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# **“United States Shall So Legislate and Act as to Secure the Permanent Prosperity and Happiness of Said Indians”: Policy Implications of the Apache Nation’s 1852 Treaty**

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## Abstract

As binding contracts among sovereigns, treaties between Indigenous and Western Nations set parameters for and guide policies that recognize Indigenous Peoples’ rights and that harmonize those rights with non-Indigenous interests. Because treaties engage specific terms, parties, and geographies, detailed analyses of treaty texts and historical contexts are required foundations for understanding Treaty Rights and for proposing policy reforms. The litigious “Save Oak Flat” battle over the Resolution Copper mine proposed for Apache Nation Treaty Territory in present day Arizona prompts close scrutiny of the 1852 Treaty between the United States and the Apache Nation. Because the 1852 Treaty guarantees rights to both parties, it provides mandates and suggests co-management mechanisms to safeguard Apache Nation Treaty Territory and Apache rights to religious practice free from threats of sacred site destruction.

## Keywords

Apache Nation, Chi’chil Bildagoteel (Oak Flat), Co-Management, Public Lands Management, Reserved Treaty Rights, Resolution Copper mine, Sacred Sites Protection, Treaty Law and Policy

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## **“United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians”: Policy Implications of the Apache Nation’s 1852 Treaty**

### **Why Study Old Treaties?**

Three countries—Canada, New Zealand, and the United States—thrive today because they obtained vast property rights in exchange for treaty and fiduciary obligations to Indigenous Peoples. Setting aside complex debates on the legal and moral foundations of the Doctrine of Discovery by which these governments—and Australia’s, where no treaties exist—assert dominion within their borders, the simple truth is that all lands claimed by these settler states are Indigenous Territory and that, in 2022, only fragments remain under Indigenous jurisdiction (Newcomb, 2008). Excluding Alaska and Hawaii, the United States (U.S.) seized about 1.5 billion acres of Indigenous Territory; some 56 million acres (~2.7%) remain under Indigenous control (U.S. Bureau of Indian Affairs, n.d.). Constitutional reforms in New Zealand promise progress toward conciliation between Maori and colonizer communities and institutions (Morris, 2014). Canada is slowly adjusting government policies to comport with the United Nations Declaration on the Rights of Indigenous Peoples (Boisvert, 2021).

U.S. treaties with “Tribes” created early and permanent obligations to compensate Indigenous Peoples for the imposition of Western jurisdiction over their Territories and societies (Singer, 2017). Article VI, clause 2 of the U.S. Constitution identifies treaties and other inter-national contracts, as “the supreme Law of the Land.” Despite this ostensibly unassailable status and the honorable intentions underlying many treaties between the U.S. and Indigenous Peoples, the U.S. has invariably shirked its treaty obligations (U.S. Commission on Civil Rights, 2018). Most of the approximately 375 “Indian” treaties ratified by the U.S. Government between 1778 and 1871 remain in effect. The fact that the U.S. has violated all of them is both a persistent driver for pernicious conflicts and a signal opportunity for policymaking (Deloria, 1985; Deloria & DeMaillie, 1999; Harjo, 2014).

The U.S. Congress’ 1871 decision to abandon treaty making shifted Indian policy burdens to the Executive Branch while retaining Legislative Branch plenary power over Native American lives and lands. Debates and lawsuits over U.S. Indian Policy will proceed but must not lose sight of the reality that, even as Indigenous Peoples in the U.S. enact their sovereignties effectively, hundreds of Indigenous communities remain among the least healthy, least educated, least employed, and most dangerous to live in the U.S. (Kalt et al., 2008; Smith, 2018). Too many U.S. actions and inactions have disproportionately harmed Indigenous Peoples, degraded the lands and waters they rely on materially and spiritually, and impeded the formation of a “more perfect union.” Conflicts over Indigenous Territories—from Wounded Knee to the Border Wall—embroil Indigenous Peoples, state governments, and proponents of land alterations in contests arising from divergent values, histories, and desired futures. These recurrent struggles are indicators of policy failures. As such, they are inspiring initiatives, including this case study, to resolve such conflicts through policy reforms grounded in formal treaties, meaning better legal recognitions and practical protocols for enacting parties’ rights and responsibilities.

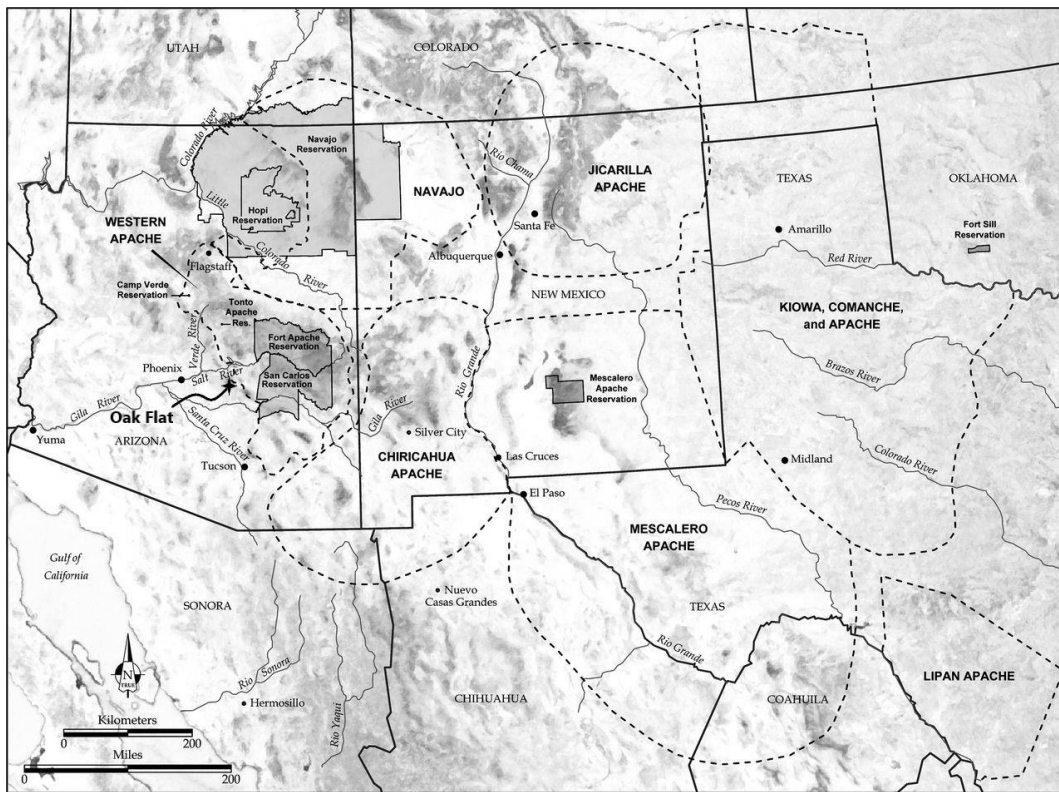
Weary of historical injustices and ongoing systemic inequities, Indigenous Peoples have used treaties as pivotal elements in political advocacy, direct action, and litigation to pursue justice and heal communities. The Supreme Court’s 2020 decision in *McGirt v. Oklahoma* is among the reasons for surging interests in overlooked treaties

and, optimistically, in reaching the end of the “Trail of Broken Treaties” (American Indian Movement, 1972; Eid, 2020; Harjo, 2014).

In the global context of escalating demands for truth, reconciliation, and just treatment of Indigenous Peoples (see, for example, Carmen, 2015), this article examines a specific policy issue—the protection of “American Indian sacred sites” located on lands managed by the U.S. Government—through the lens of a particular international contract, the 1852 Treaty between the U.S. and the Apache Nation. The Nation-to-Nation relationship between the U.S. and federally recognized “tribes,” embedded as it is in “Indian Law,” means that any reckoning for Indigenous Peoples will be distinct from that of other racialized groups. Critical scrutiny of the terms, history, signatories, and policy implications of the 1852 Treaty is prompted by the litigious “Save Oak Flat” battle over the Resolution Copper mine proposed on Ndeé (Apache) Territory in the uplands east of Phoenix (Figure 1). “Oak Flat” is a translation of Chi’chil Bildagoteel—meaning “Acorn oaks spreading broadly”—a rare adoption on U.S. maps of an antecedent and poetic Apache place name. The 1852 Treaty, and other legal safeguards for Indigenous sacred sites and Territorial integrities, offer tools for preventing desecration, resolving costly litigation, recognizing Indigenous Peoples’ rights as congruent with those of other U.S. citizens, co-managing Indigenous Territories, and advancing overdue conciliation among Indigenous and non-Indigenous peoples.

This article argues for refreshed attention to one particular treaty and for employing that treaty and comparable agreements as foundations for reforms to ameliorate U.S. policy failures to protect Indigenous sacred sites and assure sustainable management of public lands. To comport with terms used in the 1852 Treaty and other pertinent U.S. policies, I respectfully refer to all Apaches as the Apache Nation and otherwise privilege U.S. Government terms of reference. I generally use *sacred sites* instead of *holy places*. I use *policy* broadly, to mean rules, especially statutes, regulations, and agency requirements.

Figure 1 depicts Apache Nation Territory, as defined by simple aggregation of the circa 1875 Aboriginal land areas established for the Nation’s constituent “tribes” by the U.S. Indian Claims Commission (1978). Oral Traditions, comparative linguistics, and archaeology indicate that, by 1700, Apache Nation Territory stretched from present day Oklahoma and West Texas, across the uplands of northwest Mexico, to central Arizona (Conrad, 2021; Opler, 1983; Welch et al., 2017).



**Figure 1. Apache Nation Territory Map.** Includes state boundaries and the approximate location of Chi'chil Bildagoteel (Oak Flat). The dashed lines approximate boundaries of Apache Aboriginal land areas administratively established by the Indian Claims Commission in the 1960s and 1970s (and projected into present day Mexico), and some Tribes' reservation lands in 2022 (Welch et al., 2017: Figure 1)."

