

Fort McDowell Yavapai Nation



President Clinton Pattea

Vice President Bernadine Burnette

Treasurer Pamela Mott

Council Member Paul Russell

Council Member Rubin Balderas

Council Secretary Pansy Thomas

**Written Statement of President Clinton M. Pattea
of the Fort McDowell Yavapai Nation
Before the U.S. Senate Energy and
Natural Resources Committee
Subcommittee on Public Lands and Forests
June 17, 2009**

CONCERNING

**S. 409: Southeast Arizona Land Exchange and Conservation
Act of 2009**

Mr. Chairman and members of the Committee, on behalf of Fort McDowell Yavapai Nation, I wish to provide our serious concerns on the proposed Southeast Arizona Land Exchange legislation, Senate Bill 409, authorizing and directing the exchange and conveyance of National Forest and other land in central and southeast Arizona. The stated purposes of this bill is to “secure federal ownership and management of significant natural, scenic, and recreational resources, to provide for the protection of cultural resources, to facilitate the efficient extraction of mineral resources by authorizing and directing an exchange of Federal and non-Federal land, and for other purposes”. My comments specifically address and provide

evidence as to why this proposed mining operation causes great concern to the People of the Fort McDowell Yavapai Nation.

Several years ago, the increasing global demand and the associated increase in copper prices resurrected the mining industry and fostered interest in deposits previously deemed unprofitable. This includes a large undisturbed ore body beneath the original Magma Mine and about 7000 feet below Apache Leap (1000 ft below sea level), as well as Oak Flat and Devil's Canyon, just east of Superior, Arizona. Resolution Copper Company (RCC), a joint venture between foreign mining giants Rio Tinto and BHP Billiton, is exploring the feasibility of mining this deposit with a purported value of well over one hundred billion dollars. The proposed Senate (S. 409) and companion House bill (H.R. 2509), directs the Secretary of Agriculture to convey and dispose of 2406 acres of public lands within the Tonto National Forest (FS) including the federally Protected Oak Flat Campground, for the benefit of RCC. All of these lands were once inhabitant by the Yavapai People and these lands remain fundamentally important to the Yavapai.

Before I present Fort McDowell Yavapai Nation's grave concerns regarding the legislative land exchange proposed in S. 409, we ask one fundamental question. Why is this bill necessary?

RCC has failed to provide a meaningful answer to this question. Perhaps RCC does not want to invest foreign shareholders money to develop this mine without first obtaining a guarantee from the United States that they (RCC) will be given full ownership and exclusive control over these lands and the value of the resources they contain. We ask, is this great insecurity founded in a knowledge that the federal government does not currently hold? If uncertainty regarding risks is left unanswered by RCC then questions directly revert back to the federal government. Why not pull this bill and instead refer this land exchange and mining project through administrative processes mandated by Congress under the National Environmental Policy Act (NEPA) and other federal laws? We further ask, if mining is allowed (without the trade) but does not thrive while under federal control, the land could not be subject to future sale or other commercial or industrial endeavors and therefore RCC could not recoup any expenses through its sale. Is this a factor? Is it likely that federal analysis would determine that RCC's mining project simply poses too great of an environmental risk or undeniable cultural and religious desecration such that it can not be tolerated

and therefore deemed unfeasible? Are these the primary considerations that RCC has deliberated in seeking to circumvent the administrative process through this legislative land exchange? In essence, it appears that S. 409 requests Congress to accept these incalculable risks in exchange for other private lands scattered throughout Arizona in an attempt to ‘mitigate’ damages resulting from RCC’s mining of these federal lands near Superior. The Yavapai People do not and can not accept this rational.

