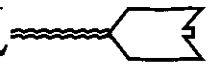




INTER TRIBAL COUNCIL of ARIZONA



December 15, 2009

- MEMBER TRIBES**
 AK-CHIN INDIAN COMMUNITY
 COCOPAH TRIBE
 COLORADO RIVER INDIAN TRIBES
 FORT McDOWELL YAVAPAI NATION
 FORT MOJAVE 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
 YAVAPAI APACHE NATION
 YAVAPAI-PRESCOTT INDIAN TRIBE

The Honorable Jeff Bingaman, Chair
 Committee on Energy and Natural Resources
 United States Senate
 304 Dirksen Senate Office Building
 Washington, D.C. 20510

Dear Chairman Bingaman:

This letter is respectfully sent on behalf of the 20 federally recognized Indian Tribes, Nations, and Communities in Arizona who are Members of the Inter-Tribal Council of Arizona ("ITCA"), concerning the amendment to S. 409 which you and Senator McCain are proposing to the Senate Committee on Energy and Natural Resources, and to offer suggestions for further improvements to the Bill.

The ITCA Member Tribes thank you for your efforts in drafting the proposed amendment to S. 409. Specifically, ITCA is grateful for the inclusion of the new provisions of Section 3 which give the Secretary of Agriculture the discretion to make a public interest determination in order to decide whether to move forward with a land exchange with Resolution Copper, and which require a full environmental review be completed in the process. ITCA is particularly grateful for Section 3(d)'s requirement that the Secretary's public interest determination include "government-to-government consultation with affected Indian tribes concerning issues related to the exchange".

Although a number of improvements have been made in the proposed amendment to S. 409, major issues remain to be addressed. The ITCA Tribes cannot support the amended legislation as proposed.

The elected officials and representatives of several of the ITCA Member Tribes, including the San Carlos Apache Tribe, the Tonto Apache Tribe, the Fort McDowell Yavapai Nation, the White Mountain Apache Tribe, and the Yavapai-Apache Nation have expressed their concerns regarding S. 409 and the related House Bill in the time since these Bills were introduced. Recently, Governor Cooyate of the Zuni Tribe testified on behalf of ITCA before your committee on June 17, 2009, making clear that the ITCA Tribes took issue with many provisions

of S. 409 as originally introduced. In response to questions posed by Senator Barrasso (enclosed) following the Governor's testimony, and sent by letter dated June 22, 2009, from Senator Ron Wyden, Chairman of the Subcommittee on Public Lands and Forests, Governor Cooney and ITCA, in answers dated July 6, 2009 (enclosed), set out provisions which must be included in the Bill in order for it to be acceptable to the ITCA Tribes. While some of these concerns have been addressed by the proposed amendment to S. 409, others have not. ITCA stands by its previous remarks, and respectfully requests that the Bill be amended to address its remaining, serious concerns.

1. Scope of the Required Environmental Review

First, ITCA requested a provision that would:

Restructure the bill so that a comprehensive EIS can be completed on the entire proposed project, including without limitation, mine development, mining, processing, mine closure, reclamation and maintenance, and so that the Secretary could make an informed decision among reasonable alternatives, which alternatives would include the power and authority to make the decision to prohibit the development of the mine . . .

The environmental impact of the proposed land exchange, and all activities which would be undertaken if a land exchange is approved, is a central concern for the ITCA Tribes. These concerns can only be adequately addressed if, before the public interest determination is made, a *full* NEPA review process is implemented and completed concerning every aspect of the exchange and its resulting mining operations – from early stage exploration, to mining operations, to the termination of mining and reclamation.

Section 3(b)(2)(A) of the proposed amendment reads:

To the maximum extent practicable under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and Council on Environmental Quality regulations, the Secretary, in consultation with the Secretary of the Interior and other affected Federal agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions under Federal law related to the land exchange and connected agency decisions related to the proposed mine on the Federal land.

While this provision would be a substantial improvement to the Bill as originally introduced, the ITCA requests that any ambiguous language in this section be replaced with language which clarifies the scope of the required environmental review, and mandates that this review broadly include all activity which would likely occur if the land exchange is approved and carried out.

This language should include the expression of Congress's intent that the full environmental review will include prefeasibility and feasibility studies, activities related to Resolution Copper's mining operations, Resolution Copper's actual mining operations, and the

cumulative impacts of such mining operations. The Bill's language in this regard should be drafted with the intent that it will be sufficiently clear to avoid future argument or litigation regarding the meaning of the terms. It should clearly mandate that the environmental analysis must include not only the exchange action itself, but all activities before the exchange, and all subsequent mining and mining related activity.

2. Protection of Sacred Sites and Locations

Second, ITCA requested a provision that:

Apache Leap, Gaan Canyon, and Oak Flat would be held as property of the United States, and withheld from entry for any mining related purpose, with no mining activities allowed on or under these sites, including without limitation, exploration, drilling, tunneling or administrative activities, and standards and restrictions are established so that any proposed related activities in areas other than these would preserve necessary vertical and lateral natural geologic support, to assure that these sites would suffer no subsidence, structural or visual damage...

