

# SAN CARLOS APACHE TRIBE

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May 12, 2011

*Via U.S. Mail*

**The Honorable Paul Gosar**

Congressional Representative District 1, Arizona  
504 Cannon House Office Building  
Washington, DC 202515

***RE: San Carlos Apache Tribe's Objections to the Draft "Southeast Arizona Land Exchange and Conservation Act of 2011"***

Dear Representative Gosar:

On behalf of the San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), I would like to thank you for your efforts to keep the Tribe informed on legislation you have indicated you plan to introduce for the exchange of certain federal public lands within the Tonto National Forest for the benefit of Resolution Copper. Your legislative aid, Jeremy Harrell, provided us with a draft copy of the Southeast Arizona Land Exchange and Conservation Act ("Act") on May 3, 2011. We received a complete set of the maps referenced in the legislation on May 10, 2011.

As you know, the Tribe strongly opposes any legislation that would allow Resolution Copper -- a subsidiary of foreign mining giants Rio Tinto (51%) and BHP Billiton (49%) (collectively, "Rio Tinto") -- to secure private ownership of over 2,400 acres of U.S. Forest Service lands and the domestic copper supplies located underneath these lands in order to facilitate an unprecedented large-scale block cave copper mine at Oak Flat, an area that is within the ancestral lands of Western Apache tribes. In an effort to ensure our specific objections to the legislation are understood in context, Part I of this letter reiterates the Tribe's religious, traditional and cultural bases for objecting to this legislation, which have not yet been addressed; while, Part II sets forth the Tribe's specific comments to provisions in the draft Act.

## I. THE OAK FLAT REGION SHOULD NOT BE TRADED TO FOREIGN MINING COMPANIES

The Oak Flat region is a place of profound religious, cultural, and historic significance to the Apache Tribe and other Indian tribes, nations, and communities, including the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Tonto Apache Tribe, the Fort McDowell Yavapai Nation, the Hualapai Tribe, Jicarilla Apache Nation, the Mescalero Apache Tribe, the Pueblo of Zuni, and others. *See, e.g.*, Hearing before the Subcommittee on Public Lands and Forests of the Committee on Energy and Natural Resources, United States Senate on S.409, 111th Cong., S. Hrg. 111-65 (June 17, 2009), *see also* Record of Hearing Before Subcommittee on National Parks, Forests and Public Lands in the U.S. House Natural Resources Committee regarding H.R. 3301, 110th Cong., Serial No. 110-52 (November 1, 2007).

Congress has enacted legislation to protect the religious, cultural and social integrity of Indian people. This was to ensure 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

The religious and cultural importance of the Oak Flat area does not only reside in isolated spots but also in the integrity of the area as a whole. Thus, impacts to **any part** of Oak Flat have an impact on the 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 and other indigenous people

Because of its importance to the Apache Tribe and other tribes, nations, and communities, Oak Flat as well as specific places within the Oak Flat area are eligible for inclusion in, and protection under, the National Register of Historic Places as a Traditional Cultural Property ("TCP") under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA"). Further, it meets the criteria to be identified 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. The importance of Oak Flat to the Apache People has been known to the U.S. Forest Service for many years.

Speaking generally, the "Oak Flat" region is bounded to the west by (and includes) portions of the large escarpment known as "*Dibecho Nadil*" or "Apache Leap" and to the east by (and including) *Gaan Bikoh*, which means "Crowndancer's (or Mountain Spirit's) Canyon," though it is often referred to by Apache People as "Gaan Canyon" and by non-Indians as "Devil's Canyon." Oak Flat is bounded to the north by *Gaan Daszin* or "Crowndancer (or Mountain Spirits) Standing," which is delineated on most maps as "Queen Creek Canyon."

Apache People call Oak Flat "*Chich'il Bildagoteel*," or "a Flat with Acorn Trees" and it lies at the heart of *T'is 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 has, for generations, played a crucial role in the exercise of Apache 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. The caring for *Nigosdzan*, our Mother Earth -- and indeed all women -- is of the utmost traditional importance to Apache people. Many our continuing, ancient religious activities, will be greatly diminished or destroyed if this land is transferred by Congress to Rio Tinto.

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. 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 Rio Tinto 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. These Holy Beings 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. The mining that will be facilitated by this land exchange legislation will also adversely impact the power of the plants that Apaches harvest and use within the Oak Flat area for ceremonial, religious, medicinal, and other purposes.

Rio Tinto has openly admitted that its block caving operation (which employs the cheapest and most destructive mining techniques available today) would create significant land subsidence and the likely collapse of portions of the Oak Flat area and would use and deplete the precious water resources of the region that give life to some of the most sacred sites of the region. This collapse and other activities associated with the mine could potentially deplete groundwater aquifers that supply the west side of the San Carlos Apache Reservation. Arizona's water supply continues to be threatened by drought, population pressures, and other factors. Yet, to date, Rio Tinto has failed to offer any substantive plans to protect the groundwater and surface water supplies of the area from the proposed mine.

