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EARTHWORKS
Public Lands and Forests Subcommittee of the
Senate Energy and Natural Resources Committee
Hearing on S. 3157 “Southeast Arizona Land Exchange and Conservation Act of 2008”
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EARTHWORKS is a non-profit, non-partisan environmental organization dedicated to protecting communities and the environment from the adverse impacts of mineral development. Our national office, based in Washington D.C., provides support to citizens across the country and around the world. Our field offices in Arizona and Montana assist communities throughout the western United States concerned about the impact of mineral development in their backyards.

EARTHWORKS supports responsible mining policies and practices and recognizes that some mining companies seek to operate in a manner that protects our environment.

The Sierra Club is America's oldest, largest and most influential grassroots environmental organization. Inspired by nature, the Sierra Club's members—including 14,000 in Arizona—work together to protect our communities and the planet. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club's Grand Canyon Chapter has been actively involved in protecting public lands in Arizona for more than 40 years.

We appreciate the opportunity to express our view in front of the Subcommittee about S. 3157, the Southeast Arizona Land Exchange and Conservation Act of 2008 (Oak Flat Land Exchange).

Background

Resolution Copper Company (RCC)—a wholly foreign-owned subsidiary of Rio Tinto and BHP, two of the largest mining companies in the world—is potentially planning to develop a deep underground copper mine. RCC seeks to acquire Oak Flat, Apache Leap, and surrounding public lands for its private use through this land exchange bill. There are many significant problems posed by this unusual bill. For example, if approved, more than 3,000 acres of the Tonto National Forest will become private property and forever off limits to recreationists and all those who enjoy public lands. Privatization of this land would end public access to some of the most spectacular outdoor recreation and wildlife viewing areas in Arizona. If a mine is developed, this land would be affected by massive surface subsidence, leaving a permanent scar on the landscape among other lasting and ongoing damage.

The Oak Flat Campground was recognized by the Eisenhower Administration as an important recreational resource in 1955, and specifically placed off limits to future

mining activity. This unique area is a world-class natural resource for birding, hunting, hiking, camping, rock climbing, bouldering, canyoneering, picnicking, responsible OHV driving, and other recreational uses. Oak Flat receives tens of thousands of visitors each year. On the eastern border of Oak Flat is Devil's Canyon, and the waters of Queen Creek, one of the crown jewels of Arizona's state trust lands, with some of the finest remaining riparian habitat in the state.

The Oak Flat Campground, Apache Leap, and the surrounding area are very important for recreation and respite to the citizens of the town of Superior and a large percentage of Superior residents oppose the Oak Flat Land Exchange.

Oak Flat, Apache Leap, Devil's Canyon, and the surrounding area have long been an important cultural site for Western Apaches as well as for the Fort McDowell Yavapai tribe.. The Tonto National Forest has discovered at least a dozen archeological sites in and around Oak Flat. Apaches continue to use the Oak Flat area to gather acorns and pine nuts that are highly valued traditional and ceremonial foods. Making Oak Flat private land would forever eliminate those Apache traditional cultural and religious uses of that unique area. Apache Leap is an historical land known as the Apache's Masada. It is hallowed grounds where many dozens of Apaches leaped to their deaths when trapped by the US Army.

The bill contains no meaningful environmental studies. Furthermore, RCC has not yet filed a mining plan and has offered scant and often conflicting information about (1) what will become of Oak Flat, Apache Leap, and environs; (2) where the mountains of mining tailings will ultimately reside; (3) where the enormous amounts of water needed for mining will come from and be discharged; (4) how endangered species (such as the Arizona hedgehog cactus, *echinocereus triglochidiatus arizonicus*) will be protected and preserved; and (5) how necessary cultural resources will be protected. Importantly, the bill makes no mention of the subsidence that could occur if RCC is allowed to mine this area as it intends. Much has yet to still be dealt with in terms of environmental considerations.

This bill is at best premature. Before we can decide on the merits of any exchange, the public must review and debate a plan of operation for an actual mine. Only if, after full review of a plan of operations and alternatives, a decision is made to move forward with a mine, should it be determined if a land exchange is needed.

For this, and other reasons listed below, we are opposed to the land exchange in its current form.

Loss of Oak Flat Campground

Oak Flat campground was recognized by President Eisenhower as an important area back in 1955, when he signed Public Land Order 1229 which specifically put this land off limits to future mining activity and reserved it for camp grounds, recreation, and other public purposes. Oak Flat provides many recreational opportunities for Arizonans, including for those in the local communities, and for others from around the country. Recreational activities in the area include hiking, camping, rock climbing, birding,

bouldering and more.

