

TESTIMONY OF THE INTER TRIBAL COUNCIL OF ARIZONA
BY
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REGARDING H.R. 1904, SOUTHEAST ARIZONA LAND EXCHANGE ACT OF 2011
Presented to
Chairman Jeff Bingaman, Ranking Member Lisa Murkowski, and Other Members of the
Senate Committee on Energy and Natural Resources
366 Dirksen Senate Office Building

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Chairman Bingaman, Ranking Member Murkowski, and other Committee Members, thank you for the opportunity to testify today. My name is Shan Lewis, Vice Chairman, Fort Mojave Tribe, and President of the Inter Tribal Council of Arizona ("Inter Tribal Council" or "ITCA"). My Tribe is a member of the Inter Tribal Council of Arizona.

Vast Tribal Opposition to H.R.1904 – Due to Sacred Site Concerns

I speak today on behalf of the Inter Tribal Council of Arizona which consists of 20 federally recognized Indian Tribes, Nations and Communities with lands within the State of Arizona, New Mexico and California. We join together on matter of tribal, national, and statewide importance to the Tribes. Today we stand in opposition to H.R.1904. These 20 tribal governments include the Ak-Chin Indian Community, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab-Paiute Tribe, Pascua Yaqui Tribe, Pueblo of Zuni, Quechan Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, and the Yavapai Prescott Indian Tribe.

Further, many other tribes and tribal organizations from across the country strongly oppose H.R. 1904, including the National Congress of American Indians, the All Indian Pueblo Council, the Inter Tribal Council of Nevada, Inc., the Affiliated Tribes of Northwest Indians, the Great Plains Tribal Chairman's Association, the Eight Northern Indian Pueblos Council, the United South and Eastern Tribes, Inc., the Mescalero Apache Tribe, the Navajo Nation, the Jicarilla Apache Nation, the Pueblo of Tesuque, the Susanville Indian Rancheria, the Shoshone-Bannock Tribes, and the Confederated Tribes of Siletz Indians.

H.R. 1904, as passed by the House of Representatives on October 26, 2011, would allow Resolution Copper Mining (RCM)-- a joint venture of foreign mining giants Rio Tinto and BHP Billiton -- to secure private ownership of over 2,400 acres of U.S. Forest Service lands and the ore and other minerals located underneath these lands in order to facilitate an unprecedented large-scale block cave copper mine in the Oak Flat region (collectively called "Oak Flat"), which is bounded by portions of Apache Leap (referred to as *Gohwhy Gah Edahpbah* by the Yavapai) and Gaan Canyon (also referred to inappropriately as "Devil's Canyon" by non-Indians mistaking the Apache Angel dancers as devil dancers), and contains the 760-acre Oak Flat Withdrawal. Oak Flat is located within the aboriginal lands of, among others, the Western Apache and Yavapai tribes.

Oak Flat has always been and continues to be a place of profound religious, cultural, and historic significance to the San Carlos Apache Tribe, the White Mountain Apache Tribe, the Fort McDowell Yavapai Nation, the Yavapai-Apache Nation, the Tonto Apache Tribe, and many other Native Nations. See attached February 2, 2012 letter to the Tonto National Forest, Globe Ranger District informing same of an upcoming Apache Sunrise ceremonial dance to be held at Oak Flat May 2-6, 2012.

Federal laws and policies are designed to protect Native sacred sites such as Oak Flat. The proposed land exchange that would be mandated by H.R. 1904 would circumvent these laws and policies and transfer ownership of federal land containing a sacred site of Apache, Yavapai, and other Native people to a company for mining activities that will destroy this sacred site. **Although ITCA is not opposed to mining in general, mining in this location that will result in destruction of a sacred site is offensive to us and should not be condoned. The 20 member Tribes of ITCA, therefore, strongly oppose H.R. 1904, S. 409 from the 111th Congress, and any and all legislation that would convey Oak Flat to private interests whose proposed activities would cause irreparable harm.**

Under the United States Constitution, treaties, federal law, and executive orders, the United States has a trust responsibility to consult with tribes on a government-to-government basis about federal actions that impact tribes. The United States must consult with tribes before making any decision on whether to convey Oak Flat, federal land, to Resolution Copper. For consultations to be effective, the tribes and the United States need to have objective information about the proposed mining activities and its impacts. To date we do not have this information. Further, the United States has a responsibility to protect sacred sites located on federal lands. Tribes ceded millions of acres, including Oak Flat, to the United States in return for protections set forth in treaties.

Because of its continued importance to Indian tribes, nations and communities, Oak Flat, as well as specific places within Oak Flat, are eligible for inclusion in, and protection under, Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA"). Further, Oak Flat meets the criteria as a "*sacred site*" within the meaning of Executive Order 13007, Indian Sacred Sites, May 24, 1996, 61 Fed. Reg. 26771 ("E.O. 13007"), as well as pursuant to the American Indian Religious Freedom Act, 42 U.S.C. § 1996, *et. seq.* ("AIRFA"), and related laws, regulations and policies.

