privileges that Christianity still holds within this legal regime, and the ongoing vibrancy of living Apache religion.

**Keywords:** Oak Flat; Western Apache; Native American religious freedom; sacred sites; Indigenous religions

Oak Flat, known to Western Apaches as Chi'chil Bildagoteel, lies within the Tonto National Forest of central Arizona, with the vast escarpment of Apache Leap to its west and the dramatic formations of Devil's Canyon, or Gáán Bikoh, to the east.<sup>1</sup> Adjacent to Chi'chil Bildagoteel is Dripping Springs, a place with running water, boulders, and caves, where ancestral Apache petroglyphs are still visible today. In 2014, the US Congress approved a land exchange to transfer ownership of Oak Flat to the Resolution Copper Mining Company, which intends to develop a profitable new mine there. Western Apaches and their allies immediately began to protest this development on the grounds that Chi'chil Bildagoteel is sacred, irreplaceable, and must be protected. Western Apache medicine man Terrell Hinton explains: "If Oak Flat were to be destroyed, there will be no good there anymore. The plants and animals will be gone. The headdresses from Crown Dance Ceremony held in the past will be destroyed. The spirit of the Gáán will be chased off. The family members that had Ceremony there will be harmed, as the power of their experience and connection will be

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<sup>1</sup> I use the Western Apache name for this place, Chi'chil Bildagoteel, but retain the name Oak Flat in direct quotations and in some discussion of the legal case.



gone.”<sup>2</sup> In Western Apache tradition the Gáán are powerful spirits, more-than-human beings who live in and are intimately tied to this place. (That the English-language name for Gáán Bikoh is “Devil’s Canyon”—and the Gáán are often called “Devil Dancers”—illustrates a pervasive demonization of Indigenous religious practices that persists in popular culture and placenames across the United States.) For centuries, Western Apaches have maintained close ties to Chi’chil Bıldagoteel as a place to collect traditional foods and medicines, a place of ancestral origins, a place where holy beings reside, and the only place where certain prayers, offerings, and ceremonies can be conducted. Despite significant disruptions to their lives and lifeways under US rule, Western Apaches have maintained and, in recent years, even strengthened their relationships with this place.

The religious significance of Chi’chil Bıldagoteel to Western Apaches is not contested by any party in the current dispute. At the end of 2020, when the federal government completed its required reviews and prepared to finalize the land transfer, the nonprofit organization Apache Stronghold took the case to the Arizona district court on behalf of Western Apache religious practitioners. Government lawyers defended the land transfer by arguing that, despite the documented cultural and religious significance of this place, the law provides no rationale for protecting it. In January 2021, the district court agreed.<sup>3</sup> Apache Stronghold immediately appealed. Meanwhile, the new Biden administration delayed the land transfer to review the previous administration’s tribal consultation process and Environmental Impact Statement. The San Carlos Apache Tribe, which had initiated separate legal proceedings, then put its case on hold for these consultations.<sup>4</sup> In June 2022 a panel from the Ninth Circuit affirmed the lower court’s ruling that the land transfer would not impose a “substantial burden” on Western Apache religion. Faced with a public uproar, the court agreed to a rehearing *en banc*, with eleven justices in attendance. In March 2024, the *en banc* court once again agreed.<sup>5</sup> As I write, Apache Stronghold has vowed to appeal to the Supreme Court. But theirs is not the only process underway. The US Forest Service has not yet completed its final reviews of the project’s environmental and cultural impact, and lawsuits from several conservation organizations as well as the San Carlos Apache Tribe are still pending.<sup>6</sup> The fate of Chi’chil Bıldagoteel could therefore be determined by the tribe’s negotiations with the federal government or by the Supreme Court. The results matter deeply to Western Apaches and may set a significant new precedent for Indigenous sacred sites across the United States.

For Native Americans, the constitutional promise of religious freedom has rarely been fulfilled. For most of US history, the federal government actively suppressed Indigenous traditions and did not consider them to be legitimately religious at all. The end of that policy

<sup>2</sup> Affidavit of Terrell Hinton, December 10, 2020, White Mountain Apache Reservation, Navajo County, Arizona (on file with the author).

<sup>3</sup> Apache Stronghold v. U.S., 519 F. Supp. 3d 591 (D. Ariz. 2021).

<sup>4</sup> See Order Granting Joint Motion to Stay Proceedings, San Carlos Apache Tribe v. U.S. Forest Service, No. 21-CV-00068-PHX-DWL (D. Ariz. March 23, 2021). For the complaint filed by the San Carlos Apache Tribe, see Amended Complaint, San Carlos Apache Tribe v. U.S. Forest Service, No. 21-CV-00068-PHX-DWL (D. Ariz. January 25, 2021).

<sup>5</sup> Apache Stronghold v. U.S., 38 F.4th 742 (9th Cir. 2022), *vacated, reh’g granted*, 56 F.4th 636 (9th Cir. Nov. 17, 2022); Apache Stronghold v. United States, 94 F.4th 608 (9th Cir. March 1, 2024).

<sup>6</sup> “Project Update (as of February 21, 2023),” Resolution Copper Project and Land Exchange Environmental Impact Statement, US Department of Agriculture, Tonto National Forest, accessed March 7, 2024, <https://www.resolutionmineeis.us/>; “Apache Stronghold 9th Circuit Ruling Does Not Advance the Resolution Mine,” Press Release, March 3, 2024, San Carlos Apache Tribe, <https://azminingreform.org/wp-content/uploads/2024/03/Press-Release-Apache-Stronghold-Ruling-Does-Not-Advance-the-Resolution-Mine.pdf>; “Recent Court Ruling Does Not Advance Resolution Copper Proposed Mine,” March 6, 2024, Arizona Mining Reform Coalition, <https://azminingreform.org/recent-court-ruling-does-not-advance-resolution-copper-proposed-mine/>.

did not mean equality for Native peoples, who remain as colonized nations within the United States, or for their ways of life. Indigenous systems of governance and cosmology differ considerably from the models of law and religion imposed on them by the colonial order.<sup>7</sup> Many scholars have noted the incommensurability of Native sacred lands with the status of land as property in the United States. Others note a wide gulf between dominant conceptions of religion—understood as a chosen set of beliefs and practices that may be set apart from other spheres of life—and Indigenous traditions that are grounded in kinship ties between place, people, and other living things.<sup>8</sup> US religious freedom law tends to prioritize either the individual believer or the institutional church, models that just do not fit well with most Indigenous traditions.<sup>9</sup> It also has a way of shifting attention away from the rights of Native nations as *nations*, possessing an inherent sovereignty that is recognized in many treaties and by US courts.<sup>10</sup> And yet, faced with many threats to their traditions including widespread destruction of their sacred lands, Native Americans have very often found religious freedom useful as a defensive tool.<sup>11</sup>

The fight for Chi'chil Biłdagoteel reveals how US law continues to disadvantage living Native American religious traditions today—and how Western Apache people nonetheless continue to defend and maintain their traditions under US rule. The struggle for religious freedom can exert a degree of pressure on Native traditions to take shape as delineated *religions*, comparable to Christianity and separable from other dimensions of Indigenous life.<sup>12</sup> But in the voices of Western Apaches fighting to protect Chi'chil Biłdagoteel, another conclusion comes into view. In their insistence on the holiness of this land and their

<sup>7</sup> On Indigenous law, see the following: John Borrows, *Drawing out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010); John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); the contributions in Marianne O. Nielsen and Karen Jarratt-Snyder, eds., *Traditional, National, and International Law and Indigenous Communities* (Tucson: University of Arizona Press, 2020). On cosmology, see Mark D. Freeland, *Aazheyaadizi Worldview, Language, and the Logics of Decolonization* (East Lansing: Michigan State University Press, 2020).

<sup>8</sup> Among others, see the following: Robert J. Miller, "Correcting Supreme Court Errors American Indian Response to *Lyng v. Northwest Indian Cemetery Protective Association* Note," *Environmental Law* 20, no. 4 (1990): 1037–64; Vine Deloria and James Treat, *For This Land: Writings on Religion in America* (New York: Routledge, 1999); Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* (Westport: Greenwood Press, 1999); Walter R. Echo-Hawk, *In the Courts of the Conqueror the 10 Worst Indian Law Cases Ever Decided* (Golden: Fulcrum, 2010); Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton: Princeton University Press, 2020); Chris Jocks, "Restoring Congruity: Indigenous Lives and Religious Freedom in the United States and Canada," in Nielsen and Jarratt-Snyder, *Traditional, National, and International Law and Indigenous Communities*, 81–103; Kristen A. Carpenter, "Living the Sacred: Indigenous Peoples and Religious Freedom," *Harvard Law Review* 134, no. 6 (2021): 2103–56; Dana Lloyd, "Storytelling and the High Country: Reading *Lyng v. Northwest Indian Cemetery Protective Association* (1988)," *Journal of Law and Religion* 36, no. 2 (2021): 181–201; Dana Lloyd, *Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites* (Lawrence: University Press of Kansas, 2023); Sonia Sikka, "Religious Freedom and Sacred Lands," *Journal of Law and Religion* 39, no. 1, published ahead of print, December 6, 2023, <https://doi.org/10.1017/jlr.2023.37>.

<sup>9</sup> On the institutional church, see Winnifred Fallers Sullivan, *Church State Corporation: Construing Religion in US Law* (Chicago: University of Chicago Press, 2020).

<sup>10</sup> Vine Deloria, Jr., *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1998); David E. Wilkins and K. Tsianina Lomawaima, *Uneven Grounds: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001); Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005); Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham: Duke University Press, 2011); Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham: Duke University Press, 2014).

<sup>11</sup> McNally, *Defend the Sacred*, 10–11.

<sup>12</sup> Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (Chapel Hill: University of North Carolina Press, 2009); Tisa Wenger, "Indian Dances and the Politics of Religious Freedom, 1870–1930," *Journal of the American Academy of Religion* 79, no. 4 (2011): 850–78.

obligations to it, Western Apaches push back against the dominant model for religion and redefine it in more expansive ways.

Western Apaches developed this approach over time. In the twentieth century, like many other Native people, Western Apaches reconfigured their ancestral traditions to make them legible as religion.<sup>13</sup> The ongoing struggle for the future of Chi'chil Biłdagoteel can be understood, in part, as another stage in this process. US religious freedom law continues to impose an implicitly Christian model for religion. Western Apaches, like other Native peoples, have little option but to employ this model even as they push back against it to insist on the irreducible importance of their holy places. The current dispute thus illuminates the paradoxes of contemporary religious freedom law, the privileges that Christianity still enjoys within this legal regime, and the contemporary vibrancy of Western Apache religion.