Legislation, litigation, and scholarship have established the pivotal importance to Indigenous Peoples of sacred sites protection (e.g., Barclay & Steele, 2021; McNally, 2020; Welch et al., 2009) and of treaty law and specific texts as essential underpinnings for public land management (Hoffman & Mills, 2021; Mills & Nie, 2020; Nie, 2008). This article considers whether treaty-driven policy can succeed where non-treaty policies have thus far failed to protect Indigenous Peoples' religious freedoms, sacred sites, and Territorial integrities. What bearing does a mid-19<sup>th</sup> century treaty—generally over-looked and under-implemented—have on an Indigenous sacred site now under presumed U.S. Government jurisdiction and being prepared for transfer to a mining corporation for destruction? U.S. inattention to the 1852 Treaty in subsequent lawmaking means that all provisions of the 1852 Treaty remain enforceable in regard to post-1852 U.S. and Apache declarations and practices. The form of the Treaty—a never-abrogated compact among designated U.S. and Apache representatives to harmonize their respective rights and interests—has since 1852 offered a sturdy framework for partnership. The terms of the Treaty—a list of prerogatives and duties that leave the Apache Nation with thus far incompletely adjudicated rights to their Territory—are available to guide the parties to co-management negotiations (for a comparative example, see Erlinder, 2015). The ultimate goal of this case study is to open realistic policy pathways for the parties to the 1852 Treaty to make good on their promises and realize their best intentions. The 1852 Treaty holds particular promise for showing how Indigenous and non-Indigenous Americans residing in Apache Nation Treaty Territory may coexist, into perpetuity and in respective pursuits of life, liberty, prosperity, and happiness, as guaranteed by the Treaty and the U.S. Constitution.

This goal is apt because most prior campaigns to safeguard Indigenous sacred sites have failed, and as of early 2022, the U.S. has permitted the destruction of the Chi'chil Bildagoteel (Oak Flat) sacred site as part of the proposed Resolution Copper mine in Apache Nation Treaty Territory (Lovett, 2017; Welch, 2017b). Therefore, research that challenges this decision by applying details of the 1852 Treaty is crucial and urgent. The discussion that follows presents facts, inferences, and policy recommendations in response to ten essential questions about the 1852 Treaty:

1. What rules guide treaty interpretation?
2. Is the 1852 Treaty in effect, and what does it say?
3. Which Apaches signed the 1852 Treaty, and who are heirs to their Treaty Rights and duties?
4. What historical events and processes drove creation of the 1852 Treaty?
5. Where is the “Apache territory” referenced in the 1852 Treaty?
6. What rights and responsibilities to Apache Nation Treaty Territory did the 1852 Treaty grant to the U.S.?
7. What rights and responsibilities to their Treaty Territory do Apaches retain?
8. Did Indian Claims Commission decisions “quiet” Apache rights and title to Oak Flat or supersede the 1852 Treaty?
9. How are Apaches asserting Treaty Rights to protect Oak Flat from the proposed Resolution Copper Mine?
10. How can Treaty Rights underwrite policies and practices, including co-management, to harmonize Apache and U.S. rights and interests in Apache Nation Treaty Territory, resolve conflicts in 2022, and reduce prospects for future conflicts over Indigenous Territories?

My research into the responses to these ten questions trace historical and political roots of the conflict over Chi'chil Bildagoteel. The answers help to define a legal standard for affirming Apache Nation rights in and to their Treaty Territory. The discussions outline parameters for bringing sacred site and public land protection policies into accord with one another and with Treaty Rights specifically agreed to in writing by the U.S. Government and retained by Indigenous Peoples. To examine old treaties is to take the U.S. at its word in the present day; it is a step toward upholding and enforcing established U.S. law. In contrast, to ignore the treaties—binding and persistent promises made by the U.S. with and to another sovereign power—undermines U.S. credibility and moral authority at home and abroad.

## 1. How Are Treaties Interpreted?

Countless U.S. court rulings have distilled Treaty texts into cogent and universally applicable rules for interpretation. Cohen (1942, p. 47) lists three legal prerequisites for using treaties to acquire rights to Indigenous Territories: “(1) That both parties to the treaty are sovereign powers; (2) that the Indian tribe has a transferable title, of some sort, to the land in question; and (3) that the acquisition of Indian lands could not safely be left to individual colonists but must be controlled as a governmental monopoly.”

Cohen's three prerequisites are complemented by history; most treaties codify both Indigenous Peoples' good faith in granting U.S. requests and demands and the “disadvantaged position which tribes occupied in relation to the United States during treaty negotiations” (U.S. Government, 1976, p. 174). These twin truths and multiple Supreme Court rulings underlie three general principles, or *Canons of Construction*, that are required to understand treaty histories, decode current events affected by treaties, and propose policy reforms to prevent and reduce conflicts between the U.S. and Indigenous Peoples (De La Hunt, 1984):

1. Treaties are to be interpreted as the Indigenous parties would have understood them at the time of the agreement (*Jones v. Meehan*, 1899).
2. Ambiguous terms in treaty texts are to be interpreted in favor of the Indigenous parties (*McClanahan v. State Tax Commission*, 1973); treaties are to be “liberally construed” by courts in favor of Indigenous parties (*Tulee v. Washington*, 1942).
3. Treaty Rights and interests of the Indigenous parties and their descendants persist unless they are explicitly conveyed, relinquished, or extinguished by statute (*National Farmers Union Ins. v. Crow Tribe of Indians*, 1985). Treaty violations do not diminish the legal effect of treaty provisions.

Canon Three proved pivotal in *McGirt's* repudiation of the *doctrine of implied repeals*. As an application of the broader principle that U.S. Tribes retain all elements of sovereignty not expressly ceded by treaty or limited by statute, Canon Three is particularly pertinent to agreements like the 1852 Treaty that languish, are incompletely implemented, or are simply disregarded. U.S. courts have confirmed the Legislative Branch's broad authority “to abrogate the provisions of an Indian treaty . . . when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so” (Lone Wolf, 1903). The obverse of that plenary power is that, unless Congress amends or annuls a treaty, the terms of the pact remain in full effect. While these canons appear to weight the scales of justice in favor of Indigenous parties, courts have relied more on treaty-specific texts and contexts than on broad principles. This study focus now shifts to the terms of the 1852 Treaty, its interpretation in accord with the three canons, and its policy implications for the protection of Chi'chil Bildagoteel.

## 2. Is the 1852 Treaty Still in Effect, and What Does It Say?

While indispensable as general guides, the three canons gain the force of controlling precedent only through their application in treaty-specific analyses of legal status and meanings. The U.S.-Apache Nation Treaty (Treaty

with the Apache, 1852) was signed in New Mexico Territory in July of 1852 by designated Apache and U.S. representatives acting in good faith.<sup>1</sup> The agreement, occasionally referenced as “The Treaty of Santa Fe,” was ratified by the U.S. Senate on March 23, 1853 (Kappler, 1904, pp. 598–600). The 1852 Treaty has not been altered or amended by subsequent ratified treaties or acts of Congress. Not all terms of the 1852 Treaty have been implemented, but no party has rescinded, modified, or disavowed the agreement. Some terms, including Apache use and occupancy of Chi’chil Bildagoteel for religious and cultural purposes, have been complied with by the U.S. for many decades and continue in 2022.

The 1852 Treaty includes 11 articles. The substance of each article is excerpted here:

1. “Said nation or tribe of Indians . . . acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States.”
2. “hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the Government and people of the United States; the said nation or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the . . . United States.”
3. Apaches agree “to treat honestly and humanely all citizens of the United States [and] . . . all persons and powers at peace with the said United States.”
4. Apaches agree “to refer all cases of aggression against themselves or their property and territory, to the government of the United States.”
5. Apaches agree “for all future time to desist and refrain from making any ‘incursions within the Territory of Mexico’ of a hostile or predatory character . . . [and to] refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico . . . [and to] surrender to their agent all captives now in their possession.”
6. The parties agree that “persons subject to the laws of the United States [who should] murder, rob, or otherwise maltreat any Apache Indian . . . shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.”

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<sup>1</sup> In the 1850s and today, not all Apache people would identify all the signatories as their representatives. As noted in section 3. below, Apaches changed group affiliations and Apache groups changed leaders in dynamic response to diverse circumstances. The 1852 signatories were selected primarily on the basis of who showed up at meetings and received recognition from Apache peers and U.S. officials.



7. The parties agree that the “people of the United States of America shall have free and safe passage through the territory of aforesaid Indians.”
8. The parties agree that, “to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.”
9. Apaches agree “that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.”
10. The government agrees to “grant to said Indians such donations, presents, and implements . . . as said government may deem meet and proper.”
11. The parties agree the “Treaty shall be binding [and] subject only to such modifications and amendments as may be adopted by the government of the United States . . . [and] receive a liberal construction . . . to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.”

The 1852 Treaty has no sunset clause and is not an agreement to end hostilities or cede contested lands. The U.S. was not at war with the Apache Nation or any of its subgroups in 1852, so the agreement is not a “peace treaty” (U.S. Senate, n.d.). Indeed, by the early 1850s, the Apache Nation had thwarted successive efforts by Spain and Mexico to colonize Apache Territory and had established promising diplomatic relations with the U.S. (Spicer, 1962). U.S. officials at the time may not have understood the distinction between raiding and warfare, but Apaches did. Apaches used *raiding* to obtain livestock, supplies, and captives. Apaches pursued *warfare*, in contrast, to kill enemies and affirm honor (Ball, 1970, p. 12; Basso, 1971). By the 1850s, after decades of clashes with Spain and Mexico, many Apache groups had institutionalized raiding and captive taking to compensate for losses of people and lands previously used for hunting, foraging, and farming (Conrad, 2021, p. 186). What some borderland historians call “The Apache Wars” (1857–1890) were mostly U.S. Army campaigns followed by Apache diplomacy, insurgency, and relocation to avoid war and resist genocide (Welch, 2017b). The most thorough Western scholar of Chiricahua history, Edwin Sweeney (2010, p. 6), calls the Apache response to U.S. incursions “entirely defensive.”

The Apache Nation has never been conquered. Despite decades of tumult, at no point in the second half of the 19th century or since, has any new agreement, law, or policy been created that abrogates the Treaty of 1852. The Treaty remains in full effect.

### 3. Which Apaches Signed the 1852 Treaty, and Who Are the Intended Beneficiaries and Heirs to 1852 Treaty Rights?

The Canon One mandate to interpret the 1852 Treaty in accord with the understandings of Apache parties would ideally be met by consulting first-person oral or documentary accounts or other direct testimony left by Apache signatories or their immediate heirs. Because such testimony has yet to surface outside of Apache society, this case study instead examines individual Apache signatory identities, their group affinities, and their actions in relation to the terms of the Treaty. Responses to other questions, especially 6 and 7, below, describe Apache group behavior following 1852 as an indirect means for assessing Apache understandings of the 1852 Treaty and its new rules for Apache lives and lands in relation to the U.S.

