



INTER TRIBAL COUNCIL of ARIZONA

March 11, 2013

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 Doug Lamborn, Chairman
 Committee on Natural Resources
 Subcommittee on Energy and Minerals
 Resources, United States House of
 Representatives
 1324 Longworth House Office Building
 Washington, D.C. 20515

The Honorable Rush Holt, Ranking Member
 Committee on Natural Resources
 Subcommittee on Energy and Minerals
 Resources, United States House of
 Representatives
 1324 Longworth House Office Building
 Washington, D.C. 20515

RE: Opposition to H.R. 687/S.339, Southeast Land Exchange and Conservation Act of 2013, That Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites.

Dear Honorable Chairman Lamborn and Ranking Member Holt:

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), express their strong opposition to H.R. 687 and S. 339, the *Southeast Land Exchange and Conservation Act of 2013*, and any companion legislation that may be introduced or considered in the U.S. Congress. We respectfully request the Subcommittee become involved and oppose this legislation based on its lack of American Indian sacred site protection.

Attached is the *ITCA Resolution 0213*, stating opposition to these two bills, and *The ITCA Inc. Opposes H.R.687*, a detailed description of the points of opposition which includes the lack of sacred site protections, failed meaningful consultation with Tribal Communities, disregard for religious freedoms, excludes an advanced NEPA review on a land exchange, fails to protect water supplies of the region, among other objections.

Thank you for your time and consideration and we hope you may find the vision to oppose these two pieces of legislation and support American Indian Communities in Arizona. The 20 member American Indian Tribes of the ITCA support your positive action in this matter.

Respectfully submitted,

Terry Rambler,
 President, Inter Tribal Council of Arizona
 Chairman, San Carlos Apache Tribe

Attachment(s)



INTER TRIBAL COUNCIL *of* **ARIZONA**

RESOLUTION 0213

Opposition to H.R. 687/S. 339, Southeast Arizona Land Exchange and Conservation Act of 2013, That Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites

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WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI-PRESCOTT INDIAN TRIBE

WHEREAS, the Inter Tribal Council of Arizona (ITCA), an organization of 20 Tribal governments in Arizona, provides a forum for Tribal governments to advocate for national, regional and specific Tribal concerns and to join in united action to address these issues; and

WHEREAS, the member Tribes of the Inter Tribal Council Arizona have the authority to act to further their collective interests as sovereign Tribal governments; and

WHEREAS, the United States Government has legal and moral responsibilities to manage traditional cultural territories in a way that shows respect for these places that hold cultural, historical, spiritual, and religious importance to Indian tribes and their quality of life; and

WHEREAS, these places have resources that provide Indian tribes with sustenance, the subsurface aquifers, natural spring waters, and other forms of watershed found in these mountains, gives life to plants and animals, and from these elements we are blessed with food and medicine; and

WHEREAS, H.R. 687 and S. 339, both entitled the "Southeast Arizona Land Exchange and Conservation Act of 2013" and which are identical bills, would mandate that the Secretary of Agriculture transfer over 2,400 acres of federal lands located within the Tonto National Forest to a private mining company called Resolution Copper, which is owned by the foreign mining giants Rio Tinto PLC (United Kingdom) and BHP Billiton Ltd (Australia), for purposes of an unprecedented block cave copper mine that would be the largest mine in North America; and

WHEREAS, H.R. 687, introduced by Rep. Paul Gosar and Rep. Ann Kirkpatrick, and S. 339, introduced by Senator John McCain and Senator Jeff Flake, are identical bills to their predecessor bill, H.R. 1904 introduced by Rep. Paul Gosar in the 112th Congress;