### Colonial Violence and the Limits of the Archive

Understanding the religious significance of Chi'chil Biłdagoteel and the complexity of the Western Apache struggle to defend it requires a detour through Apache history and the conquest of Ndee Dawa Dabini' (Apache or Ndee lands) by the United States.<sup>14</sup> Western Apaches, Ndee, the people, have lived for many centuries along the high Mogollon Rim in the mountains of Arizona and across the Salt and Gila River Valleys. Culturally and linguistically, they are closely related to the Chiricahua, Jicarilla, Lipan, and Mescalero Apache; and more distantly to the Kiowa Apache and Navajo (Diné) nations. Although anthropologists assert that these nations moved from Alaska and western Canada to the American Southwest ten to fifteen centuries ago, Western Apache oral traditions indicate that their people came into being directly within their mountainous homelands.<sup>15</sup> They tell of Changing Woman, who survived a catastrophic flood in an earlier world and took refuge in a cave with a dripping spring. She emerged alone into this new world, Ndee Dawa Dabini'. Her children, conceived

<sup>13</sup> As a scholar of religion, I understand the category *religion* as an arbitrary and historically sedimented sign. This concept developed within specific European contexts and is historically tied to Christianity; its contours are constantly contested and change over time. Traditions become *religions* when their practitioners claim that term, which carries both perils and advantages under modern secular legal regimes. See Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993); Derek R. Peterson and Darren R. Walhof, *The Invention of Religion: Rethinking Belief in Politics and History* (New Brunswick: Rutgers University Press, 2002); Markus Dressler and Arvind-pal Singh Mandair, eds., *Secularism and Religion-Making* (New York: Oxford University Press, 2011); Michael Bergunder, "What Is Religion? The Unexplained Subject Matter of Religious Studies," *Method and Theory in the Study of Religion* 26, no. 3 (2014): 246–86; Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2016).

<sup>14</sup> On Western Apache (Ndee) naming practices I follow Karl A. Hoerig et al., "Expanding Toolkits for Heritage Perpetuation: The Western Apache Ethnography and Geographic Information Science Research Experience for Undergraduates," *International Journal of Applied Geospatial Research* 6, no. 1 (2015): 59–75.

<sup>15</sup> For the anthropological accounts see R. G. (Richard Ghia) Matson and Martin P. R. Magne, *Athapaskan Migrations: The Archaeology of Eagle Lake, British Columbia* (Tucson: University of Arizona Press, 2007); Deni J. Seymour, ed., *From the Land of Ever Winter to the American Southwest: Athapaskan Migrations, Mobility, and Ethnogenesis* (Salt Lake City: University of Utah Press, 2012); Richard Perry, *Western Apache Heritage: People of the Mountain Corridor* (Austin: University of Texas Press, 1991). For Native American critiques of the anthropological gaze, see Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1969), 78–100; Audra Simpson, *Mohawk Interruptus*; Cutchá Risling Baldy, *We Are Dancing for You: Native Feminisms and the Revitalization of Women's Coming-of-Age Ceremonies* (Seattle: University of Washington Press, 2018). Ethnographic research has too often proceeded in unethical ways and discounted Indigenous needs and concerns. At the same time, as Risling Baldy explains, anthropological accounts can sometimes be useful as a record of past Indigenous practices in the revitalization of contemporary Indigenous traditions.

with the Sun, found guidance from the holy people on how to live in this land. These sacred stories reflect the holiness of place to a people whose existence, spiritually and materially, has always relied on an intimate relationship with their land. Through many historical transformations, much like Changing Woman herself, Western Apaches have remained true to their ancestral ways and have adapted them to sustain their communities in the modern world.<sup>16</sup>

The Western Apache, Ndee, are a people deeply grounded in place. Their homelands are spectacularly beautiful and ecologically varied, ranging from high mountain peaks and pine forests to verdant canyons and lowland deserts. Before the arrival of any colonial power in North America, they were loosely organized into nine bands that lived and moved seasonally within distinct regions of their larger homelands. Groups within these bands were regionally defined and flexible in size, coming together seasonally or at times of need. Families planted corn and other crops in their summer base camps and then moved through a cycle of places, well known to them, to harvest wild plants for food and medicine in their appropriate season. Clan identities cut across these affiliations, helping to maintain ties between allied bands over time. This system enabled the people to hunt, farm, and gather wild foods across the varied ecological zones of their mountainous homelands. Each band developed ties to and conducted ceremonies in different but overlapping sets of holy places.<sup>17</sup> By praying, harvesting medicinal plants, sharing stories, and conducting ceremonies in these places, observant Western Apaches today remain in intimate relationship with their ancestors and with the land itself. Stories about events that happened in specific places, either within or beyond living memory, are imparted as a means of gentle chiding or ethical instruction and add new layers of meaning to the sites where they occurred. The holiest of these places, associated with ancestors and with specific holy beings, remind observant Western Apaches of their origins, their history as a people, and their obligations to the land and all the beings who live there.<sup>18</sup>

Chi'chil Bıldagoteel lies within the traditional territory of two Western Apache bands, known as T'iis Tsebán (Cottonwood Trees Gray among Rocks People), or the Pinal Band of Apaches; and Tsé Binesti'é (Surrounded by Rocks People), or the Aravaipa Band. As its name suggests, the place was especially known for its large stand of impressive oak trees and the large quantities of acorns, used both for food and in ceremonies, that could be gathered there. Chi'chil Bıldagoteel and the adjacent Dripping Springs are recognized as places of origin and so have a powerful significance for eight different clans. In addition, specific Gáán Lichíí (Red Mountain Spirits) are said to live at Chi'chil Bıldagoteel and could not exist without this place. Nor could the prayers and ceremonies that are associated with them.<sup>19</sup> For all these reasons, Chi'chil Bıldagoteel has long been an important site for Western Apache religious practice. When Western Apaches were forcibly moved onto reservations,

<sup>16</sup> Keith H. Basso, *The Cibecue Apache* (New York: Holt Rinehart and Winston, 1970), 64–65; Neil Goodwin, *Like a Brother: Grenville Goodwin's Apache Years, 1928–1939* (Tucson: University of Arizona Press, 2015), 173–82; Maren Hopkins et al., *Ethnographic and Ethnohistorical Study of the Superior Area, Arizona* (Tucson: Anthropological Research, LLC, 2015), 26–27 (prepared for Tonto National Forest and Resolution Copper Mining; on file with the author).

<sup>17</sup> Grenville Goodwin, *The Social Organization of the Western Apache* (Chicago: University of Chicago Press, 1942); Ian W. Record, *Big Sycamore Stands Alone: The Western Apaches, Aravaipa, and the Struggle for Place* (Norman: University of Oklahoma Press, 2008), 38–54.

<sup>18</sup> Keith H. Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (Albuquerque: University of New Mexico Press, 1996).

<sup>19</sup> Affidavit of Rose Belvado, December 9, 2020, San Carlos Apache Reservation, Gila County, Arizona (on file with the author); Affidavit of Jacob Henry, November 27, 2019, San Carlos Apache Reservation, Gila County, Arizona (on file with the author); John R. Welch, “Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859–1874,” *Sage Open* 7, no. 4 (2017): 1–19, at 3, <https://doi.org/10.1177/2158244017747016>; Goodwin, *The Social Organization of the Western Apache*, 606–17.



the various bands and clans formed new bonds and gradually came to share each other's sacred places and traditions. This process gradually made some places, like Chi'chil Biłdagoteel, important to Western Apaches well beyond the bands who had historically built relationships with this place and its holy beings.<sup>20</sup>

The political economy of the Western Apaches and neighboring Native nations changed in the sixteenth and seventeenth centuries as Spain expanded its colonial territories north into present-day New Mexico and Arizona. Spanish authorities viewed Indigenous peoples as inferior savages. In the name of Christianity and civilization, they aimed to transform their lifeways and make them loyal subjects of Spain. A growing number of the Apaches' Native neighbors, including many Tohono O'odham and Akimel O'odham in Arizona, were forced into consolidated settlements, or *reducciones*, under the authority of Jesuit or Franciscan missions. Backed up by Spanish garrisons, priests forced Native workers to cultivate fields and tend livestock to sustain the missions. In mining towns, too, colonial officials forced Native people to extract mineral resources for the profit of New Spain. Western Apaches mostly remained apart and independent from these colonial endeavors. Still, the reorganization of regional economies inevitably had an impact on them. Apache subsistence strategies had long included small-scale raids on neighboring communities such as the O'odham. The growing number of *reducciones* and Spanish settlements made them easier targets, while also making it more difficult to sustain Apache communities in other ways. Raiding for livestock and other goods thus became an increasingly significant part of Western Apache life.<sup>21</sup>

For much of the eighteenth century, the region experienced ongoing warfare. Western Apaches were skillful raiders and deployed guerilla tactics that endlessly frustrated Spanish efforts to control them. In the 1790s, a new Spanish governor began to offer peace treaties with material benefits to cooperative Apache bands. Western Apaches now began to develop more amicable trading relationships with their Spanish and O'odham neighbors. That trend would likely have continued if Mexico had not secured its independence from Spain in 1821. But the change of government disrupted the peace policy, as the new government could not afford to provide goods to the Apaches, and violence flared again along these northern borderlands. Frustrated Mexican officials announced a new extermination policy and offered bounty payments for Apache scalps. Bounty hunters ravaged Apache communities, sometimes attacking the O'odham and other Indigenous communities as well. Western Apaches retaliated by escalating their raids. Increasingly, they not only seized livestock but also killed and took human captives to avenge their own losses.<sup>22</sup>

When the United States laid claim to Apache homelands, the Western Apaches had no reason to accept U.S. sovereignty or to recognize a border that was unilaterally drawn around and over them. When the Mexican American War ended in 1848, the Treaty of Guadalupe Hidalgo transferred the territories of Arizona and New Mexico to the United States and guaranteed Mexican citizens the right to US citizenship but described Native Americans only as "savages" in need of control.<sup>23</sup> Seven Apache chiefs representing both Chiricahua and Western Apache bands signed a separate treaty with the United States in 1852. They promised to halt their raids into Mexico and placed themselves "exclusively under the laws, jurisdiction, and government of the United States of America." The United States in turn promised to "adjust the territorial boundaries" of Apache lands and to enact

<sup>20</sup> Goodwin, *The Social Organization of the Western Apache*, 35.

<sup>21</sup> Record, *Big Sycamore Stands Alone*, 73–75; Paul Conrad, *The Apache Diaspora: Four Centuries of Displacement and Survival* (Philadelphia: University of Pennsylvania Press, 2021).