Indeed, as recently as June 2011, in testimony before the House Natural Resources Subcommittee on National Parks, Forests and Public Lands on H.R. 1904, the Deputy Director of the Bureau of Land Management, Ms. Marcilynn Burke, stated that BLM “could not support the bill as written,” noting that “[m]any of the lands to be exchanged in the bill hold significant cultural value to Indian Tribes.” Deputy Director Burke went on to state her understanding that “the Apache Leap area, the Oak Flat Campground, and Devil’s Canyon are culturally significant to the San Carlos Apache Tribe and the Fort McDowell Yavapai Nation.” USDA Secretary Vilsack has also acknowledged the importance of Oak Flat and the threat that block and cave mining would bring to this special place in his letter to ITCA dated June 27, 2011: *“I understand your concerns related to the potential effects of block cave mining on the religious, cultural, historic, and environmental character of Oak Flat. Clearly, this area is vitally important as a traditional and cultural site to the Apache people and Arizona Tribes.”*

Oak Flat should remain under federal jurisdiction for continued protection. Transfer of these federal lands located in the Tonto National Forest to RCM for mining purposes is almost certain to deplete and contaminate water resources from nearby watersheds and aquifers. These water sources play a critical role in Apache and Yavapai religion and religious ceremonies. According to the Tonto National Forest’s website, it was created in 1905 to protect the watersheds around reservoirs. The website also states, *“the forest produces an average of 350,000 acre-feet of water each year. Six major reservoirs on the forest have the combined capacity to store more than 2 million acre-feet of water. Management efforts are directed at protecting both water quality and watershed and riparian area conditions.”* H.R. 1904 would harm these valuable watersheds, violating the very purpose of the forest. Also, the mining activities will result in the collapse of the Earth, irrevocably damaging the landscape of Oak Flat, and the wildlife, plants and other natural features of its ecosystems and, thereby, the very integrity of Oak Flat relative to its crucial and continued role in American Indian religion, traditions, and culture.

H.R. 1904 would lift the Oak Flat Withdrawal Order, which has protected these publicly owned lands for all Americans since 1955 when President Eisenhower first signed BLM Public Land Order 1229. This Order specifically put Oak Flat off-limits to all future mining activity, despite its presence in a known mining district. In fact, even when President Nixon issued BLM Public Land Order 5132 in 1971 to modify PLO 1229, he expressly precluded any form of appropriation of Oak Flat “under the U.S. mining laws.”

Cultural and Religious Impact on Free Exercise of Religion of the Proposed Exchange

Congress has enacted laws to protect the religious and cultural integrity of Indian people. This was to ensure (among other things) that the policies and procedures of various Federal agencies, as they may impact the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion.

American Indians’ right of continued access to Oak Flat and their right to maintain the religious and cultural freedoms that Oak Flat supports is also recognized in the United Nations Declaration on the Rights of Indigenous Peoples. See, e.g., Article 12 (recognizing that “[i]ndigenous

peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies: the right to maintain, protect, and have access in privacy to their religious and cultural sites”); Article 19 (requiring “free, prior and informed consent” of indigenous peoples where the United States adopts or implements legislative or administrative measures which may affect them); Article 24 (clarifying that indigenous peoples have “the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”); Article 25 (emphasizing “the right of indigenous peoples to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”).

The religious and cultural importance of the Oak Flat area does not only reside in isolated spots or particular locations or archeological sites, but rather in the integrity of the ecosystem and environment of the area as a whole. Thus, impacts to any part of Oak Flat have an impact on the religious and cultural integrity of the area as a whole -- both as a holy and religious place and as a place of continued traditional and cultural importance to Apache, Yavapai, and other indigenous people.

For example, Apache People call Oak Flat “*Chich’il Bildagoteel*,” or “a Flat with Acorn Trees” and it lies at the heart of *T’iis Tseban* Country, which is associated with at least eight Apache clans and two Western Apache bands -- the Pinal Band and the Aravaipa Band. Oak Flat is called Gaan by the Yavapai people. Oak Flat has, for generations, played a crucial role in the exercise of their religious, traditional, and cultural practices, **and these practices continue to this day**. Oak Flat has long been used -- and is used today -- for religious ceremonies and its existence continues to enhance the lives of Apaches and Yavapais. See attached February 2, 2012 letter regarding an upcoming Apache Sunrise ceremonial dance to be held at Oak Flat May 2-6, 2012.

