



NATIONAL CONGRESS OF AMERICAN INDIANS

**U.S. House of Representatives
Committee on Natural Resources
Subcommittee for Indigenous Peoples of the United States
Legislative Hearing on
H.R. 1884, A Bill to Repeal Section 3003 of the Carl Levin and Howard P. 'Buck'
McKeon National Defense Authorization Act for Fiscal Year 2015**

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NCAI HEADQUARTERS

1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

**Written Testimony of Fawn Sharp, President
National Congress of American Indians
April 13, 2021**

On behalf of the National Congress of American Indians (NCAI), thank you for holding this hearing. My name is Fawn Sharp, and I serve as President of the National Congress of American Indians (NCAI). I look forward to working with members of this Subcommittee and other members of Congress to protect tribal sacred sites, which includes Oak Flat.

Founded in 1944, NCAI is the oldest, largest, and most representative national organization comprised of Tribal Nations and their citizens. 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 trust, 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 present and future generations.

Federal, state, and private lands are carved from the ancestral territories of Tribal Nations. In spite of this significant land loss, Tribal Nations and their citizens are place-based peoples that maintain deep and ongoing religious, social, and cultural connections to their sacred places within their ancestral territories. 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 ensure tribal peoples have access to their ancestral lands and to protect their traditional cultural territories in a manner that respects and preserves their tribal cultural, historical, spiritual and religious importance. Despite this established obligation, in a late rider to the National Defense Authorization Act of 2015 (2015 NDAA), Congress authorized a land exchange that transferred all right, title, and interest of the United States in approximately 2,242 acres of public lands in the Tonto National Forest, commonly known as Oak Flat, to Resolution Copper, a subsidiary of private, foreign-owned mining corporations. The purpose of the land transfer is to provide Resolution Copper with the ability to construct and operate a block-cave copper mine.

If the transfer were to take place, it would result in an unparalleled destruction and degradation of tribal cultural places within 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.¹ Resolution Copper proposes to extend mine workings approximately 7,000 feet below the surface of the earth² and remove approximately 1.4 billion *tons* of ore to produce 40 billion *pounds* of copper.³ 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 to 1,115 feet deep.⁴

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. The Supreme Court 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. Through its acquisition of tribal lands and resources, the United States formed a fiduciary relationship with Tribal Nations whereby it recognized a trust obligation to safeguard tribal rights, lands, and resources.⁵ In fulfillment of this trust relationship, the United States "charged itself with moral obligations of the highest responsibility and trust" toward Tribal Nations.⁶

Congress expressly and continuously recognizes its fiduciary responsibilities as reflected in 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."⁷ 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.⁸

¹ See, Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange, at p. 3.

² Id.

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

⁴ Final Environmental Impact Statement: Resolution Copper Project and Land Exchange, Volume 2, January 2021, at ES-3; *supra* note, 33, at p. 26.

⁵ See e.g., *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").

⁶ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

⁷ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012).

⁸ See e.g., The Native American Religious Freedom Act of 1978, 42 U.S.C. §1996; "Special Message on Indian Affairs, July 8, 1970," Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576; 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.

Since at least the early 20th Century, Congress has codified its policy to protect tribal cultural sites⁹ and religious practices as part of its trust responsibility to Tribal Nations.¹⁰ For example, the American Indian Religious Freedom Act states, “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise...traditional religions...including, but not limited to access to sites...and the freedom to worship through ceremonials and traditional rites.”¹¹ Congress further recognized the federal responsibility to protect historic and cultural sites as well as engage in a process of formal consultation with Tribal Nations in the National Historic Preservation Act (NHPA).

The NHPA established formal procedures for identifying and protecting tribal cultural sites and landscapes and engaging in government-to-government consultation.¹² Specifically, the NHPA states 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.”¹³ Lastly, 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.”¹⁴

The right of Tribal Nations to their culture practices and sacred places is also recognized in the United Nations Declaration on the Rights of Indigenous Peoples, which was endorsed by the United States in 2010. Among other enumerated rights, Article 8 of the UN Declaration protects the right of Tribal Nations not to be subject forced destruction of their culture and specifically requires state parties to provide mechanisms for prevention and redress for “any action which have the aim or effect of dispossessing them of their lands, territories, or resources.”¹⁵

The proposed land transfer of the Oak Flat Area to Resolution Copper, contravenes the UN Declaration on the Rights of Indigenous Peoples, the federal trust responsibility, and Congress’ longstanding intent to protect and preserve tribal historical and cultural places and items by placing them in imminent threat of destruction.