<sup>22</sup> Record, *Big Sycamore Stands Alone*, 73–75; Conrad, *The Apache Diaspora*, 180–83; Donald E. Worcester, *The Apaches: Eagles of the Southwest* (Norman: University of Oklahoma Press, 1979).

<sup>23</sup> Record, *Big Sycamore Stands Alone*, 116–17; Conrad, *The Apache Diaspora*, 183–84.

laws “conducive to [their] prosperity and happiness.”<sup>24</sup> This treaty, for Western Apaches, implied no loss of land or sovereignty. “Within the *longue durée* of Apache diplomacy,” historian Paul Conrad writes, “symbolic submission” to successive imperial powers had always “coincided with the ability to continue to live among and govern their people as they saw fit.” They had no reason to expect that this would change.<sup>25</sup>

The United States did not live up to its promises. A year after the Apache Treaty, once again without consulting any Native nations, the Gadsden Purchase transferred a disputed portion of southern Arizona from Mexico to the United States. New discoveries of gold and silver brought a flood of miners and speculators into the region. When Apaches fought back in defense of their lands, they were targeted for elimination. Local authorities and the popular press described them in racist terms as “wild” and “the wolf of the country.”<sup>26</sup> Rather than protecting them, as the recent treaty had promised, the US army backed up the miners. Fort Buchanan, south of Tucson, and Camp Grant at the mouth of the Aravaipa Creek were established in 1856 to enable strikes against the Apaches. In 1862, the commanding US general ordered that all Apache men should be killed on sight. Territorial agents and army officers stood to profit from the mines. Arizona’s Superintendent of Indian Affairs wrote in 1865: “A sickly sympathy for a few beastly savages should not stand in the way of the development of our rich gold fields, or the protection of our enterprising frontiersmen.”<sup>27</sup> Hundreds of Western Apache men, women, and children were killed by miners and militiamen in a deliberate campaign that archaeologist John Welch has described as a genocidal policy of annihilation. In Arizona, mining was the economic engine that drove this anti-Indigenous violence.<sup>28</sup>

Military and vigilante violence increasingly impeded Western Apache lifeways. Historian Ian Record explains: “The army’s relentless stalking made farming, gathering, and hunting in their accustomed places a grave proposition for the Pinals and Aravaipas”—the bands most directly connected to Chi’chil Bildagoteel—“and raiding for subsistence ever more vital.”<sup>29</sup> In 1869, President Ulysses Grant initiated a new Peace Policy that was supposed to solve the so-called Indian problem not through violence but by bringing Native Americans to Christianity and (so-called) civilization. This policy, part of a larger consolidation of US power in the west after the Civil War, was in truth a new way to eliminate Indigenous nations. It took some time for this new approach to have any effect in southern Arizona, where army contracts and mining both were central to Tucson’s booming economy. Army troops attacked several Apache camps in the summer of 1869, killing scores of people and destroying large amounts of property, including cultivated cornfields. The next spring, when a new lieutenant promised them peace and protection, several hundred war-weary Apaches gathered at Camp Grant for a celebratory dance. But Tucson’s leading men, angered by the new approach, had already organized a militia and attacked the next morning. More than a hundred unarmed Western Apaches were killed in what came to be known as the Camp Grant Massacre.<sup>30</sup>

<sup>24</sup> “U.S. Treaty with the Apache, 1852,” in *Indian Affairs: Laws and Treaties*, compiled and ed. Charles J. Kappler, vol. 2, *Treaties* (Washington, DC: Government Printing Office, 1904).

<sup>25</sup> Conrad, *The Apache Diaspora*, 185.

<sup>26</sup> As cited in Welch, “Earth, Wind, and Fire,” 7.

<sup>27</sup> As cited in Welch, “Earth, Wind, and Fire,” 8.

<sup>28</sup> Richard John Perry, *Apache Reservation: Indigenous Peoples and the American State* (Austin: University of Texas Press, 1993), 119–29; Welch, “Earth, Wind, and Fire,” 7–14.

<sup>29</sup> Record, *Big Sycamore Stands Alone*, 184.

<sup>30</sup> Record, 185–215; Chip Colwell-Chanthaphonh, “Western Apache Oral Histories and Traditions of the Camp Grant Massacre,” *American Indian Quarterly* 27, nos. 3/4 (2003): 639–66; Karl Jacoby, *Shadows at Dawn: A Borderlands Massacre and the Violence of History* (New York: Penguin Press, 2008).

The national attention that the massacre generated only resulted in additional surveillance and confinement for Western Apaches. President Grant issued executive orders to clarify the boundaries of the White Mountain Reservation, including San Carlos. A new military commander ordered all Western Apaches to gather and remain at the reservation agencies on penalty of death. The Pinal and Aravaipa bands were forced away from their canyon and mountain homelands and had to move, along with Chiricahua Apaches and Yavapais, to the hot and dry San Carlos Agency. Areas considered undesirable for white settlers, farmers, or prospectors were deliberately selected for the reservation.<sup>31</sup> Then, over the course of the next half-century, whenever prospectors discovered still more mineral riches or when loggers and ranchers wanted more land, the US government further downsized the reservation and eventually divided it into two. This process ultimately restricted Western Apache access to all but four million acres of their vast homelands, more than twelve million acres in all, which the United States had once promised to protect. The US government never compensated Western Apaches for any of these lands, including Chi'chil Biłdagoteel.<sup>32</sup>

Reservations were sites of incarceration, making it difficult for Western Apaches to access many of the places they treasured. In the early years, US agents issued metal identification tags and, with few exceptions, prohibited virtually any movement off the reservations. Barred from their own means of subsistence, the people were reliant on substandard rations that did not match their traditional foodways and sometimes did not materialize at all. They suffered from starvation and disease epidemics. If they left the reservation for any reason—to raid white settlements, to gather food, or to visit sacred sites such as Chi'chil Biłdagoteel—they were subject to punishment. In the mid-1870s, US Indian Agent John Clum reported that he had hired local Apache policemen “to patrol the Indian camps, to quell disturbances, to arrest offenders, to report any sign of mutiny or disorder, and to scout the reservation and arrest Indians who are absent from the reservation without a pass.”<sup>33</sup> The Aravaipa chief Hashké Bahnzin, who had served as one of these policemen, managed in 1877 to establish a ranching operation off the reservation with a small band of followers. When they began to sell surplus crops in nearby towns, local settlers challenged their right to the land, razed their farms, and threatened to kill the chief.<sup>34</sup> Forced to move back to San Carlos, Hashké Bahnzin was later accused of harboring his fugitive son-in-law, the Apache Kid, who had continued to fight against the United States. In penalty the chief and his whole family were marched to Mount Vernon Barracks in Alabama. Hashké Bahnzin had prospered in farming and business, only to be met with violence from white settlers and reprisals from the United States.<sup>35</sup>

New religious movements served as sources of resilience and resistance for Western Apaches through these traumatic years. In the early 1880s, a Cibecue medicine man named Nockaydelklinne became known as the “Na'ilde' Prophet” and taught a new ceremony aimed at restoring his people and bringing the dead back to life. Nockaydelklinne had joined an Apache peace delegation to Washington in 1871 and was introduced to Christianity when he

<sup>31</sup> Record, *Big Sycamore Stands Alone*, 30.

<sup>32</sup> Record, 30; John R. Welch and Ramon Riley, “Reclaiming Land and Spirit in the Western Apache Homeland,” *American Indian Quarterly* 25, no. 1 (2001), 5–12, at 6–7; Declaration of John Welch at 6, *Apache Stronghold v. United States of America*, 519 F. Supp. 3d 591 (D. Ariz. 2021) (Docket No. 2:21-cv-00050).

<sup>33</sup> US Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1875* (Washington, DC: Government Printing Office, 1875), 216. On Clum and his relationship with the Apaches, see Record, *Big Sycamore Stands Alone*, 31–35; John P. Clum, “The San Carlos Apache Police, II,” *New Mexico Historical Review* 5, no. 1 (1930): 67–93.

<sup>34</sup> Worcester, *The Apaches*, 175–207, 277–78; Record, *Big Sycamore Stands Alone*, 34–38, 63–68.

<sup>35</sup> Record, *Big Sycamore Stands Alone*, 104–07; Sherry Robinson, *Apache Voices: Their Stories of Survival as Told to Eve Ball* (Albuquerque: University of New Mexico Press, 2000), 82–84.



briefly attended a Catholic mission school in Santa Fe. A US government official conducting a census of the White Mountain Apaches reported in 1881 that Nochaydelklinne proclaimed that he could resurrect the dead. He announced the imminent resurrection of the great Cibecue chief Diablo, who had died in battle the previous year. A speech attributed to him reveals a powerful connection to the land, along with a righteous anger at the Apaches' dispossession. "Are we not natives to the earth around us?" Nochaydelklinne asked. "Are we not part of the forest, the rocks, the air? Do not the birds sing for the Apache? ... Do not the bodies of our ancestors lie beneath the earth that belongs to the Coyotero?" He taught a new dance to "commune with the spirits," to "inspire passion, faith, fury, bravery, and strength," and to prepare the people for the return of Diablo, who alone could deliver his people "from the hated whites."<sup>36</sup> Drawing on the strength of Apache traditions, Nockaydelklinne and his people dared to imagine free Indigenous futures.

This movement was similar in some respects to the later and better-known Ghost Dance, practiced not by Apaches but by many other Native people across the Western Plains.<sup>37</sup> In Arizona, as in South Dakota a decade later, rumors swirled among white settlers of a "war dance" and an imminent Native American uprising. Western Apache policemen were sent to arrest Nockaydelklinne but returned to the reservation without him. Some of them had regularly been attending his dances.<sup>38</sup> The government agent at San Carlos panicked and demanded military reinforcement. That August, US Colonel Eugene Carr took 117 soldiers and scouts out to the mountains intending to arrest the medicine man. In the so-called Battle of Cibecue, known to Apaches as a massacre, seven soldiers and more than a dozen Apaches were killed, including Nockaydelklinne. Apache fighters then briefly laid siege to Fort Apache. These events appeared in newspapers across the United States as still more evidence of Apache "savagery." Drawing on his own family memories of the event, however, Abner Tessay of Cibecue explains that the Apaches "were just fighting for their culture and their land."<sup>39</sup> The Na'ilde' movement ended with the death of Nockaydelklinne but remained alive in Apache memories, part of the history of Western Apache resistance to colonialism and of Indigenous religious adaptation and change.<sup>40</sup>

The suppression of Apache religious practices and traditions was part of a broader government policy of forced assimilation. Starting with the Peace Policy, the Office of Indian Affairs implemented ever more elaborate programs aimed at eliminating what officials called *savagery* and replacing it with the white American version of civilization, including Christianity. Government policies aimed to completely eradicate Indigenous tribal identities, practices, and traditions. Presumed incompetent to manage their own affairs, Native people were defined as wards who required a long period of tutelage before they could assume the rights and responsibilities of citizenship. The First Amendment applied in theory to all persons within the United States. But the government's treatment of those it labeled wards effectively voided these constitutional guarantees.<sup>41</sup> In 1883 the Office of Indian Affairs disseminated new "Rules Governing the Court of Indian Offenses," which created tribal courts directed to impose penalties for Indigenous practices, including the

<sup>36</sup> William Burkhardt Kessel, "White Mountain Apache Religious Cult Movements: A Study in Ethnohistory" (PhD diss., University of Arizona, 1976), 63–73.