Senate bill 409 does not provide the requisite transparency to address many of the fundamental concerns mining projects like these present, including, but not limited to, the lack of quantifiable royalties, the feasibility of the mine and mining operations, the equalization of the exchange, an unbiased analysis of the potential economic benefits, assessment and mitigation of environmental damages, untenable security and sustainability of Apache Leap, and incalculable cultural losses. Thus, basic questions have yet to be answered regarding the proposed exchange and the benefits to the public interest remain uncertain. However, questions regarding the extent of how this mining operation will affect the cultural and religious importance of the area must be fully and fairly appraised or analyzed through the *administrative process* prior to congressional action. *Only* through the administrative process can these serious concerns be adequately considered. *Only* through the administrative process would Fort McDowell Yavapai Nation be provided with an opportunity for a meaningful government-to-government consultation (see below) that is required by the United States’ trust responsibility to the Yavapai Nation and guaranteed under federal law. Examples of the specific deficiencies in S. 409 are described below. We again request that Fort McDowell be given opportunities afforded to them under federal laws for the requisite government-to-government consultation.

SUBSTANTIAL CONCERNS REMAIN REGARDING FINANCIAL AND EQUALIZATION OF THE EXCHANGE TO THE PUBLIC:

It is well known that substantive royalty provisions have not been recouped on mined federal properties thereby significantly fleecing the American people. With the intent to rectify this situation, this year, both the Chair of the Natural Resources Committee, Congressman Rahall, and Senator Bingaman, Chair of this full Committee, introduced legislation to reform the 137 year old Mining Law of 1872. In reintroducing the legislation, Congressman Rahall stated: “Given our current economic crisis and the empty state of our national Treasury, it is ludicrous to be allowing this

outmoded law to continue to exempt these lucrative mining activities from paying a fair return to the American people.” Congressman Rahall also observed: “Nobody in their right mind would allow timber, oil, gas, coal or copper to be cut, drilled for, or mined on lands they own without receiving a payment in return for the disposition of their resources. And neither should the United States.” Thus, his legislation is poised to change many of the financial aspects of the hard rock mining industry that are rightfully owed to the United States. However, under the terms of the legislative land exchange proposed in S. 409 (which would cede control of perhaps the largest copper deposit in North America to foreign interests), none of the financial benefits found in Congressman Rahall’s legislation would be realized by the American public.

As presented by S. 409 sponsors, given the current economic conditions our country and the State of Arizona are facing, this type of hard rock mining, with the *potential* to generate additional tax revenues, royalties, etc. could (at first glance) be looked upon favorably. In reality, as S. 409 is proposed, unsubstantiated facts and unanswered questions remain regarding, among other things, the overall economic feasibility and benefit of this exchange to the American taxpayer. For example, RCC is a Delaware based Limited Liability Company (LLC) and a wholly owed subsidiary of Rio Tinto and BHP Billiton, both foreign owned companies. Notably, nine percent of Rio Tinto is owned by the state-controlled Aluminum Corporation of China, also known as Chinalco. In essence, nine percent of the federal lands to be exchanged, including the mineral and other natural resources, would be held by China through its Rio Tinto holdings. Without contradictory evidence, it is reasonable to assume that most of profits will be shipped off-shore and not held within the United States based on these companies mining operations, holdings, and performance. Furthermore, it can also be assumed that much mineral deposits will be shipped and utilized for other countries to exploit.

In examining the royalty provisions found in S. 409, it is highly likely that trading these federal lands into RCC’s private ownership will result in unquantifiable, inequitable, and effectively zero royalties being provided to the United States taxpayer.

Suggestions on a valuation of the ore by multiplying an assumed quantity of mineral reserves by a unit price is almost universally disapproved by the

courts [*see Cloverport Sand & Gravel Co., Inc. v. U.S.*, 6 Cl. Ct. 178, 188, (1984)] and also not acceptable.