The oak groves at Oak Flat have always provided an abundant source of acorns that serve as an important food source for the Apache people. There are also hundreds of traditional Apache plants and other living things in the Oak Flat area that are crucial to Apache religion and culture. Some of these plants are common and some are among the holy medicines known to and harvested by only gifted Apache herbalists. Similarly, Yavapais also have relied on the abundance of Oak Flat for physical and spiritual sustenance. While these plants can be gathered in other areas, only the plants within the Oak Flat area are imbued with the unique power of this area.

Allowing RCM to conduct block cave mining at *Chich’il Bildagoteel* (Oak Flat) will destroy the living things and ecosystems that are associated with the Holy Beings that Apaches depend on, in particular a certain kind of Gaan – all powerful Mountain Spirits – with whom the Oak Flat area is associated. It is believed that these Holy Beings, these Angels, are among the most powerful, and they must be respected if the Apache people are to receive their power. Without their power, the Apache people cannot conduct their ceremonies and they become vulnerable to a wide variety of illness. Similar concerns exist for the Yavapai people as well.

Oak Flat Should Not be Sacrificed In Exchange for Other Lands Selected by RMC and Offered to the United States

RCM proposes to convey a handful of parcels in southern Arizona as part of the land exchange set forth in H.R. 1904. While some of these offered lands may have value for the American public, none of these parcels have been recognized as important as Oak Flat. The parcels that RCM would convey have not been subject to previous withdrawals by Executive Order and do not possess the totality of values as a sacred site or traditional cultural property recognized by American Indians.

Moreover, if the offered parcels are as meritorious and deserving of conversation and public use, those who seek the conservation of these parcels should look for funding help from such potential resources as the Land and Water Conservation Fund, The Conservation Fund, The Nature Conservancy, The Trust For Public Lands, the Paul Allen Foundation and others – not by sacrificing lands at Oak Flat. No one should attempt to, nor can they, put a price on the protection of spiritual, religious, cultural, and archeological values. The United States, as Trustee for all American Indians should not trade away these priceless values in order to facilitate the cheapest method of mining, which has as its sole purpose the exclusive goal of benefiting Rio Tinto and BHP and their shareholders and investors, including China.

It is highly disappointing, and indeed disturbing, that H.R. 1904 and S.409 from the 111th Congress would simply cast aside the valid concerns of American Indians regarding the need to protect the religious, cultural and traditional relationship of indigenous peoples to the Oak Flat region.

Block Cave Mining Collapse and Destruction of the Oak Flat Area

RCM has stated that block and cave mining is “cheaper.” While bottom line considerations are clearly important to RCM, the United States, as our Trustee, must not let such factors pressure it into agreeing to destructive practices – mining to unprecedented great depths and block and cave mining with unproven technology. There is no assurance once the ground starts subsiding in a block and cave mining operation that it will not collapse from the bottom of the operation up to the surface. In fact, substantial surface collapses have been witnessed in block and cave mining operations around the world, sometimes leaving large pits and craters dotting the landscape which often suffer the same pit lake problems as open pit mines.

Under the normal requirements for a land exchange in accordance with the National Environmental Policy Act (“NEPA”) and the Federal Land Policy Management Act (“FLPMA”), decision makers would be required to conduct interdisciplinary studies and closely scrutinize the inevitable and destructive impacts of the mining project to the region, including to nearby Apache Leap, Gaan Canyon, Queen Creek and the Oak Flat Withdrawal area. They would be required to consult with the American Indian Tribes and interested members of the public throughout the process and would have the obligation to consider the impacts of a potential surface collapse from a mine on Oak Flat. As part of this process, the federal decision makers would also be required to evaluate the depletion and potential contamination of the region’s water supplies, as well as the resulting damage to the integrity of Oak Flat as a sacred site and

traditional cultural property. Yet, in H.R. 1904, RCM seeks to have Congress exempt it from virtually all these important requirements of the federal law and instead turn these lands over to RCM in private ownership, where almost no protections exist for Oak Flat under the laws of the State of Arizona.

Apache Leap is not adequately protected by H.R. 1904 even though H.R. 1904 appears, on its face, to exclude it from this land exchange. Neither, of course, is the rest of the Oak Flat area. It should also be noted that while H.R. 1904 would purport to prohibit “*commercial mineral extraction*” from under Apache Leap, it does not prohibit RCM from tunneling under Apache Leap or from conducting other below ground operations directly below the escarpment. Furthermore, because the purported protections for Apache Leap under H.R. 1904 are subject to all “*valid existing rights*,” there is nothing in H.R. 1904 that would prohibit the commercial extraction of minerals and the destruction of Oak Flat by other claim holders, perhaps even including those who might be in partnership with RCM, Rio Tinto, or BHP. Given the existence of numerous mining claims to the Apache Leap area, this is almost certain to be the case, despite the promises of protection outlined in H.R. 1904.