The 1852 Treaty was signed by “chiefs, acting on the part of the Apache Nation.” As a distinct people with a recognized Territory, designated leaders, and shared values, interests, cultural traditions, and languages, Apaches meet Western legal tests of nationhood (see Black’s Law Dictionary, 2021). Conrad’s (2021, p. 119) assertion that the Apache Nation “was in fact no unitary polity at all” is unassailable. At the same time, and as manifest in ongoing collaborations by the intertribal Apache Alliance (Bruce, 2021; *Gah’nahvah/ Ya Ti’*, 2013), Apache Nationhood in 2022 does not require or rest upon centralized or unified leadership any more than it did in 1852. The U.S. officials charged to treat with Apache leaders could not have known precisely with whom they parlayed or the geographical or political scope of their respective authorities (Goodwin, 1942; Welch, 2017a). The contingent, often situation-specific nature of Apache leadership, of personal names, and of social group organization posed serious challenges well into the 1900s to non-Apache attempts to untangle Apache identities, affinities, and loyalties. Sweeney (1998, pp. 262, 320) states:

the Apache’s loose political structure, with authority vested in . . . extended family and group leaders instead of prominent band chiefs, went counter to what Americans arrogantly believed the Apaches’ political organization should be. This confusion inevitably led American military men to arrive at solutions based on broad generalizations or incorrect assumptions. To them an Apache was an Apache, a simplistic notion that would lead time and again to further violence.

Something that both U.S. and Apache signatories to the 1852 Treaty did understand was that the Rio Grande was a boundary between Eastern Apaches—groups called Mescalero, Jicarilla, Kiowa-Apache, and Lipan Apache—and Western Apaches. In accord with U.S. governmental discourse through the 1950s, Ogle’s (1940) *Federal Control of the Western Apaches, 1848-1886* chronicles engagements between the U.S. and Chiricahua Apache groups and Apaches living farther west. Basso (1983, p. 462) explains the difference between Western Apaches—comprised of groups commonly referenced as Chiricahua Apache and Western Apache (singular):

Some writers have used the term [Western Apaches] to refer inclusively to all Southern Athapaskan tribes, except the Navajo, who lived west of the Rio Grande. . . . This usage is misleading because it fails to distinguish the Chiricahua from other Apacheans in the region.

Since the 1980s, many Western scholars have employed group identifiers and classifications more meaningful to Apaches. Babcock (2016, pp. 261–263) offers a good compendium of labels and geographical affinities for the constituents of the Apache Nation, but even for a specified historical period, Apache-Anglo consensus on group names, boundaries, and alliances is likely to prove elusive.

Apache and U.S. signatories also agreed the time was ripe for a treaty. John Greiner (1852, p. 2), who signed the 1852 Treaty on behalf of the U.S., wrote, “these Indians have been desirous of making peace—and their good conduct showed their sincerity. Runners were sent through their Country to hold a general Council. . . . But the vast extent of Country through which they range rendered this scheme impracticable.” Because it was not possible to assemble concurrently the leaders of all Apache Nation constituents, the 1852 agreement is well read as at least two treaties with identical terms but different Apache signatories representing different groups of Apaches who were simultaneously allied and independent: Five leaders of apparently Eastern Apaches signed the pact on July 1, 1852, in Santa Fe; the sixth leader, Mangas Coloradas, signed for Apaches west of the Rio Grande, on July 11, 1852, at Acoma Pueblo (Table 1) (Sweeney, 1998, pp. 254–256).

The signatories further understood that Mangas Coloradas, the most powerful Apache leader of the mid-1800s, represented many Western Apaches. Period documents indicate that any Apache treaty without Mangas' endorsement would have been a waste of time, and Greiner's journal states, “Mangas is . . . their chief cap' and councillor and can speak for all his people” (Abel, 1916, p. 228). Headmen under Mangas' influence grasped the inevitability of U.S. engagement; most acted in accord with perceived interests in mutually beneficial relations with the U.S. newcomers (Sweeney, 1998).

**Table 1. The Six Apache Signatories to the 1852 Treaty and Notes on Their Identities**

Name on Treaty	Also known as	Other documentary references to identity
Cuentas Azules	“Blue Beads”	Leader with ties to Mescalero Territory
Blancito	“Little White”	Unknown
Negrito	“Little Black”	Leader of Chiricahua group favoring peaceful relations with the U.S. (Sweeney, 1998, pp. 269, 328, 570)
Capitan Simon	Unknown	Unknown
Capitan Vuelta	“Captain Turned”	His watercolor portrait is presented in “El Sabio Sembrador” (Strickland & Percy, 1969)
Mangas Coloradas	“Red Sleeves,” Gandazislichíídn, El Fuerte	Mangas signed for at least five other Chiricahua leaders present at Acoma: Ponce, Itán, Sargento, Doscientos, and José Nuevo (Sweeney, 1998, pp. 254, 260, 272, 274)

Apache people and Apache Tribal governments today are the obvious and lawful heirs to rights and responsibilities codified in the 1852 Treaty. The Apache signatories to the 1852 Treaty have hundreds of lineal descendants enrolled as members of at least seven Apache federally recognized Tribes—Fort Sill Apache, Mescalero Apache, San Carlos Apache, Tonto Apache, White Mountain Apache, and Yavapai-Apache Nation. Through the U.S. Indian Claims Commission (1969) and other proceedings, the U.S. has recognized these Tribes’ governments and member-citizens as inheritors of rights and interests guaranteed in the 1852 Treaty (Lieder & Page, 1997). Questions about whether the Jicarilla Apache Tribe and the Apache Tribe of Oklahoma and their citizen-members are heirs to the 1852 Treaty remain unresolved. Because of friendly Apache-Yavapai relations and similar lifeways, U.S. officials and scholars initially grouped the Kewevkapaya (Southeastern Yavapai) with their Apache neighbors to the east, or referenced the Kewevkapaya, Wipukpaya, Yavepes, and Tolkepaya (Yavapai Nation) and their distinct linguistic and cultural traditions as “Apache-Mohave” (Khera & Mariella, 1983). Apaches understood that Yavapais were a distinct nation. Apaches in the 1800s understood, and understand today, that Yavapai people and interests were not represented in the 1852 Treaty, something U.S. representatives, who lacked knowledge of Apache and Yavapai culture and language, were likely unaware of.

#### 4. What Historical Events and Processes Drove Creation of the 1852 Treaty?

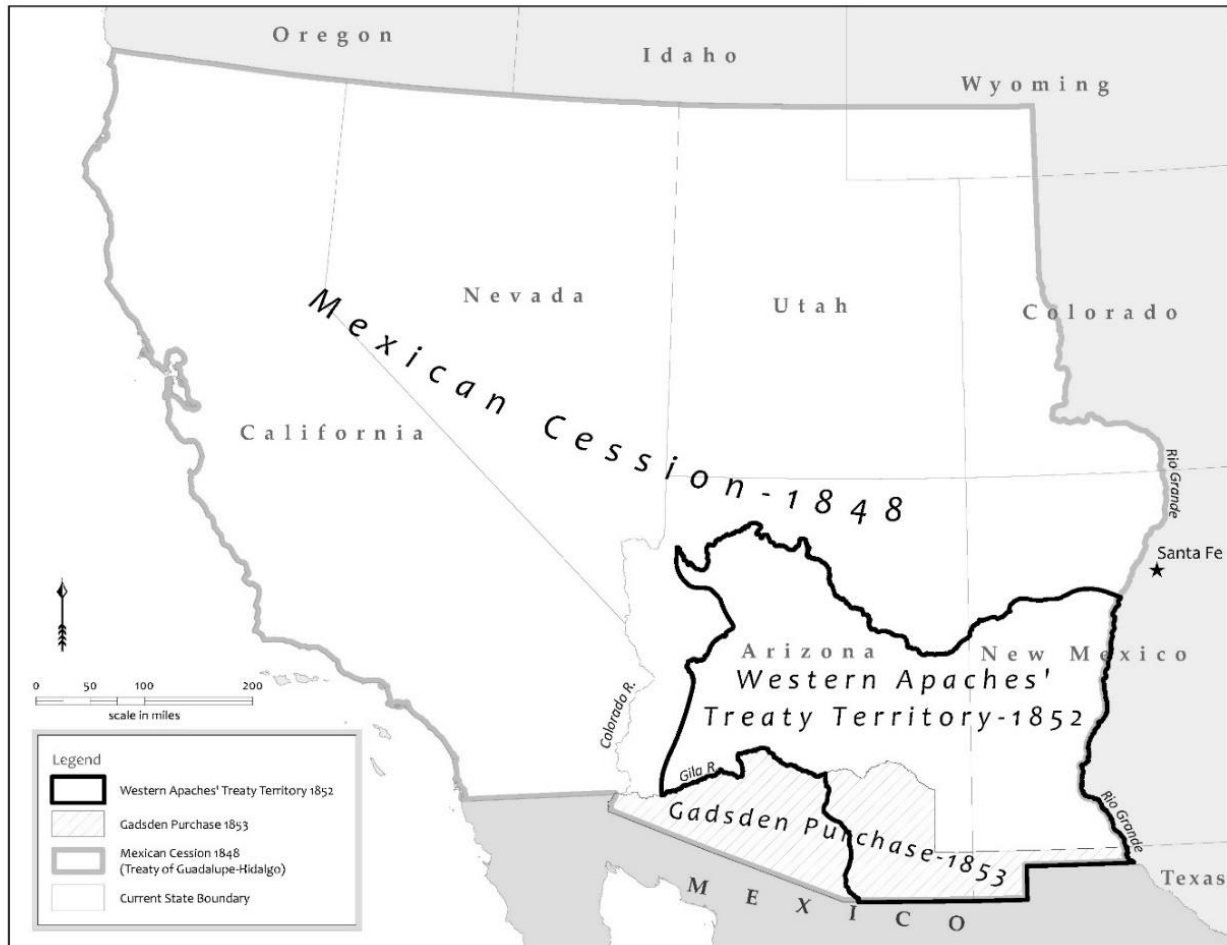
Legal and policy questions about lands affected by the 1852 Treaty and signatories’ understandings and motivations must be addressed in light of historical forces that led the U.S. to pursue that pact. The 1852 Treaty was negotiated in the wake of the moral and political failures of the Removal Era in U.S. Indian Policy (circa 1820–1850) (Newcomb, 2008). Within this national historical context, the Treaty both precipitated from and

catalyzed momentous international developments that explain why the U.S. first sought a treaty with the Apache Nation then, following the 1853 Gadsden Purchase, ignored critical treaty terms.

