

New Oak Flat land exchange language analysis Section 3003 of the National Defense Authorization Act

On December 4, 2014, the US House of Representatives voted to approve the National Defense Authorization Act (NDAA). Buried deep within the 1,600 pages bill (on page 1103 as Section 3003) was the Oak Flat land exchange.

This is the 13th version of the Oak Flat land exchange since it was first introduced by former Congressman Rick Renzi in 2005. The bill was placed in the NDAA in the dead of night and the language of the bill was not released until 11:00 the evening before the bill was voted on. This process thwarts the clear will of the US Congress who declined to vote on the bill in the House and did not even send it to a mark up in the Senate.

The NDAA is a bill specifically to approve funding for national defense purposes. The Oak Flat land exchange clearly is not about national defense, in fact, the exchange is the polar opposite of providing for national defense since it would give a sacred site located on public land that is critical for religious freedom to a foreign mining company which has ties to the Iranian government and plans to ship copper from their proposed mine overseas (most likely to China) for processing.

The version of the land exchange (now called Section 3003), has been changed from the language in HR 687 and S 339, but is every bit as bad as the previous 12 versions of the bill.

Point by point analysis of the new language in the Oak Flat land exchange.

(a) Purpose.

Bill supporters have gone to great lengths to cast the land exchange as a jobs bill. HR 687 had lots of flowery language about all the great things that the land exchange would do in the findings and purpose sections. In this new version, the language gets right to the point and makes clear that the land exchange would only benefit Rio Tinto, the huge foreign mining company that has been pushing the land exchange from the beginning. The new language says, “The purpose of this section is to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States.” Resolution Copper is the shell company Rio Tinto created to push the mine proposal. Note the “expedite” language.

(c)(3) Consultation with Indian Tribes

This directs the Secretary of Agriculture to consult with Indian Tribes (obviously after the land exchange is approved). It then requires the government to consult with Rio Tinto to address the concerns of Indian Tribes and to minimize the adverse impacts of mining at Oak Flat.

On the surface, this sounds good. However, Rio Tinto and its Congressional supporters have a serious misunderstanding about the purpose of consultation. Under the United State’s trust responsibility and pursuant to federal law, the United States has a duty to engage in advanced and meaningful consultation with Tribes on matters

that can affect their health and wellbeing, like exchanging ancestral lands to foreign mining interests. For consultation to be “advanced” and “meaningful” it must be conducted early in the process, before any final determination or outcome has been determined. In this case, consultation would not begin until after the decision to privatize Oak Flat has already been made, rendering the purpose of consultation meaningless. It is clear that Oak Flat is a holy and sacred site for many Western Apache, Yavapai and other Native American people. Its protection is a matter of religious freedom, which is supposed to be protected under the U.S. Constitution and the founding principles of this Nation. However, Rio Tinto’s mining method would forever destroy Oak Flat by caving in the surface of the Earth within the very heart of this sacred place. It would also destroy physical and spiritual access to Oak Flat and to the medicinal plants and oak trees that have forever provided religious and physical nourishment to Native Americans. In short, “consultation” that is merely after the fact is a lot like rearranging the deck chairs on the Titanic. It cannot result in any changes to the specific outcome of the bill or otherwise affect the ultimate outcome of the decision making process – either way Rio Tinto will be given Oak Flat to destroy through its mining practices.

(c)(9) Environmental Compliance

This section of the new language, according to Rio Tinto’s supporters, “fixes” the truncating or lack of real NEPA in previous versions of the bill. It fails to accomplish this.

This section provides for a single Environmental impact statement to be prepared for all federal decisions – even those decisions that have not even been anticipated by the Forest Service at this time. The bill then truncates the NEPA process by requiring that title to Oak Flat be given to Rio Tinto. The bill reads, “Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.” There you have it, no matter what the Final Environmental Impact Statement (FEIS) and its draft Record of Decision says, Rio Tinto gets the land 60 days after the FEIS is published.

As with Tribal consultation, Rio Tinto and its supporters do not fully comprehend the purpose of the National Environmental Policy Act (NEPA). The NEPA is not a decisional statute. Its purpose is to insure that federal decision-makers (and the public) have all the information they need to make an informed decision that is in the public interest. Mandating the outcome of the process (in this case by requiring that the land be given to Rio Tinto), moots any decision-making authority of the Secretary of Agriculture. Beyond that, according to NEPA rules, after the FEIS is published, there is an objection process that takes at least 90 days in which stakeholders have the legal right to challenge the Agency’s decision. Obviously granting title of the land to Rio Tinto before the normal objection process ends fails to ensure that the FULL NEPA process is followed as Rio Tinto and its Congressional supporters claim. As with the previous 12 versions of the bill, conducting a truncated NEPA process with a foregone conclusion is meaningless. It is like debating whether horses can escape the barn after you’ve left the door open and they are gone!

(g) Apache Leap Special Management Area

This language has been reworked to sound more impressive in this version, but makes no substantial changes from earlier versions.

What this section says is that the Forest Service will create a special management area consisting of Apache Leap. Rio Tinto will not be able to mine commercially under Apache Leap. However, Rio Tinto will be able to drill as many tunnels and other underground workings as they want, violating the

physical and spiritual integrity of this place, and potentially damaging the Leap and its natural ecosystems forever. In addition, there is nothing in the bill that will protect the Leap if, in the end, it is destroyed due to the adjacent mining activities and the fracturing of the Earth's surface that is standard in block cave mining operations.

The affected Tribes have made it known from the beginning that all of Oak Flat/Apache Leap area is a sacred site and critical for religious freedom. The Tribes have made it clear that the sacred and holy area is bounded by Gaan Canyon (known on maps as Devils Canyon) on the east and south, Queen Creek Canyon on the North, and Apache Leap on the West.

To explain more clearly, the entire shape of the Oak Flat / Apache Leap sacred area we've just described is a church and the entire church is sacred. What the bill language would do is to protect the last three rows of pews and the choir loft, but destroy the rest of the church. Clearly, this is not acceptable.

This also illustrates how Rio Tinto is false to say that new language "fixes" problems with previous versions. What is ironic is that studies done by Rio Tinto's archeological contractors that have been shared with the Forest Service show that all of Oak Flat and Apache Leap is a holy and sacred site. Indeed, the Forest Service is in the process of nominating the entire Oak Flat area under the National Historic Preservation Act for placement on the National List of Historic Places as a Traditional Cultural Property.

(h) Conveyances to Town of Superior, Arizona

Representative Gosar stripped this section out of HR 687 during the Natural Resources Committee mark-up in 2013 after being told by the town of Superior, who opposed the land exchange, that the Town did not like the language and didn't want to pay full market value for the land as the bill offers for purchase. This version of the bill adds the section back into the bill.

Everything else in the bill is substantially unchanged from HR 687. For a section-by-section review of the unchanged parts of the bill, see [Problems with HR 687](#).

It is clear that the Oak Flat land exchange must be stripped from the NDAA. Not only did Rio Tinto supporters inappropriately place it in the larger bill, but the new language, instead of offering meaningful fixes, simply perpetuates what Congress has known all along: The Oak Flat land exchange privatizes one of Arizona's environmental and recreational gems that was placed off limits to mining by President Eisenhower in 1955 and which is absolutely critical for religious freedoms of Native Americans.