

**Statement of
Mary Wagner
Associate Chief
U.S. Forest Service
U.S. Department of Agriculture**

**Before the
U.S. Senate
Energy and Natural Resources Committee**

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Concerning

**H.R. 1904: the “Southeast Arizona Land Exchange and Conservation Act of 2011”
as passed by the House, and S. 409, the Southeast Arizona Land Exchange and
Conservation Act of 2009, as reported during the 111th Congress**

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today to provide the Department of Agriculture’s views on H.R. 1904, the “Southeast Arizona Land Exchange and Conservation Act of 2011” as passed by the House and S. 409, the “Southeast Arizona Land Exchange and Conservation Act of 2009,” as reported by the Committee during the 111th Congress. I am Mary Wagner, Associate Chief of the U.S. Forest Service. Both H.R. 1904 and S.409, as reported, would direct the Secretary of Agriculture to convey federal land for use as an underground copper mine in exchange for environmentally sensitive non-federal land in Arizona. We defer to the Department of the Interior on provisions relating to lands to be managed by the Bureau of Land Management (BLM).

H.R. 1904: the “Southeast Arizona Land Exchange and Conservation Act of 2011”

H.R. 1904 would direct the Secretary of Agriculture to convey to Resolution Copper Mining, LLC (Resolution Copper), a 2,422 acre parcel of land on the Tonto National Forest. The federal land to be conveyed, known as Oak Flat, contains a potentially sizeable copper ore body and adjoins an existing copper mine on private land owned by Resolution Copper. In exchange, Resolution Copper would convey five parcels of land to the Forest Service and three parcels of land to BLM. The total non-federal acreage that would be conveyed by Resolution Copper is 5,344 acres, all of which are in Arizona.

The Bill calls for an equal value exchange in section 4(e). If the value of the federal land (including the ore body) to be conveyed exceeds the value of the parcels to be acquired, the Bill would allow for a cash equalization payment by Resolution Copper in excess of twenty-five percent. Under current law, cash equalization payments may not exceed twenty-five percent (section 206(b) of Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(b))). A cash equalization payment resulting from the exchange would be

deposited in the Sisk Act account to be used, upon appropriation by Congress, for acquisition of land for addition to the National Forest System within the State of Arizona.

Section 6(b) of the Bill would require Resolution Copper to make value adjustment payments if, as the mine is developed, production of the mine exceeds expectations documented in the appraisal. Those funds would be deposited in a special account in the Treasury to be used, upon appropriation by Congress, for maintenance, repair, and rehabilitation projects on BLM and National Forest System lands. The Department's position is that any value adjustment payments should be used for land acquisition.

The Bill also would provide for the sale of: a 30 acre parcel of land currently being used as a cemetery; a reversionary interest and reserved mineral rights in a 265 acre parcel; and 250 acres near the Superior Airport at market value to the Town of Superior. Sale proceeds would be deposited in the Sisk Act account to be used, upon appropriation by Congress, for acquisition of land to the National Forest System in Arizona.

H.R. 1904 would require Resolution Copper to pay all costs associated with the exchange, including any environmental review document. The Bill provides that it is the intent of Congress that the exchange be completed not later than one year after the date of enactment.

At the request of Resolution Copper, the Bill would require the Secretary, within 30 days of such request, to issue a special use permit to Resolution Copper to carry out mineral exploration activities under the Oak Flat Withdrawal Area, from existing drill pads located outside the area, if such activities would not disturb the surface of the Area. At the request of Resolution Copper, within 90 days, the Bill would require the Secretary to issue a special use permit to Resolution Copper to carry out mineral exploration activities under the Oak Flat Withdrawal Area (but not within the Oak Flat Campground), if the activities are conducted from a single exploratory drill pad which is located to reasonably minimize visual and noise impacts to the Campground.

H.R. 1904 would require the Secretary of Agriculture to complete an environmental review document after the exchange, and after the above-noted activities were permitted to take place, but before Resolution Copper's commencement of commercial mineral production on the land it would acquire in the exchange. Specifically, once the land exchange is consummated, and these lands are in the private ownership of Resolution Copper, Resolution Copper is authorized to submit a mine plan of operation to the Secretary. Thereafter, the Secretary must complete an environmental review document within three years that is limited to section 102(2) of the National Environmental Policy Act of 1969 (NEPA). The environmental document would be used as the basis for any federal action or authorization related to the proposed mine and mine plan of operations of Resolution Copper, including the construction of associated power, water, transportation, processing, tailings, waste dump, and other ancillary facilities. After the exchange, Resolution Copper may need to use the adjoining National Forest System land for ancillary activities related to the mining development, such as rights-of-way for electric lines, pipelines, or roads. As we understand the Bill, it would require the Forest

Service to prepare an environmental analysis before issuing authorizations for such activities, which would be consistent with existing requirements under NEPA.

The Bill would add five parcels of land totaling almost 1,200 acres to the National Forest System. Most of these parcels include riparian areas which are somewhat rare in Arizona. One of the parcels that would be acquired adjoins the Apache Leap area on the Tonto National Forest. Additionally, as a condition of the land exchange, Resolution Copper would surrender its rights to commercially extract minerals under Apache Leap.