The 1852 Treaty became integral to U.S. goals on parallel geo-political scales. Continentally, the expansion of U.S. territorial ambitions in the early 1800s led it to covet portions of the nascent Mexican republic's vast northlands in the wake of Mexico's 1821 independence from Spain. Regionally, raids by Apaches exploited Mexico's diminished capacities to govern in the Rio Grande and Gila River watersheds (Griffen, 1988; Weber, 1992, pp. 213–216). These raids weakened a Mexican government already impoverished by conflicts, unable to govern its North, and otherwise ill-prepared for war (DeLay, 2009; Jacoby, 2008).

Emboldened by Apache raids and Mexican military and economic vulnerabilities, the U.S. provoked the Mexican–American War (1846–1848) (Henderson, 2007). Apaches generally welcomed the U.S. as an ally against Mexico, but seem not to have grasped, at least initially, the geographical breadth and political depth of U.S. ambitions. The 1848 Treaty that ended the Mexican–American War (Treaty of Guadalupe Hidalgo, 1848) located a new U.S.–Mexico border that bisected the southern reaches of Apache Territories (Figures 1 & 2). Article 11 of the agreement with Mexico obligated the U.S. to control Apache raids into Mexico and to free Mexicans held captive by Apaches. These provisions stimulated U.S. military and diplomatic engagements with Apaches. Article 11 complicated prevailing relations, which had previously been understood by both U.S. and Apache leaders to distil to the notion that the enemy of an enemy is a friend. John Bartlett, head of the U.S. Boundary Commission, noted that Mangas Coloradas, “could not comprehend why we [U.S.] should aid them [Mexicans] in any way after we had conquered them, or what business it was to the Americans if the Apaches chose to steal their mules, as they had always done, or to make wives of their Mexican women, or prisoners of their children. I told them the Americans were bound to do so” (Bartlett, 1854, p. 301).

The war with Mexico greatly reduced both U.S. Treasury reserves and U.S. appetites for bloody expansionism; simultaneously, the 1848 California gold strikes motivated the U.S. to obtain an all-season transport route to the Pacific (Kluger, 2007). The most viable winter route was through the heart of Apache Territory, and the U.S. moved swiftly to secure that route and to otherwise boost U.S. authority in the Southwest. On September 9, 1850, Congress enacted “An 9 U.S.C. § 446 to create the Territory of New Mexico (which encompassed the boundaries of the current State of Arizona north of the Gila River) and, on February 27, 1851, enacted 9 U.S.C. § 574, 587 to prohibit non-Indian settlement of “any land belonging to any Indian or Indian tribe, without the consent of such tribe” (U.S. Indian Claims Commission, 1969, p. 216).



**Figure 2. The U.S. Southwest and the Western Apaches' Treaty Territory.** The Apache Nation Treaty Territory west of the Rio Grande (author map).

The “gathering stream of gold-seekers” (Conrad, 2021, p. 184), some of whom decided to prospect in Apache Territory, also helped bring concerned Apache leaders to the treaty table. James Calhoun, New Mexico Territory’s first governor, supported modest safeguards for Indigenous interests. In the five years following the 1848 Treaty with Mexico, the U.S. spent \$12 million to suppress Apache and Comanche raids; some estimated that \$60 million would be necessary for the Army’s full borderland control (Kluger, 2007, p. 492). Calhoun’s engagements with Apaches were grounded in his proposition that the annihilationist policy preferred by the U.S. Army for dealing with Indigenous Peoples was unjust, uneconomical, and infeasible.

Had U.S. desires to boost its international stature, establish a travel corridor, and confirm jurisdiction over New Mexico Territory been anything except core objectives, the U.S. might simply have ignored its 1848 Treaty pledges to control Apaches. But Calhoun’s appreciation of the vastness of the 1848 Treaty acquisition, and his sense of a diplomatic opportunity to quell Apache raiding, spurred his Apache treaty talks. Calhoun’s July 30, 1851, letter to the Commissioner of Indian Affairs confirms priority U.S. government interests in implementation of and compliance with the 1848 Treaty: “The only Indians (Wild Indians) with whom a treaty

should be made, are the Apaches west of the [Rio Grande]. . . . who are habitually seizing captives, and committing depredations upon Mexican citizens" (Abel, 1915, p. 392–394).

U.S. diplomacy paid off, first with Calhoun's 1852 Treaty with the Apache Nation, then a year later, with the Gadsden Purchase Treaty (Figure 2). Pursuant to the Gadsden Treaty (1853), the U.S. paid Mexico \$10 million for 29,670 square miles of land and adjusted the U.S.–Mexico border to its present alignment in New Mexico and Arizona. This purchase, the final addition to the contiguous U.S., brought more of Apache, Maricopa, Pima, Tohono O'odham, and Yuma Territories under U.S. jurisdiction (Kluger, 2007).

The 1853 Gadsden Purchase Treaty neglects mention of the 1852 Treaty with the Apache Nation, but Article 2 of that 1853 Treaty revokes Article 11 of the 1848 Treaty of Guadalupe Hidalgo, thereby relieving the U.S. of duties to control raiding into Mexico and to liberate Mexican captives. This diplomatic sleight of hand blurred parameters and deferred requirements for U.S. engagements with the much-expanded Southwest's Indigenous Peoples while further boosting U.S. prestige relative to European nations.

With the 1853 Purchase Treaty signed, the U.S. had achieved its goals of Mexican land, international recognition, and the all-season travel corridor between Texas and California. Satisfied with this advancement toward its supposed Manifest Destiny, and now acutely distracted by the chronic and escalating controversy over slavery, the U.S. Government simply did with the 1852 Treaty what it had done in relation to many other agreements with Indigenous Peoples: asserted U.S. rights and interests while ignoring whatever duties and responsibilities it deemed too cumbersome or costly. Close study of the historical contexts for the Treaty of 1852 reveals not only continental-scale developments that made an agreement virtually inevitable, but the great significance of the Treaty in populating the California and Nevada mining districts and in enabling the Gadsden Purchase. However, the good faith of the parties to the 1852 Treaty, especially the Apache signatories' willingness to trust U.S. officials to uphold their side of the deal, must be understood not merely as historical facts, but as essential elements for continuous quests to implement and realize the full promise of the 1852 Treaty in 2022 and into perpetuity. There is no legal or moral barrier to U.S. or Apache use of the Treaty to right past wrongs or otherwise collaborate toward mutually desired futures.

### **5. Where is the Apache Nation Territory Referenced in the 1852 Treaty?**

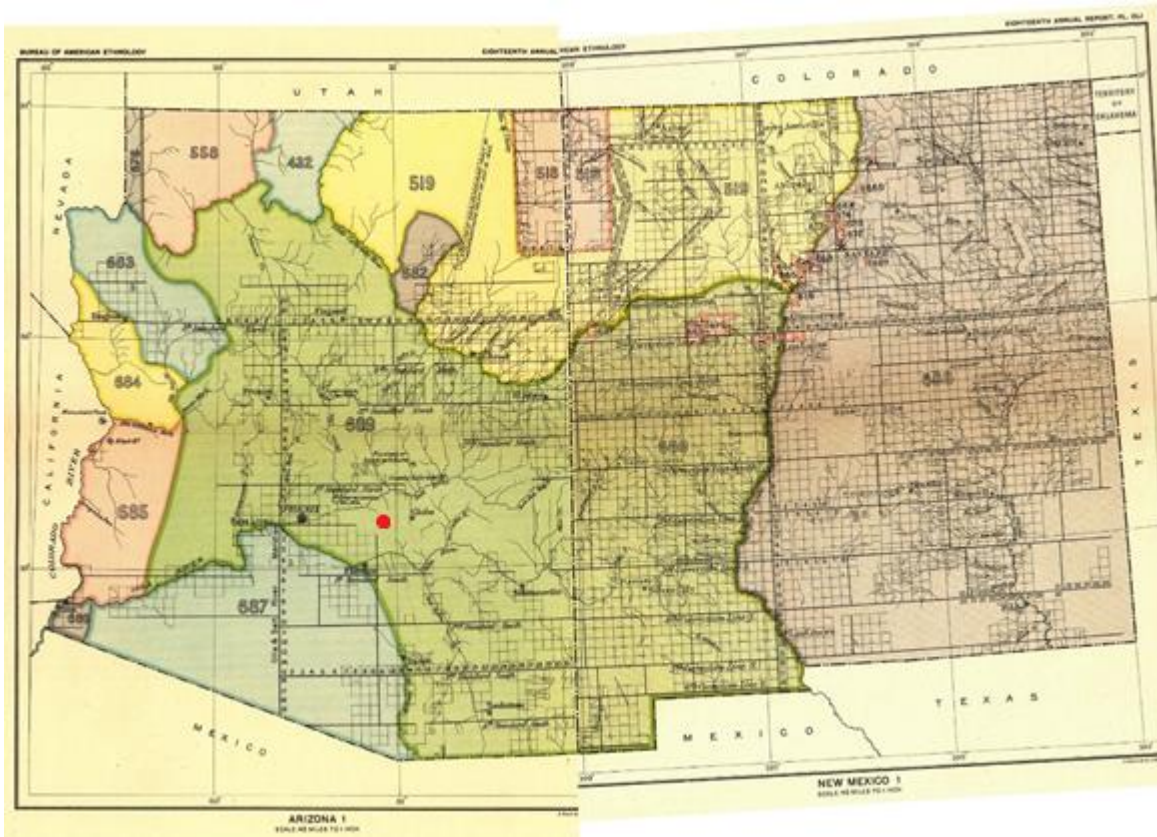
Articles 4, 7, and 9 of the 1852 Treaty all refer to Apache "territory," but the agreement does not include or reference a map or detailed description of affected lands. The simplest explanation for why the 1852 Treaty does not delineate Apache Territory boundaries comes in two-parts: (1) Apaches would not agree to any land cession; and (2) U.S. officials lacked requisite knowledge of Apache geography. Greiner (1852, p. 7) wrote, "this Country would soon be settled if the Indians would allow it, but they are unwilling to part with their lands" (see the answer to Question 7, below). The topographic and scientific survey of the U.S.–Mexico boundary was scarcely underway in 1852, and maps of the Southwest remained schematic into the 1870s (Rebert, 2011). Schoolcraft (1857, p. 216), a prominent explorer-ethnologist, wrote: "the country inhabited by the Apache nation is comparatively little known . . . with no reference to its precise latitude and longitude."