In sum, Oak Flat should not be transferred to the ownership of Rio Tinto in order to facilitate a block cave mining project on and underneath these lands. As it exists today, Oak Flat has already been harmed by the cumulative impacts of U.S. Forest Service mismanagement, including intensive overgrazing and exploratory drilling and related activities. Transfer of these lands to Rio Tinto for a block cave mine would irrevocably destroy the landscape of Oak Flat and its ecosystems and, thereby, the very integrity of Oak Flat relative to its crucial role in Apache religion, traditions, and culture. This, in turn, would profoundly weaken the strength of Apache prayer and ceremony and severely limit the ability of Apache People to effectively practice their religion and to continue important traditional practices that continue to be associated exclusively with the Oak Flat area.

## II. SPECIFIC OBJECTIONS TO THE ACT

As you have requested, the Tribe has reviewed the draft of the “Southeast Arizona Land Exchange and Conservation Act of 2011” and the following is a brief discussion of some of the Tribe’s primary objections to the Act:

### A. The Act Fails to Require Timely and Meaningful Tribal Consultation

While Sec. 4(c) of the Act calls for “consultation” with the Apache Tribe and other Indian tribes, nations, and communities “concerning issues related to the land exchange,” the consultation required by the Act is neither meaningful nor lawful. Under Sec. 4(c), consultation is required only **after** the enactment of the Act, making any consultation with the Apache Tribe or other Indian tribes, nations, and communities little more than a mere formality.<sup>1</sup>

As you know, the Apache Tribe and the Inter-Tribal Council of Arizona have repeatedly requested that the United States undertake meaningful government-to-government consultation **in advance** of any legislation on this matter. Numerous federal laws, policies, and Executive Orders mandate advanced, informed, and appropriate government-to-government consultation with Indian tribes, nations, and communities. *See, e.g.*, Presidential Executive Memorandum entitled “Government-to-Government Relations with Native American Tribal Governments” (April 29, 1994), 59 Fed. Reg. 22951; Presidential Memorandum and Order on Tribal Consultation dated November 5, 2009 (reaffirming Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments); and Presidential Executive Order 13007, “Indian Sacred Sites” (May 24, 1996), 61 Fed. Reg. 26771. These requirements are reflective of the unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Indeed, under the Apache Treaty of 1852, the United States has recognized the Apache Tribe as a sovereign government, and has had an obligation to engage in meaningful consultation with the Tribe since at least the date of this Treaty.

The NHPA also requires that federal agencies consult at all stages with any “Indian tribe ... that attaches religious and cultural significance” to traditional cultural properties, like the Oak Flat area. *See* 16 U.S.C. §470(a)(d)(6)(B), 36 C.F.R. §800.2(c)(2)(ii).<sup>2</sup> Consultation must provide the tribe “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional

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<sup>1</sup> The profound lack of consultation mandated by the Act would also seem to be contrary to the Apache Treaty of 1852, *see* Part II (F) below, and the federal government’s trust responsibility to the Apache Tribe and other Indian tribes, nations, and communities in Arizona. *See, e.g., Semmole Nation v. U.S.*, 316 U.S. 286 (1942).

<sup>2</sup> As the Court explained in the recent *Quechan* case on consultation under the NHPA: “The Tribe is a consulting party because it attaches religious and cultural significance to the historic properties that may be affected by the project. **The fact that the properties are not on the Tribe’s own land doesn’t affect this status.**” *Quechan Tribe v. U.S. Dep’t of Interior*, No. 10cv2241 LAB (CAB), 2010 WL 5113197, at \*fn.4 (S.D. Cal. Dec. 15, 2010) (*quoting* 36 C.F.R. § 800.2(c)(2)(ii) (emphasis added))

religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects " 36 C.F.R. §800.2(c)(2)(ii)

Proper government-to-government consultation under Section 106 of the NHPA, for example, further requires the federal government to, among other things, **assess the effects** of the undertaking on Oak Flat as it is an eligible historic property under the NHPA **and avoid or mitigate** any adverse effects. *See* 36 C.F.R. § 800.5. The "after the fact" consultation presently contemplated in Sec. 4(c) of the Act fails to meet these requirements.

Indeed, in a letter regarding the prior version of this Act (S.409) written to the Chairman of the Senate Subcommittee on Public Lands and Forests dated July 13, 2009, USDA Secretary Thomas Vilsack acknowledged that, while no formal government-to-government consultation had yet been undertaken by the Forest Service regarding the proposed land exchange, Tribal Governments (which included at the time the Apache Tribe) had raised "important concerns" about the need to engage in such formal consultation under the policies, Executive Orders, and laws of the United States. In light of the concerns expressed by the Tribal Governments about protecting Oak Flat and the need for proper consultation, Vilsack warned

Because of these expressed concerns and because this specific site has been the focus of historic Government protection [the Oak Flat Withdrawal, P.L.O. 1229], **it is important that this bill engage in a process of formal tribal consultation to ensure both tribal participation and the protection of this site.** (Emphasis added; footnote omitted).