In addition, nothing in H.R. 1904 or in the “NEPA” like review of RCM’s “mining plan of operations” would require RCM to cease its mining operations and block caving activities at Oak Flat should these operations and activities show signs of a more extensive surface collapse than anticipated, including the potential damage or violation of Apache Leap. Indeed, this is likely to be quite difficult, if not impossible, once RCM acquires Oak Flat and the copper and other deposits beneath the surface of this land.

Apache Leap is part of the larger holy and sacred site that is encompassed by Oak Flat. Under this proposed legislation, even if Apache Leap were to be protected from harm, it would eventually be bordered by thousands of acres of land that have been irretrievably harmed and defiled by the proposed mining project. This is not acceptable to the members of the Inter Tribal Council of Arizona, and it should not be acceptable to this Congress.

The Mining Project Will Dangerously Deplete Groundwater and Surface Water Supplies Throughout the Region

Water is a source of life for all people. The existence of water at Oak Flat, including life-giving springs, seeps and surface supplies, is fundamental to the health of Oak Flat’s ecosystems and therefore, to the religion, culture and very identity of both the Apache and the Yavapai people. Water is fundamental to, indeed holds the survival of the economic future of Globe, Superior and Miami and other adjacent communities.

As noted briefly above, however, the massive mining operation to be facilitated by H.R. 1904, threatens to dangerously deplete surface and groundwater supplies and federally reserved water rights, and ground water sources beneath Globe, Superior and Miami and throughout the region - water supplies that are already relied upon and desperately needed by others in Arizona. H.R. 1904 does not require Rio Tinto to perform any modeling or proper studies of the impact of their project on the regional water supply and hydrology, despite the fact that the Inter Tribal Council and other Arizona tribes and nations, including the San Carlos Apache Tribe and the Fort

McDowell Yavapai Nation, have repeatedly requested that an independent agency of the federal government, like the U.S. Geological Survey or another federal agency or department, conduct such studies.

The copper ore body at Oak Flat is estimated at its highest point to be located 7,000 feet below the surface of the Earth or approximately 3,000 feet below sea level. Given the depth of the ore body, as well as its immense size, throughout the 40 plus years of the mining project, RCM will have to aggressively conduct extensive "dewatering" activities in order to continually pump and remove the surface water and the groundwater from both the shallow alluvial aquifer at Oak Flat and the deeper aquifers in the area whose water supplies will increasingly migrate into the enormous cavity created by the removed ore and waste rock (and the extensive tunnel system needed for the mine), nearly all of which will be located well below the elevation of the streams in the region, and will cut through the region's groundwater aquifers.

Surface water, tributary groundwater, and aquifers that are located where the copper ore body would be excavated and where the mining tunnels would be located. Thus, throughout the mining process, water will constantly migrate to and from the vacant ore body and mining tunnels. As this process continues over the decades long life of the project, the necessary mine dewatering process will deplete many billions of gallons of water from the surface water and groundwater throughout the region, resulting in the loss of important seeps, springs and other surface water features, and resulting in the gross depletion (and likely contamination) of important and unique perennial pools in Gaan Canyon, (referred to as Devil's Canyon) flows to Queen Creek and other surface water features – all of which is crucial to maintain the healthy ecosystem of Oak Flat and the surrounding area, and, therefore, the integrity of this place as a sacred site and traditional cultural property. RCM does not have the legal right to disrupt, deplete or contaminate this water under any law.

Further, the alteration of both the subsurface and the surface geological structure of this area as the result of the block caving process and imminent surface collapse will alter the natural state of the aquifers and surface drainage of the watersheds throughout the region forever. Despite the fact that this legislation has been introduced in the Congress over the past seven years, to date ITCA has never seen any meaningful studies conducted by the federal government or independent agency regarding potential impacts to the water supplies of the region. Instead, for over seven years, RCM has claimed that it is urgent for Congress to pass this legislation and that there is no time for studies. Studies could have been done by now but for the fact that RCM adamantly opposes such studies.

In fact, in the USDA/Forest Service's prior testimony on H.R. 1904 in the House Subcommittee on National Parks, Forests and Public Lands, Associate Chief of the Forest Service, Mary Wagner, observed that the Forest Service lacked *"an understanding of the impacts the proposed mine will have on local and regional water supplies, water quality, or possible dewatering of the area."* Ms. Wagner also warned that there had yet to be any "studies or assessments" of the water supplies, though she noted that this is information that the Forest Service would require under NEPA if NEPA were properly utilized before the exchange. However, Ms. Wagner warned that, under H.R. 1904, "NEPA analysis after the exchange would not allow the Forest

Service to recommend alternatives since the exchanged parcel would already be in private ownership.”

The gross depletion of the local aquifers and the local springs, seeps and other water supplies of the Oak Flat area and neighboring communities of Globe, Superior, Miami and others, cannot be remediated by “banking” Central Arizona Project water elsewhere, including in storage facilities near Phoenix and in Pinal County.