Lacking maps or other mutually cognizable means to communicate with Apaches about the extent of their Territory, U.S. officials simply deferred. Article 9 of the 1852 Treaty obligates the U.S., at some later date, to

“designate, settle, and adjust” the boundaries of the Apache Nation Territory. David Meriwether, Governor Calhoun’s successor, engaged Apaches to address this U.S. obligation in 1855, but Congress rejected further treaties with borderland Apaches on the grounds that the U.S. had already paid Mexico for the land (Sweeney, 1998, pp. 310–314) and did not want to give up rights to future mining within newly proposed reservation lands (Thrapp, 1974, p. 45). Instead of fulfilling its 1852 Treaty duties, the U.S. eventually opted, in the 1860s and 1870s, to establish the Apache reservations recognized today (Figure 1; Welch, 2016). The executive orders the U.S. used to create these reservations do not reference, implement, amend, or rescind the 1852 Treaty.

Although the U.S. has yet to designate or settle the boundaries of the Apache Nation Treaty Territory (ANTT), it did map it. For example, the U.S. Department of War (Dougal, 1859) depicted the lands of the “Pinaleños” and “Tontos” Apaches within an area that encompasses Oak Fat, the surrounding mountains, and tracts north, west, and south. Later, in response to growing interest in the geographical correlates of Federal Indian Policy, the U.S. Smithsonian Institution’s Bureau of American Ethnology commissioned Charles C. Royce to produce an historical atlas of treaties and Indigenous “land cessions.” Authoritative at the time, Royce’s (1899) widely-used compendium infers ANTT boundaries (Figure 3), and those of other treaty, statutory, and executive order jurisdictional changes, from documentary and cartographic materials available prior to about 1885, when the project was substantively completed. Royce almost certainly used the 1859 War Department map but did not conduct field studies or interviews. When Royce lacked data sufficient to depict “unratified treaty and unsurveyed areas, he frequently fudged his maps,” often in favor of the U.S. (Cole and Sutton, 2013, pp. 48, 52). Royce’s maps were widely used in the proceedings of the Indian Claims Commission (see the response to Question 8, below). Royce’s goal was to create a general reference work, not legal evidence (Cole and Sutton, 2013, p. 52).





**Figure 3. Apache Nation Treaty Territory.** Figure 3 depicts Royce's (1899, pp. 922–923) Arizona 1 and New Mexico 1 maps conjoined to depict Apache Nation Treaty Territory (polygon 688 east of the Rio Grande; 689 to the west). The red circle indicates the approximate location of the Chi'chil Bildagoteel sacred site and the proposed Resolution Copper mine.

Royce's "cession 689," referenced here as the Western ANTT, encompasses lands on which the U.S. established reservations for the San Carlos Tribe, the Tonto Tribe, the White Mountain Tribe, and Yavapai-Apache Nation. The Western ANTT also includes lands the U.S. Indian Claims Commission (1969, 1978) recognized as Chiricahua and Western Apache Aboriginal Territories, as well as tracts of Pima-Maricopa, Yavapai, Hualapai, Havasupai, Navajo, Acoma, Zuni, Laguna, Quechan, and Tohono O'odham Aboriginal Territories (Figure 4). The west boundary of Royce's ANTT—also including the approximate west boundary of Yavapai Territory—roughly coincides with the east boundary of the Colorado River Tribes' ancestral lands.

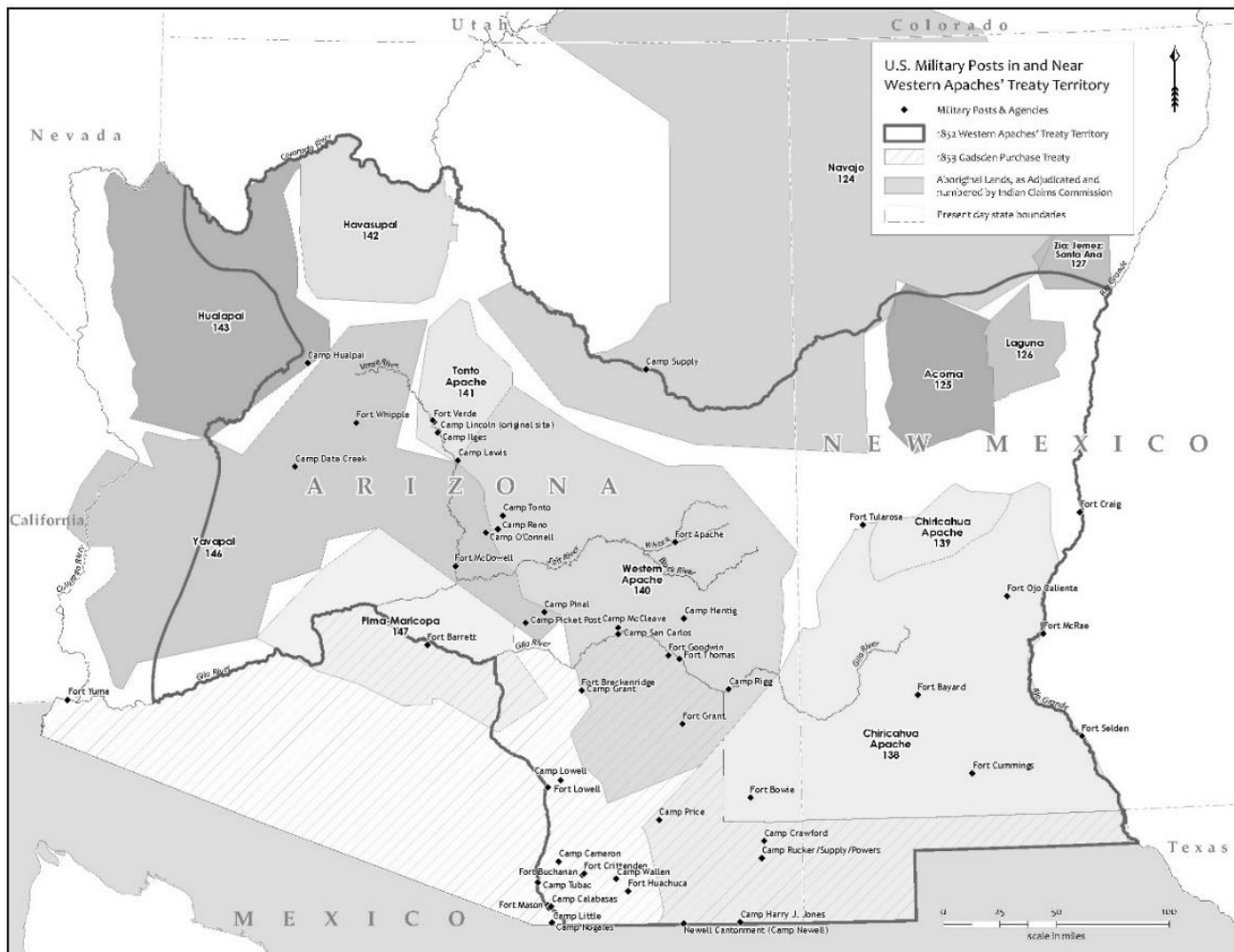


Figure 4. Indigenous Peoples' Aboriginal Territories (U.S. Indian Claims Commission, 1978) and U.S. military posts in and adjacent to Western Apaches' Treaty Territory, 1852–1900 (author map; sources: Walker & Bufkin, 1986; Payette & Payette, 2020, 2021).

## 6. What Rights Does the 1852 Treaty Grant to the U.S.?

The 1852 Treaty grants the U.S. some general rights and some specific land-use rights. Articles 1, 4, and 6 recognize U.S. “laws, jurisdiction, and government,” including use of U.S. courts to adjudicate disputes. Apaches have generally honored these terms. Treaty Article 8 grants rights to the U.S. to establish “military posts and agencies.” The U.S. swiftly exercised its Article 8 prerogatives: Figure 4 depicts the roughly 30 posts established by the U.S. Army in the Western ANTT, making the region one of the most militarized in world history.

The U.S. initially boosted its military presence in ANTT in large part to protect Mexico from raids and thus comply with the 1848 Treaty of Guadalupe Hidalgo and the 1852 Treaty. By the mid-1850s, however, most of these posts pursued an expanded mandate of Apache subjugation. Some U.S. Army forces continued to patrol the borderlands, but more were soon deployed—in apparent contravention of the 1851 Act creating New

Mexico Territory, the 1852 Treaty, and other U.S. policies—to facilitate unauthorized ANTT uses by non-Apaches, especially grazing, hunting, and mining. The 1851 New Mexico Territory statute explicitly incorporates Sections 10 and 11 of the Indian Trade and Intercourse Act (1834). The 1834 Act prohibits non-Indian settlement on “any lands belonging . . . to any Indian tribe” and authorizes U.S. officials “to remove from the Indian country all persons found therein contrary to law.” Instead of abiding by and enforcing U.S. law and policy, the U.S. Army launched excursions well north of the Mexican border, including “The Gila Campaign” of 1857 (Walker & Bonneville, 1980). U.S. Army and civilian officials were soon supporting and participating in prospecting forays into Apache Territory (Welch, 2017b). The increased regional militarization emboldened soldiers, trappers, ranchers, and miners to adopt an informal policy of shooting Apaches on sight (Terrell, 1972, pp. 244–245; Sweeney, 1998, p. 421).

Apaches often responded to violence with violence; however, contrary to frontier legendry, Apaches generally honored Article 8. Many Apache leaders collaborated with U.S. officials to establish forts within Apache lands and to raise troops of Apache scouts to support peacekeeping (Welch, 2016). The only concerted Apache attack on a U.S. Army post west of the Rio Grande was at Fort Apache in 1881 (Welch et al., 2005).

Treaty Article 7 conveys to the U.S. the rights to use ANTT for “free and safe passage,” a grant acknowledging and further enabling the surge of post-1848 east-west travel by non-Apaches through ANTT (Figure 5). Cochise, one of Mangas Coloradas’s successors, sometimes protected these travelers. Beginning in 1861, after the U.S. betrayed Cochise’s trust and violated the 1852 Treaty in the “Bascom Affair,” Apache observance of Article 7 waned (U.S. National Park Service, 1986). In their study of the 1869 Apache attack on the Tully & Ochoa wagon train, Van Orden and Barnes (2013, pp. 320, 322) say, “Apache attacks on wagon trains at this time were not uncommon.” In fact, however, bona fide Apache attacks on non-Apaches passing *through* ANTT were uncommon (Kühn, 2014). Apaches certainly posed risks to travelers who lingered, but no Butterfield Stage passengers were ever killed by Apaches (Hackler, 2005, p. 19).