According to Rio Tinto's own materials, they do not intend to undertake full-scale mining at this location until the year 2020. Therefore, there is ample time to gather the necessary information and consult meaningfully with the Apache Tribe and other affected Indian tribes, nations, and communities about their knowledge of this important place before Congress enacts any legislation on this matter

**B. The Act Fails to Recognize or Protect the Religious Freedoms of the Apache People and the Integrity of Oak Flat as a Sacred Site and Traditional Cultural Property**

The Act completely fails to recognize the fundamental religious importance that the Oak Flat area (from the center of the Earth to the top of the sky) has to the Western Apache Tribes. *See* Part I. The Act would transfer the Oak Flat area, including the 760-acre Oak Flat Withdrawal, to foreign mining interests without including any substantive protections for the majority of the Oak Flat area or for the continued health and vitality of the natural ecosystems of the area. Furthermore, because the legislation fails to require the normal "hard look" at the mining project and its impacts as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") and other important federal laws, *see* Part II (D)-(E), it is clear that, once again, the fundamental concerns about the exchange and mining project that have consistently been raised by the Apache Tribes and other Indian tribes, nations, and communities have been cast aside in this draft legislation

For this reason and others, the draft Act also fails to mandate compliance with a myriad of important federal laws and Executive Orders critical to the protection of the religious freedoms of the Western Apache, including its sacred sites and traditional cultural properties under, *inter alia*, the First Amendment of the United States Constitution, the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, the American Indian Religious Freedom Act, the Archeological Resources Protection Act of 1979, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and Executive Order 13007.

These failings in the Act are particularly egregious as Rio Tinto's planned surface and subsurface mining, mine dewatering, and other related activities at Oak Flat will result in the physical destruction of the Oak Flat area (for which there is no mitigation) and, therefore, the very integrity of the Oak Flat area as a sacred site and traditional cultural property. The destruction of Oak Flat will also deny physical and spiritual access to this site as required by, among other things, the RFRA. The legislation even lacks protections for the many archaeological and historical sites located within the Oak Flat area in the event these lands are transferred into the foreign hands of Rio Tinto. There are no provisions under State law which would require a mining company to protect these resources once they are in their private lands.<sup>3</sup>

Rio Tinto has openly admitted that its block caving operation would create significant land subsidence and likely collapse portions of Oak Flat area and would use and deplete precious water resources of the region. Indeed, this is perhaps precisely why they seek to acquire these lands in private ownership in order to avoid the scrutiny of these problems that would be required to be considered or mitigated under federal law.<sup>4</sup>

### **C. The Legislation Fails to Wait For and/or Require Needed Independent Studies**

The Act fails to require that an independent and neutral agency or department of the government, such as the U.S. Geological Survey or another agency, first be required to conduct independent studies in order to better understand the potential impact of the mine to be facilitated by the exchange on the water resources, environment, stability, natural ecosystems, and landscape of the Oak Flat area. Such studies are not only a necessary requirement for proper government-to-government consultation with the Apache Tribes, as discussed above,<sup>5</sup> but they

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<sup>3</sup> Provisions of A.R.S. §13-1504 (criminal trespass) and §13-370 (defacing or damaging petroglyphs on the property of another) offer no protection for the integrity of Oak Flat as a sacred site and traditional cultural property or for the specific resources located within this area once the land is exchanged into private ownership.

<sup>4</sup> In Arizona, metal mining facilities on non-federal lands are exempted from a wide variety of environmental protection laws, zoning requirements, water permit requirements, rigorous mining standards, and the like.

<sup>5</sup> A recent federal court has reminded federal agencies that Indian tribes, nations, and communities are "entitled to be provided with adequate information and time, consistent with its status as a government

also are necessary to inform Congress and the public about the potential impacts stemming from the enactment of the land exchange, which is intended to “facilitate” the large block cave mine operation to be conducted by Rio Tinto.

As discussed in greater detail below, this is particularly problematic because the Act fails to require an advanced “hard look” at various alternatives to the exchange and the mining project under NEPA. Thus, the advanced studies of the type that have been requested by the Apache Tribe, and other Indian tribes, nations, and communities are more important than ever if Congress, the Administration, and the public are truly going to have any understanding of the ramifications of exchanging these important lands (and their resources) into the private ownership of foreign mining interests

**D. The Legislation Requires the Consummation of the Exchange Without NEPA Review**

Under Sec. 4(i) of the proposed legislation, Congress would express its intent that **“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).<sup>6</sup> The Act fails to comply with the intent of NEPA

Normally, NEPA requires the federal government to consider the environmental consequences of their actions. *See* 42 U.S.C. §4331 *et seq.* NEPA is intended to ensure that the agency will have available and will carefully consider detailed information concerning significant environmental impacts. It also guarantees that the relevant information will be made available to a larger audience to ensure the public can play a role in both the decision-making process and the implementation of the federal government’s decision. *See, e.g.,* 40 C.F.R. §§ 1501.2 & 1502.5.