- WHEREAS,** the federal lands proposed for transfer, which are generally known as Oak Flat, including the Oak Flat Withdrawal area, are the ancestral lands of tribes in the region; and these lands are of unique religious, cultural, traditional, and archeological significance; and
- WHEREAS,** H.R. 687 and S. 339 would require Congress to lift the decades old ban against mining within the 760 acres of the Oak Flat Withdrawal, which was expressly set aside from mining by President Eisenhower in 1955 due to the lands value for recreation and other important purposes; and
- WHEREAS,** the mining proposed for Oak Flat will destroy the religious, cultural and traditional integrity of Oak Flat for tribes in the region, and it will cause serious and highly damaging environmental consequences to the water, wildlife, plants, and other natural ecosystems of the area; and
- WHEREAS,** the block cave mining method to be employed at Oak Flat will also cause the collapse of the surface of the earth and endanger the religious, cultural, and historic terrain at Apache Leap, Oak Flat, and Gaan Canyon, which are adjacent to Oak Flat; and
- WHEREAS,** the mining activity would deplete and contaminate water resources from nearby watersheds and aquifers leaving in its wake long term and in some cases, permanent religious, cultural and environmental damage; and
- WHEREAS,** the extent of irreparable water damage through contamination is unknown and will continue throughout the 40-plus year life span of the proposed mine and will cause continuing harm to all living things in the region forever following mine closure; and
- WHEREAS,** in it's minimal exploration to-date the mining company has already begun to leave a destructive footprint on culturally significant areas and on precious resources, such as water, in and surrounding Oak Flat and Apache Leap; and
- WHEREAS,** H.R. 687 and S. 339 have national significance because they would direct the mandatory transfer of this federal land that is a sacred area of tribes to a private company for mining activities that will destroy it; and
- WHEREAS,** H.R. 687 and S. 339 set bad precedent because it does not allow for meaningful consultation with Indian tribes that would be affected by the proposed conveyance; and
- WHEREAS,** H.R. 687 and S. 339 mandate that the Secretary of Agriculture convey to Resolution Copper the land in question within one year of enactment of the Act without any advance studies or analyses; and

WHEREAS, these studies and analyses and tribal consultations should be conducted before there are any decisions on whether to convey this land; and

NOW THEREFORE BE IT RESOLVED, that the member Tribes of the Inter Tribal Council of Arizona, does hereby express its strong opposition to H.R. 687 and S. 339, the Southeast Arizona Land Exchange and Conservation Act of 2013, and any companion legislation that may be introduced or considered in the U.S. Congress; and

BE IT FURTHER RESOLVED, that the member Tribes of the Inter Tribal Council of Arizona declares that Resolution Copper should not be allowed to circumvent laws and policies designed to promote tribal consultation and designed to ensure transparency and full consideration of impacts and consequences; and

BE IT FURTHER RESOLVED, that the member Tribes of the Inter Tribal Council of Arizona urgently calls upon the Senate Energy and Natural Resources Committee, the Senate Indian Affairs Committee, other Members of the United States Senate, the House Natural Resources Committee, other Members of the House of Representatives, and the President of the United States to act to ensure that H.R. 687 and S. 339 are not enacted into law; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of the member Tribes of the Inter Tribal Council of Arizona until is withdrawn or modified by subsequent resolution; and until the United States Government and all its agencies act in a manner that is respectful to the quality of life and existence of tribal communities.

CERTIFICATION

The foregoing resolution was presented and duly adopted at a meeting of the Inter Tribal Council of Arizona on **Friday, February 22, 2013**, where a quorum was present.



Terry Rambler,
President, Inter Tribal Council of Arizona
Chairman, San Carlos Tribe

THE INTER TRIBAL COUNCIL OF ARIZONA, INC. OPPOSES H.R. 687

The Southeast Arizona Land Exchange and Conservation Act of 2013

The Inter Tribal Council of Arizona, Inc. opposes the Southeast Arizona Land Exchange and Conservation Act of 2013 (“H.R. 687” or “the Act”) that would allow Resolution Copper -- a subsidiary of foreign mining giants Rio Tinto and BHP Billiton (collectively, “Rio Tinto”) -- to secure private ownership of over 2,400 acres of U.S. Forest Service lands to operate an unprecedented large-scale block cave copper mine at the sacred site of Oak Flat, an area that is within the ancestral lands of the Western Apache, Yavapai, Zuni and other ITCA Member Tribes.

The Oak Flat Region is a Sacred Site to Western Apache and Other Native Communities

- The Oak Flat region is and has always been a place of profound religious, cultural, and historic significance to certain ITCA Member Tribes.
- 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 impact 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 the Western Apache, Yavapai, Zuni and other indigenous people.
- Oak Flat, as well as specific places within the Oak Flat area are eligible for inclusion in, **and protection under**, the National Historic Preservation Act, and it meets the criteria to be identified as a “sacred site” within the meaning of Executive Order 13007, Indian Sacred Sites, as well as pursuant to the American Indian Religious Freedom Act, and related federal laws, regulations and policies.
- Allowing Rio Tinto to conduct block cave mining at Oak Flat will destroy the living things and ecosystems that make Oak Flat a sacred place for ITCA Member Tribes.
- 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 result in 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.