S. 409 calls for an appraisal report that would include a royalty income approach analysis, in accordance with the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA), of the market value of the Federal land. However, this approach often requires the appraiser to use a multitude of indicators, facts, and variables, the accuracy of which cannot clearly and easily be demonstrated by direct market data [*See Foster v. United States*, 2 Cl. Ct. 426 (1983)]. This is particularly true when discounted cash flow (DCF) analysis or other forms of yield capitalization are employed in the analysis. Furthermore, within the UASFLA there are several specific requirements to assess values, including the need for a detailed mining plan for the property. UASFLA requires that production level estimates should be supported by documentation regarding production levels achieved in similar operations. The annual amount of production and the number of years of production are more difficult (and speculative) to estimate, and require at a minimum, not only physical tests of the property to determine the quantity and quality of the mineral present, but also market studies to determine the volume and duration of the demand for the mineral in the subject property. However, it is unknown at this time what the true production estimates are as specific mining plan details have not been forthcoming from RCC. In addition, the true quality or quantity of the material is unknown and the extraction technology for this mining operation at a 7000 foot depth has not been developed and thus not currently available. This fact is further underscored by the lack of available information on production levels being consistent with an (unknown) mining plan's labor and equipment. Significantly, all of this information is required for a meaningful and accurate appraisal.

In further examining UASFLA, the royalty income approach also requires several economic predictions including a cash-flow projection of incomes and expenses over the life-span of the project and a determination of the Net Present Value (NPV), including the NPV of the profit stream, based on a discount factor. The NPV of a future income is always lower than its current value because an income in the future assumes risk. The actual discount factor used depends on this assumed risk. A proven technology carries a lower risk of non-performance (thus, a lower discount rate) than a technology being applied for the first time.

Given the evaluation standards prescribed by the UASFLA, coupled with the lack of factual data and uncertainty of the technology described above, the final appraisal of this massive ore body could ultimately net zero, meaning that the valuation of the federal lands exchanged for the benefit of RCC would not reflect the value of the copper and other saleable minerals these lands contain. The American taxpayer would once again be short-changed.

Given the trade from federal to private holdings in S. 409, the inadequacies described above in this land trade remain regardless of whether or not the Senate and House hard rock legislation moves forward. RCC must be required to provide additional information and pay for additional research in order to generate an appraisal that is fair and equitable to the people of the United States.

Moreover, since the Federal government has yet to perform a substantive economic evaluation of the lands along with the copper and other minerals to be exchanged to RCC, it is also impossible for the Congressional Budget Office (CBO) and /or Office of Management and Budget (OMB) to effectively evaluate S. 409. The public interest requires that a complete and fully informed appraisal and equalization of values be performed *prior to* Congressional passage of S. 409, *not after*. As of today, RCC asserts that there may be over 1.34 billion tons, containing 1.51 percent copper and 0.040 percent molybdenum to be removed over the 66 years of mine life. Although the current value of all minerals present on these federal lands are not provided by RCC, estimates have ranged from \$100 to \$200 billion. Thus, even RCC's *own self evaluation* of the ore body underlying these public lands is orders of magnitude greater in value than that of the non-federal parcels offered in exchange by RCC to the public.

Section 5(a) of the legislation requires that the exchange and other critical documentation be completed within one year after congressional passage. Given the rationalizations above regarding the complexity of such analysis, it is incredulous that one year is sufficient time for the completion, and subsequent thorough examination, and to review of all reports and appraisals. Indeed, Michael Nedd, then Assistant Director, Minerals & Realty Management Bureau of Land Management, stated in his previous testimony on this matter that he and the Department did not believe a one year provision was sufficient time for the completion and review of a mineral report, completion and review of the appraisals, and final verification and preparation of title documents. Yet, the sponsors of this bill

have chosen not to heed the governments own experts advice and counsel on mineral appraisals. Why?

Once RCC has completed its evaluation and analysis, the Fort McDowell Yavapai Nation urges Congress to require an independent, third party review of the all reports, including the engineering report, for this operation. This must be accomplished in consultation with all affected parties, including between the Federal government and Fort McDowell Yavapai Nation, prior to this legislation moving forward. At this time, relying on the RCC current engineering and other reports or the Departments of Agriculture and Interior review of these reports is insufficient. On a monetary level, one can clearly see that RCC financially recoups all mineral profits at the expense of the public making such an exchange grossly disproportionate.