NEPA also requires the preparation of a detailed “Environmental Impact Statement” (“EIS”) for any major Federal action that may significantly affect the quality of the environment. *See* 42 U.S.C. §4332(2)(C). Under NEPA, the federal government must study, develop, and describe appropriate alternatives to recommended courses of action for any proposal that involves unresolved conflicts concerning alternative uses of available resources. *See* 42 U.S.C. §4332(2)(E). Further, the federal government is required to integrate the NEPA process with other planning at the earliest possible time in order to insure that planning and decisions reflect environmental values and to head off potential conflicts. *See* 40 C.F.R. §1501.2

However, the draft Act has the following failings: (1) it does not require or even permit the Secretary to take a “hard look” at the exchange under NEPA **before** the exchange is

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that is entitled to be consulted” *Quechan Tribe v. U.S. Dep’t of Interior*, No. 10cv2241 LAB (CAB), 2010 WL 5113197, at \*15 (S.D. Cal. Dec. 15, 2010).

<sup>6</sup> *See also* Sec. 4(a) which provides: “Subject to the provisions of this Act, if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, 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.” (Emphasis added)

consummated; (2) it fails to vest any discretion in the Secretary of Agriculture to consider appropriate alternatives; (3) it does not provide for or permit mitigation of impacts related to the exchange and/or the mining project; and (4) it would not permit the Secretary to avoid consummating the exchange should he determine under the Federal Land Policy and Management Act of 1976 ("FLPMA") and other laws that the exchange is a bad deal for the American taxpayer or the citizens who use our public lands or in the event he finds that the religious, environmental, cultural, water supply and other harms of the mining project are simply too great.

Finally, the mandatory exchange language found in Sec. 4(i) of the Act removes the rights that the Tribe or other concerned citizens would normally have under the law to file an administrative appeal of the decision with the USDA/U.S. Forest Service before the exchange becomes final. This provision could be interpreted to limit the rights of the Tribe or others to challenge the exchange through legal action if it is believed that the Secretary's "NEPA" efforts were flawed or in the event the requirements of the legislation are not followed

#### **E. The Act Contains Sham NEPA Requirements After the Exchange**

In addition to the foregoing, the NEPA process outlined by Sec. 4(j) of the Act (which is to be conducted after the lands are exchanged) would be nothing more than a futile exercise on the part of the Secretary. The Secretary would have **no discretion** to exercise any **meaningful** authority over Rio Tinto's mining plan of operations or mining activities on private land, absent a federal nexus.<sup>7</sup> Specifically, Sec. 4(j) provides in relevant part:

(j) ENVIRONMENTAL COMPLIANCE.—Compliance with the requirements of the National Environmental Policy (42 U.S.C. 3421 et seq.) under this Act shall be as follows:

(1) Prior to commencing production in commercial quantities of any valuable mineral from the Federal land conveyed to Resolution Copper under this Act (except for any production from exploration and mine development shafts, audits, and tunnels needed to determine feasibility and pilot plant testing of commercial production or to access the ore body and tailing deposition areas), Resolution Copper shall submit to the Secretary a proposed mine plan of operations.

(2) The Secretary shall, within 3 years of such submission, complete preparation of an environmental review document in accordance with section 102(2) of the National Environmental Policy Act of 1969 (42

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<sup>7</sup> Suggestions that federal laws will continue to be applicable to this mine once the lands are transferred to private ownership are false, except to the extent there is a federal nexus to these lands or to the activities to be conducted on these lands or to the extent a Clean Water Act permit may be required. Otherwise, Rio Tinto's activities will be conducted under the limited and inadequate provisions of state law.



U.S.C. 4322(2))<sup>8</sup> which shall be used as the basis for all decisions under applicable Federal laws, rules and regulations regarding any Federal actions or authorizations related to the proposed mine and mine plan of operations of Resolution Copper, including the construction of associated power, water, transportation, processing, tailings, waste dump, and other ancillary facilities.

First, it is important to recall that the once Oak Flat is exchanged and transferred to the private ownership of these foreign mining companies, Rio Tinto is entitled to conduct mining activities on these lands with almost no federal oversight and (absent a federal nexus) without being subject to most environmental, cultural resources and other protections found in NEPA and other federal laws, regulations and requirements.<sup>9</sup>

Instead, under the highly constrained NEPA provisions found in Sec. 4(j) of the Act,<sup>10</sup> Rio Tinto would be merely required to submit to the Secretary a document called a "plan of operations" only in advance of producing "commercial quantities" of any valuable mineral. Thus, Rio Tinto will likely argue that there would be no requirement under NEPA, the NHPA, or any other federal law, Executive Order or policy 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 at Oak Flat *before* production of commercial quantities of minerals.

