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**U.S. House of Representatives
Committee on Natural Resources
Subcommittee for Indigenous Peoples of the United States
Oversight Hearing on “The Irreparable Environmental and Cultural Impacts of
the Proposed Resolution Copper Mining Operation”**

**Written Testimony of Kevin J. Allis, Chief Executive Officer
National Congress of American Indians
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On behalf of the National Congress of American Indians (NCAI), thank you for holding this hearing on “The Irreparable Environmental and Cultural Impacts of the Proposed Resolution Copper Mining Operation.” My name is Kevin Allis, and I am a citizen of the Forest County Potawatomi Community and the Chief Executive Officer of the National Congress of American Indians (NCAI). I look forward to working with members of this Subcommittee and other members of Congress to address the grave impacts the proposed Resolution Copper mine will have on tribal sacred places and cultural resources.

Founded in 1944, NCAI is the oldest, largest, and most representative national organization serving the broad interests of tribal nations and communities. Tribal leaders created NCAI in response to termination and assimilation policies that threatened the existence of American Indian and Alaska Native tribal nations. Since then, NCAI has fought tirelessly to preserve the treaty and sovereign rights of tribal nations, advance the government-to-government relationship, and remove historic structural impediments to tribal self-determination. Core to NCAI’s mission is a tireless commitment to securing tribal traditional cultures and ways of life for our descendants.

Federal, state, and private lands are carved from the ancestral territories of tribal nations. In spite of this significant land loss, tribal nations maintain deep and ongoing religious, social, and cultural connections to their sacred places within their ancestral territories. This is, in part, because tribal nations and their citizens are place-based peoples. Sacred and cultural landscapes are places for tribal nations and their citizens to pray, hold ceremonies, and gather traditional and medicinal plants. They also are places where tribal cultures, religions, and ways of life are preserved, protected, and passed on to the next generation through oral tradition and traditional acts of cultural and religious observance.

The United States government has a legal and moral obligation to provide tribal peoples access to these ancestral lands and to protect these traditional cultural territories in a manner that respects and preserves their tribal cultural, historical, spiritual and religious importance. Despite this obligation, Congress, in a late rider to the National Defense Authorization Act of 2015 (2015 NDAA), authorized a land exchange which transferred all right, title, and interest of the United States in approximately 2,242 acres of public lands in the Tonto National Forest to Resolution Copper, which is a subsidiary of private, foreign-owned mining corporations. The

purpose of this transfer of land, within an area commonly known as Oak Flat, is to construct and operate a block-cave copper mine. Pursuant to Section 3003 of the 2015 NDAA, a review of cultural and archaeological resources impacted by the proposed mine is required and the land transfer will commence upon the completion of a final environmental impact statement.¹

This testimony addresses Congress's fiduciary obligation to protect tribal resources; details the documented historical and cultural resources within the Oak Flat Area; and highlights Indian Country's united opposition to this land transfer, which will irrevocably destroy the resources within this sacred area.

Congress Has a Trust Responsibility to Protect Tribal Historical and Cultural Resources

Tribal nations are members of the original family of American governments and have a unique legal and political relationship with the United States as defined by the U.S. Constitution, treaties, statutes, court decisions, and executive orders. Supreme Court case law has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States and that have retained inherent sovereign authority over their lands and people since time immemorial. Through its acquisition of tribal lands and resources, the United States formed a fiduciary relationship with tribal nations whereby it has recognized a trust relationship to safeguard tribal rights, lands, and resources.² In fulfillment of this trust relationship, the United States "charged itself with moral obligations of the highest responsibility and trust" toward tribal nations.³

Congress has expressly recognized its fiduciary responsibilities as reflected by the fact that "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."⁴ An essential component of this fiduciary responsibility is the preservation of sacred places, objects, and cultural landscapes, as provided for in numerous statutes, executive orders, departmental policies, and inter-departmental memoranda.⁵

Congress, in the National Historic Preservation Act, specifically stated that it is the policy of the federal government, "in cooperation with other nations and in partnership with...Indian tribes... [to] provide leadership in the preservation of the prehistoric and historic resources of the United States."⁶ Additionally, Executive Order 13007 directs that "in managing federal lands, each executive branch agency with statutory or administrative responsibility...shall, [to] the extent practicable...avoid adversely affecting the physical integrity of such sacred sites."⁷ Lastly, the American Indian Religious Freedom Act states, "it shall be the policy of the United States to protect

¹ P.L. 113-291 §30003.

