



To: Subcommittee for Indigenous Peoples Republican Members
From: Subcommittee for Indigenous Peoples Committee Staff; Ken Degenfelder
(Ken.Degenfelder@mail.house.gov)
Date: April 12, 2021
Subject: Legislative Hearing on H.R. 1884, “To repeal section 3003 of the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, and for other purpose”

The Subcommittee for Indigenous Peoples will hold a Legislative Hearing on H.R. 1884, the “Save Oak Flat Act,” on Tuesday, April 13, 2021, at 1:00pm online via Cisco WebEx.

Member offices are requested to notify Rob MacGregor by 4:30pm on Monday, April 12, 2021, if their Member intends to participate in person in the hearing room or remotely from his/her laptop from another location. Submissions for the hearing record must be submitted through the Committee’s electronic depository at HNRCDocs@mail.house.gov. Please contact David DeMarco (DavidDeMarco@mail.house.gov) or Everett Winnick (Everitt.Winnick@mail.house.gov) should any technical difficulties arise.

I. KEY MESSAGES

- Global copper demand for electric vehicles and the expansion of renewable energy capacity is projected to rise to 1.5 million tons by 2025 and 3.3 million tons by 2030.¹²
- The proposed Resolution Copper mine in Arizona is estimated to be one of the world’s largest untapped copper deposits. The project is estimated to annually support 3,700 jobs, produce nearly a \$1 billion in economic value in Arizona, and \$200 million in federal tax revenues for an estimated 40 years.³
- The project has undergone a seven year tribal consultation and federal permitting review in addition to pre-consultation efforts that began in 2003.⁴

¹https://www.realclearenergy.org/articles/2021/04/01/to_support_americas_electrification_well_need_more_copper_than_ever_before_770754.html

²<https://www.nasdaq.com/articles/graphic-copper-demand-from-electric-vehicle-segment-accelerating-2020-11-30>

³<https://www.resolutioncopper.com/files/media-releases/Resolution%20Economic%20Benefits%20Nov%202020.pdf>

⁴<https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-6.pdf>, *Final Environmental Impact Statement: Resolution Copper Project and Land Exchange*, Appendix S-2, January 2021.



- The Advisory Council on Historic Preservation (ACHP), one of the many government entities involved in this years-long process of review, has repeatedly acknowledged Resolution Copper’s mitigation efforts and engagement in tribal consultation. ACHP’s position began to shift and become less supportive as it became clear a Final Environmental Impact Statement (FEIS) was nearing publication.
- Shortly after President Biden took office, the ACHP reversed its earlier position and pulled its support for the project. This sudden reversal immediately after a new Administration began indicates that the Resolution Copper project was likely impeded due to political reasons. Yet, the Majority has failed to invite any Administration witness, preventing an opportunity for Committee members to ask the Biden Administration why it has moved the goalposts on this project.

II. WITNESSES

- The Honorable Mila Besich, Mayor, Superior, AZ [*Republican Witness*]
- Dr. James Wells, PhD., Chief Operating Officer, L. Everett & Associates, Santa Barbara, CA
- Mr. Shan Lewis, President, Inter Tribal Association of Arizona, Phoenix, AZ
- Ms. Fawn Sharp, President, National Congress of American Indians, Washington, D.C.

III. BACKGROUND

H.R. 1884, Save Oak Flat Act (Grijalva)

H.R. 1884 (Grijalva) would repeal 16 U.S.C. 539p, the Southeast Arizona land exchange and conservation, which was enacted as part of the FY 2015 National Defense Authorization Act (NDAA).⁵ The bill also establishes an Oak Flat withdrawal area from mineral entry.

Background

The Resolution Copper project is a proposed copper mine located near the town of Superior, Arizona, on lands within the Tonto National Forest.⁶ Bipartisan legislation providing for a land exchange to facilitate development of the mine project had been introduced in the House and Senate since at least the 109th Congress (2005-2006). The land exchange was made law in 2014 as part of the Fiscal Year 2015 NDAA, which provided for the exchange of 2,422 acres of U.S. Forest Service land (known as the “Oak Flat” parcel) for eight land parcels throughout Arizona totaling 5,376 acres owned by

⁵ Public Law 113-291.