A. Apache Leap Must be Sufficiently Protected

ITCA supports the proposed amendment's provision in Section 7 that Apache Leap be "withdrawn from all forms of – (1) entry, appropriation, or disposal under the public land laws; (2) location, entry, and patent under the mining laws; and (3) disposition under the mineral leasing, mineral materials, and geothermal leasing laws." In addition, ITCA supports Section 8(a)(1)'s provision which provides for the Secretary to "manage Apache Leap to preserve the natural character of Apache Leap and to protect archaeological and cultural resources located on Apache Leap."

ITCA has remaining concerns, however, that the provisions of Section 8(a)(2) do not sufficiently protect this area of great cultural and religious significance to ITCA Tribes, and do not sufficiently protect the rights of Tribal Members to continue to conduct religious and cultural activities at Apache Leap as they have since the beginning of time. Although the provisions of Section 8(a)(2) only allow for activities to occur under the surface of Apache Leap if the Secretary determines that they "would not disturb the surface of the land", this is not sufficient to protect the integrity of this consecrated site. The subsurface activity itself is sacrilege. In addition, even if the Secretary rightly exercises all due diligence in making such a determination to allow subsurface activity, the determination cannot be made without a chance of error. In the case that a determination was made in error, and underground activities resulted in damage to this sacred land, there would be no means or manner by which the mistake could be corrected – the character of Apache Leap and its resources would be lost forever. The United States should not allow that possibility to occur.

ITCA cannot support any provision which would allow for activity beneath the surface of Apache Leap, and does not see any justifiable rationale for including such a provision in this bill. If Apache Leap will be withdrawn from activity under the public land laws, mining laws, and leasing laws, there is no legitimate purpose in conducting activities beneath its surface at any

time.

B. Oak Flat Requires Increased Protection

The proposed amendment refers to the federal land to be exchanged as “the approximately 2, 406 acres of land . . . depicted on the map entitled ‘Southeast Arizona Land Exchange and Conservation Act of 2009 – Federal Parcel-Oak Flat’ and dated January 2009.” The amendment also refers a parcel of land titled the “Oak Flat Withdrawal Area”. ITCA has not seen the maps referenced in the proposed amendment, and is therefore unclear on which part of Oak Flat is within the Withdrawal Area, and which part is included in the Federal land proposed to be exchanged.

The Oak Flat Picnic and Camp Ground has been permanently withdrawn from appropriation under the United States’ mining laws since the Eisenhower Administration, yet Section 3(g) allows the Secretary to authorize Resolution Copper to carry out mineral exploration activities under and on the Oak Flat Withdrawal Area prior to a land exchange. This violates the intent of the Secretary of Interior on behalf of the United States to permanently protect this site, and is unacceptable to ITCA. The protections afforded to Oak Flat years ago were intended to be permanent, and there is no legitimate reason to remove these protections, and certainly not for mining on lands that include sites sacred to Native Americans.

C. Sacred and Religious Sites Must be Protected

In addition to Apache Leap and Oak Flat, Gaan Canyon and Queen Creek are religious and sacred sites which would be affected adversely by the proposed exchange and subsequent mining operations, and which require protection under the Bill. Oak Flat, Gaan Canyon, and Queen Creek have equally significant cultural and religious meaning and importance to ITCA Tribes. The proposed amendment does not provide for protection of these sites.

ITCA requests that S. 409 be amended to fully protect Apache Leap, Oak Flat, Gaan Canyon, and Queen Creek from surface and subsurface mining or other activities, and additionally provide for permanent access for Tribal Members to these sites. We request that the Committee respect and protect the religious beliefs and activities of the Tribes and their Tribal members, beyond the requirements of the American Indian Religious Freedom Act.

In the American Indian Religious Freedom Report dated August 1979 and issued by the Federal Agencies Task Force as mandated by Public Law 95-341, the report identifies some of the obstacles throughout our nation that Native Americans face in terms of obtaining appropriate respect for and recognition of their religious views by federal agencies as they implement others of our nation’s laws. The report states that:

While proclaiming their (non-Indians’) own traditions to be infallible and literal truths, non-Indians have not accorded other religions the same courtesy . . . The most critical aspect of past federal treatment of Indian religious activities, practices, and sacred locations is that abuses have for the most part arisen because of ignorance or misunderstanding on the part of the non-Indian. The treatment

exemplifies what can happen to a religious minority when its tradition is radically divergent from that of a majority in society . . .

Further, the report states:

The primary essence of the tribal religions is to remain in a constant and consistent relationship with nature . . . Customs which adjust to the natural world and its inhabitants thus dominate the tribal religions where laws and institutions are the dominant factors in the larger religions.

Additionally, Executive Order 13007 requires with certain guidelines, that federal agencies – “accommodate access to and ceremonial use of Indian sacred sites . . . and . . . avoid adversely affecting the physical integrity of such sacred sites.”