Oak Flat is a key birding area. Four of the bird species that have been sighted at Oak Flat are on the National Audubon Society's watch list of declining species that are of national conservation concern including the black-chinned sparrow, Costa's hummingbird, Lewis' woodpecker, and gray vireo. The endangered Arizona Hedgehog cactus (*Echinocereus triglochidiatus* var. *arizonicus*) also inhabits the Oak Flat area and is threatened by this proposed mine.

In addition to privatizing this important area, S. 3157 also rescinds P.L.O. 1229. In Section 9 of the bill, titled "MISCELLANEOUS PROVISIONS", it revokes any public land order that withdraws Federal land or the land to be conveyed to Arizona State Parks. It is disturbing to see this withdrawal of the protection for Oak Flat. Considering all the pressures on our public lands, the important services and opportunities they provide, and the important respite from the increasing urbanization they provide, it is a bad precedent and a bad message for the Congress to give up to a mining company an area protected by President Eisenhower more than 50 years ago.

Threats to Devil's Canyon

Devil's Canyon is located in the Tonto National Forest and on State Trust Lands near the proposed mine, just northeast of the town of Superior. It flows into Mineral Creek which is a tributary of the Gila River. Devil's Canyon provides important and all too rare riparian habitat in a state where much of our riparian habitat has been degraded or destroyed – most estimates indicate that more than 90 percent has been lost to water diversions, groundwater pumping, and other activities. It is an area enjoyed by hikers and climbers and those seeking some relief from the heat. Sycamores and Arizona alders thrive on Devil's Canyon's water and also provide valuable habitat for wildlife.

Considering its proximity to the proposed mine and the amount of water the mine would utilize, between 17,000 and 19,000 acre feet of water per year, the risks of dewatering Devil's Canyon are significant. Banking Central Arizona Project water at a remote location as the company is currently doing will not protect this important riparian area.

No Meaningful Environmental Analysis

For the first time, this version of the Oak Flat land exchange bill mentions the National Environmental Policy Act (NEPA). While this may sound like a step forward, the bill language does not change the status quo.

There would be no NEPA analysis on the land exchange. The bill forbids any NEPA analysis of impact except for commercial production and then ONLY if there were a Federal nexus to what would become RCC private land. The very fact that the entire section that deals with NEPA is titled "POST-EXCHANGE PROCESSING" makes it clear that no NEPA would occur until the land exchange was a done deal. At that point, the bill clearly states that NEPA would only happen "regarding any Federal agency action carried out relating to the commercial production..." This is already the case. A mine on private land that, for example, wanted to build a road across Federal land would require NEPA on that action. The only real difference this "NEPA" section would make

is that an EIS would need to be done instead of a simpler Environmental Assessment.

Even if this provision would somehow invoke a NEPA analysis on a mine design (and this would be highly unlikely), the exchange and the mine would already be a done deal and the NEPA analysis would be moot at best and more likely a complete waste of taxpayer money done simply to give RCC some extra “window dressing.”.

There would still be no analysis in the bill of the impacts on the land traded out of public ownership, including impacts from mining or other uses of the land on adjacent lands.

There is plenty of time to undertake the full public review of any possible mine under Oak Flat and Apache Leap. Full public review and input would show that the area is critically important to Western Apache and others—a point that is being glossed over in the current rush to approve the exchange.

S. 3157 allows Resolution Copper Company to bypass the National Environmental Policy Act (NEPA), as would be required if this land exchange was evaluated through the administrative process. An administrative exchange would require a NEPA Environmental Impact Statement on the exchange itself, including an examination of alternatives, the environmental impacts, the cumulative impacts (including past and anticipated impacts in the area), and possible mitigation of the impacts. This type of analysis helps the public better evaluate whether they are getting a fair exchange and also evaluate the true environmental impacts of such an exchange. A NEPA analysis can identify a less environmentally harmful alternative as well. It is clear that Resolution Copper Company (RCC) will benefit enormously from this exchange. It is clear that the public would not get a fair return on the loss of Oak Flat, the possible damage to Devil’s Canyon, and the threats to Apache Leap.

Because there is no NEPA process associated with the exchange itself, there is no opportunity for the public to review a Mining Plan of Operation up front.

There are key questions outstanding on this proposal which make it impossible to say the exchange is in the larger public’s interest. Where would all mining waste go? What is the plan for the mine tailings? Is this a sulfide ore, which is often the case for ore that is below the water table? If it is, how are they going to address the acid mine drainage from the rock dumps? How are they going to process the ore? At one point they suggested using the leach pad at Pinto Valley, but if their estimates on the amount of ore are accurate, they could only process a fraction of the ore at that leach pad. Are they going to smelt the ore? If so, where? Clearly there are significant air quality issues associated with that, not to mention considerable energy use.