<sup>37</sup> Tiffany Hale, *Fugitive Religion: The Ghost Dance and Native American Resistance after the US Civil War* (New Haven: Yale University Press, forthcoming).

<sup>38</sup> Record, *Big Sycamore Stands Alone*, 309.

<sup>39</sup> John R. Welch, Chip Colwell-Chanthaphonh, and Mark Altaha, "Retracing the Battle of Cibecue: Western Apache, Documentary, and Archaeological Interpretations," *Kiva* 71, no. 2 (2005): 133–63, at 145.

<sup>40</sup> Kessel, "White Mountain Apache Religious Cult Movements," 63–73; Welch, Colwell-Chanthaphonh, and Altaha, "Retracing the Battle of Cibecue," 145.

<sup>41</sup> John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), 35; Wenger, "Indian Dances and the Politics of Religious Freedom, 1870–1930," 857–58.

“practices of so called ‘medicine-men’” along with “the ‘sun-dance,’ ‘scalp-dance,’ ‘war-dance,’ or all other so-called feasts.”<sup>42</sup> These rules were updated and expanded in 1892, when the penalties for violating them included fines, forced labor, the loss of rations, and up to six months in prison for any Native person who used “the arts of a conjurer to prevent Indians from abandoning their barbarous rites and customs.” Indigenous traditions were classified here not as religions but as “barbarous rites” that kept Native Americans from progressing in “civilization.”<sup>43</sup> In keeping with this policy, a new US agent on the San Carlos Apache Reservation reported in 1892 that he had recently organized a “Court of Indian Offenses” and was actively discouraging the “practices of ‘medicine men’... in every way.”<sup>44</sup> Western Apaches had every incentive to conceal whatever they could from the agents’ prying eyes—especially the kinds of ceremonies that they continued to hold, whenever possible, at their holy places.

### Holy Ground

How might one understand cultural continuity and change under such conditions? How have Western Apache religions developed under the colonial impositions of US rule? In the early twentieth century, as Western Apaches lived with continued military violence and confinement on the San Carlos and Fort Apache reservations, they also suffered from a series of droughts, disease epidemics, and reduced government rations. Their children were forcibly taken to boarding schools, where they were too often assigned to hard manual labor, whipped for small infractions, required to attend Christian church services, and forbidden to speak their own language.<sup>45</sup> White farmers and ranchers channeled away scarce river waters and staked out claims to more and more Apache lands. Western Apaches were sometimes forbidden to leave their reservations at all. It is no wonder that there is little record in the colonial archive of where, precisely, they traveled during these years, or how they remained in relationship with their sacred places. In official records, their travels and their ceremonies appeared only as problems, either an infraction of the rules or a direct threat to the colonial order. Even when they could travel, the ongoing threat of military violence and the growing number of mines and white settlements limited their access to many sites. They nevertheless continued to draw on sacred powers and remained intimately connected, if only in their memories, at the hardest times, to the places that had always sustained them. They also adapted their religious practices and traditions in ways that helped them survive within the constraints of US rule. The new ways were always connected to the old, rekindling and reinforcing Western Apache relationships to the landscapes and places, like Chi’chil Bildagoteel, that had always been most important to them.

Like many other Native Americans under US rule, Western Apaches soon began to defend their traditions by labeling them in English as a distinct religion.<sup>46</sup> When Christian

<sup>42</sup> Henry M. Teller, United States Secretary of the Interior, to Hiram Pierce, Commissioner of Indian Affairs, regarding Rules Governing the Court of Indian Offenses, March 30, 1883, Chester Fritz Library, University of North Dakota, <https://commons.und.edu/indigenous-gov-docs/131/> (transcribed version); US Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1883* (Washington, DC: Government Printing Office, 1883), xv, <https://search.library.wisc.edu/digital/AUSIINXBHKS3GO8P>.

<sup>43</sup> US Office of Indian Affairs, *Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* (Washington, DC: Government Printing Office, 1892), 27–29, <https://search.library.wisc.edu/digital/AMYCRNQV4YWPBZ8N>.

<sup>44</sup> US Office of Indian Affairs, *Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*, 222, 220.

<sup>45</sup> For one family’s painful experience with these policies, see Eva Tulene Watt, *Don’t Let the Sun Step over You: A White Mountain Apache Family Life (1860–1975)* (Tucson: University of Arizona Press, 2004).

<sup>46</sup> Wenger, *We Have a Religion*; Wenger, “Indian Dances and the Politics of Religious Freedom, 1870–1930.”

missionaries condemned what they called *heathenism*, for example, Apache people pushed back by insisting that they had their own religion and did not need a new one. Lutheran missionaries arrived on the San Carlos Reservation in 1893 and held worship services at the reservation boarding school. One of them, Paul Mayerhoff, reported that very few Apaches were interested in his message. They told him that they did not need the “[w]hite man’s [g]od” because they were satisfied with their own. Apache people refused to describe the details or reveal the locations of their dances and ceremonies to the missionaries or any other white men. One medicine man threatened death “in hell” to any Apache who gave out such information.<sup>47</sup> Catholic missionaries seem to have been a bit more open than their Protestant counterparts to the ongoing practice of Apache traditions. Eva Watt, a Western Apache woman who attended a Catholic boarding school on the Gila River Indian Reservation in the late 1920s, recalls that teachers there did not “preach against Indians’ religion.” While “each nationality” had “their own way of praying,” they said, “still they’re praying to the same thing.”<sup>48</sup> Behind this acceptance lay a supersessionist theology. Catholic authorities understood non-Christian traditions not as distinct religions with their own integrity, but as preparatory precursors to the Christian gospel. Still, the priests at least granted some legitimacy to Apache prayers. This approach encouraged Western Apaches like Watt herself, along with the teachers at St. John’s, to conceptualize Apache traditions as a distinct religion that should be recognized and respected as such.

In the early twentieth century, Western Apache medicine men developed new ceremonies that affirmed traditional lifeways while shaping new hopes for the future. Echoing the Na’ilde’ movement of the 1880s, the Daghodiya’ (They will be raised upward) movement began in 1903 with a Cibecue medicine man named Daslahdn, or Big John, on the White Mountain Reservation. Daslahdn told the people to dress in white clothing and taught them new dances that he said would renew the world. The faithful were to be raised up into the sky on a cloud and then would return to earth after its evils were destroyed by a great flood or earthquake. Medicine men at San Carlos also began practicing the Daghodiya’ alongside their own songs and healing ceremonies. These dances seem to have ended a few years later after Daslahdn died, and the promised new world had not yet appeared. Torrential rains came in 1908, washing out the roads and then bringing “new cottonwoods” and “wonderful crops all over.” People joked, “All this is what we must have done all that dancing for.”<sup>49</sup> Similarly, in the ‘Aayode’ (It will happen) movement of 1916–1917, medicine men directed people to dance, dressed all in white, so that they would be lifted up by a deity to live in peace and harmony in a new world. These new movements built on traditional Western Apache frameworks, including a cosmological cycle in which the destruction of one world led to the birth of the next. The Daghodiya’ and ‘Aayode’ dances were conducted in special places, their locations hidden by necessity from authorities and thus from the colonial archive. I have found no evidence to say whether any of these dances were held at Chi’chil Biłdagoteel. The choice of this site, already recognized as sacred, would have underlined the holiness of the dances while also deepening the sanctity of such a holy place.<sup>50</sup>

Another new movement known as Sailis Jaan Bi’at’eelhi (Silas John His Sayings), or the Holy Ground Movement, emerged in the 1920s and very clearly included ceremonies at

<sup>47</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 84–85, 92, 119–20, 130–31, quotations at 92, 131.

<sup>48</sup> Watt, *Don’t Let the Sun Step over You*, 128–33.

<sup>49</sup> Grenville Goodwin and Charles Kaut, “A Native Religious Movement among the White Mountain and Cibecue Apache,” *Southwestern Journal of Anthropology* 10, no. 4 (1954): 385–404, at 399.

<sup>50</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 97–100, 111–12, 128–30; Grenville Goodwin and Charles Kaut, “A Native Religious Movement among the White Mountain and Cibecue Apache,” *Southwestern Journal of Anthropology* 10, no. 4 (1954): 385–404; Sharon M. Gloshey, “*Indigenous Ways of Knowing and Its Interpretation of the White Mountain Apache Holy Ground Spiritual Movement*” (MA thesis, New Mexico State University, 2020), 32–33, 37.