These issues have direct relevance to whether or not the land exchange proposed by the two international mining conglomerates can be determined to be in the public interest. From our standpoint, if the United States takes its responsibilities to Native Americans with the solemnity and commitment that is required under the Constitution, treaties and the law, it would defy rationality for anyone to contend that such an exchange could be “in the public interest”.

D. Block Cave Mining Must Not Be Used

Finally, ITCA believes that when the block cave mining technique is used, it is impossible to permanently protect surrounding lands from surface subsidence and instability. ITCA requests that the Bill be amended to include language which will require that any mining activity conducted before, during or after the proposed land exchange use a technique which will ensure permanent vertical and lateral support of all surface features in the area.

The prime reason given by those seeking to benefit from the land exchange for using the block cave mining technique is that it is “cheaper” than alternative methods. ITCA believes that the United States should not abrogate solemn constitutional, legal, and moral responsibilities to Native Americans because a mining company wants to mine in a “cheaper” way.

3. Water Supply and Water Quality Issues

ITCA’s third requested provision was that:
Resolution Copper would be required to disclose the potential impact on local and regional surface and subsurface water supplies, and water quality resulting from mine development, mining activity, ore processing and mine closure and maintenance . . .

The proposed amendment makes no mention of concerns regarding water supplies or water quality. While these issues may be addressed in the required environmental review and the Secretary’s public interest determination, ITCA strongly urges the Committee to include specific language in the Bill requiring Resolution Copper to disclose potential impacts on water supplies

and water quality posed by mining activities. Specific language as to these issues would demonstrate Congress's intent to consider water quality and supply as vital to the public interest determination and environmental review. Assuming that these issues will be addressed in environmental review is not sufficient.

4. **Water Rights**

Finally, ITCA requested that:

Resolution Copper would be required to prove that it has present perfected legal rights and priorities for all water necessary to develop, mine, process ores, restore and maintain the proposed mine processing sites, prior to the initiation of any mine development, if approved by the Secretary.

The proposed amendment does not address whether Resolution Copper holds the rights to legally use the water required for their proposed mine without interfering with prior superior rights under Federal and Arizona law. ITCA strongly urges you to insert language into the Bill which is appropriate and sufficient to address this issue.

In sum, ITCA recognizes and is grateful for the steps that have been taken toward addressing the ITCA Member Tribes' concerns in drafting the current amended version of S. 409. Nevertheless, because of the major outstanding deficiencies of the Bill, ITCA and its Member Tribes cannot support the Bill as presented in the current amended version.

Thank you for the opportunity to be heard on this matter. We encourage you and the Committee to work with us to prepare a bill that will remedy the concerns we have expressed, and thereby best serve the Member Tribes of ITCA, the people of Arizona, and all the people of the Nation, through protecting religious and sacred places and the natural resources which are vital to Arizona, Arizonans, and the health of the Earth.

Sincerely,



Shan Lewis, President
Inter Tribal Council of Arizona

Vice-Chairman,
Fort Mojave Indian Tribe

Enclosures: As Stated

Cc: The Honorable Lisa Murkowski, Ranking Member (with enclosures)

**Senator Barrasso Supplemental Questions
For Public Lands Legislative Hearing
2:30 PM June 17, 2009**

Questions for Norman Coocyate:

1. Are there any changes you would want to make to this bill?
2. If they were made, would those changes make the bill acceptable to the tribes?

Answers of the Inter-Tribal Council of Arizona and Governor Coocoyate
to
Supplemental Questions
by
Arizona Senator Barrasso
concerning
S.409 and the Hearing held June 17, 2009

Senate Subcommittee on Public Lands and Forests

July 6, 2009

Question 1: Are there any changes you would want to make to this bill?

Answer 1: Yes.

A. Restructure the bill so that a comprehensive EIS can be completed on the entire proposed project, including without limitation, mine development, mining, processing, mine closure, reclamation and maintenance, and so that the Secretary could make an informed decision among reasonable alternatives, which alternatives would include the power and authority to make the decision to prohibit the development of the mine; and

B. Apache Leap, Gaan Canyon and Oak Flat would be held as property of the United States, and withheld from entry for any mining related purpose, with no mining activities allowed on or under these sites, including without limitation, exploration, drilling, tunneling or administrative activities, and standards and restrictions are established so that any proposed related activities in areas other than these would preserve necessary vertical and lateral natural geologic support, to assure that these sites would suffer no subsidence, structural or visual damage; and

C. Resolution Copper would be required to disclose the potential impact on local and regional surface and subsurface water supplies, and water quality resulting from mine development, mining activity, ore processing and mine closure and maintenance; and

D. Resolution Copper would be required to prove that it has present perfected legal rights and priorities for all water necessary to develop, mine, process ores, restore and maintain the proposed mine processing sites, prior to the initiation of any mine development, if allowed by the Secretary.

Question 2: If they were made, would those changes make the bill acceptable to the Tribes?

Answer 2: Yes.