SUBSTANTIAL FINANCIAL AND ENVIRONMENTAL CONCERNS REMAIN IN S. 409:

In introducing his proposed hardrock mining and reclamation legislation, Senator Bingaman made clear that the “Secretary of Agriculture must take any action necessary to prevent unnecessary or undue degradation in administering mineral activities on National Forest System land.” Senator Bingaman also warned that under the Mining Law of 1872 “billions of dollars of hardrock minerals can be mined from Federal lands without payment of a royalty. General land management and environmental laws apply, but there are no specific statutory provisions under the Mining Law setting surface management or environmental standards. Efforts to comprehensively reform the Mining Law have been ongoing literally for decades, but results have thus far been elusive.” Yet, by virtue of the provisions set forth in this proposed land trade - that is before this very committee – the lack of governing regulations or policies leave the federal lands to be exchanged effectively with no protections.

One of the overarching questions regarding RCC remains, how will RCC, as an LLC, be mandated to hold and provide significant and meaningful financial assurances (e.g. bonding) that would ordinarily be required from such an immense mining operation? The need for bonding assurances is obvious, particularly with the great uncertainty surrounding this massive undertaking (see below regarding Arizona mining laws). Yet, S. 409 does not adequately address this issue. Such financial assurances must be provided particularly in regard to environmental and cultural concerns.

Subsidence, water quality and quantity concerns, air quality concerns, tailings and overburden placement/storage, acid mine drainage and subsequent pollution, and a host of other damages yet to be determined as a result of this type of operation have not been sufficiently addressed in this bill. Furthermore, as discussed below, with only superficial legislative provisions to protect the sacred places of Apache Leap and Oak Flat and the important cultural resources these places provide, there is simply not a way to hold RCC *responsible* when mining destroys these areas.

Oak Flat is a major piece of this land exchange. In 1955, Oak Flat campground was recognized by President Eisenhower as an important place and critical resource of the United States. This area was specifically withdrawn from mining activity when he signed Public Land Order 1229. I will not expound on reversing President Eisenhower's decision as others before me have either testified or documented the significance of this region. However, the dangerous precedent set by S. 409 should not go without note. When lands like Oak Flat that have been legally protected from future anthropogenic disturbances, in this case mining activity, can have their protections congressionally reversed, negates assurances that other Federal lands (particularly those that are deemed culturally important or environmentally critical) can remain 'protected'. There is no valid reason to set such a dangerous precedent today.

As past stewards of this land, we are deeply concerned that the RCC mine will cause irreparable harm to the environment including, but not limited to, contaminating scarce water supplies, dewatering nearby surface water, decimating the land base directly through mining practices, mining and post mining subsidence, destroying habitat for endangered species, and causing massive surface damage. S. 409 does not specifically direct the Secretary of Agriculture to perform or have performed in-depth, critically needed environmental studies and analysis of the mining operation. It is likely that, RCC will be effectively exempt from NEPA and any opportunity for public involvement required by NEPA. The NEPA process mandates analysis and disclosure of environmental impacts, including cumulative impacts, allowing all affected parties and decision-makers to review and comprehend the risk assessment.

The current 'NEPA language' in the bill can not be supported or supervised by the Federal government particularly after the land trade is finalized and therefore, as currently drafted, is ineffectual. In this case, NEPA is merely

pro forma and is perfunctory at best. As mentioned above, it will take significant time consuming operation to undertake such an in-depth analysis far longer than was provided for in this bill. This conclusion has also been supported by the administrations testimony at previous hearings on earlier versions of this bill. Joel Holtrop, Deputy Chief, U.S.D.A., Forest Service, stated in testimony regarding the house version of this bill that one year is insufficient time to complete all the necessary work to complete the exchange, including the development and review of a mineral report, completion of appraisals and surveys, verification of title documents, and the many environmental clearances, reviews, as well as the consultation with Indian Tribes required under various laws, regulations, and policy.

Thus, the limited time will not yield analysis that will have true scientifically based findings and conclusions, yet the timing provisions have not changed. Why? If additional reports, examinations, scientific analysis, etc. come forward and they demonstrate significant impacts to the environment *after* the trade takes place and the land is privately held, the federal government can no longer exert its jurisdiction, can no longer mitigate, or provide guidance on how to remedy an environmental consequence.