Chi'chil Bildagoteel. Silas John Edwards, the son of a medicine man, had attended two reservation boarding schools and had worked as an interpreter for the Lutheran missionary Edgar Guenther. Starting around 1904 when he was twenty-one, Silas John had a series of visions that reflected both Christian and indigenous Apache influences. In one vision, twelve snakes lifted him from a torrential flood and carried him to a place of beginnings, where a supernatural being taught him prayers and promised that he would become a powerful holy man. The flu epidemic of 1918–19 hit the Apaches hard and, despite the prayers and healing ministrations of Apache herbalists, medicine men, and a sympathetic agency doctor, many people died. By 1920, Silas John was holding large dances and had gathered many followers on both the White Mountain and San Carlos reservations. He sang songs from his visions, used live rattlesnakes in a healing ceremony, and blessed all in attendance to neutralize any witchcraft and to prevent future illnesses. He also taught an original Apache-language writing system, used solely to convey prayers and instructions for Holy Ground ceremonial practice. In so doing, he drew Apaches away from the Lutheran mission and earned the enmity of the missionaries.<sup>51</sup>

The Holy Ground movement is a window on how some Western Apaches have compared their religious traditions to Christianity—a dynamic repeated today in the legal battle over Chi'chil Bildagoteel/Oak Flat—and how these comparisons worked to assert religious legitimacy in the face of government hostility. Silas John identified his new movement as a religion distinct from Christianity, given by God specifically for the Apache people. To do this, though, he had to compare it to the religions that were already familiar to his audience. Apaches, he said, did not need the Christian Bible. God had given him “62 prayers” in his visions, along with the writing needed to record them.<sup>52</sup> Many years later he explained: “God made it [the writing], but it came down to our earth. I liken this to what has happened in the religions we have now. In the center of the earth, when it first began, when the earth was first made, there was absolutely nothing on this world. There was no written language. So it was in 1904 that I became aware of the writing; it was then that I heard about it from God.”<sup>53</sup>

Silas John's emphasis on the divine origins of his writing—and the comparison he drew to other religions—responded to a colonial system of classification that assigned greater prestige to those traditions deemed world religions, a category defined in part by the existence of sacred texts.<sup>54</sup> Like the central figure of Moses in the Jewish and Christian scriptures, Silas John had received his new writings directly from God. In this and many other ways, he worked both to demonstrate his power as a medicine man and to secure religious legitimacy in the government's eyes. He held his meetings on Sundays, thus making the movement fit more closely into the Christian mold for religion. He informed the superintendent that Apaches learned about Jesus Christ in his services and measurably improved their lives. He hired an attorney from Globe, who argued for the movement on religious freedom grounds.<sup>55</sup> In other words, like many other Native American religious leaders in this period, Silas John tried, in terms that authorities might be willing to accept, to

<sup>51</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 142–57, 162–65; Keith H. Basso and Ned Anderson, “A Western Apache Writing System: The Symbols of Silas John,” *Science* 180, no. 4090 (1973): 1013–22; Gloshey, “Indigenous Ways of Knowing and Its Interpretation of the White Mountain Apache Holy Ground Spiritual Movement,” 37, 41–42; William B. Kessel, “Edgar and Minnie Guenther,” in *Western Apache Material Culture: The Goodwin and Guenther Collections*, ed. Alan Ferg (Tucson: University of Arizona Press, 1987), 21.

<sup>52</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 167.

<sup>53</sup> Basso and Anderson, “A Western Apache Writing System,” 1014.

<sup>54</sup> On the category of world religions, see Tomoko Masuzawa, *The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005).

<sup>55</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 167, 170–72.

position the Holy Ground movement as a *religion*, different from Christianity but worthy of the same level of respect and recognition it received under US law.<sup>56</sup>

US authorities, however, rejected that attempt. In the fall of 1920, a government agent forbade Silas John's dances and then jailed him. "I have told Silas and all the Indians here that I do not object to them keeping up to some extent their ancient rites and tribal teachings[,]” he reported, “but that I would not permit any of the young men to start new religions.”<sup>57</sup> This agent assumed that the Apache practices he deemed “ancient,” and their practitioners, were doomed in the face of modernity. Note too that the agent did not dignify these “rites” and “teachings” with the term *religion*. He was convinced that such practices would inevitably disappear as younger Apaches became more educated and, perhaps, Christianized. His report thus reflected the embedded racial and colonial hierarchies of twentieth-century secularization theory.<sup>58</sup> Because the agent believed that the older traditions would eventually disappear, he permitted them “to some extent.” In contrast, he viewed any “new religion” as a serious problem. Silas John's comparisons to Christianity and his claim to religious legitimacy had no traction with this agent, who saw anything Native-led as automatically illegitimate and bound to inhibit Apache progress toward civilization. It did not occur to this agent that First Amendment protections might extend to Native American religious traditions, especially those with new elements like Silas John's. Novelty and change in tradition, however, are no reason to withhold First Amendment protections. All religious traditions were new at some point; all of them blend multiple influences, in one way or another; all continue to change over time.

With all its innovations and its Christian influences, the Holy Ground Movement also maintained a great deal of continuity with traditional Apache ways of seeing and doing. Silas John taught his revealed prayers to twelve disciples at San Carlos, following a model set by Christ and his twelve disciples. He empowered these disciples to lead prayers and ceremonies at specially designated holy grounds. In her important insider's history of the Western Apache people, Eva Watt has explained that Silas John's followers, including her own brother and sister-in-law, held their most important dances in the springtime at these sites. Rose Belvado, born in 1944, recalls that her family participated in Holy Ground ceremonies at Chi'chil Bildagoteel when she was a child.<sup>59</sup> The holy grounds were marked at the corners with “four posts,” Watt recalls, each post in a different color to mark the four directions. As they entered, the people would remove their shoes and Silas's assistants “blessed around their legs and feet” with *hádndín* [cattail pollen]. Western Apache scholar Sharon Gloshey explains that pollen “is a life[-]giver[,] for by it the earth is poll[i]nated,” creating “the circle of life” that sustains all. On some occasions all the people would pass through “huge hoops[,]” symbolizing their inclusion within that circle. Then those who wished to do so danced with rattlesnakes held out in front of them, following precise instructions from Silas John. The pollen and the prayers, Watt notes, provided protection from snakebite and many other perils.<sup>60</sup> In selecting sites that Apaches already considered sacred, the Holy Ground

<sup>56</sup> Tisa Wenger, *Religious Freedom: The Contested History of an American Ideal* (Chapel Hill: University of North Carolina Press, 2017), 101–42.

<sup>57</sup> Kessel, “White Mountain Apache Religious Cult Movements,” 157.

<sup>58</sup> For more on these hierarchies, see Masuzawa, *The Invention of World Religions*; Tracy Fessenden, *Culture and Redemption: Religion, the Secular, and American Literature* (Princeton: Princeton University Press, 2007); the contributions in Jonathon S. Kahn and Vincent W. Lloyd, eds., *Race and Secularism in America* (New York: Columbia University Press, 2016); Wenger, *Religious Freedom*.

<sup>59</sup> Affidavit of Rose Belvado.

<sup>60</sup> Watt, *Don't Let the Sun Step over You*, 119–23; Gloshey, “Indigenous Ways of Knowing and Its Interpretation of the White Mountain Apache Holy Ground Spiritual Movement,” 39–40.



movement secured credibility in Indigenous terms and deepened the sanctity of the places where its ceremonies were held.

The government tried to stop this movement. Through the 1920s, Silas John was repeatedly jailed, for months at a time, on a variety of charges. Still, he continued holding dances. He trained many ceremonial leaders and assistants who could bless the holy grounds and could, in his absence, lead the necessary prayers and ceremonies on each of the Apache reservations. Tragedy struck in 1933 with the violent murder of Silas John's wife. He was convicted of the crime and sentenced to life in prison. During his years of imprisonment, Holy Grounds committees planned Sunday meetings and special healing ceremonies, but they were careful to keep any of their more controversial practices underground. The Lutheran missionaries especially were staunch opponents.<sup>61</sup> By this time, some Apache Christians had become convinced that the traditional Apache ways were sinful and that medicine men "would get Hell for practicing ceremonies and the old religion[.]" Some were convinced to abandon the movement. Faced with so much opposition, many who remained were reticent to speak about Apache ceremonies and holy things.<sup>62</sup> Most details about the movement's history therefore exist not in the colonial archives but only in the memories of Apache elders.

The Holy Ground movement remained alive despite its leader's incarceration. Silas John kept up an active correspondence with the Holy Grounds committees. Many of his followers traveled to the prison seeking blessings and healing directly from him. Eventually it became clear that he had been falsely accused and framed for his wife's murder. In 1955, he was paroled and allowed to return home. For the first decade after his release, he held only private ceremonies. By the mid-1960s, however, a changing political climate brought greater freedom on the Apache reservations. Silas John decided in 1965 that he could, at last, openly hold a healing ceremony and a snake dance without fear of reprisals. The dance was well attended, and many observers remarked on its inclusivity and its powerful impact. But the elderly Silas could no longer sustain the arduous days-long cycle of songs and chants that his ceremonies required. He retired from public leadership, and without him the movement lost some of its energy.<sup>63</sup> Still it continues today. In her recent University of Arizona master's thesis, Sharon Gloshey recalls participating as a child in Holy Ground ceremonies, including dances with rattlesnakes. Terrell Hinton, a medicine man born in 1980, has joined in several of these ceremonies at Chi'chil Bildagoteel since the year 2013. Gloshey argues for the movement's ongoing value in supporting Apache epistemologies and ontologies. Within and beyond the Holy Ground movement, Western Apache connections to place—and to recognized sacred places like Chi'chil Bildagoteel—have not only remained alive but have added new layers of meaning, becoming stronger over time.<sup>64</sup>

As the restrictions of reservation life loosened, Western Apache families were more often able to visit the places most important to them. Indeed, for many struggling families, travel was a necessity. Eva Watt explains that her family went wherever work could be found. During her childhood in the 1920s, her parents traveled to labor in the mines and in dam construction; to collect government rations; to plant and harvest crops such as potatoes,

<sup>61</sup> Kessel, "White Mountain Apache Religious Cult Movements," 158–61, 181–82; Goodwin and Kaut, "A Native Religious Movement among the White Mountain and Cibecue Apache," 388.

<sup>62</sup> Goodwin, *Like a Brother*, 170–71.

<sup>63</sup> Kessel, "White Mountain Apache Religious Cult Movements," 159–61, 181–85; Goodwin and Kaut, "A Native Religious Movement among the White Mountain and Cibecue Apache," 388.