Ironically, at the same time that ITCA and other Indian tribes, nations and communities have raised these and related concerns before Congress, RCM has maneuvered and manipulated political interests in Arizona to change laws and regulations which have been in place for decades in order to except itself from vital public safeguards and conditions normally used to protect Arizona’s water supplies. *See, e.g.,* H.B. 2289, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 2617, 49th Leg., 2d Reg. Sess. (Ariz. 2010); S.C.R. 1046, 49th Leg., Reg. Sess. (Ariz. 2010).

This Committee should oppose H.R. 1904. The United States should maintain federal ownership of these lands and exercise its federal control necessary to ensure that the surface water and ground water supplies of this region are protected in both quantity and quality, and that federal, tribal, private, and public water rights are protected in perpetuity from the interference, diminishment and degradation presented by this massive mining project.

H.R. 1904 Requires a Mandatory Conveyance of Federal Lands Circumventing Federal Laws

H.R. 1904 **dictates** that the Secretary of Agriculture convey the federal lands to RCM within one year of enactment of the Act after which time a vast majority of federal laws will no longer apply because the lands will become private lands, not federal lands. Section 4(i) of the bill states, “*the land exchange directed by this Act shall be consummated not later than one year after the date of enactment of this Act.*” (Emphasis added). Similarly, Sec.4(a) states, “*the Secretary is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land*” when RCM offers to convey the non-federal lands to the United States.

There is nothing in H.R. 1904 that calls for Congress or the USDA/Forest Service to review the proposed land exchange itself, prior to RCM’s acquisition of the Oak Flat lands. H.R. 1904 fails to require or even permit the Secretary to take a “hard look” at the land exchange itself under NEPA or other laws, before the exchange is consummated, and seemingly fails to vest any discretion in the Secretary of Agriculture to consider possible alternatives to the exchange. H.R. 1904 also does not call for or permit the mitigation of impacts related to the land exchange and it would not permit the Secretary to avoid consummating the exchange should the Secretary determine, under FLPMA and other laws, that the exchange is a bad deal for the American taxpayer or the American public or in the event he finds that the religious, environmental, cultural, water supply and other harms of the mining project are simply too great.

Further, HR. 1904 is contrary to various laws, policies, and Executive Orders, such as Executive Order 13175, that direct federal land managing agencies to engage in meaningful formal

consultation with interested Indian tribes and that protect and preserve sites that are sacred to American Indians, such as the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, the National Historic Preservation Act, the American Indian Graves Protection and Repatriation Act, and Executive Order 13007. None of these laws, policies, or Executive Orders would apply after the federal lands are conveyed to RCM under H.R. 1904.

H.R. 1904 Contains Sham NEPA Requirements After the Exchange

The limited “NEPA” process outlined by Sec. 4(j) of H.R. 1904 (which is to be conducted only after the lands are exchanged) is little more than a futile exercise on the part of the Secretary. Under H.R. 1904, the Secretary would have no discretion to exercise any meaningful authority over RCM’s mining plan of operations or mining activities on private land after an the exchange, absent a federal nexus. There is also no requirement in the bill for the Secretary to examine the direct, indirect and cumulative impacts of interim exploratory activities, pre-feasibility and feasibility operations, or mine facility construction that will be conducted by Rio Tinto after the exchange, but before production of commercial quantities of minerals. Sec. 4(f) mandates that the Secretary “shall” provide RCM with a special use permit within 30 days of enactment of the Act to engage in mineral exploration activities underneath the 760-acre Oak Flat Withdrawal and, within 90 days, the Secretary is required to allow RCM to begin mineral explorations within the Oak Flat Withdrawal itself.

In fact, under H.R. 1904, the integrity of Oak Flat could be harmed so substantially by exploratory activities before the limited NEPA requirements found in Sec. 4(j)(2) are triggered, that any NEPA review conducted upon the submission of the mining plan of operations would have little to no benefit in any event. Similarly, the Secretary would also seemingly lack any authority under this bill to even consider alternatives to these interim activities, which may include alternatives necessary to protect the integrity of Oak Flat as a traditional cultural property and sacred site, including its water resources, landscape, plants and ecosystems. Allowing the immediate exploration on and under Oak Flat prior to the NEPA review contemplated by Sec. 4(j) will constitute an “irretrievable commitment of resources” in contravention to NEPA.

Under H.R. 1904, there is no definition of “mining plan of operations”, and there is nothing to make clear what form the “plan of operations” required by Sec. 4(j)(1) of the bill would take, as this term is not tied to the requirements of 36 C.F.R. Part 288. There are no guarantees that the “plan of operations” provided by RCM will be sufficiently detailed or contain a complete description of the type of mining to be conducted on the lands, the subsurface information for the area, the length of operations, or the measures that RCM will take to meet the environmental and cultural resources protections that would normally be required by the law if these lands were not exchanged into private ownership.