Our paramount concern is where and how will the tailings be re-located? In consulting with geologists and geomorphologists, it does not appear that there are sufficient, previously abandoned surface mine pits that could either temporarily or permanently house the predicted hundred of thousands of tons of material generated per day for the 66 years of mining. Much of this material will contain an array of toxic substances. Will unspoiled canyons be sacrificed to store this material?

Furthermore, technologically enhanced naturally occurring radioactive materials (TENORM) are waste elements within stockpiles that release toxins into the environment. Subterranean toxic metals pose little harm to human health. However, when brought to the surface, stockpiled, exposed to the air, and subjected to various technological processes, there is a potential for adverse effects to humans. This is particularly true in Arizona where there are abundant deposits of radioactive metals and poisonous arsenic. The Surface Mining Control and Reclamation Act of 1977 is not applicable for copper mining. Thus, in the absence of truly meaningful Federal laws regulating copper mining, who will make determinations as to what lands will be sacrificed – lands that my People

hold so sacred? We must be consulted and allowed to participate in the process.

It is also important to understand that once these public lands are conveyed, under the permissive mining and reclamation laws of the State of Arizona, RCC will probably not be required to expend cash to post a bond to underwrite either the cost of remediating toxic spills during its mining operations, or for its pollution clean-up upon mine closure. Typically, only self-bonding or *corporate guarantees* are all that is required. This is woefully insufficient to protect the public from bearing the potentially astronomic costs of clean-up resulting from RCC's massive mining operations.

The impacts of sulfuric acid and other contaminants from leach solution are well documented and require no elaboration here. However, in Arizona, mining companies who declare bankruptcy leave behind a large burden for tax payers who are often left with the enormous clean-up obligations that should have rightfully fallen on the mining company. For example, Asarco, which owns many mines in Arizona, declared bankruptcy and was reported to have left hundreds on millions of dollars in clean-up costs. The Governor of Arizona only recently signed an agreement settling this case, but it is yet from over as taxpayers will provide millions toward environmental clean-up. It is therefore incumbent upon Congress to intercede now, before RCC undertakes its massive mining operations, to mandate a greater level of financial responsibility from RCC (beyond a cooperate assurances) for the multitude of risks associated with their project. (For additional information, see testimony of the Honorable Roy Chavez, former town manager and Mayor of Superior)

In regard to the environmental considerations, the Yavapai People are a critically affected party in this legislation. The Yavapai will not be provided an opportunity to engage in any activities to protect this land either before or after the exchange takes place. As such, the Secretary of Agriculture must direct RCC to provide full disclosure of all pertinent environmental information regarding the detailed mining operation, including a substantive mining, environmental, and reclamation plan prior to congressional mark-ups.

APACHE LEAP REMAINS WITHOUT ANY REAL PROTECTIONS UNDER S. 409:

Previous versions of the Southeast Arizona Land Exchange and Conservation Act contained provisions for a conservation easement for Apache Leap. This provision is noticeably absent in S. 409. In keeping the land as 'public', it does not protect it from mining activities. In fact, overall protections of Apache Leap are seriously undermined by language in Section 4 (d) of S. 409 that provides for substantial mining activities both on top of and under the Apache Leap that will result in its subsidence. Without any protection or funding assurances, such as substantial bonding, should damage to Apache Leap result from mining activities we ask, who is responsible for the damage? As written, both RCC and the Federal government appear to have circumvented any responsibility for injury to Apache Leap caused either directly or indirectly by RCC's mining activities or operation.

Moreover, any implications that Apache Leap will be protected through the development of a "management plan" as described in Section 8(b) is misplaced. A plain reading of this section reveals little in the way of specifics. Indeed, while S. 409 directs the Secretary of Interior to "initiate" and "implement" a management plan for this important and sacred place, the bill contains absolutely no requirements for the plan and provides no substantive direction to the Secretary as to what the plan should entail. The final terms of the plan are left to the discretion of the Secretary, without guidance from Congress. Thus, there is little assurance that a plan for the "permanent protection" of the cultural, historic, educational, and natural resource values of Apache Leap will be developed.