⁶ Castle, Lauren. “With savvy and sensitivity, tribal monitors help preserve sacred places.” The Republic. AZ Central.com. May 16, 2018. <https://www.azcentral.com/story/news/local/arizona/2018/05/16/tribal-monitors-work-forest-service-identify-sacred-places/566667002/>

Resolution Copper.⁷ The bill also provides the right for the Town of Superior to purchase the rights to 545 acres of land with the exchange. The land exchange is conditioned on the publication of a Final Environmental Impact Statement by the Department of Agriculture (USDA) through the U.S. Forest Service (USFS).

Public engagement on the Resolution Copper project has been occurring almost continuously since 2011.⁸ Before and during the submission of the original plan of operations in 2013, through the legislative process authorizing the land exchange, and before and after the publication of the FEIS, Resolution Copper engaged in extensive and ongoing consultation with the USFS, local tribes, non-governmental organizations, local elected officials, and other stakeholders.⁹ Public comment and tribal input has directly led to multiple changes from the original mine plan, such as a location change for a proposed tailings site and the protection of Apache Leap.¹⁰ A list of the Tonto National Forest's Record of Tribal Consultation Meetings for the Resolution Copper and Land Exchange Project, 2008 through February 2020 can be found [here](#).

On January 15, 2021 a FEIS and draft Record of Decision (ROD) was issued by the Trump Administration.¹¹ However, on February 11, 2021, the ACHP terminated the Section 106 consultation process under the National Historic Preservation Act, directly contradicting its earlier acknowledgements that both the Tonto National Forest and Resolution Copper were in compliance with their requirements. In fact, as recently as September 2020, the ACHP was working productively with interested parties on the consultation process stating: “Generally, we are supportive of the substantive revisions that the [programmatic agreement of the Tonto National Forest] has undergone to improve its clarity and functionality...”¹² As a result of ACHP's termination of the Section 106 consultation, on March 1, 2021, the Biden Administration withdrew the Notice of Availability and rescinded the FEIS and draft ROD on the final (45th) day of the public comment period. The reasons given were to review and ensure that the consultation process met the standard of President Biden's Executive Order 13175 on Tribal Consultation and Strengthening Nation-to-Nation Relationships. USDA said additional time was necessary to fully understand concerns raised by both tribes and the public, to understand the project's impacts to these resources and ensure the agency's compliance with federal law.¹³ In order to do this, the USDA said they will conduct additional consultation with the eleven affected tribes, a process that the USFS expects to take approximately 3-6 months from the date the FEIS was rescinded.¹⁴ Throughout the development of the FEIS, the USFS received approximately 130,000 comments during the project scoping period, approximately 35,000

⁷ 16 U.S.C. 539p

⁸ Resolution Copper. Staff briefing. March 6, 2020.

⁹ Id.

¹⁰ Id.

¹¹ U.S. Department of Agriculture. Tonto National Forest. “Resolution Copper Project and Land Exchange Environmental Impact Statement.” Project Update. <https://www.resolutionmineeis.us/>

¹² Letter to Mr. Neil Bosworth, U.S. Forest Service, Tonto National Forest ref: Proposed Resolution Copper Mining Project and Land Exchange, Tonto National Forest, Penal County, Arizona, ACHP Project Number: 012344. September 15, 2020.

¹³ <https://www.resolutionmineeis.us/>.

¹⁴ Staff Briefing with U.S. Forest Service 4.9.21.

comments in response to the Draft EIS, and only 13 objections, including an objection from one Indian tribe, to the FEIS.