Deputy Chief of the U.S. Forest Service, Joel Holtrop, has warned, in response to prior legislation for this land exchange, that a plan of operations which contains, in particular, subsurface information is “essential in order to assess environmental impacts, including hydrological conditions, subsidence, and other related issues.” See Deputy Chief of the U.S. Forest Service, Joel Holtrop, August 2009, written response to questions by the Senate

Subcommittee on Public Lands and Forests on S. 409. However, H.R. 1904 would not provide the Secretary with sufficient discretion or authority to reject the plan of operations submitted by RCM if the information contained in the plan is insufficient to conduct even the limited review called for under Sec. 4(j)(2) of the bill. Similar concerns were expressed by the U.S. Forest Service in their testimony on H.R. 1904 on June 14, 2011, when Associate Chief of the Forest Service, Mary Wagner, noted that the Department could not support the bill as written because, among other flaws, H.R. 1904 “limited the discretion” of the Forest Service under NEPA and because it would “preclude the Forest Service from developing a reasonable range of alternatives to the proposal and providing the public with opportunities to comment on the proposal.” These concerns were echoed during this same hearing by BM Deputy Director Burke.

The Secretary is also only given 3 years under H.R. 1904 to conduct his review after submission of a “plan of operations.” Under this limited time frame, the Secretary would have little time to demand that Rio Tinto refine its plan, even if this was necessary to conduct a meaningful review, rendering this provision a *de facto* waiver for RCM to comply with federal laws.

Indeed, USDA Secretary Vilsack has previously objected to similar sham NEPA provisions contained in previous legislation for this land exchange (S.409, 111th Congress), warning:

The purpose of a requirement [in S.409] that the agency prepare the EIS after the exchange, when the land is in private ownership, is unclear because the bill provides the agency with no discretion to exercise after completing the EIS. If the objective of the environmental analysis is to ascertain the impacts of the potential commercial mineral production on the parcel to be exchanged, then the analysis should be prepared before an exchange, not afterwards, and only if the agency retains the discretion to apply what it learns in the EIS to its decision about the exchange. It seems completion of the exchange prior to the EIS would negate the utility of the EIS. (Emphasis added).

Finally, H.R. 1904 does not allow for the preparation of a supplemental EIS document if additional review is called for in order to examine the direct, indirect and cumulative impacts of future activities by RCM. Sec. 4(j)(2) makes clear that the Secretary may only use the single environmental review document which is to be prepared within 3 years of the plan of operations as the basis for all future “decisions under applicable Federal laws, rules and regulations regarding any Federal actions or authorizations related to the proposed mine or plan of operations.”

In sum, the “NEPA” provisions contained in H.R. 1904, do not comply with the purposes of NEPA and they fail to vest any real discretion in the Secretary of Agriculture to address (or even meaningfully consider) the many concerns presented by the block cave mining operation proposed for this place.

The RCM Promise of Significant Jobs Creation in the Local Economy is Not Worth the Destruction of Oak Flat.

The ITCA, like all Americans in today's difficult economy, recognizes the need for job creation; and, while ITCA member tribes are working hard to create jobs and other economic opportunities on their Reservations and for the benefit of their surrounding communities, the ITCA understands that leaders of the San Carlos Apache Tribe and the Fort McDowell Yavapai Nation (among others) have been told by their Elders that any job opportunities that might be created by the proposed mine are not worth watching the destruction of Oak Flat, especially given that preservation of tribal religion, culture, and sacred sites is directly tied to preserving tribal identity and health. Further, the promise of jobs (especially the "boom and bust" jobs mining provides in the region) is also not worth risking the potential harm this massive mine presents to the drinking and groundwater supplies of the region -- in particular the groundwater supplies that support the western side of the San Carlos Apache Reservation. Without a source of clean and healthy water, the Apache People will lose a means to sustain their lives and livelihoods on the Reservation as a permanent homeland. Neighboring communities of Globe, Superior, Miami and others could not survive the loss of this water supply needed to sustain the local economy and support local jobs.

We also understand that the proposed mine is likely to be highly automated, require advanced degrees to work there, and likely will be run from a remote operating center far away from the San Carlos Apache Reservation or the Town of Superior, making the promise of jobs in exchange for the destruction of Oak Flat questionable at best. Further, RCM admits that it does not even have the technology it needs to extract the ore given how deep beneath the Earth the ore is and that it may take at least a decade to develop this technology. Thus, RCM's claims that significant number of jobs will be created in the region in the short-term are questionable.

