

Problems with S. 409, a Bill to Trade Away Oak Flat Campground

On February 11, 2009, AZ Senators Jon Kyl and John McCain introduced S. 409, the “Southeast Arizona Land Exchange and Conservation Act of 2009.” This Bill follows five unsuccessful attempts by Senator Kyl to pass similar special interest Bills.

The bill directs the Forest Service to consummate a land exchange requested by Resolution Copper Company (RCC); a Delaware based limited liability Corporation that is wholly owned by mining giants Rio Tinto (UK) and BHP (Australia).

The Bill description cynically states that the purpose of the 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...” All of these statements are untrue!

This land exchange is a bad deal for communities and water resources:

- Although this version says that Apache Leap would remain public land, it also allows RCC to continue to use mining claims on Apache Leap. Other parcels involved in this legislation would be withdrawn from mineral entry, but RCC would maintain its claims at Apache Leap. That renders meaningless any claims of how this measure protects the area.
- The land exchange bills provide no acknowledgement that Oak Flat has been federally protected from mining for over 50 years by executive order. This order – PLO 1229 – is still as valid today as it was in 1955 when it was issued by President Eisenhower.
- The bill fails to require any environmental analyses under the National Environmental Policy Act (NEPA) that would consider the long-term implications or cumulative effects of this proposed mine.
- Although the express purpose of this bill is to facilitate the development of a mine by Resolution Copper, there is no discussion whatsoever of the mine itself.
- There is no statement of water resource use, acquisition or disposal for the proposed mine at Oak Flat.
- There is no discussion of the enormous environmental and recreational loss, mountains of mining tailings, and associated pollution caused by this mine.
- The bill does not include copies of maps for the exchange and Congress is not obligated to provide maps unless the bill becomes law.
- There is no discussion of the land values in the bill and no appraisals are needed unless the bill becomes law.
- The bill does not address the loss of access for religious and cultural purposes to Oak Flats or the protection of artifacts or lands or springs needed by Western Apache and other Tribes other than force Native Americans to get a permit to use their traditional religious sites.
- Apache Leap, an important historical and cultural land mark would end up in the middle of a major mine and of grave danger of subsidence.

Section by Section:

Section 4 – Land Conveyances and Exchanges

- This section lists a series of parcels of land that Resolution Copper would like to exchange for Oak Flat and Apache Leap.
- This section also would allow the town of Superior to purchase at market value the public land on which the Fairview Cemetery is located and would allow the town to buy the reversionary interest of the Superior airport which is located on public land.

- This section would allow RCC to select the appraiser and pay for the appraisal of the lands that are proposed for the land exchange.

Section 5 – Timing and Processing of Exchange

- While this Section talks about requiring a NEPA analysis. However, unless there is a federal nexus to what would become private lands, there would be no EIS and even if there were, it's conclusion would be mandated by this land exchange. NEPA requires the federal government to look before it leaps; this bill mandates a giant leap with no prior look.
- This bill would allow RCC to immediately begin to explore for minerals under the Oak Flat Campground upon the signing of this Bill even before the land exchange would be consummated.

Section 7 – Valuation of Land Exchanged or Conveyed.

- Only the Secretary of Agriculture determines whether the appraisal is fair.
- The draft forbids any reappraisal or updating of the appraisal.
- There is no provision for public input into the appraisal. The Secretary of Agriculture is required to provide a “summary” of the appraisals but not detailed information.
- While the bill seems to assume that the private lands are roughly equal in value than the public land that we would give up forever, there is no mention of the value of the campground or the publicly owned minerals under the surface (which RCC estimates to be worth several billion dollars).

Section 8 – Apache Leap Protection and Management

- Since this Bill expressly recognizes that RCC's mining claims on Apache Leap are valid, any talk of real protection of Apache Leap is meaningless. Nothing in this Bill would prevent RCC from using methods guaranteed to cause subsidence of the surface.

Section 10 – Public Uses of Federal Land

- If the bill becomes law, there is a maximum of 4 years for the public to have access to the campground even though the company would not be ready to mine for at least another decade.
- RCC is required to pay no more than \$1,000,000 to replace the Oak Flat Campground.

Section 11 – Traditional Acorn Gathering

- This section allows RCC to attempt to grant a permit to allow Apache Tribes to gather acorns on what would become the private property of the mining company. This would essentially force traditional Native Americans to ask permission to exercise their religious traditions – a serious human rights infringement on religious freedom.
- RCC would be able to revoke this permit at any time.

Section 12 – Value Adjustment Payment to United States

- This Section includes a payment on production scheme based on a royalty income approach that in theory would require RCC to pay a royalty on minerals extracted, but is unlikely to result in any additional dollars to the American public in the form of royalties. It is likely to net out to zero in royalties.

Conclusion: While this version of the bill is better than the version introduced in the last Congress, it still falls short of following acceptable mine permitting practices (and includes a sham NEPA provision), privatizes valuable public resources and sacred areas without establishing need, and ignores a basic tenet of responsible mining: informed prior consent of the effected local communities. There is no need for this legislation. RCC can use current laws to develop a mining plan of operation that would go through the usual and customary mining permit process that all other mining companies follow. This is simply a taxpayer rip off design to benefit two huge international mining companies by allowing them to circumvent US law.