What is also evident, there is no connection or coordination in S. 409 between the development of a management plan for Apache Leap and RCC's overall plan for the conduct of mining activities throughout the larger mining area, including its subsurface activities below Apache Leap. In this case, the management plan of Apache Leap is separate and distinct from any operations or mining plans. Furthermore, while Section 8(b) calls for "consultation" with the Yavapai People regarding the management plan for Apache Leap, there are no provisions in the bill for consultation with the Yavapai Nation regarding RCC's unrestricted mining activities in the area surrounding Apache Leap as well as its operations and activities under the Leap. Yet, it is these activities, including the deep underground block caving operation itself, that present the greatest threat to the cultural,

historic, educational, and natural resource values and continued integrity of Apache Leap.

Although a management plan is to be developed, as discussed below, the few “protections” intended to serve as preserving the natural character of Apache Leap are negated by several sections of this bill for example: Under section 4 (d), additional consideration to United States, affirms that Resolution Copper shall surrender to the United States, without compensation, the rights held by Resolution Copper under mining and other laws of the United States to commercially extract minerals under Apache Leap. However, upon further review of this subsection, under (2) exploration activities, it clearly states that ***mining activities will be allowed***: “nothing in this Act prohibits Resolution Copper from using any existing mining claim held by Resolution Copper ***on Apache Leap***, or from retaining any right held by Resolution Copper to the parcel described in subsection (c)(1)(G), to carry out ***any underground activities*** (emphasis added) under Apache Leap in a manner that the Secretary determines will not adversely impact the surface of Apache Leap (including drilling or locating any tunnels, shafts, or other facilities relating to mining, monitoring, or collecting geological or hydrological information) that do not involve commercial mineral extraction under Apache Leap.” In essence, the Act does not provide actual protection of the Leap against mining activities as Resolution Copper is afforded any and all mining operations other than commercial extraction. These mining activities will be granted by the administration without any consultation with the Yavapai people. Furthermore, there are no provisions as to how to evaluate, monitor or stop either short- or long term impacts of these mining activities to Apache Leap resulting from RCC’s mining activities. If mining is to occur despite significant objections, when catastrophic disturbances, such as subsidence, fissures, etc., cause destruction on, under, or around Apache Leap to occur, detailed provisions must be in place as to the restoration or reclamation activities and who will be the responsible party to provide for those restoration activities. What’s more, destruction of irreplaceable cultural and religious resources is not provided any consideration.

In addition to above, Section 4(d) of the bill permits surface disturbance to Apache Leap for the placement of fences, signs, monitoring wells, and other devices, instruments, or improvements as “are necessary to monitor the public health and safety or achieve other appropriate administrative purposes, as determined by the Secretary, in consultation with Resolution

Copper.” Here again, the Yavapai people are left out of this consultation process as this is part of the mining operations needed to carry out mining activities and not considered under the management plan. The Yavapai are also not consulted regarding if, and to what extent, any “disturbance” to the surface of Apache Leap is acceptable. Because S. 409 does not provide provision or other guidance in this matter, it can be truly said that this bill is silent on the true protection for Apache Leap.

S. 409 FAILS TO PROTECT THE WATER SUPPLY OF THE REGION:

As related in previous public testimony on earlier versions of this bill, a major scientific concern relates to groundwater pumping as it will de-water this region. This area of concern is discussed in testimony provided to you today by other groups and organizations; however Fort McDowell addresses this issue in brief and poses a number of questions that must be resolved through the administrative process prior to any consideration of legislative exchange.

Devil’s Canyon, located in the Tonto National Forest and on State Trust Lands near RCC’s mine is of great importance and of critical concern to the Yavapai people. Without providing sacred details of the area, Congress should be cognizant of the fact that the Yavapai perform and have performed numerous religious and cultural ceremonies at Devil’s Canyon since time immemorial. The sacred significance of Devil’s Canyon to the Yavapai People can not be described in words on a page. The loss of the area, as mentioned below, can not simply be ‘mitigated away’.