If done properly and with a solid open public process, an environmental analysis can inform the proposed action. A study after the fact does not allow that, plus there will be no opportunity to choose the no action alternative or a less environmentally damaging alternative. We will not know the effects of this proposed mine on Devil’s Canyon until after the fact. We will not know if it is really necessary for the public to give up Oak Flat in the exchange or if they can mine this ore body without it until after the deal is done.

The study after the fact might make people feel better about the deal, but its value is negligible, at best, as it will not change the outcome. The exchange will not be modified.

If the information that Resolution Copper Company has provided on this proposed mine is accurate, this mine will be the largest mining operation in Arizona. It would be larger than the Phelps Dodge (now Freeport McMoRan) Morenci Mine and one of the largest working copper mines in the United States. To allow the company to circumvent the National Environmental Policy Act on such a large mine that has great potential to negatively affect the surrounding environs and that has so many unanswered questions associated with it, would be potentially harmful to Arizonans and United States taxpayers.

Sham Royalty

Section 10 of this version of the land exchange contains a provision for RCC to possibly pay a royalty to the Federal government. While this provision may look good on the surface,, it is essentially an attempt to “greenwash” the bill to make it more palatable to decision-makers.

There is no mention in the bill of either the royalty amount or the royalty method. We have attached to our written comments copies of reports EARTHWORKS has prepared showing the problems with different kinds of royalties. Congress should, at the very least, specify both the royalty amount and define the royalty calculation method. Royalty amounts paid on private lands in the United States are as high as 18 percent. Especially since Oak Flat and Apache Leap are so important to the public (including Native American communities, recreationists, and for conservation purposes) purposes) the royalty amount should be enough to attempt to compensate for these losses. Especially since the bill language makes it clear that the appraiser will not be placing a value on the surface estate of Oak Flat and Apache Leap.

The bill places the entire burden of setting the rate and method of the royalty to the appraiser and out of the hands of Congress and the public. This is bad policy. Since most appraisers that are experts in setting royalties spend the majority of their time working for the mining industry, there is a high likelihood that, without oversight by Congress or the public, that the royalty amount would be set far too low. The way the bill is written, only RCC and the Department of Interior will have any input into setting the royalty amount or method.

This royalty section also does not specify the quantity of mineral production used in the appraisal calculations or any analysis of how the estimate was calculated. Again, the company (who would be responsible both in hiring and paying for the appraisal) would wish to lowball these calculations to avoid paying money up front for the value of minerals taken out of the public domain.

A critical issue that is not addressed by this legislation is the value of the lands that RCC will acquire. There is no real discussion of the known and anticipated mineral values on the US Forest Service (public) lands. It is difficult to understand how this land exchange could move forward without solid appraisals, including on the value of the copper itself.

The Mineral Report and Feasibility Study help provide the basis for the appraisal. The value of the exchange cannot possibly be properly evaluated without that.

Inherent Problems with Land Exchanges

In particular, this land exchange bill does little to ensure that the land trade would fairly compensate the American public for the loss of Oak Flat and Apache Leap. The bill requires that an appraisal be completed within one year, yet the company itself will have no idea of the full value of the minerals that are now held in the public trust. This is particularly important given that the royalty payments in Section 10 of the bill are based on this appraisal.

There is no mandate that RCC build a mine if the exchange were to be approved. If the company decides not to mine, Rio Tinto and BHP would be able to enter into the real estate development business. If this bill passes, the land will be private land, allowing mining companies to sell the land for condominiums or golf courses. Rio Tinto is currently planning a massive housing development on its mine land outside of Salt Lake City that could house as many as 500,000–600,000 people. BHP is planning a large subdivision for 3,500 at its mine site near San Manuel. There is nothing to stop RCC from using this bill as a grab of public land under the guise of mining.

While land exchanges can be a tool for conservation, it is a limited tool and the pitfalls are many. It should be used very judiciously. Even with an administrative exchange that would include examination of alternatives and would look at the environmental impacts, it is difficult to determine if the public's interest is really being served. Even though the federal land management agencies are required to do thorough reviews and ensure that a trade is in the public interest, there are significant problems. The General Accounting Office (GAO) issued a report in June 2000 where it examined a total of 51 land exchanges, most of which occurred in the west (BLM and the Forest Service: Land Exchanges Need to Reflect Appropriate Value and Serve the Public Interest, GAO/RCED-00-73, June 2000.) The GAO auditors found that often the public lands were being undervalued while the private lands were being overvalued, resulting in significant losses to taxpayers. The agency also found that many of these exchanges had questionable public benefit.

