



United States Department of Agriculture

Office of the Secretary
Washington, D.C. 20250

July 13, 2009

The Honorable Ron Wyden
Chairman
Subcommittee on Public Lands and Forests
Committee on Energy and Natural Resources
United State Senate
304 Dirksen Senate Office Building
Washington, DC 20510-6150

Dear Chairman Wyden:

The Department of Agriculture (USDA) appreciates the opportunity to provide the Administration's position on S.409, the Southeast Arizona Land Exchange and Conservation Act of 2009.

This bill would convey lands on the Tonto National Forest to be used for an underground copper mine in exchange for environmentally sensitive lands in the State of Arizona. USDA has weighed many factors in clarifying our position. One key factor is the unique and significant natural and cultural qualities of the lands to be conveyed and the lands to be acquired. The Administration still has a number of concerns with the legislation, as outlined below and expressed by the Department of the Interior (DOI) in its testimony from June 17, 2009.

The bill would direct the Secretary of Agriculture, after certain requirements are met, to convey 2,406 acres in the Oak Flat area, located within the northeastern portion of Pinal County, approximately four miles east of Superior, Arizona, south of U.S. Route 60 (US 60), to Resolution Copper Mining, LLC. These lands of historical, cultural, and environmental significance are adjacent to Apache Leap, Devil's Canyon, and Queen's Creek, which are all located on the Tonto National Forest. These areas are considered sacred places to the Apache and Yavapai tribes, and are used to conduct religious ceremonies. In exchange, the United States Government would acquire 5,566 acres. The U.S. Forest Service would manage 1,377 of the acquired acres and the Bureau of Land Management (BLM) would manage the remaining approximately 4,200 acres.

Lands to Be Conveyed by the Forest Service (2,406 acres)

The following is a description of the parcels which are proposed to be conveyed:

Most of the 2,406 acres of the Oak Flat parcel is hilly, rocky terrain. Near the northeast corner of the tract is a large relatively flat terrain named Oak Flat. The name is derived from the large evergreen Emory oak trees growing along the shallow drainages that traverse the area. Oak Flat was developed as a campground by the Civilian Conservation Corp (CCC) in the late 1930's and has been used continuously since the CCC era. Visitation of the campground is estimated to be 6,600 campers per year. In addition to camping, Oak Flat is popular for "bouldering" (a scaled down version of rock climbing) and off road vehicle use. World class bouldering competitions are held in this area.

The approximately 760 acres of land within Oak Flat was withdrawn from all forms of appropriation in 1955 by Public Land Order (PLO) 1229, as modified by PLO 5132 in 1971. This area contains additional dispersed camping sites and recreational opportunities.

To the west of Oak Flat and adjacent to it, overlooking the Town of Superior (Superior), is an escarpment known as Apache Leap. This is a famous site where Apache warriors were trapped by the U.S. Army. Rather than surrender, the warriors chose to jump to their deaths. According to Apache legend, the tears of their wives were transformed into the dark green obsidian nodules called "Apache tears" found prolifically throughout the perlite bedrock east of Superior. To the east of Oak Flat and adjacent to it is an area called Devil's Canyon, known as Gaan Canyon by the Apache and Yavapai Nations, which is a perennial stream and an ecologically significant riparian area. This Canyon, with its perennial stream, is important to the Apache and Yavapai Nations. To the northwest of Oak Flat and adjacent to it is Queen Creek, which flows along the north edge of Apache Leap down to the town of Superior and Boyce Thompson Arboretum. The creek flows southwest into the Gila River watershed. This water source is also important to the Apache and Yavapai as well as to surrounding communities. The extensive tribal history in Apache Leap, the prehistoric rock art found within Oak Flat, the other sites sacred to Native Americans, and the numerous burial and archeological resources in these areas are the basis for tribal concerns over the likelihood of serious subsidence and loss of access to the Oak Flat area.

Fairview Cemetery is another tract of Federal property to be conveyed out of Federal ownership. The Forest Service has made several offers to convey this property to the Town of Superior through "Townsite Act" authority over the last 25 years. The property is fully utilized with both old and new gravesites and monuments. In addition there are remnants of old wooden crosses and small sunken pits that mark some very early graves that have been overgrown with desert shrubs in the northwest corner of the property.