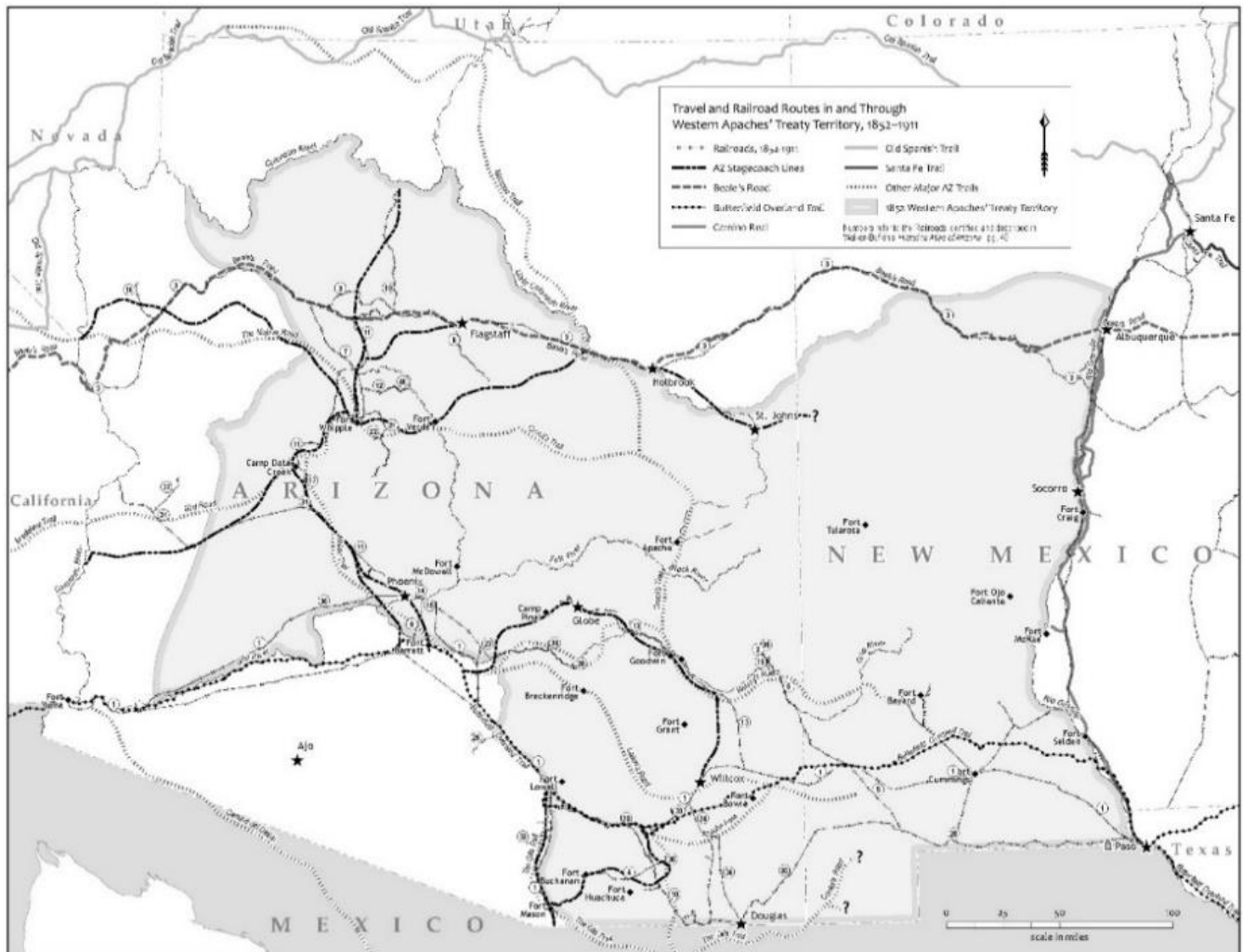


Figure 5. Free and Safe Passage Routes Through the Western Apaches' Treaty Territory (author map).<sup>2</sup>

### 7. What Rights Do Apaches Retain to their 1852 Treaty Territory?

In tandem with the *McGirt* decision's repudiation of *implied treaty repeals*, Canon Three, which affirms that Indigenous parties' Treaty Rights endure unless they are explicitly conveyed, relinquished, or extinguished by statute, enables an unequivocal answer to questions regarding rights that Apaches retain in ANTT: Until explicitly altered or annulled by Congress, all Indigenous Peoples' rights to treaty territories persist into perpetuity. In 1852 and thereafter, Apaches have generally acted in ways consistent with an understanding that their reserved ANTT rights include unrestricted entitlements, both within and beyond reservation boundaries, to travel and access, to pray and conduct rituals, and to use water, plants, animals, and minerals.

<sup>2</sup> Map created with reference to Ahnert (2011), Attack (n.d.), National Park Service (2019) and National Historic Trails (n.d.).

Specific application of the reserved rights doctrine (Charlton, 2015) to ANTT requires at least two steps: (1) scrutiny of U.S. actions affecting ANTT to determine whether those actions amend, truncate, or annul Apaches' reserved rights, including retained use rights (see Table 2); (2) approximation of an Apache-centric understanding of Territory.

The U.S. enactments listed in Table 2, the Acts establishing and altering the boundaries of reservations for Apaches (see Welch, 2017b: Table 5), and all other U.S. Government actions and enactments affecting ANTT share a critically significant attribute: None reference, much less explicitly amend, truncate, alter, or rescind, the 1852 Treaty. With the exception of the rights Apaches generously granted to the U.S. through the 1852 Treaty, Apaches manifestly retain all rights in and to ANTT. Apaches also retain the rights affirmed in Article 1 of the 1852 Treaty to access to U.S. courts to address disputes relating to the Treaty.

As for the Apache Nation's reserved Treaty Rights, Canon One requires a review of land tenure as signatory Apaches understood it in 1852. *Land tenure* refers both to human-land relationships and to policies for defining how rights to land are allocated, exercised, and transferred. Apache and U.S. land tenure policies share the precept that people possess rights to land, rather than land itself. This commonality allows the use of widely shared understandings of rights to land as "bundles" made up of as many as four sets of "sticks"—i.e., rights (a) to access and use; (b) to exclude others from access and use; (c) to improve, manage, and steward (or degrade); and (d) to alienate and transfer (Caldwell, 1974).

**Table 2. A Partial List of U.S. Government Actions Affecting ANTT in Arizona, Including Oak Flat**

Year	Act, purpose, consequence
1854	10 U.S.C. § 308 establishes the office of the surveyor general for the Territory of New Mexico, facilitating non-Indian settlement of Apache Territory.
1862	12 U.S.C. § 392, Homestead Act, authorizes U.S. citizens to apply for use and ownership rights to “public domain” lands, including ANTT lands
1877	19 U.S.C. § 377, Desert Land Act, authorizes U.S. citizens to apply to irrigate, cultivate, and own parcels larger than 160 acres under the Homestead Act
1898	30 U.S.C. § 1782, establishes Black Mesa Forest Reserve <sup>3</sup>
1899	34 U.S.C. § 3126, establishes Gila River Forest Reserve
1902	32 U.S.C. § 388, Reclamation Act, authorizes the construction of dams and irrigation systems to “reclaim” lands otherwise not amenable to farming
1905	34 U.S.C. § 2991, establishes 45,760-acre Pinal Mountains National Forest; <sup>4</sup> 34 U.S.C. § 3166, establishes 1,115,200-acre Tonto National Forest <sup>5</sup>
1908	35 U.S.C. § 2194, establishes Crook National Forest, which includes Oak Flat, from parts of Tonto National Forest and other “public lands” <sup>6</sup>
1910	36 U.S.C. § 557, Arizona-New Mexico Enabling Act, authorizes the two Territories to become states on the condition the said States relinquish all claims and jurisdiction over Indian lands within respective State boundaries; assigns sections 2 and 32 of each township to be held in trust for K-12 schools.
1964– 1990	78 U.S.C. § 890, Wilderness Act, as amended, designates ~90 wilderness areas (~4.5 million acres) in Arizona, ~30 in ANTT (not including Gila Wilderness)
2014	128 U.S.C. § 3292, Southeast Arizona Land Exchange and Conservation Act, authorizes (a) limited mineral exploration within Oak Flat; (b) creation of the 807-acre Apache Leap Special Management Area; and (c) exchange of the 2,422-acre Oak Flat U.S. land parcel for about eight parcels of private land <sup>7</sup>

<sup>3</sup> In a suite of administrative actions, 1898–1907, the U.S. attempted to include forested portions of various Indian reservations, including White Mountain Apache lands, within U.S. forest reserves. The U.S. determined such removals were illegal and “returned” all timberlands to Indian landowners (Baker et al., 1988, p. 35–36).

<sup>4</sup> Davis (1983)

<sup>5</sup> Davis (1983)

<sup>6</sup> Davis (1983)

<sup>7</sup> Carl Levin and Howard P. “Buck” Mckeen National Defense Authorization Act for Fiscal Year 2015 (2014).

Apache land tenure bundles include several of these property “rights-sticks.” Apaches generally honored the grants they made to the U.S., via the 1852 Treaty, of limited rights to access, use, and improve ANTT—the latter through military posts, agencies, and travel corridors. Also, per the Article 1 grant of jurisdiction, the Apache Nation arguably recognizes U.S. rights to exclude non-Apaches from ANTT. Perhaps more significantly, Article 9 may also have granted the U.S. rights to exclude Apaches themselves from portions of their ANTT, contingent, as noted above, on U.S. actions, per Treaty Article 9, to “designate, settle, and adjust their territorial boundaries.” One reasonable interpretation for why the U.S. never implemented Article 9 is that predominant Apache comportment with the other terms of the Treaty made it unnecessary. In other words, the U.S. has been able to rely on Apaches to uphold their side of the 1852 Treaty, implicitly abiding by and endorsing many key terms.