The GAO discovered that there were some exchanges in Nevada in which the nonfederal party who acquired federal land sold it the same day for amounts that were two to six times the amount that it had been valued in the exchange. While that would not necessarily be the case here, we do know that the non-federal party is likely to make billions of dollars off this land, far short of what the public will get in return.

While the GAO was examining administrative exchanges, it noted that there are inherent problems with exchanging lands no matter the mechanism. In particular, it noted that there are no market mechanisms to address the issues relative to value for value.

Land exchanges have been very controversial in Arizona, which may be one more reason that large corporations do not want to go through the National Environmental Policy Act process which includes significant public involvement. Arizonans have made it clear

how they feel about land exchanges by rejecting six times land exchange authority for the Arizona State Land Department.

In 2003, an independent entity, the Appraisal and Exchange Work Group, was formed to review Bureau of Land Management (BLM) land exchanges. The Work Group's report concluded that BLM's land appraisals were inappropriately influenced by the managers wanting to complete the deals and that these unduly influenced appraisals cost the public millions of dollars in lost value in exchanges with private entities and state governments.

One land swap resulted in an ethics violation investigation of Kathleen Clarke, the BLM Director at the time. The proposed San Rafael Swell land exchange would have cost federal taxpayers \$100 million because the BLM lands were so undervalued. The Office of Inspector General's Report on the San Rafael Land Exchange found that several BLM employees devalued the public lands and kept information from Congress.

Reclamation

There is no discussion about reclamation or closure of a mine in the bill. If the land were privatized, Arizona state law would allow the company itself to insure the cost of reclamation. This type of self-guaranteed bond leaves the taxpayers vulnerable if the mining company is to go bankrupt. We should learn from the example of the bankruptcies of ASARCO and other mining companies. Without cash up front for reclamation, the taxpayer would be left responsible for reclamation costs.

Catering to Special Interests

RCC has gone to great lengths in this bill to attempt to accommodate several interest groups. The bill bends over backwards to provide incentives for rock climber support of the bill. Yet in spite of this effort, all but a few climbers oppose the exchange. The bill's sponsors have offered parcels of land that would benefit only certain conservation organizations. Yet, the bill locks other groups out of areas traditionally used by the public. Not only would Native Americans be locked out of traditional-use areas, but so would recreationists and birdwatchers. Such a divide and conquer strategy of talking to and appeasing only certain special interest groups is not the way to conduct good public policy.

In addition, RCC has used what could certainly be considered strong-arm tactics in eliciting letters of support from local governments including the town council and Mayor of Superior. If similar tactics, including working behind the scenes to force the firing of individuals opposing the Land Exchange, were used in other countries, Americans would be outraged. Such behavior is hardly consistent with an environmentally and socially conscious corporate citizen.

Summary

There is no need for a land exchange in order for RCC to move forward with plans to mine on public land. The 1872 Mining Law, which governs hard rock mining on public land, makes it clear that RCC has the ability to propose a mine on public land. Of the 183 major hard rock mines in the US that have opened since 1975, 137 have operated on public land.

The real solution is to put this land exchange bill on hold and ask RCC to submit a Plan of Operation to the U.S. Forest Service so that an Environmental Impact Statement can be written to cover all the alternatives in the project. RCC has stated that it will not be ready to mine for at least 10 years, giving the Forest Service and the public plenty of time to scrutinize the mine plan and come up with a solution that benefits the mining company, recreationists, and the traditional-use tribal interests.

Unfortunately, this land exchange bill leaves many affected parties out of decision-making process. The bill takes the decision from the many and puts it in the hands of a few, undercutting good decision-making that would involve and benefit the public and surrounding communities. Rather than working out the details behind closed doors, RCC should allow for full disclosure and scrutiny. This will allow any environmental issues—such as subsidence, water use, and pollution issues—to be dealt with early on in the process. It will also allow RCC to fully consult with the tribes and other constituencies that will be affected by the exchange. There seems to be only one reason this bill is being rushed through the process—the companies know that the only way to get what they want is to circumvent America’s tried and true public process by asking Congress to mandate a quick fix.

This land exchange bill would set a chilling precedent, allowing for the revocation of similar land withdrawals such as parks, recreation areas, and wildlife refuges. Public lands such as Oak Flat that are set aside for recreation should remain protected for future generations. This land exchange bill would sacrifice the interests of Arizonans and all Americans, to benefit a mining company. Twenty years from now—if a mine is built and ceases operation and the jobs once again leave—what will be the fate of these towns and landscapes? We strongly urge you to protect these public lands for the public's future use and preserve the unique opportunities for Arizonans that the Oak Flat area provides.

Recently the public has spoken loudly on several occasions about keeping America’s public lands public. This is just another land grab under the guise of mining. Do not let this happen. There is time to do this right.