The Federal Government Recognizes the Historical and Cultural Importance of Oak Flat

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. Later, in 1971, the Nixon Administration’s Department of the Interior again acknowledged the importance of this area when it retained the mining ban.¹⁶ In March of 2016, the Oak Flat area was placed on the National Register of Historic Places (National Register) as a Traditional Cultural Property (TCP).¹⁷

⁹ Antiquities Act of 1906, 16 U.S.C. §§ 431-433; *see also*, RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 (1970).

¹⁰ The Native American Religious Freedom Act of 1978, 42 U.S.C. § 1996.

¹¹ *Id.*

¹² 16 U.S.C. § 470f; 36 C.F.R. § 800.

¹³ 16 U.S.C. § 470-1(2).

¹⁴ Executive Order No. 13,007, “Indian Sacred Sites,” (1996).

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, Article 8 (adopted 2007).

¹⁶ Lydia Millet, “Selling off Apache Holy Land,” <https://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html>.

¹⁷ On January 15, 2021, the U.S. Forest Service (USFS) released its six volume Final Environmental Impact Statement. *See*, “Final Environmental Impact Statement: Resolution Copper Project and Land Exchange” (<https://www.resolutionmineeis.us/documents/final-eis>). On March 1, 2021, the USDA directed the USFS Service to

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.¹⁸ Properties may be nominated to the National Register by a State Historic Preservation Officer,¹⁹ Tribal Historic Preservation Officer,²⁰ or federal agencies.²¹ Importantly, TCPs may also be identified as part of an agency’s responsibilities to prepare a draft environmental impact statement,²² determine categorical exclusions,²³ or prepare an environmental assessment under the National Environmental Policy Act.²⁴

Once determined to be eligible for listing on the National Register, a TCP is considered a “historic property” within the meaning of the NHPA.²⁵ As such, any agency undertakings that may affect that property is required to engage in what is commonly known as a Section 106 review.²⁶ Section 106 of the NHPA directs federal agencies to take into account the effect of their actions on properties included in or eligible for inclusion in the National Register.²⁷ The regulations for section 106 clarify how agencies are to meet their statutory responsibilities – from initiating the Section 106 process and identifying historic properties to resolving adverse effects. Central to the entire process is consultation with affected Tribal Nations or their representatives, including Tribal Historic Preservation Officers.²⁸ Specifically, the NHPA requires the agency to consult with Tribal Nations that attach religious and cultural significance to historic properties that may be affected by an undertaking,²⁹ assess adverse effects,³⁰ and continue tribal consultation to resolve any adverse effects.³¹ If no resolution is reached, the Advisory Council on Historic Preservation (ACHP) provides comments to the head of the agency that must be taken into account as part of the final agency decision.³²

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

withdraw the Final Environmental Impact Statement. *See*, “United States Department of Agriculture, Tonto National Forest, Project Update: March 1, 2021.” (<https://www.resolutionmineeis.us/>).

¹⁸ “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).

¹⁹ 36 C.F.R. § 60.6.

²⁰ *Id.*

²¹ 36 C.F.R. § 60.9.

²² 40 C.F.R. § 1502.25.

²³ 36 C.F.R. § 800(b).

²⁴ 36 C.F.R. § 800.8(c).

²⁵ 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).

²⁶ 36 C.F.R. § 800.1(a).

²⁷ 54 U.S.C. 306108.

²⁸ 36 C.F.R. § 800.2(a)(4).

²⁹ 36 C.F.R. § 800.2(c)(2)(ii).

³⁰ 36 C.F.R. § 800.5.

³¹ 36 C.F.R. § 800.6.