Similarly, the Secretary would lack any authority under the Act to 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. In short, under Sec. 4(j) of the Act, the integrity of Oak Flat could be harmed so substantially before the limited NEPA requirements found in Sec. 4(j)(2) are triggered that any NEPA review conducted upon the submission of the plan of operations would have little to no benefit in any event.

It is also unclear what form the "plan of operations" required by Sec. 4(j)(1) would take as this term is not defined in the Act, and it is not tied to the requirements of 36 C.F.R., Part 288.

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<sup>8</sup> This citation to NEPA in the draft Act is incorrect.

<sup>9</sup> There is no reason for Congress to sidestep the normal process for mining on federal lands. It is undeniable that Rio Tinto could mine the Oak Flat area (except for the Withdrawal) under the 1872 Mining Law today. However, it is clear that Rio Tinto wants to be able to mine Oak Flat with virtual impunity without having to comply with the federal laws and forest service directives and regulations, such as those required by, among other things, the Federal Land Policy Management Act of 1976, 43 U.S.C. §§1701-1785, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531, and 36 C.F.R., Subparts A (Forest Service Functions and Procedures) and Subpart B (Locatable Minerals), and other applicable federal laws, including NEPA.

<sup>10</sup> Because the Act specifically dictates how compliance with NEPA is to be achieved, it is unclear whether and under what circumstances normal requirements of NEPA may be applied to Rio Tinto's post exchange activities at Oak Flat. It is likely NEPA will simply not apply.

There is therefore no guarantee that the plan of operations submitted to the Secretary would (among other requirements) 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 Rio Tinto 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. The need for a proper plan of operations was emphasized by Deputy Chief of the USDA/Forest Service, Joel Holtrop, in response to written questions by the Senate Subcommittee on Public Lands and Forests on S. 409, dated June 17, 2009, where he stated, "Subsurface information that would be part of the mining plan and mining operations documentation **are essential** in order to assess environmental impacts, including hydrological conditions, subsidence, and other related issues." (Emphasis added)

Furthermore, there is no provision in the Act that would provide the Secretary with authority to reject the plan of operations submitted by Rio Tinto if the information contained in the plan is insufficient to conduct even the limited review called for under Sec 4(j)(2). Indeed, because the Secretary is only given 3 years under the Act to conduct his review after submission of a "plan of operations," the Secretary would have little time to demand that Rio Tinto refine its plan, even if this was necessary to conduct a meaningful review

Nevertheless, pursuant to Sec. 4(j)(2) of the Act, the environmental review document to be prepared by the Secretary would serve little to no purpose even if the plan of operations was detailed and comprehensive (which it will likely not be). This is because (as noted above) the Act does not call for or permit the Secretary to exercise any of the normal environmental decision making responsibilities required by NEPA, including the consideration of alternatives. As Secretary Vilsack has explained in his letter to Senator Wyden dated July 13, 2009, regarding S. 409:

The bill should be amended to require the preparation of an environmental impact statement *before* the land exchange is completed. NEPA is a forward-looking statute setting out procedural obligations to be carried out before a Federal action is taken. It requires that, before making a discretionary decision, a Federal agency consider the environmental impacts of a proposed major Federal action and alternatives to such action. **The purpose of a requirement 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, there is no provision in Sec. 4(j) that would allow for a supplemental EIS document if a supplemental EIS is called for in order to examine the direct, indirect and cumulative impacts of future activities by Rio Tinto, such as those referenced in Sec. 4(j)(2) like the "construction of associated power, water, transportation, processing, tailings, waste dump,

and other ancillary facilities.” To the contrary, 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.” Thus, even assuming there is a federal nexus to these future actions (which given the fact the mine will be located on “private land” a federal nexus will not be likely), the Secretary will not be able to prepare a supplemental EIS even if the original EIS is wholly outdated or if it fails to address the current activities of the mine.

**F. The Legislation Violates the Spirit of the Apache Treaty of 1852 and the United States’ Trust Responsibility to the Apache Tribe**

Pursuant to Article 11 of the Apache Treaty of 1852, 10 Stat. 979, the United States is required to “so legislate and act as to secure the permanent prosperity and happiness” of the Apache people. The Apache Tribe has complied with all aspects of its Treaty obligations and it expects the United States to do the same. The United States should respect and protect the religious beliefs and cultural practices of the Apache people as these beliefs and practices remain crucial to their “permanent prosperity and happiness.”

While it is true that Congress has the constitutional authority to legislate exchanges of federal lands, to do so in this case would violate, at a minimum, the spirit of the Apache Treaty because it would give important and religiously significant Apache ancestral lands to foreign mining companies and thereby facilitate the wholesale destruction of these lands, and, in turn, the religious, cultural, and traditional beliefs fundamental to the identity of Apache people and their ways of life. Furthermore, the United States’ trust responsibility and treaty obligations **do extend** to lands that are no longer located on the Reservation under specific requirements of federal law and policy, including, but not limited to, Executive Order 13007, the National Historic Preservation Act, and many other federal laws, Executive Orders, and policies.