With regard to the sort of land alienation and degradation that the U.S. has proposed to serve the interests of Resolution Copper, Apaches could not have granted any such rights to the U.S., or anyone. This is true because, unlike U.S. conceptions of land and land tenure, Apache understandings of land tenure do not include rationales or rights to permanently degrade or alienate Territory. Apaches and most other Indigenous Peoples understand both land and people “as belonging to the totality of nature” (Caldwell, 1974, p. 767). Apache land tenure mandates balance in rights and responsibilities, often referenced in English as *stewardship*. Goodwin (1942, p. 150) notes Apache “resentment to the variance between the concept of landownership of white people and his own.” Apache Elder Raymond Kane described his grandfather’s experience of U.S. executive order severances of Territory from reservations to enable mining in the early 1870s as an “unanesthetized amputation” (Welch & Riley, 2001, p. 7). White Mountain Apache Tribe Chairman Ronnie Lupe (1991, p. 3) warned: “We are not patient with those who disregard our knowledge and our love of the land and those creatures that live upon it.” At a minimum, because the Apache Nation never surrendered many of its land rights—including prerogatives to access, use, steward, participate in decisions affecting, and worship on and through their Territory—Apaches reserve these rights in and to the ANTT. Alienation, degradation, and other actions that impede these rights are inconsistent with the 1852 Treaty and with Apache understandings of that Treaty, of land tenure, and the Universe’s general moral order.

### 8. Did Indian Claims Commission Proceedings “Quiet” Apaches’ Rights to ANTT?

The 1852 Treaty stands, unchanged by any treaty, statute, Executive Branch action, or U.S. Government neglect or disregard. Although the Indian Claims Commission Act (1946) (60 U.S.C. § 1049) does not specifically reference the 1852 Treaty, that 1946 statute does indicate Congress’ general intent to “quiet” Tribes’ *Aboriginal Title* claims for land beyond the boundaries of tribal trust lands (i.e., Indian reservations). This intent certainly encompasses lands acquired by the U.S. from Mexico pursuant to the 1848 and 1853 Treaties. The Indian Claims Commission Act waived U.S. sovereign immunity, enabled financial compensation claims from tribes, and identified petitions from tribes to the Indian Claims Commission (ICC) as a time-limited means to “quiet” Aboriginal Titles and award financial compensation to tribes for lands unlawfully taken. ICC Commissioners interpreted the 1946 Act to restrict claimants to U.S.-recognized tribes and to limit tribes’ claims to definable territory exclusively used and occupied from time immemorial. Commissioners rejected compensation claims for (1) tracts used or occupied by more than one tribe or group of related tribes; (2) interest on the value of land held by the U.S. between the time of the taking and the completion of ICC adjudication; (3) wealth extracted

from land through logging, mining, and agriculture; and (4) value in excess of real estate prices at the historical moment of the taking, when real estate markets were often nonexistent (Lurie, 1978; Wilkins, 2013).

These interpretations of the 1946 ICC Act by the Commissioners—especially the requirements for single-party ownership and fixed and transferable land titles—do not comport with Apaches' land tenure policies, or those of most other Indigenous Peoples. Because the U.S. presented the ICC process to tribes coercively, as the final, “take it or leave it” path to payment for misappropriated lands, and because ICC decisions are negotiated settlements, not historical dicta or legal precedents, ICC decisions affecting ANTT, especially Oak Flat, require scrutiny. One parameter for this scrutiny is the contested legal reality that neither the ICC nor its predecessor and successor, the U.S. Court of Federal Claims, has authority to alter Treaty Rights, return taken land, or enforce property use rights, *per se*. The power of these bodies in the adjudication of Territory claims brought by Indigenous tribes is limited to the award of monetary damages to tribes for wrongful takings or related harms to Indigenous lands.

From 1949 until about 1976, the ICC adjudicated Docket 22, a series of claims by Apaches and neighboring Indigenous Peoples for ANTT tracts taken by the U.S. The Apache Nation's First Amended Petition to the ICC lists 18 Apache and Yavapai leaders representing 14 subgroups of “the Apache Tribe of the Mescalero Reservation, the Jicarilla Apache Tribe of the Jicarilla Reservation, the Yavapai-Apache Community, the San Carlos Apache Tribe of Arizona, and the White Mountain Apache Tribe,” together constituting the Apache Nation (Curry, 1949, p. 2). The 1949 Petition relies heavily on the 1852 Treaty in asserting “exclusive use and occupancy from time immemorial” by the Apache Nation, of lands “shown on maps included in . . . Indian Land Cessions in the United States, compiled by Charles C. Royce. . . until deprived of the same by the various acts” of the U.S. (Curry, 1949, pp. 5–6). The 1949 Petition affirms that the U.S. signed but failed to ratify the 1855 treaties Governor Meriwether negotiated per the 1852 Treaty Article 9 mandate to “designate, settle, and adjust” ANTT boundaries (Curry, 1949, pp. 14–15; section 5, above). The Petition further affirms that the U.S. proceeded, after the 1853 Gadsden Purchase Treaty, with “action and policy in complete denial and derogation of the ownership and rights to possession in the Plaintiff's or their predecessors in interest, of the ancestral lands . . . and considered and treated such public lands for such purposes as the United States might desire to use them, including public homestead and settlement. . . without their consent and without compensation, to the great damage of the Plaintiff's” (Curry, 1949, p. 15).

As the ICC considered this forceful claim to compensation for something like 50 million acres (the 1946 Act prohibited the return of land by the ICC), U.S. Commissioner of Indian Affairs Dillon Myer intervened. Myer vetoed renewal of Curry's attorney contracts with the Apache Tribes and other ICC plaintiffs (Martin, 2008). Myer then approved new contracts with attorneys amenable to more “efficient” resolution of ICC proceedings. Docket 22 lawyers soon agreed to partition the 1949 Petition into multiple claims. Docket 22-D resulted in payments, circa 1973, to the San Carlos and White Mountain Apache Tribes for about six million acres of ANTT taken by the U.S.



Because the ICC Act does not amend or abrogate the 1852 Treaty, and because ICC proceedings in Docket 22-E erroneously recognized Oak Flat as Yavapai Nation Aboriginal Territory and excluded Oak Flat from the lands for which Apaches were paid, neither the 1946 ICC Act nor the adjudications and compensatory payments it authorized could have altered the property and Treaty Rights that Apaches retain to Oak Flat. Yavapais and Apaches customarily shared foraging areas, but Chi'chil Bildagoteel was shared by Apaches with Yavapais, not the other way around (U.S. Tonto National Forest, 2016). Vincent Randall (personal communication, November 25, 2020), the Dilzhe'e (Tonto Apache) historian and Yavapai-Apache Nation citizen, said "Oak Flat has always been Apache. There are five Apache clans with origin places around Oak Flat. . . . Yavapais could go there, but it wasn't their place." Oak Flat rightfully belonged in the Apache Claim (Docket 22-D), not the Yavapai Claim (22-E). No ICC-authorized payment or non-payment alters Apache Treaty and use rights to Oak Flat.

### 9. How are Apaches Asserting Treaty Rights to Chi'chil Bildagoteel and its Vicinity?

Legal questions regarding persistent Apache rights to ANTT are, as of early 2022, being considered by the Court of the District of Arizona and the 9<sup>th</sup> Circuit Court of Appeals in *Apache Stronghold v. U.S.* (2021). Apache Stronghold is the non-profit led by former San Carlos Apache Tribe Chairman Wendsler Nosie and dedicated to the perpetuation of Apache culture. *Apache Stronghold*, along with two lawsuits suspended in early 2021 pending re-release of the final environmental impact statement for the proposed Resolution Copper mine, challenge U.S. plans to industrialize about 10,000 ANTT acres on the western flanks of the Pinal Mountains. Most of the acreage proposed for alteration by the Resolution Copper mine is under U.S. Department of Agriculture Forest Service management. The mine, if permitted, will dewater, poison, forever desecrate, and effectively destroy a beautiful part of ANTT, adversely altering the Chi'chil Bildagoteel sacred site by enabling Oak Flat to collapse into a massive subsidence crater (Redniss, 2020).

The *Apache Stronghold* plaintiffs claim that the proposed mine would violate Apaches' uninterrupted rights to access, use, and steward their ANTT and to conduct their spiritual practices at Chi'chil Bildagoteel (Romo et al., 2021; Indian Country Today, 2021). O'odham, Yavapai, Hopi, Zuni, and Apache Peoples have, since time immemorial, used Oak Flat's acorn masts, minerals, medicinal herbs, springs, streams, and animals, thereby establishing Oak Flat as a nexus of ecological-cultural values embraced by diverse Indigenous Peoples (U.S. Tonto National Forest, 2016; Welch, 2017b). Pottery fragments, engravings on bedrock, and ceremonial and living areas surround the Emory oak groves, adding senses of place, affinity, and spiritual potency to Oak Flat.

Terry Rambler (2021), Chairman of the San Carlos Apache Tribe, describes his family's links to Chi'chil Bildagoteel and how the U.S. violently and unlawfully severed those links. The unique and powerful convergence of Indigenous personal histories with archaeological and documentary evidence obliged the U.S. to list Chi'chil Bildagoteel in the National Register of Historic Places (U.S. Tonto National Forest, 2016). The U.S. National Park Service has formally recognized that Oak Flat's landforms, springs, woodlands, and religious sites define a 4,309-acre cultural landscape significant in Western Apache culture and religion.

The U.S. Government accepts both the cultural-religious significance of Oak Flat for Indigenous Peoples and claims made by Resolution Copper that 40 billion pounds of copper lie beneath Oak Flat and that this copper

can only be produced if the company acquires ownership of the 2,422-acres managed by Tonto Forest within the Chi'chil Bildagoteel National Register district (Krol, 2021). In a rare comment on legislative and judicial matters, the U.S. Advisory Council on Historic Preservation informed Congressional leaders of what is at stake (Tannenbaum, 2021, p. 1):

The land that would leave federal ownership includes the Chi'chil Bildagoteel Historic District. . . . The historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects that would result to this historic property from its transfer and subsequent use for mining. While the proposed mining would occur underground, the removal of the ore would cause the ground surface to collapse, creating a subsidence area that would result in a crater between 800 and 1,115 feet deep and roughly 1.8 miles across.

