

Alliance for Historic Landscape Preservation • American Rock Art Research Association • Crow Canyon Archaeological Center • New Mexico Heritage Preservation Alliance • National Trust for Historic Preservation • Partnership for the National Trails System • Sacred Sites International • Society for American Archaeology

October 24, 2011

The Honorable John Boehner
Speaker
U.S. House of Representatives
H-232
Washington, DC 20515

The Honorable Eric Cantor
Majority Leader
U.S. House of Representatives
303 Cannon House Office Building
Washington, DC 20515

Re: Vote NO on H.R. 1904, the Southeast Arizona Land Exchange and Conservation Act of 2011

Dear Speaker Boehner and Majority Leader Cantor:

On behalf of the undersigned organizations representing historic, cultural, archeological, rock art and Tribal preservation interests on public lands we respectfully urge you to VOTE NO on H.R. 1904, the Southeast Arizona Land Exchange and Conservation Act of 2011. H.R. 1904 would transfer more than 2,400 acres of public land to a privately owned mining company without assurances that priceless historic and cultural resources will be protected. Resolution Copper Mining, the primary beneficiary of the transfer, intends to remove the ore body beneath Oak Flat, a popular campground and significant site to several area Tribes, through block mining. The drill pads, mine shafts and tunnels, roads and other human created disturbances generated by the mine will have devastating consequences on the area's ecosystem, thereby severely affecting its religious and cultural integrity. Most alarmingly, the H.R. 1904 effectively exempts the transfer from federal law pertaining to consultation with Tribes and limits the public's opportunity to comment during the environmental review process. Such a blatant giveaway of the nation's public land to a single private stakeholder sets a dangerous precedent and we urge the Committee to reject the proposal.

Significance of Oak Flat

The area proposed to be transferred out of federal control includes a popular campground called Oak Flat, set aside by President Eisenhower in 1955 specifically for recreational purposes. Oak Flat is also a place of profound religious, cultural, and historic significance to many Native American Tribes, nations, and communities in the region including the San Carlos Apache Tribe, the White Mountain Apache Tribe, the

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Yavapai-Apache Nation, the Tonto Apache Tribe, the Fort McDowell Yavapai Nation, the Hualapai Tribe, Jicarilla Apache Nation, the Mescalero Apache Tribe, the Pueblo of Zuni among others. See Hearing before the Subcommittee on Public Lands and Forests of the Committee on Energy and Natural Resources, United States Senate on S.409, 111th Cong., S. Hrg. 111-65 (June 17, 2009).

Concerns with H.R. 1904

I. NEPA Exemption

The H.R. 1904 requires review under National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, only *after* the land transfer is complete. Such ex post facto review is clearly contrary to the spirit and intent of NEPA which requires that federal agencies analyze alternatives prior to making decisions that would affect the environment.¹ The U.S. Forest Service has stated this portion of the legislation as its “principal concern” since “[a]n environmental review document after the exchange would preclude [USFS]...from developing a reasonable range of alternatives to the proposal and providing the public with opportunities to comment.” *Southeast Arizona Land Exchange and Conservation Act of 2011: Hearing on H.R. 1904 Before the Subcomm. on National Parks, Forests, and Pub. Lands of the H. Comm. on Natural Res.*, 112th Cong. (2011) (statement of Mary Wagner, Associate Chief, U.S. Forest Service). We agree. NEPA review after land has been removed from federal control is clearly too little, too late and not in the public interest.

II. NHPA Exemption

Further, H.R. 1904 exempts the Forest Service from its responsibility to comply with Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f. Section 106 requires federal agencies to consider the effects of their actions on historic resources before taking action which may affect historic properties. The Section 106 regulations make clear that the “[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” is an adverse impact for which the Forest Service is required to consult with stakeholders including Tribes which attach spiritual significance to the site. 36 C.F.R. § 800.5(a)(2)(vii).

While making some effort to involve interested stakeholders after the land is transferred to Resolution Copper, the legislation clearly circumvents any meaningful

¹ See, *Center for Biological Diversity v. U.S. Dept of Interior*, 623 F.3d 633 (9th Cir. 2010)(holding that BLM violated NEPA by not taking a hard look at the environmental consequences of transferring public land to a private copper mining corporation in Arizona.)

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consultation process. For instance, consultation could start as late as 30 days from the date of enactment. See H.R. 1904, § 4(c), yet, ironically, if requested by RCM, the Secretary is mandated to begin issuing permits for mineral exploration activities underneath the Oak Flat Withdrawal Area, from platforms outside the area, starting thirty (30) days after the enactment of H.R. 1904. See *id.* § 4(f)(1)(A). This allows for the initiation of activities which could disrupt the historical and cultural integrity of the site before any meaningful consultation was mandated. Then, ninety (90) days after enactment, by special use permit, exploration activities could be conducted inside the Oak Flats Withdrawal area itself, if requested by RCM. See *id.* § 4(f)(1)(B). The true extent of these activities cannot be known as no map is available for the public until enactment of H.R. 1904. See *id.* at § 10(b)(3).

III. Abrogation of Duties Under FLPMA

H.R. 1904 states that the land exchange furthers the public interest in accordance with the objectives of the Federal Land Policy and Management Act of 1976 which requires that the public interest be “well served.” 43 U.S.C. § 1716(a); See H.R. 1904 § 2(a)(1)(A). However, this rationale clearly elevates the interest of a few who seek to permanently damaging the land to extract a limited amount of minerals against Native American groups who have relied on Oak Flat for traditional religious uses for centuries. It is far from clear that the public interest would be well-served by such a transfer.

Further, FLPMA’s implementation is based on a policy of Multiple Use Sustained Yield which is meant to take into account, “the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” 43 U.S.C. § 1702(c) (emphasis added). The fact that both “minerals” and “historic values” are both considered indicates that use of federal lands is not necessarily maximum economic development; rather, it is economic development along with consideration of other interests, including those of cultural resources. Furthermore, under FLPMA, it is declared to be the policy of the federal government that, “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition;...and that will provide for outdoor recreation and human occupancy and use.” 43 U.S.C. § 1701 (emphasis added). Given the explicit intent for FLPMA land exchanges to include consideration of archaeological and historic resources, the current legislation falls short of its requirement to be in the “public interest,” as it claims to be.

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IV. Violation of Fiduciary Duty to Tribes

Finally, H.R. 1904 directly contradicts numerous statutes and regulations Congress has passed with the intent of protecting the religious, cultural, social integrity of Tribes to ensure that the policies and procedure of federal agencies do not impede the exercise of traditional religious practices. Most critically, H.R. 1904 circumvents the Forest Service's fiduciary duty to the Tribal community to engage in meaningful government-to-government consultation. *See, Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir.2006). The blatant abrogation of these duties represented by H.R. 1904 is alarming.

Conclusion

Because of the foregoing, we respectfully urge you to VOTE NO on H.R. 1904. First, review under NEPA should be conducted before and not after the land exchange. Second, a historic resources review process, as required by NHPA, should be added to the legislation. These two changes together will ensure that before any exchange commences, there has been an adequate assessment of the possible risks involved in the land transfer and that cultural resources on the land to be transferred can be retained, or at the very least, the effects to them mitigated. Third, to adequately conduct both the required environmental and cultural resources analyses, the federal government should consult directly with the interested Native American Tribes, so that their concerns over the project can be adequately addressed. Lastly, the legislation should provide the Tribes real and actual recourse in the event that RCM intentionally, knowingly, or negligently destroys, alters, or detrimentally affects the cultural resources of Oak Flat.

Sincerely,

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