<sup>64</sup> Gloshey, "Indigenous Ways of Knowing and Its Interpretation of the White Mountain Apache Holy Ground Spiritual Movement," 40, 44. Affidavit of Terrell Hinton.

squash, corn, and beans; and to gather wild foods including acorns, agave, and mescal.<sup>65</sup> Rose Belvado of the San Carlos Reservation similarly remembers her family constantly traveling off the reservation in the 1940s and 1950s, to find work, plant crops, gather traditional foods, and visit sacred places. At Chi'chil Biłdagoteel, she recalls, they collected plant foods and medicines and joined "in Apache religious ceremonies, such as the Holy Ground Ceremony, near the current picnic area and adjacent wash; prayer ceremonies for [the] sick; and Sunrise Ceremonies where Crown Dancers would appear." The presence of the Gáán, she explains, makes the plants, herbs, and medicines gathered at Chi'chil Biłdagoteel more potent for both medicinal and ceremonial use. Vernelda Grant, Historic Preservation Officer for the San Carlos Apache Tribe, similarly recalls that, when she was a child, her family often visited Chi'chil Biłdagoteel, where she was always told "to be respectful because we were at a special place that had ancestral sites and burial grounds." In all these ways, too, Western Apaches rebuilt and even strengthened their relationships with this place and the holy beings who live there.<sup>66</sup>

To convey the significance of Oak Flat, Western Apache religious experts must translate Western Apache concepts into English words and concepts that reflect the cultural bias of the dominant society. One of these concepts is "spirituality." Rose Belvado explains that the whole vicinity "is an area of powerful experience, a place where great spiritual powers are present. Oak Flat, Apache Leap, and Devil's Canyon are places where the presence of Gáán (spiritual beings) may be felt."<sup>67</sup> In the contemporary United States, spirituality tends to be associated with individual experience and with a nebulous, interiorized sense of fulfillment that seems to transcend any specific history or tradition.<sup>68</sup> Belvado's use of the word *spiritual*, however, does not imply a purely interior state, divorced from the material. She and other Western Apaches recall gathering food and medicine alongside family prayers and clan ceremonies that link them to their ancestors and to the land itself. Vernelda Grant testifies that the "rock formations" at Chi'chil Biłdagoteel represented "life, death, and the spirit of our ancestors and deities who lived here since the beginning of time and continued to inhabit these places." The mountains around this place were especially "holy," she explains, because they "had the spirit of our ancestors and mountain spirit dancers and the Holy People congregated deep inside."<sup>69</sup> There is nothing vague, diffuse, or individualistic about the practices described here. In their efforts to defend Chi'chil Biłdagoteel, Western Apaches like Belvado and Grant reach for English-language concepts that convey the depth of their connection to this place. But the available words in English do not capture the kinship quality of these Indigenous relationships.<sup>70</sup>

Nor are these relationships transferrable to a different place, as a more diffuse kind of spirituality might be. Western Apache religious experts explain that certain holy beings exist solely and uniquely at Chi'chil Biłdagoteel, so that certain prayers and ceremonies can only be conducted here. The early twentieth-century anthropologist Grenville Goodwin, who worked intensively with Western Apache communities, wrote that the mountain spirits

<sup>65</sup> Watt, *Don't Let the Sun Step over You*, 78–80, 97–100, 23, 12–13; see also Welch and Riley, "Reclaiming Land and Spirit in the Western Apache Homeland."

<sup>66</sup> Affidavit of Rose Belvado; Declaration of Vernelda Grant, Historic Preservation Officer for the San Carlos Apache Tribe in Support of Motion for Preliminary Injunction, December 23, 2020, San Carlos Apache Tribe v. United States Forest Service (on file with the author); Hopkins et al., "Ethnographic and Ethnohistorical Study of the Superior Area, Arizona," 52.

<sup>67</sup> Affidavit of Rose Belvado.

<sup>68</sup> Jeffrey John Kripal, *Esalen: America and the Religion of No Religion* (Chicago: University of Chicago Press, 2007); Courtney Bender, *The New Metaphysicals: Spirituality and the American Religious Imagination* (Chicago: University of Chicago Press, 2010).

<sup>69</sup> Declaration of Vernelda Grant.

<sup>70</sup> See also McNally, *Defend the Sacred*; Lloyd, "Storytelling and the High Country;" Lloyd, *Land Is Kin*.

known as the Gáán once lived on the earth but departed in search of eternal life.<sup>71</sup> Vernelda Grant's parents taught her that the Gáán now reside deep within the land at specific holy places and can be contacted only there. Eva Watt writes that the Crown dancers, who perform on behalf of the Gáán, "used to dress way up on a mountain somewhere" and then process down the mountain to the ceremonial grounds. These dancers wear elaborate ceremonial headdresses and must memorize dozens of songs and chants before they can perform.<sup>72</sup> Some of these headdresses "have been buried up at Oak Flat for generations," medicine man Terrell Hinton explains. "The power of these headdresses and the Ceremony that they were a part of remain where they are located." The Gáán are linked to the history of the people, and the Crown Dances performed at Chi'chil Bıldagoteel reinforce and renew the intimate ties between the spirits, the people, and the holy place.<sup>73</sup>

One of the most important religious events in contemporary Western Apache life is the Sunrise Ceremony, a rite of passage held for girls at puberty. "The girl's puberty ceremony given in full was a spectacular affair," wrote anthropologist Grenville Goodwin in the mid-twentieth century. "Such ceremonies brought together large crowds ... irrespective of band and local group."<sup>74</sup> This event celebrates a girl's growth into adulthood and ritually connects her to the sacred origins of the Apache people. During the ceremony she embodies Changing Woman, a holy figure in the Apache creation story. Joined by Crown dancers and through the performance of songs specific to this ritual, the girl "dances her way into womanhood over a period of four days."<sup>75</sup> Her family and the medicine man who directs this event must choose a suitable location. Sometimes the place is associated with the origins of the family's clan; the medicine man might select it through prayer as an auspicious place; or it may be chosen for the family's convenience.<sup>76</sup> Sunrise Ceremonies have long been held at Chi'chil Bıldagoteel and, according to recent Western Apache testimonies, have been held there with greater frequency in recent years.<sup>77</sup> This development serves as further evidence for the vitality and ongoing development of Western Apache religion. In this living tradition, every ceremony conducted at Chi'chil Bıldagoteel adds new layers to the sanctity of this place.

Through all these ceremonies, after more than a century of religious suppression, Western Apaches today are restoring and repairing their relationships with the sacred landscapes of their ancestral homelands. Terrell Hinton of the White Mountain Apache Tribe describes a deeply felt connection with ancestors and holy beings at Chi'chil Bıldagoteel and the adjacent Dripping Springs. He had an especially potent encounter there in 2010, after a Sunrise Ceremony held at Chi'chil Bıldagoteel by his grandfather, medicine man Bert Hinton. As the younger Hinton looked at the petroglyphs and entered the caves at Dripping Springs, he recalls, "I could feel their presence, like they were there, alive, speaking to me not just from the drawings, but from their being .... I could hear bells jingling, like the bells of

<sup>71</sup> Grenville Goodwin, "White Mountain Apache Religion," *American Anthropologist* 40, no. 1 (1938): 28–30; see also Basso, *The Cibecue Apache*.

<sup>72</sup> Watt, *Don't Let the Sun Step over You*, 211–13.

<sup>73</sup> Affidavit of Terrell Hinton; see also Hopkins et al., "Ethnographic and Ethnohistorical Study of the Superior Area, Arizona," 52.

<sup>74</sup> Goodwin, *The Social Organization of the Western Apache*, 160.

<sup>75</sup> Affidavit of Jacob Henry; see also Inés Talamantez, "In the Space between Earth and Sky: Contemporary Mescalero Apache," in *Native Religions and Cultures of North America*, ed. Lawrence Sullivan (New York: Continuum, 2000), 142–59; Anne Dhu Shapiro and Inés Talamantez, "The Mescalero Apache Girls' Puberty Ceremony: The Role of Music in Structuring Ritual Time," *Yearbook for Traditional Music*, no. 18 (1986), 77–90.

<sup>76</sup> Basso, *The Cibecue Apache*, 53–70; on place, see Basso, *Wisdom Sits in Places*; see also Trudy Griffin-Pierce, *Chiricahua Apache Enduring Power Naiche's Puberty Ceremony Paintings* (Tuscaloosa: University of Alabama Press, 2006), 33–36; Goodwin, *Like a Brother*, 173–82.

<sup>77</sup> Hopkins et al., "Ethnographic and Ethnohistorical Study of the Superior Area, Arizona," 52.

the Crown Dancers, and I could hear drums, and even some of the old people.”<sup>78</sup> Jacob Henry, from San Carlos, tells of a similarly profound experience on a 2018 visit to Chi’chil Bildagoteel while he was on duty as a Tribal Monitor for the Tonto National Forest. When the group reached the petroglyphs at Dripping Springs, Henry recalls, one of the elders gave a blessing and several began to pray in the Apache language. With their guidance, he experienced the holy beings in this place. “We all had a very deep, personal, powerful, spiritual connection to a presence we could not see, but could feel,” he explains. One of the elders described to him “how this kind of thing had happened in the past” at Chi’chil Bildagoteel, “and that we were recreating it.” In this way, Western Apaches strengthen their connections with human and other-than-human kin through relationally embedded experiences that can only happen in this place.<sup>79</sup>

It is worth noting that Henry and the Apache people working with him experienced the power of Chi’chil Bildagoteel while they were doing research about the site for the National Forest Service. Several of the accounts I have cited were gathered by Apache Stronghold and the San Carlos Apache Tribe as part of the effort to defeat the proposed copper mine. The current legal struggle has thus created new occasions for Apache people to reflect on and rearticulate the importance of this place. The depth of their concern for Chi’chil Bildagoteel—the fact that so many Apaches have taken the time and trouble to join this movement—demonstrates the religious significance of this place. Through this struggle, too, a new generation of Western Apaches are entering into relationship with Chi’chil Bildagoteel and experiencing its holiness anew. Their efforts also bring a new level of attention to this place from a wider public, including non-Indigenous scholars like myself. For Western Apaches, the holiness of Chi’chil Bildagoteel is grounded in an ancestral tradition of intimate relationship with the land and its beings. This tradition continues, under conditions of colonial coercion, to develop with the times.<sup>80</sup>

### Apache Stronghold v. United States of America

Today, the legal battle over Chi’chil Bildagoteel/Oak Flat is writing a new chapter in the history of Apache struggles against colonial dispossession and violence. Recall that mining was the primary engine driving anti-Indigenous violence and the seizure of Apache lands in the late nineteenth century. On this score, remarkably little has changed. Resolution Copper Mining, LLC, based in Superior, Arizona, is jointly owned by two giant mining corporations: the Resolution Copper Company, a US subsidiary of Rio Tinto PLC, and BHP Copper Inc., a BHP PLC subsidiary. Starting in 2004, Rio Tinto lobbied Congress for legislation to enable a land exchange that would give the company legal title to a large plot of land in the Tonto National Forest so that they could develop a new copper mine. Their intended method, block cave mining, would leave only a vast polluted crater where Chi’chil Bildagoteel now lies. For more than a decade, with input from Native American tribes, environmental groups, and other allies, Congress rejected this proposal. And so, Rio Tinto’s executives went through the back door, finally convincing their congressional allies to append “The Southeast Arizona Land Exchange and Conservation” to the immense 2015 national defense appropriations bill. (These bills are notoriously complex and full of pet projects, which gain approval either by sneaking in under the radar, or because any challenge risks sabotaging the whole thing.) The

<sup>78</sup> Affidavit of Terrell Hinton.

<sup>79</sup> Affidavit of Jacob Henry.