A 265 acre tract that lies to the south of US 60 and east of the Superior was granted to Pinal County for an airstrip in 1952. A reversion clause in that property patent stipulated the land must be used for airport purposes. Over the years Pinal County forgot about that reversion clause and chose that property to put in a sewage disposal plant for Superior. The conveyance of the reversionary interest in that tract would prevent the legal entanglements that the land reverting back to the Federal Government would entail.

Two hundred and fifty acres designated as "Superior Airport Contiguous Parcels" are four tracts of desert lands surrounded or abutted by private lands that can not be suitably managed for National Forest purposes. Local government ownership of those four tracts would enable Pinal County and Superior to plan and eventually build other public facilities to support community needs and would simplify some forest boundary identification issues.

Lands to Be Conveyed to the Forest Service by Resolution Copper Mining

The following are descriptions of some of the parcels proposed for transfer to the Forest Service; three additional parcels are identified for transfer to the BLM as described in the DOI testimony.

- Two parcels (total 110 acres) adjacent to the Apache Leap area on the Tonto National Forest. This area is the escarpment adjoining the Apache Leap area. This area is utilized by the San Carlos Apache and other tribes for acorn collection and traditional ceremonies.
- Turkey Creek (147 acres), Cave Creek (149 acres), J-I Ranch (88 acres), and Tangle Creek (148 acres) land parcels, which would consolidate Forest Service management of key lands with riparian habitat on its Cave Creek, Pleasant Valley, and Globe Ranger Districts. Each of these parcels is an in-holding surrounded by lands managed by the Tonto National Forest. This acquisition will allow the Tonto National Forest to apply more consistent, comprehensive landscape management.
- The East Clear Creek parcel (640 acres) which would become part of the Coconino National Forest, contains important riparian and stream habitats. This section of land is also an in-holding surrounded by lands managed by the Coconino National Forest. The acquisition of this parcel would complement the recent acquisition of another 640 acre parcel located nearby.

Concerns

The acquired lands to be managed by the U.S. Forest Service and the BLM have important resource values that should be protected, and it is clear that environmentally sensitive production of the copper to be produced by Resolution Copper, LLC can provide important economic benefits. However, it is equally important that the negative environmental consequences that can result from mining operations be avoided; environmental impairment of this special place is not the legacy to leave for future generations. The National Forests are, unfortunately, home to numerous remnants of past mining operations which are still creating significant environmental and financial impacts.

Of primary concern is the requirement in section 5 of the bill that the Secretary of Agriculture prepare an environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA) *after* the land exchange in section 4 is completed, which will include consultation with tribal entities. 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.

While the environmental analysis before the exchange would identify the impacts of the transfer itself and reasonably foreseeable post-transfer mineral development, as the bill is currently drafted the Agency could not require the mitigation of these impacts because it would have no discretion under the bill to impose any conditions or mitigation measures on the land exchanged. The bill should be amended to identify the Agency's latitude for decision making under the legislated exchange and limit the environmental analysis to those issues where there is administrative discretion.

If the bill is amended as requested, the Agency line officer will make a decision on whether or not to proceed with the exchange and under what conditions. Alternatively, the bill could be amended to require the Agency to perform a NEPA analysis on the transaction and provide the results to Congress, allowing Congress to provide further direction in subsequent legislation.

USDA also has additional concerns with S. 409.

- Section 4(c)(1)(F) of the bill would direct Resolution Copper, LLC, as part of the exchange, to convey to the United States land known as "the Pond parcel." USDA is concerned about the recreation-related liability issues, and the access and facilities needed to manage this parcel. Acquiring this parcel is not in the public interest, and we request that the provision mandating the conveyance of this parcel to the United States be dropped from the bill.
- Section 4(d)(1)(A) would provide that Resolution Copper, LLC, as part of its consideration to the United States Government, must surrender its rights under mining and other laws of the United States to commercially extract minerals under Apache Leap or the Pond parcel (the company would, however, retain certain exploration rights under section 4(d)(2).) The U.S. Forest Service seeks to avoid management challenges with conflicting uses on the surface by *not* acquiring "split estates". Should the bill continue to require the acquisition of the Pond parcel, USDA believes that Resolution Copper should surrender its rights to both parcels.
- Section 4(e) would make any cash equalization payment made by Resolution Copper, LLC available for use by the Secretaries of Agriculture and Interior, as they jointly determine is appropriate, for the acquisition of land or interests within the hydrologic boundary of the San Pedro River and tributaries in Arizona, and for management and

protection of endangered species and other sensitive environmental values and land within the San Pedro Riparian National Conservation Area. The Administration's position is that funds received from land conveyance should be used for land acquisition only, and not also for management. Our policy is to maintain the value of the Federal estate and not exchange long term assets (National Forest land) for short term management needs. Also, consistent with the Federal Land Transaction Facilitation Act (FLTFA; Public Law 106-248) the funds should be available for the purchase of other environmentally important lands anywhere in the State of Arizona and not be limited to lands within the hydrologic boundary of the San Pedro River and its tributaries.