Jobs and Broader Economic Impact

The Resolution Copper project would be an underground panel caving mining operation more than a mile beneath the earth's surface.¹⁵ Once operational, this would be the largest copper mine in North America, capable of producing about 40 billion pounds of copper over 40 years, and meeting about 25 percent of domestic copper demand in the process.¹⁶

Copper has extensive uses across economic sectors, including telecommunications, electronics, and renewable energy technologies. Partly due to the projected growth in renewable energy use, global demand for copper is expected to drastically increase over the coming decades. In fact, the World Bank projects the need to mine as much copper in the next 25 years as we have in the last 5,000 years to meet demand, if we are to meet the global needs mandated by a transition to electric vehicles.¹⁷ Resolution Copper's parent company, Rio Tinto, operates one of two operating copper smelters in North America, located in Utah.¹⁸ The smelter produces critical minerals that are byproducts of copper, namely rhenium, a critical mineral used in superalloys for high-temperature turbine engines,¹⁹ as well as tellurium, an essential element in solar panels.²⁰ Rio Tinto has partnered with Department of Energy's (DOE) Critical Minerals Institute and Department of Defense's (DOD) Defense Logistics Agency on both projects.

Rio Tinto stated publicly that all copper produced from the mine will stay in the United States.²¹ Benefits of this project will also be felt at the local and state level. Resolution Copper is anticipated to support 1,500 direct jobs and 2,200 indirect jobs in the surrounding area and could generate as much as \$61 billion to the Arizona economy over the decades-long life of the mine.²² It is also estimated that annually, the project would generate \$88 to \$113 million in state and local tax revenues and the federal government could see \$200 million in annual tax revenue. Investment in the project has already reached \$2 billion,

¹⁵ <https://www.hatch.com/Projects/Metals-And-Minerals/Resolution-Copper-Mine-No-9-Shaft-Deepening-Project#:~:text=The%20Resolution%20copper%20deposit%20lies,world's%20largest%20undeveloped%20copper%20deposits.>

¹⁶ Lewis, Barbara. "Rio Tinto's Resolution copper project in Arizona moves step closer." Reuters. August 9, 2019. <https://www.reuters.com/article/us-riotinto-resolution/rio-tintos-resolution-copper-project-in-arizona-moves-step-closer-idUSKCN1UZ23S>

¹⁷ <https://www.realclearenergy.org/articles/2021/04/01/to-support-americas-electrification-well-need-more-copper-than-ever-before-770754.html#:~:text=In%20total%2C%20it%20is%20anticipated,transition%20and%20wider%20electrification%20goals.>

¹⁸ Resolution Copper. Staff briefing. March 6, 2020.

¹⁹ U.S. Geological Survey. Mineral Commodity Summaries 2021. <https://pubs.usgs.gov/periodicals/mcs2021/mcs2021.pdf>

²⁰ U.S. Geological Survey. "Tellurium – The Bright Future of Solar Energy." April 2015.

²¹ Hrg. Before H Subcmte Energy Mineral Resources. Hearing on The Importance of Domestically Sourced Raw Materials for Infrastructure Projects. Nigel Steward, Rio Tinto Q&A. 3.21.17.

²² Resolution Copper. "Project Facts." <https://www.resolutioncopper.com/files/media-releases/Resolution%20Economic%20Benefits%20Nov%202020.pdf>

including about 600 current employees, many of whom are American Indian.²³ The project workforce includes approximately 60 members of the San Carlos Tribe.²⁴

Water Use and Treatment

The mine's water use and treatment plan will likely be emphasized by Committee Democrats. Mining at Resolution Copper will require a maximum of 13,000 acre-feet of water per a year, in a desert environment.²⁵ Resolution Copper has acquired water rights from the Colorado River via the Central Arizona Project canal for about half of the projected mine life.²⁶ However, mining at the significant depths of this operation will also produce water, which could provide a secondary source for the project.²⁷

Another likely focus of Committee Democrats will be the potential for acid-generating tailings, the disposal of these tailings, and a plan to ensure there will be no contamination of any nearby water sources. These concerns have been addressed in detail during the National Environmental Policy Act process, including evaluations of the best location and storage method for the tailings. Water quality monitoring at the surface and the groundwater level has been carefully planned.²⁸