If RCM does build and operate the mine as they propose, the potential negative impact to the local economy (including on the nearby San Carlos Apache Reservation) through a loss in recreation and tourism, particularly ecotourism and heritage tourism, could be substantial, as the area of Oak Flat and the surrounding lands of the Tonto National Forest will be destroyed by the mine. In 2009 alone, detailed direct travel impact estimates for Pinal County totaled \$421 million dollars, with over \$16 million spent by those visiting the nearby campground areas. *See Arizona Travel Impacts 1998-2009p, July 2010 Report, Arizona Office of Tourism, Phoenix, Arizona.* Many of these dollars were spent in and around the area of this proposed mine.

The loss to the economy could be even greater as the mine is likely to deplete and contaminate billions of gallons of water from the Superior area and potentially the San Carlos Reservation, leaving these nearby communities with a limited water supply, without which, any hope of future economic development will have little chance.

Past Environmental and Human Rights Record of Rio Tinto and BHP Billiton Provide a Frightening Window Into the Future Conduct of Resolution Copper

The sub-standard environmental track record and history of shameful human and labor rights practices by Rio Tinto and BHP Billiton are well known. Resolution Copper Mining (RCM) is a joint venture of foreign mining giants Rio Tinto and BHP Billiton.

Both companies' operations over the years have left a wake of environmental destruction, human rights complaints, and lawsuits filed worldwide. Here in the United States, the Greens Creek Mine in Alaska (owned by Rio Tinto and two other companies) is alleged to be that state's second largest discharger of toxic waste, releasing 59 million pounds of toxic chemicals in one year, and violating the Clean Water Act 391 times. In the United Kingdom, Rio Tinto's Capper Pass smelter dropped an estimated 1.3 pounds of lead and other emissions on area residents each week during its operation, leading to a settlement agreement with hundreds of claimants in which the company refused to accept blame, but provided compensation to those with cancer and other illnesses.

On the other side of the world, current and former residents of Papua New Guinea were compelled to file suit in federal court against Rio Tinto, alleging violations of international law, including war crimes and crimes against humanity in Rio Tinto's operation of a large-scale mine in that country. Just last fall, the United States Ninth Circuit Court of Appeals revived this lawsuit when it reversed a lower court's dismissal of certain of these claims, including those related to the complaint's allegations of *"purposeful conduct undertaken by Rio Tinto with the intent to assist in the commission of violence, injury, and death, to the degree necessary to keep its mines open."*

In relation to another mining operation in Papua New Guinea, villagers sued BHP Billiton for more than \$4 billion in damages for the destruction of the Ningerum people's traditional lands in which they have lived since time immemorial. BHP Billiton eventually was forced to abandon the destructive mining project after studies showed that the operation was causing great environmental harms, but the company is accused of failing to oversee that the project was properly managed upon its departure. Villagers may no longer be able to safely eat locally harvested fish or food grown from their own gardens. It is estimated that it will take 300 years to clean up the area.

More recently, Rio Tinto locked out 570 miners from its borates mine in Boron, California. For 107 days, the miners and their families struggled to make ends meet without a paycheck from Rio Tinto. The company allegedly locked out the miners in retaliation for their refusal to agree to a contract that threatened to turn decent, family and community-supporting jobs into part-time, temporary or contracted jobs. Rio Tinto brought in replacement workers to do the jobs of long-time, experienced miners, some of whom have worked at the mine and processing plant for 30 to 40 years. It appeared that Rio Tinto was simply using the replacement workers to help the company starve out the locked-out families. However, after Rio Tinto got word that their product would not be shipped out of the docks because it was "scab" cargo, they decided to negotiate with the miners and on May 24, 2010, the miners returned to work. And finally, in the House of Representatives Hearing on H.R.1904, serious concerns were voiced over potential Rio Tinto connections to Iran. These connections need to be clarified.

It is often stated that history is prophecy. In this case, the historical conduct of Rio Tinto and BHP Billiton is the best predictor of future behavior, and certainly this conduct provides no assurances that these companies will keep their promise to protect Oak Flat, Apache Leap and the water supplies and ecosystems of this region or to preserve the environment and respect the traditional culture and religious values of American Indians. Indeed, there are no enforcement

provisions in H.R.1904 to force these companies to keep their promises, such as bonding provisions, stiff penalties, or statutory causes of action.

The 20 Member Tribes of the ITCA oppose H.R. 1904, S. 409, and any and all legislation that Would Trade these Lands to RCM for Mining Interests

ITCA continues to oppose H.R. 1904, S. 409, or any other legislation that would convey Tribal ancestral lands at Oak Flat to a private company that will destroy a holy and sacred site of ITCA member Tribes.