<sup>80</sup> For a related argument involving the protests at Mauna Kea and living religious traditions in Hawai’i, see Greg Johnson, “Ritual, Advocacy, and Authority: The Challenge of Being an Irreverent Witness,” in *Irreverence and the Sacred: Critical Studies in the History of Religions*, ed. Hugh Urban and Greg Johnson (New York: Oxford University Press, 2018), 131–55.

federal government then began the standard process of tribal consultation and environmental review. By the end of 2020—even though this process clearly demonstrated the vital historical, cultural, and religious significance of Chi'chil Bıldagoteel for Western Apaches—the Forest Service and Resolution Copper were ready to proceed.<sup>81</sup>

Native Americans are a colonized people in the United States, with many of their remaining sacred sites and most of their ancestral lands controlled and claimed as property by others. For the big corporations invested in copper mining at Oak Flat and for their allies in the government, the Western Apaches stand in the way of profit and progress. To the corporations—and evidently to the courts as well—they and their religion are merely an inconvenience to be eliminated. This land exchange differs only in method from the colonial land grabs of the past. What then do we learn from this case about how the legal systems and structures of the United States manage both land and religion? About the contours and the limits of American religious freedom, especially when it comes to traditions that are so different from Christianity and practiced by a colonized people? And what do we learn about the peculiar situation of Native Americans as colonized nations—but also citizens—under US law? How are Western Apaches pushing back against the combined power of the corporation and the US government, and what are the contradictions that they face along the way? Religious freedom is a necessary strategy in such legal battles, it seems, but one fraught with perils and contradictions. Just as it has in the past, this legal strategy requires that Native people represent their traditions in ways that fit, as closely as possible, the Christian model for what counts as *religion* under US law. In several respects, this model (and this law) distorts the religious traditions of the Western Apache and the quality of their relationships with Chi'chil Bıldagoteel. At the same time, it sparks new religious practice and reflection at the site, reinforcing its sanctity and continuing the process of defining Apache religion for the twenty-first century.

As of this writing, the Arizona district court and the Ninth Circuit Court of Appeals have each ruled in favor of the land transfer that would enable the new copper mine. Both decisions, in January 2021 and March 2024 respectively, hinged on the legal definition of a “substantial burden.” Arguing for the land transfer in early 2021, the US Department of Justice reviewed the relevant case law to argue that the destruction of Oak Flat would not constitute a “substantial burden” on Western Apache religious practice.<sup>82</sup> Both courts agreed, holding that the Religious Freedom Restoration Act of 1994 had merely restored the legal protections in place prior to *Employment Division v. Smith* (1990) without expanding their scope. “In *Sherbert*, the Supreme Court held that denying government benefits on account of religion imposes a substantial burden on religion,” Judge Carlos Bea wrote for a panel of the Ninth Circuit in 2022. Judge Bea continued, “In *Yoder*, the Supreme Court held that imposing a government penalty on account of religion also imposes a substantial burden.”<sup>83</sup> In the court's view, *only* these two kinds of burdens can be considered *substantial* in the eyes of the law. But it is the court's choice, and not a predetermined result of the precedents, to restrict the meaning of a substantial burden in this way.

In fact, this legal standard reflects the structural privilege that Christianity continues to hold in US law. In the early United States, many laws directly favored Christianity. Even after

<sup>81</sup> First Amended Complaint for Declaratory and Injunctive Relief, *San Carlos Apache Tribe v. U.S. Forest Service*, No. 21-CV-00068-PHX-DWL (D. Ariz. January 25, 2021).

<sup>82</sup> Appellees' Answering Brief, at 22, 26, *Apache Stronghold v. U.S.*, 38 F.4th 1202 (9th Cir. 2022) (No. 21-15295) (citing *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Navajo Nation v. U.S. Forest Service*, 535 F. 3d 1058 (9th Cir. 2008)).

<sup>83</sup> *Apache Stronghold*, 38 F.4th at 19 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); see also *Apache Stronghold v. U.S.*, 519 F. Supp. 3d 591 (D. Ariz, 2021); and *Apache Stronghold v. United States*, 2024 U.S. App. LEXIS 5007, F.4th, 2024 WL 884564 (9th Cir. March 1, 2024).



religious minorities successfully challenged that privilege, Christianity remained as the implicit model for religion under US law. And while the religion clauses of the First Amendment push towards inclusivity, those who interpret them continue to assume a particular framework for what counts as *religion*. This framework tends to privilege Christian models of belief, conscience, and the institutional church.<sup>84</sup> In both cases cited by Judge Bea, *Sherbert* and *Yoder*, the Supreme Court aimed to protect a religion that it construed primarily in terms of conscience and belief. It is equally clear that the courts tend to rule in favor of religious groups that the majority culture (and the judges themselves) already view in positive terms. These two cases involved, respectively, Seventh-day Adventist and Amish plaintiffs. Both are minority Christian groups that many Americans consider to be exceptionally devout. The Amish are also a tourist attraction, popularly portrayed as a picturesque remnant of rural and early modern (European) Christian virtue. The substantial burden test that emerged from these two cases has of course been applied successfully to non-Christians. But to succeed in the courts, religious minorities have had no choice but to draw on Christian precedents and to frame their concerns according to an assumptive Christian norm. To rely entirely on historical precedents is therefore to perpetuate a Christian privilege that runs against the aims of the First Amendment.

To find precedents where the courts similarly rejected substantial burden claims, Judge Bea turned to several earlier cases involving Native American religion. In *Navajo Nation v. U.S. Forest Service* (2008), the Ninth Circuit ruled that the use of recycled wastewater to make artificial snow at a ski resort on the San Francisco Peaks—sacred to the Navajo, Hopi, Havasupai, and Apache—did not create a substantial burden on the free exercise of religion no matter how sincere the Indians' beliefs might be. This decision drew on two key Supreme Court cases, which Judge Bea also references: *Lyng v. Northwest Indian Cemetery Protective Association* (1988) and *Bowen v. Roy* (1986). In *Lyng*, the Yurok, Karuk, and Tolowa nations tried to prevent the construction of a logging road through their sacred lands in northern California, and the Supreme Court held that government programs which did not coerce anyone into “acting contrary to their religious beliefs” did not violate the principle of free exercise even if they might incidentally harm religious practice.<sup>85</sup> In *Bowen*, which had nothing to do with sacred lands, the court rejected a claim by a single Native American family that the state's use of social security numbers to identify welfare recipients would rob their child of “spiritual power.”<sup>86</sup> As Judge Bea recalled, the *Lyng* court explained that in neither of these cases “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.”<sup>87</sup> Only these two kinds of burden, the Ninth Circuit panel concludes, can be considered substantial under the law. However much the government's action might incidentally harm a religious site, the court claims, the substantial burden test does not apply because there are no penalties imposed on religious practice and nothing that coerces individuals to violate their religious beliefs. By this definition, public land management—and therefore any Native American sacred place that is claimed by the federal government—is simply beyond the scope of religious freedom law.

Christianity provided the founding rationale for a system of law that, conveniently for corporate interests, construes land and religion as utterly different kinds of things. *Johnson v. M'Intosh* (1823), in which the Supreme Court articulated the Doctrine of Discovery as the

<sup>84</sup> David Sehat, *The Myth of American Religious Freedom* (Oxford: Oxford University Press, 2011); Sullivan, *Church State Corporation*.

<sup>85</sup> *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

<sup>86</sup> *Bowen v. Roy*, 476 U.S. 693, 696 (1986).

<sup>87</sup> *Apache Stronghold*, 38 F.4th at 755.

basis for US sovereignty over Native lands, placed Christian sources of authority and Christian superiority over the “heathen” at the heart of American property law.<sup>88</sup> At the same time, by setting something called *religion* apart to be protected, US law also segregated religion and property into completely different arenas and so makes the land available for capitalist exploitation without regard for the kinds of kinship relations that Native peoples generally prioritize.<sup>89</sup> Until the 1970s, most US authorities explicitly defined Indigenous tribal identities and religious traditions as impediments to so-called progress and civilization. The American Indian Religious Freedom Act, enacted by Congress in 1978 after decades of Native initiative, guaranteed the “freedom to believe, express, and exercise” traditional Indigenous religions along with “access to sacred sites required in their religions.”<sup>90</sup> Although this law had no real enforcement mechanisms, it provided a powerful statement of principle to which Native activists and tribal leaders have regularly appealed.<sup>91</sup> When it comes to sacred land, however, these efforts have repeatedly failed in the courts. “Whatever rights the Indians may have to the use of the area,” Justice O’Connor famously opined in *Lyng*, “those rights do not divest the Government of the right to use what is, after all, its land.”<sup>92</sup> Or as an amicus brief supporting Resolution Copper in *Apache Stronghold* puts it, “the burden imposed by the government’s use of its land, however extreme or total, is not the kind of burden the First Amendment recognizes.”<sup>93</sup> Within this legal framework, land is presumptively outside the bounds of what the courts have been willing to protect as *religion*. Land is instead the paradigmatic form of property—and the rights of property have been paramount under US law.

Native American ways of relating to sacred lands are foreign to a legal system that defines religion according to a Christian mold. This Christian norm makes it necessary for Native people and their allies to communicate the significance of sacred places by comparing them to Christian churches or cathedrals, or to the sacred sites and places of worship associated with other widely recognized religions. In a 2021 amicus brief, for example, a group of Native legal scholars and organizations supporting Apache Stronghold asserted: “Practitioners of many and varied religious faiths escape the mundane to commune with the Divine in specific places set apart and sanctified for that purpose—Jews at the wailing wall in Jerusalem, Catholics at the Grotto at Lourdes, members of the Church of Jesus Christ of Latter-day Saints at the Sacred Grove in upstate New York, Muslims at the Kaaba in Mecca, and many others.”<sup>94</sup> Like Silas John a century earlier, Western Apaches and their allies today have little choice but to defend their religious traditions in this way. My point here is not to reject the validity of these comparisons. Comparison is an important method for communicating across lines of difference; it is one of the primary ways that all of us think and make sense of

<sup>88</sup> *Johnson v. M’Intosh*, 21 U.S. 543, 577 (1823).

<sup>89</sup> Steven Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery*, 3rd ed. (Golden: Fulcrum, 2008); Tisa Wenger, “Sovereignty,” in *Religion, Law, USA*, ed. Joshua Dubler and Isaac Weiner (New York: New York University Press, 2019); Lloyd, *Land Is Kin*. On the category of religion as a precondition for global capitalism, see Timothy Fitzgerald, *Discourse on Civility and Barbarity: A Critical History of Religion and Related Categories* (New York: Oxford University Press, 2007).