- Section 8 relates to the protection and management of Apache Leap. Subsection (b)(1) would require the Secretary to initiate implementation of a management plan for Apache Leap within four years. We understand there are concerns about management of the additional acreage that would be added to the Tonto National Forest in the Apache Leap Area. The appropriate process to analyze and, if necessary, create a special management area should be addressed through the ongoing Tonto National Forest Planning process. Further, if any subsequent activity on the transferred land damages any of the surrounding public lands, the responsible private entity should be held liable for damages.
- Section 10(a) would require the Secretary to construct replacement campgrounds for the Oak Flat Campground that would be conveyed. Under subsection (b), Resolution Copper, LLC, as a condition of the exchange, would be required to provide an additional \$1,000,000 for the cost of the replacement. Because the Forest Service cannot find a suitable replacement for the Oak Flat Campground, USDA recommends that if the bill provides such a payment, the provision be amended to provide for the funds to be used to improve the capacity and quality of the existing campgrounds on the Tonto National Forest.

The U.S. Forest Service has conducted informal consultations with concerned Tribes over the course of the several years this exchange has been under discussion, and supports the continuation of consultation efforts, including a formal Government to Government consultation. Concerns have been raised by Tribal Governments that the bill circumvents various laws,¹ policies,² and an Executive Order³ that directs the federal land managing agencies to engage in formal consultation with the interested Indian tribes. Tribal Governments have also raised important concerns that the bill is contrary to various policies⁴ and Executive Orders⁵ that require

¹ For example, NEPA requires federal agency officials to consult with Indian tribes concerning the effects of the proposed projects on their sacred sites.

² The 2004 Forest Service Manual requires the Forest Service to consult with Tribes on matters that may affect tribal rights and interests.

³ Executive Order 13175 relating to Consultation and Coordination with Indian Tribal Governments directs each federal agency to consult with Indian tribes on actions that have substantial direct effects on one or more Indian tribes.

⁴ The Forest Service Manual provides comprehensive direction for agency interaction with Indian Tribes to ensure compliance with the laws and Executive Orders as well as other laws designed to protect areas of significance to Indian tribes that are located on National Forest System lands.

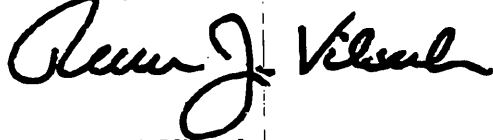
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Federal land managing agencies to protect and preserve sites that are sacred to Native Americans. Because of these expressed concerns and because this specific site has been the focus of historic Government protection⁶ it is important that this bill engage in the process of formal tribal consultation to ensure both tribal participation and the protection of this site.

The Office of Management and Budget has no objection to the presentation of this legislative report to the Congress.

Again, thank you for this opportunity to amplify USDA's views expressed at the Subcommittee's June 17, 2009, hearing. I would welcome the opportunity to have further discussions with the Committee on this issue. If we can be of further assistance, please have your staff contact Jay Jensen, Deputy Under Secretary for Natural Resources and Environment, at (202) 720 7173.

Sincerely,



Thomas J. Vilsack
Secretary

⁵ Executive Order 13007 relating to Indian sacred sites directs that federal land management agencies, to the extent permitted by law, and not clearly inconsistent with essential agency functions, to accommodate access to and ceremonial use of Indian sacred sites and avoid adversely affecting the physical integrity of such sacred sites. Federal agencies are required to establish a process for ensuring that reasonable notice is provided to affected tribes of proposed federal actions or policies that may affect Indian sacred sites.

⁶ BLM Public Land Order 1229 placed the Oak Flat area off limits to future mining activity so that it could be used as a place for public access and recreation. Subsequently, BLM Public Land Order 5132 modified Public Land Order 1229 to allow "all forms of appropriation under the public land laws applicable to national forest lands – except under the US mining laws."