

July 11, 2011

The Honorable Doc Hastings
Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

The Honorable Edward Markey
Ranking Minority Member
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

Re: H.R. 1904, the Southeast Arizona Land Exchange and Conservation Act of 2011

Dear Chairman Hastings and Ranking Member Markey:

The National Trust for Historic Preservation is strongly opposed to H.R. 1904, the Southeast Arizona Land Exchange and Conservation Act of 2011, which would transfer more than 2,400 acres of public land to a privately owned mining company without assurances that priceless historic and cultural resources will be protected. Resolution Copper Mining (RCM), the primary beneficiary of the transfer, intends to remove the ore body beneath Oak Flat, a popular campground and significant site to several area Tribes, through block mining. The drill pads, mine shafts and tunnels, roads and other human created disturbances generated by the mine will have devastating consequences on the area's ecosystem, thereby severely affecting its religious and cultural integrity. Most alarmingly, the legislation effectively exempts the transfer from federal law pertaining to consultation with Tribes and limits the public's opportunity to comment during the environmental review process. Such a blatant giveaway of the nation's public land to a single private stakeholder sets a dangerous precedent and we urge the Committee to reject the proposal.

Significance of Oak Flat

The area proposed to be transferred out of federal control includes a popular campground called Oak Flat, set aside by President Eisenhower in 1955 specifically for recreational purposes. Oak Flat is also a place of profound religious, cultural, and historic significance to many Native American Tribes, nations, and communities in the region, including the San Carlos Apache Tribe, 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, and the Pueblo of Zuni, among others. *Hearing on S. 409 Before the Subcomm. on Public Lands & Forests of the Senate Comm. on Energy & Natural Res.*, 111th Cong. 65 (June 17, 2009).

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David J. Brown
EXECUTIVE VICE PRESIDENT AND
CHIEF PRESERVATION OFFICER

Concerns with the Proposed Legislation

I. NEPA Exemption

The proposed legislation requires review under the National Environmental Policy Act (NEPA), only *after* the land transfer is complete. Such *ex post facto* review is clearly contrary to the spirit and intent of NEPA which requires that federal agencies analyze alternatives prior to making decisions that would affect the environment. The U.S. Forest Service has stated this portion of the proposed legislation as its “principal concern,” since “[a]n environmental review document after the exchange would preclude [USFS] . . . from developing a reasonable range of alternatives to the proposal and providing the public with opportunities to comment.” *Southeast Arizona Land Exchange & Conservation Act of 2011: Hearing on H.R. 1904 Before the Subcomm. on National Parks, Forests, & Pub. Lands of the House Comm. on Natural Res.*, 112th Cong. (2011) (statement of Mary Wagner, Associate Chief, U.S. Forest Service). We agree. NEPA review after land has been removed from federal control is clearly too little, too late and not in the public interest.

II. NHPA Exemption

Further, the legislation implicitly exempts the Forest Service from its responsibility to comply with the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires federal agencies to consider the effects of their actions on historic resources before taking action which may affect historic properties. The regulations make clear that the “[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” is an adverse impact for which the Forest Service is required to consult with stakeholders, including Tribes which attach spiritual significance to the site. 36 C.F.R. § 800.5(a)(2)(vii).

While making some effort to involve interested stakeholders after the land is transferred to Resolution Copper, the proposed legislation clearly circumvents any meaningful consultation process. For instance, consultation could start as late as 30 days from the date of enactment (H.R. 1904, § 4(c)). Yet, ironically, if requested by RCM, the Secretary is mandated to begin issuing permits for mineral exploration activities underneath the Oak Flat Withdrawal Area, from platforms outside the area, starting thirty (30) days after the enactment of the proposed legislation (§ 4(f)(1)(A)). This allows for the initiation of activities which could disrupt the historical and cultural integrity of the site before any meaningful consultation was mandated. Then, ninety (90) days after enactment, by special use permit, exploration activities could be conducted inside the Oak Flats Withdrawal area itself, if requested by RCM (§ 4(f)(1)(B)). The true extent of these activities cannot be known, as no map is available for the public until enactment of the proposed legislation (§ 10(b)(3)).

III. Abrogation of Duties Under FLPMA

The proposed legislation states that the land exchange furthers the public interest in accordance with the objectives of the Federal Land Policy and Management Act of 1976 (FLPMA), which requires that the public interest be "well served" (H.R. 1904, § 2(a)(1)(A)). However, the proposed exchange would clearly elevate the interests of a few who seek to permanently damage the land to extract a limited amount of minerals, over and above the public interest of the Native American tribes who have relied on Oak Flat for traditional cultural and religious uses for centuries. It is far from clear that the public interest would be well-served by such a transfer.

Further, FLPMA's implementation is based on a policy of Multiple Use and Sustained Yield, which is meant to take into account "the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c). The fact that "minerals," "recreation," "scenic" values, and "historic values" are all considered, indicates that the use of federal lands is not supposed to be based on maximum economic development; rather, it is economic development *balanced with* the consideration of other interests, including those of cultural resources. Under FLPMA, it is the policy of the federal government that, "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; . . . and that will provide for outdoor recreation and human occupancy and use." *Id.* § 1701. Given the explicit intent for FLPMA land exchanges to include consideration of archaeological and historic resources, the current proposed legislation falls short of its requirement to be in the "public interest," as it claims to be.

IV. Violation of Fiduciary Duty to Tribes

Finally, the proposed legislation directly undermines numerous statutes and regulations Congress has passed with the intent of protecting the religious, cultural, and social integrity of Indian Tribes to ensure that the policies and procedures of federal agencies do not impede the exercise of traditional religious practices. Most critically, the legislation circumvents the Forest Service's fiduciary duty to the Tribal community to engage in meaningful government-to-government consultation before the transfer, by not allowing adequate time for consultation. The blatant abrogation of these duties, as represented by this bill, is alarming.

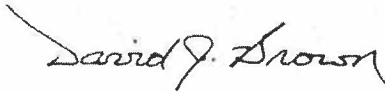
Conclusion

Because of the foregoing, the National Trust strongly recommends that the proposed legislation, H.R. 1904, be amended to incorporate the legitimate concerns of the public. First, review under NEPA should be conducted before and not after the land

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exchange. Second, consideration of effects on historic resources, as required by Section 106 of the NHPA, should be included rather than exempted by the legislation. These two changes together will ensure that before any exchange commences, there has been an adequate assessment of the possible risks involved in the land transfer and that cultural resources on the land to be transferred can be retained, or at the very least, the effects to them mitigated. Third, to adequately conduct both the required environmental and cultural resources analyses, the federal government should consult directly with the interested Native American Tribes, so that their concerns over the project can be adequately addressed. Lastly, the National Trust would like for the legislation to provide the Tribes real and actual recourse in the event that RCM intentionally, knowingly, or negligently destroys, alters, or detrimentally affects the cultural resources of Oak Flat.

Sincerely,



David Brown
Executive Vice President
National Trust for Historic Preservation

cc: The Honorable Rob Bishop, Chairman, House Committee on Natural Resources
Subcommittee on National Parks, Forests and Public Lands