² See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832) (collectively called the "Marshall Trilogy").

³ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

⁴ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012).

⁵ See e.g., National Historic Preservation Act, 16 U.S.C. 470 et seq.; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et. seq.; Executive Order No. 13,007, "Indian Sacred Sites," (1996); Memorandum of Understanding Among: U.S. Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, Department of Energy, Advisory Council on Historic Preservation on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites.

⁶ 16 U.S.C. § 470-1(2).

⁷ Executive Order No. 13,007, "Indian Sacred Sites," (1996).

and preserve for American Indians their inherent right of freedom to believe, express, and exercise...traditional religions...and the freedom to worship through ceremonials and traditional rites.”⁸

The proposed land transfer of the Oak Flat Area in the Tonto National Forest to Resolution Copper contravenes the federal trust responsibility and Congress’ longstanding support for the protection and preservation of tribal environmental, historical, and cultural resources.

The Federal Government Has Recognized the Historical and Cultural Uniqueness of the Oak Flat Area

In 1955, President Dwight D. Eisenhower recognized the importance of the Oak Flat Area when he signed Public Land Order 1229. This order withdrew the Oak Flat Picnic and Camp Ground from future mining activities. In 1971, the Nixon Administration’s Department of the Interior again acknowledged the importance of the area when it retained this mining ban.⁹ Most recently, in 2016, the Oak Flat area was placed on the National Register of Historic Places (National Register) as a Traditional Cultural Property (TCP).

A TCP is a type of property that is eligible for inclusion on the National Register based on its associations with cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions.¹⁰ Properties may be nominated to the National Register by a State Historic Preservation Officer,¹¹ Tribal Historic Preservation Officer,¹² or federal agencies.¹³ Importantly, TCPs may also be identified as part of an agency’s responsibilities to prepare a draft environmental impact statement,¹⁴ determining categorical exclusions,¹⁵ or preparing an environmental assessment¹⁶ under the National Environmental Policy Act.

Once identified and determined to be eligible for listing on the National Register, a TCP is a “historic property” within the meaning of the NHPA.¹⁷ As a National Register-eligible property, agencies carrying out undertakings that may affect the property are required to engage in what is commonly known as a Section 106 review.¹⁸ As part of the Section 106 process, federal agencies are required to consult with Tribal Historic Preservation Officers and American Indian and Alaska Native tribal nations.¹⁹ Specifically, the Act requires the agency to consult with tribal nations that attach religious and cultural significance to historic properties that may be affected by an

⁸ 46 U.S.C. §1996(1).

⁹ Lydia Millet, “Selling off Apache Holy Land,” <https://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html> (last visited, March 19, 2020).

¹⁰ “National Register of Historic Places – Traditional Cultural Properties (TCPs): A Quick Guide for Preserving Native American Cultural Resources,” U.S. Department of the Interior, National Park Service, American Indian Liaison Office.” <https://www.nps.gov/history/TRIBES/Documents/TCP.pdf> (last visited, Mar. 10, 2020).

¹¹ 36 C.F.R. §60.6.

¹² Id.

¹³ 36 C.F.R. §60.9.

¹⁴ 40 C.F.R. §1502.25.

¹⁵ 36 C.F.R. §800(b).

¹⁶ 36 C.F.R. §800.8(c).

¹⁷ 36 C.F.R. §800.16(l)(1) (Historic Properties are any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places).

¹⁸ 36 C.F.R. §800.1(a).

¹⁹ 36 C.F.R. §800.2(a)(4).

undertaking,²⁰ assess adverse effects,²¹ and continue tribal consultation to resolve any adverse effects.²² If no resolution is reached, the Advisory Council on Historic Preservation provides comments to the head of the agency that must be taken into account as part of the final agency decision.²³

The placement of the Oak Flat Area on the National Register is the product of lengthy historical and archaeological analysis. It demonstrates the federal government's explicit recognition of this landscape's national historical and cultural significance and its obligation to preserve it. The proposed land transfer to Resolution Copper of a National Register property would set a dangerous precedent and violate the very purpose of the NHPA, which establishes that certain historic properties are so significant to our national heritage that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."²⁴