As discussed in other testimony today and in written testimony by groups such as the Serria Club, the riparian areas and natural springs in and around Devil’s Canyon are of hydrologic significance to the Yavapai People and to those people who rely on this water in the surrounding region. Water flows from these springs into Mineral Creek, a tributary of the Gila River. Devil’s Canyon is also a critically important, though dwindling, riparian habitat for numerous species. Dewatering through groundwater pumping, mine dewatering, and other mining activities will cause these springs to be lost forever. This is an irrefutable scientific fact and not addressed within the proposed legislation. Moreover, as outlined in the aforementioned section, since there are no legislative provisions that provide protections to Apache

Leap from disturbance, it is very likely that RCC's need to dewater its extensive and deep underground tunnel system used for its mining activities will cause a serious drawdown in the water table of the region and will result in subsidence in and around the Apache Leap.

While the water demands and consumptive use of RCC's mining project is not fully known, it has been estimated that 40,000 acre feet per year (AFY) of water will be required by RCC for its mining operations. This is equivalent annual water supply for a community of about 80,000 people. It has been expressed by many in the scientific community that there is insufficient groundwater to maintain yearly mining operations over the longevity of mine. Thus, RCC is seeking to obtain and store water through the Central Arizona Project (CAP). Currently, there are no long-term water leases available for RCC under CAP to meet their water demands. How RCC's water demand will be met has not been investigated by the Federal government and only spuriously explained by RCC. Given that water is the most critical natural resource to inhabitants of the State of Arizona, further compulsory investigations vis-à-vis water must also address:

- What empirical and realistic predictions are made for long-term water-use over the 66 years of mining? Has the long-term availability and sustainability of water use been assessed?
- How will dewatering of the mine be executed? Will water removed from the shafts, tunnels, and related areas be stored? If so where and how will this take place? How will water be replaced (or will it be replaced) in an environmentally safe and effective way after ore is removed?
- If during the course of mining operations, financial conditions prove this mine impracticable, what guarantees will be made to assure that water will be returned to the aquifer?
- What is the long-term certainty of water from the CAP that the mine is assuming to utilize for its operations? What will happen in cases of drought or where shortage provisions are placed along the Colorado River? These shortages are predicted to be in effect within the next decade. Within the seven basin states agreement, Arizona has a junior priority water status along the river and subsequently the CAP must

take shortage first. Will CAP municipal water be relied upon and or taken away in order to meet RCC long-term water demands?

In understanding the complex dynamic surrounded Arizona's water laws, policies, and availability as written S. 409, the Fort McDowell Yavapai Nation believe that water from Arizona residences, the environment, and cultural and religious areas will be ultimately scarified for the operations of the mine. Furthermore, by conveying the land from public ownership to a private entity, much of the permitting process, particularly regarding clean water, is effectively removed. For example, if one looks at federal court rulings concerning private property across the U.S., Sections 402 and 404 of the Clean Water Act have often been rendered unenforceable (Section 402 - National Pollutant Discharge Elimination System; Section 404 - regulates the discharge of dredged and fill material into waters of the United States, including wetlands). Thus, what safeguards will be congressionally mandated to prevent water contamination or a decrease in quality that will/may result due to either direct or indirect discharge or that will result from this type of mining technique?

In summary, water feasibility and water related economic provisions and studies have not been addressed. Furthermore, given future climate change and climate warming predictions for this area, the on-going long-term drought and resulting potential water shortages within the State, including the Colorado River (see Bureau of Reclamation, Colorado River Water Shortage Criteria Documentation, 2006-7) it is imperative that long-term strategic projections and economic data substantiate that water for mining purposes is the most beneficial use for the State as a whole. Thus, before this legislation moves forward, we request that the Secretary of Agriculture be directed to commission an independent, third party analysis of the hydrologic and engineering reports that evaluate potential impacts on the entire area including Devil's Canyon and Apache Leap. This analysis must be in direct consultation with the Fort McDowell Yavapai Nation.