Sacred Site Issues

The exchange lands include a 760-acre unit of National Forest System called the Oak Flat Withdrawal Area, under which the copper ore deposit likely extends. According to the 2021 FEIS for the project, Oak Flat has been "historically used by Native Americans who hold the land as sacred and use the area for spiritual and traditional uses."²⁹ The 2021 FEIS further stated that Oak Flat will be subject to subsidence from the mine over the long term and notes the possible loss of the site. Resolution Copper affirmed that subsidence will occur gradually over the life of the project but the main cultural and religious areas will be unaffected. The site known as Apache Leap and additional 1,000 acres have received a Special Management Area designation by the USFS,³⁰ meaning there is a legal obligation to leave the site in the same condition it is in now.³¹ Additionally, in March 2016, the Oak Flat area was listed on the National Register of Historic Places (NRHP) as a traditional cultural property. The addition of this area to the NRHP by the National Park Service raises questions as to whether the listing was conducted properly, was prompted by the passage of

²³ FEIS, 387. <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-2.pdf>

²⁴ Resolution Copper. Staff briefing. April 7, 2021.

²⁵ Id. at 48. <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf>

²⁶ Id. at 80. <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf>

²⁷ Id. at 80.

²⁸ Id., Appendix J. <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-6.pdf>

²⁹ Resolution Copper Project and Land Exchange FEIS Executive summary. January 2021. E-4.

<https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf>.

³⁰ Introduction at 1.1. <https://www.apacheleapsma.us/sites/default/files/alsma-management-plan-20180103.pdf>

³¹ Id. at 165.

the land exchange legislation and whether the Arizona State Historic Preservation Office provided comments.^{32 33}

Organized environmental groups actively opposed the land exchange, consistent with their routine opposition to mine projects, mining jobs, and production of mineral resources to meet domestic demand. The San Carlos Apache Tribe have been the principle opposers of the mine project, saying the project would irreparably damage sacred sites including Oak Flat and Apache Leap. Many other tribes and tribal organizations outside the State of Arizona have also gone on the record in opposition to the land exchange bill and the mine project.

However, opposition to the project is not unanimous within the tribal community, and the validity of Oak Flat as a sacred site has been disputed. Notably, a San Carlos Apache member and historian has stated:

My book, “The History of the San Carlos Apache,” published by the San Carlos Apache Historic and Cultural Preservation Office in 1997, offers a much different perspective. There has not been a long history of ceremonial or cultural activities such as Sunrise or Holy Ground ceremonies taking place at Oak Flat.³⁴

He adds that:

In 1970, the Magma Copper Company built a mine shaft on Oak Flat that you can see from the passing highway. No member of the San Carlos Apache Tribe said anything about it being a sacred site. I know because I was living in Superior at the time. Some tribal people from San Carlos even talked about getting employment with the mine.³⁵

There is no statute concerning “sacred sites” of Indian tribes. On May 24, 1996, President Bill Clinton signed Executive Order 13007,³⁶ titled “Indian Sacred Sites,” directing agencies to implement procedures to ensure “reasonable notice” for proposed federal actions that affect access to or the physical integrity of Indian sacred sites, and to consult with Indian tribes. The Order also required agencies to report back on the implementation of the Order. Under its own terms, the Order creates no enforceable rights, benefits, or responsibilities against the United States or any person.

There are several statutes to provide for conservation and appropriate disposition of Native American human remains, objects of cultural patrimony, and culturally or historically significant sites on public lands and Indian lands. For example, the Native American

³² <https://azcapitoltimes.com/news/2016/03/02/lawmakers-challenge-proposal-to-have-oak-flat-listed-as-historic-site/>

³³ https://tucson.com/news/historic-designation-of-mining-site-provokes-lawmakers-anger/article_42b65dcd-6b5c-5355-8a50-150ae8a65a48.html

³⁴ <https://www.azcentral.com/story/opinion/op-ed/2015/07/23/oak-flat-sacred/30587803/>

³⁵ Id.

³⁶ <https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf>

Graves Protection and Repatriation Act³⁷ provides for the disposition and repatriation of Native American human remains and artifacts discovered on federal lands, and the Archaeological Resources Protection Act of 1979³⁸ protects archaeological resources and sites on public and Indian lands.