There is Broad Indian Country Opposition to the Destruction of the Oak Flat Area

Despite a 65-year history of federal acknowledgement of the historical and cultural significance of the Oak Flat Area, Section 3003 of the 2015 NDAA provides that no later than 60 days following the publication of a Final Environmental Impact Statement, the Secretary of the United States Department of Agriculture must convey the Oak Flat Area to Resolution Copper.²⁵

This transfer will result in an unparalleled destruction of the cultural and environmental resources of the Oak Flat Area. The project proposes to remove copper ore through a technique called block-cave mining. This is a type of mining that digs deep below the earth's surface to extract ore as the earth above collapses from the void created. If permitted, Resolution Copper would create one of the largest and deepest copper mines in the United States.²⁶ Resolution Copper proposes to extend mine workings approximately 7,000 feet below the surface of the earth²⁷ and remove approximately 1.4 billion *tons* of ore to produce 40 billion *pounds* of copper.²⁸ The result of removing ore from below ground would cause a subsidence of roughly 6,951 acres, or 11 square miles approximately 1.8 miles wide and 800 – 1,115 feet deep.²⁹

In addition to the existing listing on the National Register, this area is home to many traditional cultural properties eligible for inclusion in the National Register that are culturally important to

²⁰ 36 C.F.R. §800.2(c)(2)(ii).

²¹ 36 C.F.R. §800.5.

²² 36 C.F.R. §800.6.

²³ 36 C.F.R. §800.7.

²⁴ 16 U.S.C. § 470

²⁵ P.L. 113-291 §30003(c)(10).

²⁶ See Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange, at p. 3.

²⁷ Id.

²⁸ Id. Executive Summary, at ES-3; see also Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange, at p. 6.

²⁹ Id., at p. 26.

tribal nations in the area.³⁰ Regarding the effects of the proposed project on tribal cultural resources, the Draft Environmental Impact Statement states:

All of these resources would be adversely affected by leaving Federal management. In particular, the loss of the ceremonial area and acorn-collecting area in Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes, because healthy groves are few and access is usually restricted unless the grove is on Federal land.³¹

The environmental degradation and destruction of this life-sustaining landscape is unacceptable. Since 2001, NCAI has passed over 60 resolutions that speak to the broad concerns of tribal nations and their citizens regarding cultural and historic resources. Specifically, NCAI has passed several resolutions directly opposing the proposed land transfer in Section 3003 of the 2015 NDAA,³² and recently passed Resolution #ABQ-19-062, titled “[Support for the Protection of Oak Flat and Other Native American Sacred Spaces from Harm.](#)”

This resolution expresses NCAI’s support for repeal of Section 3003 of the 2015 NDAA due to its circumvention of federal laws that protect sacred places from destruction and harm. In addition to NCAI’s national advocacy, there is broad opposition across Indian Country to the land transfer, which will be unprecedented in its destruction of religious, cultural, archeological, historical, and natural resources.

Indian Country has urged Congress to affirm its trust responsibility by repealing Section 3003 of the 2015 NDAA. Prior to the late addition of Section 3003 in the 2015 NDAA, Congress had consistently rejected legislation that would have transferred the Oak Flat Area for copper mining. Given the clear cultural and environmental destruction that this land transfer will cause, NCAI calls on Congress to fulfill its fiduciary duty and prevent Resolution Copper from acquiring the Oak Flat Area.

Conclusion

On behalf of NCAI, I again thank you for holding this oversight hearing to address the extraordinary threat to tribal cultural and historic resources posed by the transfer of the Oak Flat Area to Resolution Copper.

³⁰ See Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange, at p. 628 (“Within the direct impacts analysis area, 721 archaeological sites have been recorded...Of the 721 sites, 523 are recommended or determined eligible for the NRHP [National Register of Historic Places]...”).

³¹ See Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange, at p. 665.

³² NCAI Resolution #REN-13-019: “[In opposition to the Conveyance of Federal Lands to Foreign Mining Interests with Sacred and Cultural Significance to Tribes, Including H.R. 687 and S. 339](#)”; NCAI Resolution #MSP-15-001: “[Support for Repeal of Section 3003 of the FY 15 National Defense Authorization Act, the Southeast Arizona Land Exchange.](#)”