S. 409 FAILS TO PROTECT CULTURAL AND RELIGIOUS CONCERNS OF THE YAVAPAI PEOPLE;

Although Inter Tribal Council of Arizona has provided compelling testimony regarding the Native American cultural and religious concerns regarding S. 409, Fort McDowell has a number of concerns that must be

addressed in this legislation and through the administrative process. Mining will impact lands that are tied to our cultural and religious heritage as this region is part of the Yavapai ancestral territory. As stated earlier, many federal protections will be removed from this land when it is conveyed to RCC. Hence, the Native American Graves Protection and Repatriation Act (Public Law 101-601) or any provision of the American Indian Religious Freedom Act (42 U.S.C. 1996), the National Historic Preservation Act (6 U.S.C. 4701 et seq.), and the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) that are designated to protect areas important to Native American's may be inapplicable or unenforceable.

As stated above, dewatering, land subsidence, polluting of the land and water will desecrate this sacred area. I can not express in words how deeply felt this land is to the Yavapai – it simply transcends words. Damages resulting from this legislated land exchange and mining project *can not* be mitigated simply by placing a dollar value on it or by exchanging it for some other land that is far from the area of concern. The Tonto National Forest has discovered at least a dozen archeological sites in and around Oak Flat. Therefore, Fort McDowell Yavapai Nation requests the opportunity to evaluate all data in internal and external reports for the entire area, including data that were not included in the final version of these reports. Fort McDowell also request answers to the specific questions regarding how RCC and the Federal government will protect the religious and cultural resources of the area. The questions that must be addressed include, but are not limited to, the following:

- What, if anything, in this legislation will account for Yavapai cultural resources in the area? Given the extent of land that will be needed for all mining operations, what federal authority will statutorily assure that cultural assessments of the entire area will not just represent a “ cursory review ”? How will all collected data - raw and published - be disseminated to the Yavapai? What provision will ensure that this information will not become public domain so that culturally sensitive and sacred areas will not be subject to vandalism?
- Where will material be housed if removed from the site? Storage or dissemination of materials must be formally and legally agreed to by the Fort McDowell Yavapai.

- What language in the bill is the federal government proposing to assure that Yavapai cultural heritage, whether tangible or not and regardless of lineage, is going to be preserved in such a way that it meets with our approval?

- As the bill is currently written, the Native American Graves Protection and Repatriation Act (NAGPRA) may not be applicable once the land is conveyed. Therefore, what language will be added to assure the protection or removal of sacred burial sites will meet with our approval?

To conclude our testimony, the language of S. 409, as currently drafted, does not adequately address: 1) the mineral report and appraisal of the Federal parcel to assure the parity of the land exchange; 2) the weakness of Federal and Arizona's current statutes or laws governing copper mining; 3) the lack of an extensive mining plan, reclamation protocol, or bonding assurances; 4) groundwater and surface water issues; 5) subsidence issues; 6) the need for a third party, independent Environmental Impact Statement on the entire mining operation; 7) Federal environmental and cultural protections afforded public lands are no longer applicable once the land is conveyed; and 8) meaningful consultation with a sovereign nation that is required by the United States' trust responsibility to the Yavapai Nation and guaranteed under federal law. We have additional concerns but many are addressed by others before you today, as well as in former Arizona Governor Napolitano's letter of August 24, 2007 outlining very specific economic, environmental, and cultural omissions in the current bill. San Carlos Apache Tribe has also expressed many of these very same concerns. Other Arizona Tribes have also articulated their grave trepidations about this bill and provided documentation under separate cover. Thus, at this time, we believe there are too many unresolved serious issues that must be fully addressed prior to congressional approval.

Mr. Chairman, members of the Committee, on behalf of the Fort McDowell Yavapai People, I thank you for the opportunity to express our deep concerns regarding this proposed legislation.