**G. The Legislation Bypasses the Normal Administrative Process that Other Mining Companies Typically Are Required to Follow**

It is undeniable that, in order to “expedite” development of the mining project by Rio Tinto, the Act bypasses the normal administrative and legal requirements under federal law and U.S. Forest Service regulations (1) for the conduct of mining projects on federal lands (such as a federal plan of operation, bond postings, and site reclamation, and compliance with 36 C.F.R. Part 228) and (2) for federal land exchanges, both of which would normally include, among other things, advanced Tribal consultation, meaningful public input, and close scrutiny of the proposed exchange and/or mining project under NEPA, the NHPA, FLPMA, the National Forest Management Act, 16 U.S.C. § 1600, the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and other cultural resource and environmental laws and U.S. Forest Service requirements.

Rio Tinto has yet to articulate any **credible** reason why a congressional land exchange is needed versus the normal administrative processes that other mining companies must follow under FLPMA and other laws – laws that require the Secretary to “determine that the public interest will be well served” by the exchange. In this respect, it is incorrect to say that the Act, as

proposed, follows the basic rules of administrative land exchanges found in FLPMA. In addition, any purported complication to an administrative exchange created by the voluntary inclusion of lands for the Town of Superior is simply not a valid reason to avoid the normal exchange process.<sup>11</sup>

#### **H. The Legislation Fails to Offer Protections for the Water Supplies of the Region**

There are no provisions in the language of the Act that would offer any protections from the large-scale water depletions anticipated by the mine. The mining project facilitated by this Congressional exchange is likely to dry up (and/or contaminate) surface flows, springs and dripping caves within the Oak Flat region -- all of which are fundamental to the integrity of the Oak Flat region as a sacred site and traditional cultural property for the Apache Tribe. Adverse impacts will also be experienced through the depletion of groundwater aquifers that support the base flows in Queen Creek and the perennial pools in Gaan Canyon and possibly the groundwater underlying the western edge of the San Carlos Apache Reservation

The impacts to the water sources are almost a foregone conclusion given the extensive mine dewatering required by mining of this type, the need for water in the mine processing, and as a result of the massive and unprecedented changes to the geology and hydrogeology of the area which will be caused by the mine operation itself and the significant surface subsidence that inevitably results from block cave mining of this type. The loss to the local aquifers, including the shallow alluvial aquifers and the Apache Leap Tuft Aquifer which collectively support local springs, dripping caves, seeps and other water supplies, cannot be remediated by "banking" Central Arizona Project water elsewhere, including in storage facilities near Phoenix and in Pinal County. Without water, the natural ecosystems found within the Oak Flat area will collapse and the integrity of Oak Flat as a sacred site and traditional cultural property will be destroyed.

In addition, the mine could impact the groundwater underlying the San Carlos Apache Reservation. This groundwater is protected by the Apache Treaty of 1852 and by Congress as part of the San Carlos Apache Tribe Water Rights Settlement Act of 1992, which provides at Section 3704(f), 106 Stat. 4744, that the Tribe "is entitled to the diversion and use of all of the groundwater underneath the Tribe's Reservation . . . ." Because the Act does not wait for advanced studies on these and other issues and because it fails to include any NEPA protections of any substance, Congress will have no way of assessing all of the impacts to the water supplies of the region until it is too late.

#### **I. The Legislation Allows Rio Tinto to Immediately Conduct Mineral Exploration within the Oak Flat Withdrawal Even Before the Land Exchange is Consummated**

Sec. 4(f) of the Act would mandate that within 30 days of enactment of the Act, the Secretary shall issue a "special use" permit to allow Rio Tinto to engage in mineral exploration

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<sup>11</sup> It should be noted that in Arizona the applicant for administrative federal land exchanges is required to bear the full cost of the exchange, thus, there is no cost savings found in Sec. 4(g) of the Act.

activities underneath the 760-acre Oak Flat Withdrawal and, within 90 days, shall allow Rio Tinto to begin mineral explorations within the Oak Flat Withdrawal itself, even though this land was expressly set aside from mining by President Eisenhower in 1955 by Public Land Order 1229 as modified by Public Land Order 5132 in 1971. From President Eisenhower to Secretary Vilsack, Oak Flat has been recognized by the Federal Government as a “special place” that should be protected from harm “for future generations.” See Secretary Vilsack letter to Senator Wyden, dated July 13, 2009.