Tribal Consultation

Out of respect for the special status of Indian tribes, the United States and its agencies consult with Indian tribes on proposed actions that may affect their interests. This obligation was formalized in Executive Order 13175 (November 6, 2000), which contained instructions for agencies to establish procedures to ensure “meaningful consultation and collaboration with tribal officials with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes ...”³⁹

On January 26, 2021, President Biden issued a memorandum reaffirming the policy established under Executive Order 13175.⁴⁰ As with the Executive Order on sacred sites, this order creates no right, benefit or trust responsibility in law or equity. In addition to Executive Order 13175, the statute authorizing the Resolution Copper project required the U.S. Forest Service to conduct tribal consultations with eleven identified affected tribes. As of the date of this writing, the USFS has not made clear whether Resolution Copper project is in compliance with this new memorandum.

As noted above, the Tonto National Forest has held many formal consultation meetings and field tours with Indian tribes surrounding the Resolution Copper project. The record of these meetings is summarized in a document prepared by the USFS which can be found [here](#). As a result of the consultations, a programmatic agreement⁴¹ was developed to include Emery Oak restoration and conservation, scholarships for tribal members, tribal monitoring programs to conduct cultural studies and provisions for continued access to the Oak Flat area. In addition, a significant number of changes to the mine’s plan have been incorporated to address concerns raised by tribes. For example, the initial Resolution Copper mine footprint area has shrunk, with more land being permanently conserved. The mine tailings storage facility will also be relocated approximately 30 miles away from the original tailings facility site.⁴² Despite Resolution Copper’s active engagement to address concerns by several tribes, the San Carlos Apache tribe contends that regardless of the changes to the mine’s plan, the only acceptable action the tribe will find acceptable is to cancel the project.⁴³

³⁷ 25 U.S.C. 3001 et seq.

³⁸ 16 U.S.C. 470aa et seq.

³⁹ <https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf>

⁴⁰ <https://www.govinfo.gov/content/pkg/DCPD-202100091/pdf/DCPD-202100091.pdf>

⁴¹ Appendix O. <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-5.pdf>

⁴² Id.

⁴³ <https://www.azcentral.com/story/opinion/op-ed/2021/02/04/resolution-copper-would-destroy-our-tribes-sacred-lands-oak-flat/4344377001/>

Recent Committee Action

Extensive Congressional action occurred from [2005-2013](#) on legislation to authorize the Resolution Copper land exchange, the Southeast Arizona Land Exchange and Conservation Act. However, the Committee has only held one “Save Oak Flat” related oversight hearing on March 12, 2020, entitled, “The Irreparable Environmental and Cultural Impacts of the Proposed Resolution Copper Mining Operation.”⁴⁴ The U.S. Forest Service was not invited to testify at the 2020 hearing and has not been invited by the Democrat Majority for this hearing either. This will be the first legislative hearing for the Save Oak Flat bill.

Republican members did not participate in the March 2020 hearing. Ironically, at the time the Committee Majority denied requests to make accommodations for some Committee members and tribal witnesses to participate remotely due to COVID-19 complications. Further, an opponent of the Resolution Copper project engaged in public intimidation tactics against the Republican witness on social media, which resulted in the individual withdrawing his participation as a witness in the hearing.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. Provides Short title.

Section 2. Sets forth findings.

Section 3. Provides definitions for the Act.

Section 4. *Subsection (a)* Repeals section 3003, Southeast Arizona Land Exchange and Conservation, from the Fiscal Year 2015 National Defense Authorization Act.

Subsection (b) Withdrawals Oak Flat from any entry, appropriation, disposals under public land, mining, and geothermal laws and leasing.

The withdrawal map cited in the legislation would expand beyond Oak Flat area that is considered sacred, to include all of Resolution Copper’s unpatented claims.

V. COST

A Congressional Budget Office score for the legislation in the 117th Congress has not been completed.

VI. ADMINISTRATION POSITION

Unknown.

VII. EFFECT ON CURRENT LAW (RAMSEYER)

⁴⁴ <https://www.govinfo.gov/content/pkg/CHRG-116hrg40520/pdf/CHRG-116hrg40520.pdf>

H.R. 1884 (Grijalva)

[Link to Ramsayer.](#)