While the Department understands and appreciates the potential economic benefits and the value of the lands to be acquired by the American public, the Department cannot support the Bill as written but is looking forward to working with the Sponsor and the Committee. The principal concern is that the Bill would require the agency to prepare an environmental review document under NEPA *after* the land exchange is completed. Also of concern is the fact the Bill would immediately authorize mining exploration activities under an area that is considered sacred by the San Carlos Apache Tribe without a review or study or consultation with Tribes.

NEPA is a forward looking statute setting out procedural obligations to be carried out before a federal action is taken. It requires that, before taking a discretionary decision, the federal agency consider the environmental impacts of a proposed major federal action and alternatives of such action. It is this Administration's policy that NEPA be fully complied with to address all federal actions and decisions, including those necessary to implement congressional direction.

The purpose of the requirement in the bill that the agency prepare a limited NEPA review *after* the exchange, when the land is in private ownership, is unclear because the bill provides the agency limited discretion to exercise. An environmental review document after the exchange would preclude the U.S. Forest Service from developing a reasonable range of alternatives to the proposal and providing the public with opportunities to comment on the proposal. In addition, the U.S. Forest Service does not have an understanding of the impacts the proposed mine will have on local or regional water supplies, water quality, or possible dewatering of the area. No studies or assessments of the water supplies have been conducted. That is information which could and should be obtained by the Forest Service with NEPA analysis *before* the exchange. A NEPA analysis after the exchange would not allow the Forest Service to recommend alternatives since the exchanged parcel would already be in private ownership.

The Bill should be amended to require the preparation of an environmental analysis *before* the land exchange is completed. The purpose of preparing an environmental analysis before consummating the land exchange would be to analyze the effects of the transfer of the federal land to Resolution Copper, any activities that are reasonably foreseeable to occur on the transferred land (including mineral development), and the acquisition of the non-federal land resulting from the exchange. The agency would use the environmental analysis to make a decision on whether and how to proceed with the

exchange and what mitigation conditions would be required to mitigate the identified impacts.

The legislation states that it is Congressional intent that the exchange be completed within one year. Based on our experience with complex land exchanges, this is an insufficient amount of time to complete the exchange. Given the requirement of mineral reports, appraisals, title documents, environmental analysis and government to government consultation with local Tribes, a two to three-year timeframe is much more realistic.

The agency also understands that a number of federally recognized Indian tribes and regional and national tribal organizations are concerned that the H.R. 1904 circumvents various laws, policies, and Executive order that directs the Federal land managing agencies to engage in formal consultation with the interested Indian tribes. Indian tribes have also raised important concerns that the Bill is contrary to various policies and Executive Orders that Federal land managing agencies protect and preserve sites that are sacred to Native Americans. The Forest Service understands that the land is considered sacred by the tribe and holds significant traditional and historic value. Because of these expressed concerns and because this specific site has been the focus of historic Government protection it is important that this Bill provide for the process of formal tribal consultation to ensure both tribal participation and protection of this site.

The Bill would require the Secretary to prepare a management plan for Apache Leap. Further, the federal lands to be exchanged (Oak Flat) hold significant cultural values to Indian Tribes. Although the Bill would require government-to-government consultation, any consultation would not be considered meaningful under Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", because the Secretary's discretion regarding the land exchange is limited. The focus of the consultations would likely be the management of those areas over which the agency would have discretion, namely, the federal land adjacent to the mine and Apache Leap.

For example, the Secretary would not have discretion over the conveyance or on-site management of the Oak Flat site, which under the legislation would be conveyed to Resolution Copper. The San Carlos Apache Tribe considers the Oak Flat area to be a sacred site. They have expressed concerns that block cave mining would cause subsidence that would impact the fundamental religious nature of the site. They have also expressed concerns regarding potential impacts on water quality. They have detailed in correspondence to Secretary Vilsack, the importance of traditional acorn gathering and religious ceremonies which still occur on this site. The Department has a responsibility to consider the Tribes' concerns and these can only be adequately addressed if a pre-exchange environmental analysis is the first step.

S.409, the Southeast Arizona Land Exchange and Conservation Act of 2009, as reported by the Committee during the 111th Congress

With the exception of the “Pond Parcel,” S.409, as reported, describes the same lands to be considered for exchange and many of the same provisions as H.R.1904. However, in contrast to H.R. 1904, S.409 would address the principal concerns the Department has with H.R.1904. S. 409 would require the agency to make a public interest determination on the merit of moving forward with the exchange based on an environmental analysis to be conducted *before* the land exchange would proceed. It also mandates consultation with affected Indian tribes as part of that process. S.409 requires government-to-government consultation prior to making a determination as to whether the exchange is in the public interest. The Administration believes that the timing of government-to-government consultation prior to the Secretary of Agriculture’s public interest determination would allow for meaningful consultation and coordination with interested tribes.

We have a number of significant concerns with both versions such as parcels to be included for acquisition, valuation of the parcel to be conveyed, etc. We would like to work with the Committee to resolve these concerns.

There is no doubt that the lands that would be acquired and managed by the U.S. Forest Service under either bill have important resource values that should be protected. There are also potential economic and employment benefits from the proposed mining operation. However, it is important to understand and address environmental concerns and impacts on sites considered sacred and important by the Tribes. In addition to the concerns expressed in testimony, the Department would like to work with the Committee on a number of technical concerns with H.R.1904, as passed by the House, or a Senate version of the Bill.

This concludes my statement and I would be happy to answer any questions you may have.