It has long been understood that the protections afforded Oak Flat years ago were intended to be permanent, and there is no legitimate reason to remove these protections, particularly where this exploration will adversely impact the integrity and vitality of the Oak Flat region as a traditional cultural property and sacred site of the Apache People

In addition, allowing the immediate exploration on and under Oak Flat prior to the NEPA review contemplated by Sec. 4(j) of the Act will likely constitute an “irretrievable commitment of resources” in contravention to NEPA. Until the NEPA process is done and decision is complete, Rio Tinto and the Forest Service normally are not permitted to undertake any irretrievable commitment of resources on the project to shift the equity status quo. Thus, NEPA requires that the government must delay irretrievable commitments of resources while it prepares such an EIS. In *Latham v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971), the Ninth Circuit held that individual highway segments had to be delayed until a programmatic EIS was prepared for the entire highway because “[o]nce the highway-planning process has reached these latter stages, flexibility in selecting alternative plans has to a large extent been lost.” See also *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979) (“After major investment of both time and money, it is likely that more environmental harm will be tolerated.”); *Calvert Cliffs’ Coordinating Committee v. USAEC*, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (construction permit stage of project must wait for EIS for operating license stage; commitment of resources would “inevitably restrict the Commission’s options” and would make consideration of environmental factors at the operating license stage “a hollow exercise”). Allowing the advance impacts to the Withdrawal area as well as to the other areas of Oak Flat contemplated by the Act would result in an irretrievable commitment of resources well before the purported requirements of NEPA could be met under Sec. 4(j).

**J. The Legislation Fails to Provide any Means of Recourse for the Tribe and the Public**

The Act does not provide the Apache Tribe or other members of the public with any form of recourse if damage to archaeological, religious, historical, and cultural sites **does occur** during the exploratory or mining phases of the project or if access to the Oak Flat area is impeded or permanently blocked after conveyance of the lands to Rio Tinto – all of which is a virtual certainty given the collapse of the surface lands and the impacts to water that are anticipated from the mining project. The nominal laws that will be in place **after** these lands are exchanged into the private ownership of Rio Tinto offer little to no substantive protection or recourse for the Tribe or the public

**K. The Legislation Does Not Adequately Protect Apache Leap**

The legislation does not adequately protect Apache Leap. Sec. 8 of the Act would permit Rio Tinto to conduct underground mining and other activities (except for “commercial mineral extraction”) at Apache Leap. If Apache Leap is to be withdrawn from mining activity under the public land laws, mining laws, and leasing laws, there is simply no legitimate purpose in conducting activities beneath its surface at any time.

Furthermore, because the block caving planned for the Oak Flat area will result in substantial surface subsidence or collapse that is difficult to predict, there is no guarantee that the surface of Apache Leap and its “natural character” (as used in the legislation) can actually be protected from damage or destruction, regardless of any assurances contained in the legislation.

**L. The Legislation Removes Rio Tinto from Federal Requirements for Bonding and Clean Up of the Mining Project**

The Act does not provide adequate assurances to the Tribe or the American public that Rio Tinto will clean up and reclaim the Oak Flat area once these lands are transferred to private ownership and removed from the more rigorous bonding and clean up requirements of federal law. Large-scale mining operations of this type have scarred the land and resulted in significant contamination problems that have polluted the air, soil and water resources throughout Western Apache ancestral lands.

As Secretary Vilsack noted in his July 13, 2009, letter to Senator Wyden on S. 409, “The National Forests, are, unfortunately, home to numerous remnants of past mining operations which are still creating significant environmental and financial impacts.” Yet, under the proposed Act, there is nothing to prevent the federal government, the state, or the tribes (and not foreign owned mining companies) from being left once again with the cost of cleanup for the project.

**M. The Substantial Harm from this Land Exchange are Not Balanced by the Speculative Promise of Local Job Creation**

The stated reason for the Act is, among other things, to promote immediate and significant job opportunities in the Superior area. The Apache Tribe supports local job creation for its own people and for the region. Rio Tinto has circulated various economic and job figures related to their mining project, however, these numbers are speculative and lack credibility and support.

As discussed here, Rio Tinto does not yet have a plan of operations for the mine, and it is possibly a decade or more away from completing this Plan, making it impossible to accurately determine at this time the total number of jobs or the types of jobs that might be created by the mine. In fact, Rio Tinto has acknowledged that exploration will take years and will not be completed until 2020, at the earliest. This offers little help for the needs of the local economy today. Even with the exploration complete, there is no guarantee that Rio Tinto will build the mine given the depth of the ore body (the ore is more than one mile beneath the surface of the

earth and technology does not exist today to extract this ore) and other factors. There is also no guarantee that the mine will provide the large number of jobs that Rio Tinto has promised due to the potential automation of the project and other factors. There is nothing in the Act that promises or commits to local job creation.