This important statement nonetheless neglects both Apache rights to ANTT and the mine's effects on the "permanent prosperity and happiness of said Indians," the Apaches who, along with other Indigenous Peoples, rely on Chi'chil Bildagoteel for vitality, identity, and spiritual orientation. As noted in discussing land tenure, Apache leaders consistently affirm integral connections among Apache Territory, wellbeing, and cultural survival. In specific reference to Oak Flat, the San Carlos Elders Cultural Advisory Council (2011, pp. 1–2) stated:

Before the Reservation the land and the people were healthy, strong, and happy. . . . The strength of our prayers and ceremonies depend on the land's health, and our ability to treat everything with respect. . . . There are many sacred and holy sites throughout our traditional lands, on and off the Reservation. These are natural places filled with power, and we go to them (or invoke them in our prayer) for a variety of reasons: for prayers and ceremonies, to get healing and ceremonial items, or for peace and personal cleansing. . . . We respect these places, and we need them to be healthy and strong for our prayer to be healthy and strong. . . . Oak Flat is one of these sacred places. . . . To this day some of us go to some of the holy places within Oak Flat area for prayer and healing. . . . If they put in a big mine at Oak flat then it will poison, damage, or destroy all the things there that we need to survive and conduct our ceremonies, especially the springs and underground water. It will add to the many problems and sufferings that our community already faces.

Despite these and other warnings regarding the transcendent and irreplaceable importance of specific holy places and sacred sites in Apache culture and Apache lives (Basso, 1996), the U.S. has consistently prioritized for-profit industrial interests over its treaty and fiduciary obligations to Apaches and to the protection of Indigenous sacred sites. Mining around Oak Flat began immediately following violent U.S. Army evictions, circa 1859–1874, of Chairman Rambler's family and other Apaches from Oak Flat and other mineral-rich parts of their ANTT. Relentless industrialization of ANTT included the "return to the public domain" of several major mining districts previously reserved for the exclusive benefit of Apaches (Welch 2016, 2017b). These unilateral U.S. actions funneled billions into the hands of non-Apaches and left behind toxic wastelands. Apache Stronghold and their allies have declared that enough Apache Territory has been sacrificed for mining profits,

that a full accounting of Apache rights and interests in ANTT is overdue, and that any and every proposed desecration, damaging alteration, or alienation of Chi'chil Bildagoteel or other essential area violates the terms of the 1852 Treaty and is unacceptable. Apache Stronghold is asserting Reserved Treaty Rights to access, use, steward, participate in decisions affecting, and worship on, in, and through ANTT in general and Chi'chil Bildagoteel in particular. Treaty Rights held and asserted by Apache Stronghold challenge U.S. commitments to alienate Oak Flat for purposes of destruction.

### 10. What Public Land and Sacred Site Protection Policy Reforms Does the 1852 Treaty Support?

Despite sustained opposition by Apaches and other Indigenous Peoples, the U.S. defends its commitments to harm Apache people and Territory, making the following four claims, among other things, in court filings:

1. U.S. acquired title to ANTT and Oak Flat through the 1848 and 1853 Treaties with Mexico.
2. The 1852 Treaty has no enforceable provisions, and even if it did, only federally recognized tribes—not individual Apaches (even those directly descended from signatories), Apache Stronghold, or non-tribal organizations—have legal standing to enforce treaties.
3. Congress eliminated Executive Branch discretion over Chi'chil Bildagoteel with the 2014 *Southeast Arizona Land Exchange and Conservation Act* (SALECA), which directs the U.S. to convey title, within 60 days of the publication of the final environmental impact statement for the proposed Resolution Copper mine, to 2,422 acres of the Oak Flat National Register District, to Resolution Copper in exchange for privately owned lands.
4. Oak Flat's recognition as a place of profound importance in Apache culture, religion, and religious conduct cannot prevent its alienation or destruction because Congress' did not *intend* to burden Apache worship when it passed SALECA.

The U.S. continues to espouse the words of Sandra Day O'Connor, the only Supreme Court justice born and raised in Arizona, who wrote, "whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land" (*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 1988). Nothing in Western law precludes "split" rights in property (Singer, 2017, pp. 22–23). The U.S. may have some property rights or interests in Oak Flat, but pursuant to Canon Three, no assertion of those rights can diminish or alter Treaty Rights in the absence of an act of Congress that does so explicitly and intentionally. As U.S. courts weigh the relative strengths of Apache and U.S. rights, the U.S. Congress is considering the Save Oak Flat Act, which would repeal SALECA, halt the land exchange, and withdraw Oak Flat from use for mining (Krol, 2021).

Either a court ruling in favor of Apache Stronghold or passage of the *Save Oak Flat Act* would prevent Resolution Copper's proposed alteration of ANTT and set a crucial precedent. But historically and legally institutionalized injustices require systemic policy remedies, not only individual, place-focused verdicts or statutes. What the struggle for Oak Flat and comparable case studies offer is opportunities to learn from place-based policy experiments designed to affirm, reconcile, and mobilize U.S. and Indigenous Peoples' rights and

interests. Table 3 lists Apache rights to Oak Flat, asserted or implied, and pairs those with pertinent U.S. policies that support those same rights.

**Table 3. Apaches’ Claimed Rights to Oak Flat and Existing U.S. Policies Affirming Those Rights**

Rights Apaches claim to ANTT	U.S. policies & actions in accord with Apache claims
<p><b>Access:</b> At all safe times &amp; <b>Use (Non-Consumptive):</b> Praying; Conducting ceremonies; Camping</p>	<p>U.S. Tonto National Forest (2012, 2014) closed the Oak Flat Campground to enable exclusive use by Apaches for “traditional cultural purposes” and for unrestricted “access to sacred sites for individual and group prayer and traditional ceremonies and rituals.”</p>
<p><b>Use (Consumptive):</b> Foraging; Hunting; Collecting water, minerals, fuelwood</p>	<p>Cultural and Heritage Cooperative Authority empowers the Secretary of Agriculture to provide forest products for traditional and cultural purposes free of charge to tribes (25 U.S.C. Chapter 32A, §3055).</p>
<p><b>Stewardship:</b> Speaking, praying, and acting for protection of place, especially non-degradation and non- alienation</p>	<p>Section 316 of the National Indian Forest Management Act authorizes the Secretary of the Interior to enter into cooperative agreements with tribes for “fire protection, reforestation, timber stand improvement, debris removal, and other activities.”</p> <p>U.S. Forest Service (2016, p. 28) policy instructs staff to “maintain effective working relationships with Indian tribes in achieving the common values of shared stewardship, promoting ecosystem health, protecting cultural resources and sacred places, providing appropriate access to sacred places, and benefitting tribal communities.”</p> <p>U.S. Reserved Treaty Rights Lands program facilitates participation by tribes and individual Apaches in restoring ANTT lands degraded under U.S. management (U.S. Forest Service, 2019)</p>
<p><b>Worship / Use of Sacred Sites</b></p>	<p>The American Indian Religious Freedom Act (AIRFA) (1996) declares U.S. policy “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . and the freedom to worship through ceremonial and traditional rites.”</p> <p>Executive Order 13007, Indian Sacred Sites, directs U.S. land management agencies to accommodate access to and use of sacred sites and to avoid affecting the physical integrity of such sites.</p>

Considered without regard to the above-listed four U.S. assertions to the courts in response to the Apache Stronghold lawsuit, Table 3 suggests Chi'chil Bildagoteel has all the protection it needs and deserves. U.S. responsibilities to protect Indigenous Peoples' Treaty Rights and sacred sites are unequivocally codified, *de jure*, in Executive Orders, legislation, and other policies (Dockry et al., 2018). The *de facto* reality, however, is that the U.S. consistently claims unilateral discretion to waive those responsibilities. Even in the face of sustained objections from Indigenous Peoples, U.S. fiduciary obligations to those Peoples, and the United Nations Declaration on the Rights of Indigenous Peoples, the U.S. has approved the great majority of proposals to violate treaties, decimate Indigenous Territories, and desecrate sacred sites (Welch et al., 2009).

Setting aside for now unlikely prospects for the U.S. to abide by all its obligations to Indigenous Peoples or for Apaches to regain full jurisdiction over Chi'chil Bildagoteel and other parts of ANTT, the answer to this final complex question concerning policy recommendations flowing from the 1852 Treaty is deceptively simple: *Co-management*. As a tested means for just, multi-party sharing of rights and responsibilities for Territories or specific resources (for example, a trails system, set of oak groves, or a salmon fishery), co-management recognizes co-existence of diverse rights and interests, empowers their holders to find common ground, and catalyzes innovative approaches to persistent barriers to cooperation (Diver, 2016; Erlinder, 2015; Pinkerton, 2019). The partial list of U.S. land management policies presented in Table 3 are available to guide co-management of ANTT and other Treaty Territories. These policies are ready for long-overdue coupling with Indigenous Peoples' Treaty Rights, with rights affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, and with equally fundamental responsibilities, notably including the U.S. 1852 Treaty obligation to "legislate and act as to secure the permanent prosperity and happiness of" the Apache Nation.

Elegant in theory and challenging in practice, co-management arrangements for parts of ANTT could be designed to comport with the terms of the 1852 Treaty and mobilize the policies listed in Table 3. Such arrangements would directly involve Apaches—continuously, collaboratively, and consequentially—in ANTT stewardship in general and in specific management decisions affecting sacred sites, especially Chi'chil Bildagoteel. Co-management grounded in Apache ecological knowledge and ways of learning from and with their Territory would broaden the range of stewardship approaches and tools. White Mountain Apache Chairwoman Gwendena Lee-Gatewood has already called on the U.S. Government to catalyze better relations with tribes by "promoting the use of traditional stewardship methods" and "sharing decision-making power over" portions of Indigenous Territories under management by non-Indigenous governments (Lee-Gatewood, as cited in Oaster, 2021, p. 7). There is no guarantee that policy reforms encapsulated in co-management will unfold without legal, political, and logistical challenges. The alternative notion—that Indigenous Peoples' will suddenly surrender their birthrights and Treaty Rights—is delusional, immoral, and at odds with the "supreme Law of the Land" pursuant to which the 1852 Treaty became law.

The broadest implication of the 2020 decision in *McGirt* may be to obligate the U.S. to match its declared Indian policy of Nation-to-Nation and Government-to-Government relations (U.S. Commission on Civil Rights, 2018) with administrative practice tailored to individual Indigenous Peoples and to policy parameters embedded in legal histories, especially treaties. As the sturdiest and most readily available "bridge to a new era" of policy and practice at the nexus of U.S. obligations to Indigenous Peoples and responsibilities for public lands (Mills & Nie, 2020), treaty-driven co-management offers a place-based pathway to systemic recognition of

moral, legal, and practical rights and imperatives, inherited and inspired by Indigenous Peoples, to take better care of Indigenous Territories, including all of North America, so they can always care for us and All Our Relations.

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