³² 36 C.F.R. § 800.7. On February 11, 2021, ACHP terminated Section 106 consultation. On March 29, 2021, pursuant to 36 C.F.R. § 800.7(c), the ACHP sent Secretary of Agriculture Vilsack its final comments regarding the proposed land exchange Advisory Council on Historic Preservation. In that letter, the ACHP stated, “the historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects that would result to this property for the undertaking.” ACHP letter to Secretary Vilsack, *Resolution Copper Mining Project and Land Exchange Tonto National Forest, Pinal County, Arizona* (March 29, 2021).

landscape's national historical and cultural significance and trust and statutory obligations to preserve it. The proposed transfer of the Oak Flat area, to Resolution Copper violates the original purpose of the NHPA; 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."³³

There is Long-Standing Opposition to the Destruction of Oak Flat

In addition to being listed on the National Register as a TCP, this area is home to hundreds of additional sites eligible for inclusion in the National Register that are culturally important to Tribal Nations in the area.³⁴ Degradation and destruction of these places and the larger landscape is unacceptable. Since 2001, NCAI has passed over 60 resolutions that speak to the broad concerns of Tribal Nations and their citizens regarding the need to protect cultural and historic resources. Since 2009, NCAI membership, which is comprised of Tribal Nations from across the country, has passed seven resolutions directly opposing legislation that would transfer the Oak Flat area to Resolution Copper.³⁵ Most recently, NCAI 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 tribal sacred places from destruction and harm.

Section 3003 of the 2015 NDAA is an affront to the 65-year history of federal administrative actions that acknowledge and actively protect the deep historical and cultural significance of the Oak Flat Area. It is also an abrogation of the federal trust responsibility and a violation of the United States' obligations under the UN Declaration on the Rights of Indigenous Peoples. Due to the problematic nature of how the land transfer occurred, tribal opposition, and broad Congressional opposition since 2005, there have been thirteen failed attempts to pass legislation that would transfer the Oak Flat area to Resolution Copper.³⁶ The late rider to the 2015 NDAA circumvented what had been long-standing Congressional acknowledgement of its trust obligation to Tribal Nations.

If finalized, the Southeast Land Exchange would be unprecedented not only in its destruction of tribal religious, cultural, archeological, historical, and natural resources. It would be the first time

³³ 16 U.S.C. § 470.

³⁴Final Environmental Impact Statement: Resolution Copper Project and Land Exchange, Volume 2, January 2021, at p. 778 (noting a total of 644 archaeological sites in the area, of which 506 are National Register eligible). *See also*, 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]...").

³⁵ *See, e.g.*, NCAI Resolutions #NGF-09-001, "To Protect Oak Flat and Apache Leap in Arizona from Mining"; #MKE-11-002, "[Opposition to Legislation Proposing a Land Exchange in Southeastern Arizona for the Purpose of Mining Operations](#)"; #PDX-11-001, "[Opposition to H.R. 1904, Southeast Arizona Land Exchange and Conservation Act of 2011, Which Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites](#)"; #SAC-12-006, "[Opposition to H.R. 1904, Southeast Arizona Land Exchange and Conservation Act of 2011, Which Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites](#)"; #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](#)"; and #MSP-15-001, "[Support for Repeal of Section 3003 of the FY 15 National Defense Authorization Act, the Southeast Arizona Land Exchange](#)."

³⁶ Only H.R.1904 passed the House during the 112th Congress. (<https://www.congress.gov/bill/112th-congress/house-bill/1904?q=%7B%22search%22%3A%5B%22%5C%22oak+flat%5C%22%22%5D%7D&s=3&r=17>).

the United States actively sought to relinquish control of federal property to a foreign entity that would knowingly destroy the sacred places of peoples to whom it has a trust responsibility.

Conclusion

On behalf of NCAI, I again thank you for the opportunity to submit testimony and holding this legislative hearing on H.R. 1884. Prior to the late addition of Section 3003 to the 2015 NDAA, Congress consistently rejected legislation transferring the Oak Flat Area to Resolution Copper. Given the clear cultural and environmental destruction that this land transfer will cause, and given the untenable impact this land transfer would have on Indian religious practices, NCAI calls on Congress to affirm its trust obligation, pass H.R. 1884, and permanently protect Oak Flat.