Rio Tinto has recently launched a prototype of a fully automated “mine of the future” in the iron rich Pilbara region of Australia. This “mine of the future” operates eleven mines with robotized drilling, automated haul trucks, and driverless ore trains -- all of which are controlled from an operations center 800 miles away. The aim of Rio Tinto’s prototype is to lower production costs by eliminating the need to hire a substantial number of workers. By Rio Tinto’s own admission, “some of the roles currently based at the mine [Pilbara Mine] site will, in the future, be based in a city thousands of kilometers away [approximately 600 or more miles away]” and “employees will work like air traffic controllers.”<sup>12</sup> Rio Tinto’s Eagle Ore Mine in Marquette, Michigan, also plans to use a fully automated system which may make mines safer but at the cost of requiring fewer workers -- a major reason why mining jobs are rapidly declining industry-wide. As production and company profits continue to rise, labor statistics show that the (mining) industry is expected to lose roughly 104,000 additional jobs between 2008 and 2018.<sup>13</sup>

Indeed, Rio Tinto executives openly admit they plan to implement similar automated technology at the Resolution Copper Mine in Superior, Arizona. In Rio Tinto’s 2010 Sustainable Development Report, it states that, based upon “today’s improved understanding of caving processes and advanced technology,” Resolution Copper will be able to “employ more automation and mechanization than were available in the past.”<sup>14</sup>

This technology would allow Rio Tinto to operate the mine from anywhere in the world, substantially reducing the need for manpower and skilled and unskilled workers in the Superior region. Rio Tinto boasts that in their mines of the future (which will include the Resolution Copper mine at Superior), “Humans will no longer need to be hands on as all this equipment will be ‘autonomous’ – able to make decisions on what to do based on their environment and interaction with other machines. Operators will oversee the equipment from the ROC (Remote Operation Centers).”<sup>15</sup> **Once fully operational, the Remote Operation Center for the Superior mine is unlikely to be located in rural Superior, Arizona. Rather, the ROC will be “metropolitan based” and “the future miner will be required to have a higher degree of education**

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<sup>12</sup> “Mine of the Future”, Riotinto.com, Rio Tinto, n.d. Web (2011).

<sup>13</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industry* (2010), available at <http://www.bls.gov/oco/cg/cgs004.htm#outlook>.

<sup>14</sup> Resolution Copper Mining, *2010 Sustainable Development Report* (2010), available at <http://resolutioncopper.com/sdr/2010/environment>.

<sup>15</sup> Rio Tinto, *Rio Tinto chief executive unveils vision of “mine of the future”* (Jan. 18 2008), available at [http://www.riotinto.com/media/5157\\_7037.asp](http://www.riotinto.com/media/5157_7037.asp).

in mechatronics, supercomputing or artificial intelligence,”<sup>16</sup> leaving the Town of Superior in the same economic situation it faces now. Rio Tinto’s own workers acknowledge a decrease in the need for manual labor due to automation, stating, “[p]eople frequently ask whether we have anyone working here at all.”<sup>17</sup>

Even today, Rio Tinto generally does not employ local drill operators or drill rigs for its exploration activities; rather, it chooses to bring in outside subcontractors from Utah, Canada and elsewhere to work on the project.

Lastly, it should be noted that, if Rio Tinto does build and operate the mine as they propose, the potential impact to the local economy through a loss in 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 disturbed and degraded by the mine. In the long run, the loss to the economy could be even greater due to the depletion and possible contamination of billions of gallons of water from the Superior area, potentially leaving Superior and other nearby communities with a limited water supply, without which, any hope of future economic growth is lost.

#### **N. The Act Suffers Other Fatal Flaws**

Please understand that the comments set forth here related to the draft legislation focus on certain primary concerns that the Apache Tribe has with the Act. There are other substantial and fatal flaws with this legislation that others are likely to bring to your attention, including with regard to the appraisal process, the equalization of values, and the “royalty” provisions, just to name a few. However, the Tribe leaves these points to be made by others.

For the San Carlos Apache Tribe, the Oak Flat region simply should not be removed from the Forest Service and traded to foreign mining companies.

The Apache Tribe respectfully requests that you consider carefully our comments to this legislation set forth here. The cost of doing anything less could have profound consequences for the Apache people as well as for the people of the Superior region and America as a whole.

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<sup>16</sup> Julian Cribb, Rio Tinto, *Miners of the Future*, Review (September 2008).

<sup>17</sup> Amy Coopes, “Robots, space technology run Australia’s mining miracle”, Physorg.com, available at <http://www.physorg.com/news188967104.html>



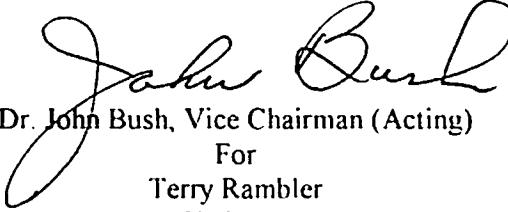
SAN CARLOS APACHE TRIBE cont. -

*Re: Objections to Proposed Legislation for Oak Flat Land Exchange*

May 12, 2011

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Sincerely,



Dr. John Bush, Vice Chairman (Acting)  
For  
Terry Rambler  
Chairman

Cc: Tribal Council, San Carlos Apache Tribe