

United States | An Apache battle

A fight in Arizona over sacred land and a mine raises big issues

A tricky religious-liberty dispute is coming to a head



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About 50 miles (80km) east of Phoenix, Arizona, the desert turns to mountains. Some 900 metres above the plain lies Oak Flat, a 300-hectare expanse known in Western Apache as Chi'chil Bildagoteel. The land is sacred to several Native American tribes. "For us it's a female place," says Wendsler Nosie, a former chairman of the San Carlos Apache, evoking its life-giving quality. "You can be born there and die there and it has everything for you."

One of the world's largest copper deposits sits beneath Oak Flat. Mining it would supply a quarter of the copper America needs for at least four decades, and provide thousands of jobs. Copper is used in renewable-power generation, and demand is growing. The federal government, which owns the land, plans

to transfer it to Resolution Copper, a joint venture by Rio Tinto and bhp, two multinational mining companies.

Hoping to block the transfer, Apache Stronghold, a group of tribespeople led by Mr Nosie, has taken the government to court. Its members say establishing a mine would violate their religious freedom by destroying the centre of their faith. In June 2022 they lost in a 2-1 decision at the 9th Circuit Court of Appeals. But in November the court said it would rehear the case *en banc* (with a panel of 11 judges). Oral arguments are set for March 21st.

A ruling in Apache Stronghold's favour could save Oak Flat. But it could also cost Arizona, which stands to gain \$60bn over the life of the mine. Scrapping the project could also hinder America's green transition. Unless domestic copper-mining were expanded elsewhere, imports would have to make up the shortfall. And as competition for copper grows elsewhere, too, America risks losing out.

Fewer than 1% of requests for rehearing *en banc* are granted. It is rarer still for a court to decide to rehear a case of its own accord. That suggests many 9th-circuit judges are interested in thinking through the conundrum posed by Oak Flat. Though American law is designed to protect all faiths equally, Native American claims have often fared badly. Courts have ruled that when the government prevents a church from building an extension, it may be curtailing religious freedom. But sacred Native American sites have been lawfully bulldozed.

Stephanie Barclay, of the University of Notre Dame, who will represent the National Congress of American Indians in the Oak Flat case, says that the federal government has a history of showing "callousness, disregard and, I think, contempt" to Native American faith. In one instance, it changed the design of a road to protect a tattoo parlour, but destroyed a Native American holy place.

The First Amendment protects freedom of religion in broad terms. In 1993, following a Supreme Court decision in 1990 that watered down that liberty, Congress passed the Religious Freedom Restoration Act. This forbids the federal government from placing a "substantial burden" on religious exercise unless it can show a "compelling interest" in doing so—without clarifying how that burden should be defined.

In 2008, in *Navajo Nation v United States Forest Service*, the 9th circuit ruled that the government was not imposing such a burden on Native American faith by allowing a ski resort to use treated sewage water to make artificial snow on a sacred mountain. Drawing on earlier cases, the court held that the government creates a “substantial burden” only when it penalises a person for upholding their religious beliefs, or denies them something to which they are entitled, such as unemployment benefits.

When the court considered the fate of Oak Flat last year, it was bound by the *Navajo Nation* ruling. But *en banc* cases can revisit precedents. Apache Stronghold wants the court to adopt a less pinched reading of “substantial burden”. A mine that destroys a site of such significance is clearly burdensome, it says. If Oak Flat is destroyed, Mr Nosie says, “our children will no longer be who they are.”

Those on the government’s side say that applying those standards to cases involving federal land would create a slippery slope. It would be easy, they argue, for faith groups to make demands on huge tracts of federal land, unreasonably hindering the government. If the mine were abandoned local people—including Native Americans who support the project—would lose jobs and money. But a ruling in Apache Stronghold’s favour would narrow the gap between how Western and Native religions are protected by the law.

Whatever the outcome at the 9th circuit, the Supreme Court will probably have the last word. In previous decades a conservative bench might have spelled trouble for Apache Stronghold. But today’s court might be different. Justice Neil Gorsuch, appointed by President Donald Trump, is an expert on Indian federal law and has championed Native American religious rights. And the current bench seems invested in protecting religion. Of 22 religious-freedom cases brought before the court since 2012, 21 decisions have expanded those freedoms, 18 of them unanimously.