ITCA also understands that the purpose of the current hearing is to consider the text of S. 409, as reported by the Committee during the 111th Congress. The 20 member Tribes of the ITCA also opposed S. 409, as marked up in the 111th Congress, for the following reasons: (1) S. 409 did not contain any guaranteed protections for areas of significant religious, historical, cultural, and archeological value to Indian tribes and Indian people located on the federal lands even if the Secretary makes a determination to convey the lands to RCM; (2) S. 409 did not make it explicit that the Secretary must consider, in USDA's public interest determination, laws and policies critical to protecting sacred sites; (3) S. 409 did not contain any provisions to protect water sources in the area even if the Secretary makes a determination to convey the lands to RCM; (4) S. 409 did not contain any provisions allowing for continuing government-to-government consultation after conveyance; (5) S. 409 did not provide any protections from impacts from mining activities for areas adjacent to the federal lands, such as Apache Leap, Gaan Canyon, and Queens Creek; (6) S. 409 did not provide for any penalty or bonding provisions in the event damages occur due to RCM's activities and did not contain a cause of action for suit in the event there is harm to the land, water, or sacred sites due to RCM's mining activities; and (7) S. 409 was unclear on whether RCM's mining plan of operation must be submitted for NEPA and other environmental review and whether mitigation would be required.

Conclusion

We appreciate this opportunity to provide testimony to the Committee. Again, ITCA continues to oppose S. 409, H.R. 1904, and any other legislation that would convey the Tribal ancestral lands commonly referred to as "Oak Flat" to RCM for mining that would destroy a sacred site of tribes and Indian people. If enacted, H.R. 1904 will permanently destroy Oak Flat and possibly surrounding areas of importance to tribes and Indian people. The area will never recover from RCM's mining activities. In other words, H.R. 1904 is like Pandora's Box. Once you open it, you can not undue it.

With the Committee's permission, I would like to submit for the hearing record all the letters and resolutions we have received from tribes and tribal organizations across the country opposing H.R. 1904.

Tonto National Forest
Globe Ranger District
7680 S. Six Shooter Canyon Rd.
Globe, AZ 85501

2/6/12

Tonto National Forest Supervisor,

This letter is to inform you that we and our families are very proud to announce the dates of our upcoming Apache Sunrise ceremonial dance which is to be held at Oak flat.

The dates we have scheduled are May 2 through May 16, 2012. We are requesting to meet with you and your office as soon as possible to discuss arrangements so that our use of Oak flat is a priority among any and all requests that may be submitted for the area.

As you are aware, Oak flat was and has always been the home to us, Apaches, as well as being a sacred place that Usen(God) had blessed the world in the beginning of time.

History, both written and oral, tell of the wrongs that took place, the extermination and removal of our people to the reservation as prisoners of war, this being mandated because of federal policies to remove us from this place.

Our Sunrise dance is one of the oldest religious practices in North America which celebrates a young woman coming of age. The ceremony brings teaching of life's blessings for the girl, and for all people, it brings blessings, healing and visions of things to come. The ancient songs are sung to communicate with all God's creations.

We are very fortunate, and blessed that the religion was able to survive and overcome all the obstacles and forces that were against it. We commend those before us who made every effort in keeping and preserving Oak flat as a sacred place, those who prayed, those who came for blessings, the holy people, the medicine men, the elders, and the Mount Graham sacred runners.

So this is to notify you that we will be in Oak flat to exercise our religious rights and human rights, as your forefathers claimed for all U.S. citizens. We appreciate your assistance in advance.

Respectfully,

Loren Pina Sr.
Loren Pina Sr.
Michelle Randall
Michelle Nell
(928) 812-1132

Elaina Nosie
Elaina Nosie
(928) 200-8684

CC

San Carlos Apache Tribe
W. Nosie, Mt Graham Sacred Runners
Verna Grant SCAT Archaeologist

TRIBAL NATIONS & ORGANIZATIONS, and other Groups
that oppose H.R. 1904, the Southeast Arizona Land Exchange and
Conservation Act of 2011

(as of 2.8.12)

1. National Congress of American Indians
2. Inter Tribal Council of Arizona, Inc.
3. San Carlos Apache Tribe
4. United Southern and Eastern Tribe, Inc.
5. Jicarilla Apache Nation
6. Pueblo of Tesuque
7. Pueblo of Zuni
8. White Mountain Apache Tribe
9. Pascua Yaqui Tribe
10. Yavapai-Apache Nation
11. Susanville Indian Rancheria
12. Ft. McDowell Yavapai Nation
13. Arizona Mining Coalition
14. Concerned Citizens and Retired Miner's Coalition
15. Religious and Human Rights Organizations
16. Concerned Climbers of Arizona
17. Mescalero Apache Nation
18. All Indian Pueblo Council
19. Eight Northern Indian Pueblos
20. Hopi Tribe
21. Save the Scenic Santa Ritas Association
22. Tohono O'odham Nation
23. Azee Bee Nahagha of Dine Nation
24. Karuk Tribe
25. Affiliated Tribes of the Northwest Indians
26. Navajo Nation
27. Inter-Tribal Council of Nevada, Inc.
28. Great Plains Tribal Chairman's Association
29. Picuris Pueblo
30. Ramona Band of Cahuilla