<sup>90</sup> American Indian Religious Freedom (Joint Resolution), Pub. L. No. 341, 92 Stat. 469 (1978), <https://common.sund.edu/indigenous-gov-docs/129/>.

<sup>91</sup> McNally, *Defend the Sacred*, 193–94.

<sup>92</sup> *Lyng*, 485 U.S. at 453.

<sup>93</sup> Brief of Pinal Partnership, Valley Partnership, Phx East Valley Partnership, the Honorable Scott J. Davis, the Honorable Myron Lizer, and John Tahsuda, III as Amici Curiae in Support of Appellees, at 20, *Apache Stronghold*, 38 F.4th 1202 (No. 21-15295).

<sup>94</sup> Amicus Brief of the National Congress of American Indians, a Tribal Elder, and Other Federal Indian Law Scholars and Organizations in Support of the Appellant, at 5, *Apache Stronghold v. U.S.*, 38 F.4th 742 (9th Cir. 2022) (No. 21-15295).

our worlds. But I do note the colonial conditions that make these specific comparisons necessary as a legal strategy for Native people—and to understand their implications in the courts and beyond.

Christianity has a significant presence among Western Apaches today, and many Apache people draw naturally on Christian prayers and Christian metaphors. As with many other Native traditions, too, ancestral Apache ways have changed in conversation with Christianity. Jacob Henry of San Carlos, relating a powerful experience at Chi'chil Bıldagoteel with a group of Apache elders in 2018, described Christian prayers as part of the elders' collective practice. "Another one of the elders, a woman," he testified, "started to shuffle, like dancing in place, giving thanks to Jesus Christ." Henry also compared his own experience to Christian worship: "I had a sensation come over me, a sensation I had felt before in church," he recalled. "Tears started to come down my cheek."<sup>95</sup> Still, the specificity of Apache relationships with this place and its holy beings has no direct analogue in Christianity. Terrell Hinton explains that "Oak Flat is related to all of the four peaks that are most sacred to Apaches; it is like a middle, a connection to them all." Given this rootedness in a very particular place, comparisons to Christianity can sometimes seem strained. Hinton reaches for Christian analogies to convey the sacred quality of Chi'chil Bıldagoteel to non-Apaches. "It is like a church that the four peaks reflects upon," he says. "The hills are like the walls, the sky is the ceiling, and the ground is the floor."<sup>96</sup> In its 2021 appeal to the Ninth Circuit, Apache Stronghold offered a different comparison, explaining that the Gáán are "roughly comparable to angels in the Judeo-Christian tradition." Churches and angels are familiar points of reference for most Americans—exactly what Native people need to convey the value of their own ways.<sup>97</sup>

These comparisons provide a way for Western Apaches to communicate the value of their traditions to outsiders and to defend them under the law. At the same time, majority Christian assumptions about religion allow the courts to misconstrue Western Apache relationships with Chi'chil Bıldagoteel. This place may be comparable to a church, but it is also radically different. Christians may consider their churches and cathedrals to be sacred places. But a church can always be rebuilt on a new site. In contrast, Native American sacred places like Chi'chil Bıldagoteel are irreplaceable. The Gáán may be like angels in some respects. But unlike angels, which are spiritual beings in a heavenly realm, the Gáán are bound up with a specific place and would cease to exist without it. The language of *spiritual experience* also facilitates a persistent trivialization of Native American religious traditions. This tendency is clear in the repeated application of *Bowen* to cases involving sacred lands. In *Bowen*, a single Native American family objected to the use of social security numbers as a violation of their personal beliefs. This objection was not supported by any indigenous nation. The court's concern that any individual might upend otherwise neutral government programs by claiming an individually defined *spiritual* harm makes some sense in this case. But when the Supreme Court applied the same logic in *Lyng* to the California high country held sacred by the Yurok, Karuk, and Tolowa nations, it dismissed the overwhelming evidence of a deep and longstanding relationship between these peoples and the land they had long held sacred. It also ignored the status of these Native nations as *nations*, with claims to this land that long predated the United States. The same was true in *Navajo Nation*, the most immediate precedent to *Apache Stronghold* in the Ninth Circuit. Judge Bea approvingly quotes the court's acknowledgement in that case that, to the Navajo, the use of wastewater

<sup>95</sup> Affidavit of Jacob Henry.

<sup>96</sup> Affidavit of Terrell Hinton.

<sup>97</sup> Opening Brief of Plaintiff-Appellant Apache Stronghold, at 5, *Apache Stronghold*, 38 F.4th 742 (No. 21-15295).

on Humphrey's Peak would "spiritually desecrate a sacred mountain."<sup>98</sup> But these Native concerns were not about a merely spiritual desecration or a quest for individual (or even collective) spiritual fulfillment. Instead, they involved a long-standing and materially grounded kinship relationship between the people, the place, and the other-than-human beings who also live there.

The Ninth Circuit panel likewise misconstrues the quality of Western Apache religion at Chi'chil Bildagoteel. An industry amicus brief, supporting the land transfer, quoted the *Lyng* court in acknowledging that "the challenged Government action ... would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."<sup>99</sup> Once again, this way of framing the case makes Western Apache concerns appear to be a matter merely of belief and individual "spiritual fulfillment" rather than about a specific and deeply rooted Indigenous relationship with the land. But Western Apaches themselves have made it abundantly clear that this relationship would end if Chi'chil Bildagoteel is destroyed, making it impossible to practice key elements of their religion. A brief from Apache Stronghold explains: "The claim isn't just about 'subjective spiritual experience,' it's about complete physical destruction that annihilates core Apache religious practices forever."<sup>100</sup> Rose Belvado puts it even more succinctly: "It would kill not just my spirituality, but it will kill our Gáán and ruin our Apache religion." As these Apache religious experts note, the notion of *spiritual experience* fails to communicate the substance of Western Apache religion—a religious tradition with a living vitality demonstrated in and through the movement to save Chi'chil Bildagoteel—or the quality of Apache relationships with this place. The industry's brief summons the false specter of a host of individuals, each seeking their own forms of spiritual fulfillment, who might challenge government decisions on the use of public lands. Corporate lawyers and the judges they persuade thus use the idea of spirituality, entirely divorced from land and material practice, to trivialize Western Apache claims.

The recent Apache Stronghold rulings also echo a persistent assumption that religion—perhaps especially those religions deemed primitive—are inauthentic if they have changed over time. In its 2022 denial of injunctive relief, the Ninth Circuit panel noted, dismissively, that Apache religious practice at Chi'chil Bildagoteel has increased in frequency in recent years. "The Apache have [only] recently returned to worship in Tonto Forest," Judge Bea wrote, as "in 2014, the Apache held a 'Sunrise Dance' on Oak Flat for just the second time in 'more than a hundred years.'"<sup>101</sup> He implies that Chi'chil Bildagoteel cannot really be all that important; its destruction would therefore not be as devastating as Western Apaches say it would be. As shown above, the factual claim here is inaccurate. The judge utterly ignores the long history of federal Indian policy that imposed severe restrictions on all Apache movements and directly suppressed Apache religious practices. These colonial policies not only limited the ability of Apaches to visit Chi'chil Bildagoteel and other sacred sites—so that the associated religious practices were indeed less common in the twentieth century—but also made Apache religion essentially invisible in the archives. Despite this suppression, as we have seen, Apache testimony joined by other key sources document not only Sunrise Dances but many other kinds of religious practice at Chi'chil Bildagoteel over the course of the past century.

<sup>98</sup> *Apache Stronghold*, 38 F.4th at 756 (quoting *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008)). For a related analysis, see Michael D. McNally, "The Sacred and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated," *California Law Review* 111, no. 2 (2023): 395–464.

<sup>99</sup> Brief for the Arizona Chamber of Commerce and Industry as Amicus Curiae Supporting Appellee United States, at 9, *Apache Stronghold*, 38 F.4th 742 (No. 21-1529).

<sup>100</sup> Opening Brief of Plaintiff-Appellant Apache Stronghold, at 36, *Apache Stronghold*, 38 F.4th 742 (No. 21-15295).

<sup>101</sup> *Apache Stronghold*, 38 F.4th at 749.

## Conclusion

Along the way, in and through the events described above, Chi'chil Bıldagoteel has become more sacred to Western Apaches than ever before. All human traditions develop and change; all religions take shape in place and over time. Familiar practices, objects, and places frequently take on new and deeper meanings when they are threatened. Places that were already special take on new layers of meaning when significant things happen and are remembered in community. Sometimes, as at Chi'chil Bıldagoteel, this involves a community's efforts to protect a place from harm. Chi'chil Bıldagoteel was always sacred as a place of clan origins, the source of plant medicines, and the home of many Apache Gáán. It became important to more Western Apache people in the twentieth century, as the bands and clans who had always prayed and gathered medicines there maintained these practices—despite the violence and restrictions of reservation life—and shared them with expanded family networks on their reservations. The gradually increasing number of Crown Dances, Holy Ground Ceremonies, and Sunrise Dances held at Chi'chil Bıldagoteel in the twentieth and early twenty-first centuries supports this conclusion. The recent struggle to protect Chi'chil Bıldagoteel from the threat of destruction demonstrates the depth and sincerity of Western Apache relationships to this place—and has further reinforced them. Comparisons to the sacred places and practices of Christianity and other world religions, advanced in defense of Chi'chil Bıldagoteel, risk misrepresenting these traditions but also add new dimensions to Western Apache experiences of this place. Always a holy place, it has become even holier in and through the Western Apache fight to defend it in court. If the promises of the United States for religious freedom and equal protection are to be realized, then the law can no longer assume that all religions work the same way or fit into a single mold. And if the United States is to honor its treaties with and legal obligations to Native American nations, it must at the very least honor their right to the places that their people hold most sacred today.

**Acknowledgments and Citation Guide.** *I thank Michael McNally, Karl Hoerig, and the anonymous JLR peer reviewers for their comments on this essay, along with the people of the San Carlos Apache Tribe and the White Mountain Apache Tribe who have given testimony and continue to fight for the future of Chi'chil Bıldagoteel. I served from August through December 2022 as a consultant for the San Carlos Apache Tribe, conducting background research for the Oak Flat case on the history of Native Americans and religious freedom. Much of the research for this article was completed during that time. The affidavits and declaration cited above as “on file with the author” were collected by the San Carlos Apache Tribe and shared with me by tribal attorneys. Citations in this article follow the Chicago Manual of Style, 17th edition.*

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**Cite this article:** Wenger, Tisa. 2024. “Fighting for Oak Flat: Western Apaches and American Religious Freedom.” *Journal of Law and Religion* 1–23. <https://doi.org/10.1017/jlr.2024.3>