H.R. 687 Fails to Require Meaningful Consultation with Native Communities

- Sec. 4(c) of H.R. 687 requires consultation only **after** the enactment of the Act, making any consultation with the Native communities little more than a mere formality.

Re: Objections to Proposed Legislation for Oak Flat Land Exchange

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- Numerous federal laws, policies, and Executive Orders mandate advanced, informed, and appropriate government-to-government consultation with Indian tribes, nations, and communities.
- 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). In addition, the government is required under the NHPA 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.
- USDA Secretary Vilsack has acknowledged in prior written comments on the previous legislation for this land exchange (S.409) that **“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.”**¹ The Secretary’s concern is disregarded in H.R. 687.

H.R. 687 Disregards the Religious Freedoms of the Western Apache, Yavapai and others and will Destroy the Integrity of Oak Flat as a Sacred Site and Traditional Cultural Property

- H.R. 687 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, Yavapai and other indigenous peoples, as it 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.
- The need to protect Oak Flat is supported by the letter and spirit of 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”), 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.
- 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.

¹ (Emphasis added; footnote omitted).

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H.R. 687 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.
- Independent studies required for proper government-to-government consultation with ITCA Member Tribes are also 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.

H.R. 687 Requires that the Land Exchange be Consummated Without Advanced NEPA Review

- Sec. 4(i) of the Act provides 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).²
- H.R. 687 fails to require or even permit the Secretary to take a “hard look” at the land exchange itself under NEPA before the exchange is consummated, and fails to vest any discretion in the Secretary of Agriculture to consider possible alternatives to the exchange.
- H.R. 687 does call for the mitigation of impacts related to the land exchange and it would not permit the Secretary to avoid consummating the exchange should he determine under the Federal Land Policy and Management Act of 1976, and other laws, that the exchange is a bad deal for the American taxpayer or the citizens or in the event he finds that the religious, environmental, cultural, water supply and other harms of the mining project are simply too great.

H.R. 687 Contains Sham NEPA Requirements *After* the Exchange

- The NEPA process outlined by Sec. 4(j) of the Act (which is to be conducted after the lands are exchanged) is little more than a futile exercise on the part of the Secretary.
- Under H.R. 687, 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 after an the exchange, absent a federal nexus.

² 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).

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- There is no requirement in the Act 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.
- 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.
 - The Secretary would also 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.
 - Sec. 4(f) of the Act requires the Secretary to provide Rio Tinto 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 Rio Tinto to begin mineral explorations within the Oak Flat Withdrawal itself.
 - Allowing the immediate exploration on and under Oak Flat prior to the NEPA review contemplated by Sec. 4(j) of the Act will constitute an “irretrievable commitment of resources” in contravention to NEPA.
- The Act fails to make clear 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.
 - There are no guarantees that the “plan of operations” 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 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.
 - Deputy Chief of the USDA/Forest Service, Joel Holtrop, has warned that a plan of operations that contains, in particular, subsurface information is “essential in order to assess environmental impacts, including hydrological conditions, subsidence, and other related issues.” (Emphasis added).³

³ June 17, 2009, Written Response to Questions from the Senate Subcommittee on Public Lands and Forests on S. 409 by the Deputy Chief of the USDA/Forest Service, Joel Holtrop.

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- H.R. 687 would not 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).
- 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.
- Secretary Vilsack has previously objected to similar sham NEPA provisions found in S.409:

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).⁴

- H.R. 687 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 Rio Tinto. Sec. 4(j)(2) of the Act 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.”

H.R. 687 Bypasses the Normal Administrative Process that Other Mining Companies Typically Are Required to Follow

- H.R. 687 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.
- 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.

⁴ Letter from USDA Secretary Thomas Vilsack regarding the prior version of this Act (S.409) to the Chairman of the Senate Subcommittee on Public Lands and Forests dated July 13, 2009.

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H.R. 687 Fails to Protect 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 is likely to dry up (and/or contaminate) surface flows, springs and other important water resources 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.
- The mine also threatens to 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.

H.R. 687 Does Not Adequately Protect Apache Leap

- The Act 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.
- Because block cave mining causes the surface of the Earth to progressively fracture and then collapse, 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 Act.

H.R. 687 Relieves Rio Tinto from Federal Requirements for Bonding and Clean Up of the Mining Project

- H.R. 687 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 mining, bonding and clean up requirements found in 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.

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- Secretary Vilsack noted in his July 13, 2009, letter to Senator Wyden on S. 409, that “[t]he 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 protect 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.