

SAN CARLOS APACHE TRIBE

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**Testimony of Wendsler Nosie Sr.
Chairman of the San Carlos Apache Tribe
Before the U.S. Senate Energy and Natural Resources Committee
Subcommittee on Public Lands and Forests.
June 17, 2009**

My name is Wendsler Nosie Sr. I am Chairman of the San Carlos Apache Tribe. Thank you for the opportunity to submit testimony to the Subcommittee on Public Lands and Forests concerning the Southeast Arizona Land Exchange and Conservation Act of 2009 (S. 409).

I previously testified before U.S. House Natural Resources Committee, Subcommittee on National Parks, Forests and Public Lands concerning the Southeast Arizona Land Exchange and Conservation Act of 2007 (H.R. 3301). I request that my earlier testimony be made a part of the record here.

I present my testimony as an American, an Arizonan and as an Apache tribal leader. What is done here before this Subcommittee will be judged not by any of us who are present today. It will be judged by future generations of Americans, Arizonans and Apaches. It is in that context that I ask the members of this Subcommittee and the Committee, as the stewards of our great lands, to consider my testimony.

In considering S. 409, I respectfully request that you question why there is such pressure to rush this bill through this Committee. S. 409 is a bill for a special interest, Resolution Copper Mining, a foreign owned, limited liability corporation of Rio Tinto. Through S. 409, RCM seeks to obtain title to a unique portion of the Tonto National Forest. While RCM touts job creation, no one has undertaken a cost analysis of potential environmental impacts. RCM will be able to mine copper without any of the permitting, water quality requirements, cultural protections, or financial assurances required under the recently proposed Hardrock Mining and Reclamation Act of 2009. As a limited liability corporation, RCM could simply walk away from

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hundreds of millions, if not billions, of dollars in environmental and infrastructure damages. RCM will also benefit from a \$7 billion bailout by avoiding royalties – a windfall at the expense of the American public. Most alarming is that RCM’s proposed mine will certainly desecrate sites – Apache Leap, Gaan Canyon and Oak Flat – which represent key elements of the Apache religion. For these reasons, the San Carlos Apache Tribe has joined with an alliance of other Tribes (Inter Tribal Council of Arizona, Jicarilla Apache Nation of New Mexico and others), mine workers, residents of Superior, Miami and Globe who oppose this potential environmental disaster, conservationists, to oppose this bill. Our specific concerns are as follows.

S. 409 Circumvents Existing Law and Provides No Financial Assurances Against Future Environmental Catastrophes

By engaging in a legislative land exchange at this time, RCM seeks to circumvent existing federal law and to avoid the consequences of future federal legislation. S. 409 would bypass the “hard look” required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). S. 409 pays lip service to NEPA, but only after the exchange is complete. Section 5(c) of S. 409 requires the Secretary of Agriculture to undertake an environmental assessment only after the land exchange has occurred.

Without going into detail, S. 409 also circumvents other important environmental and cultural resource protections afforded by the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (NHPA), the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA), the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (NAGPRA), the Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.* (ARPA), and the American Indian Religious Freedom Act 42 U.S.C. § 1996 *et seq.* (AIRFA). By circumventing the law, this is tantamount to slamming the barn door after the horse has escaped.

NEPA Review Must Occur Before the Exchange, Not After

NEPA review must occur *before* the exchange is completed for two critically important reasons. First, RCM’s website admits that its mining methodology will cause significant land subsidence. The extent of the potential subsidence is unknown because RCM, for all of its claims of transparency, has not explained with any degree of credibility how such a mining operation can avoid destruction of Oak Flat, Apache Leap and Gaan Canyon.

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Transparency requires that the critical fact of subsidence be examined in the NEPA process now, not later. Subsidence models, depending on where exactly the mining occurs, could cause subsidence of significant natural geographic features which would affect the current Oak Flats Campground and the butte commonly known as Apache Leap. Indeed, the subsidence caused by RCM's proposed mining activities could affect a national highway, US 60. NEPA review, if credibly conducted, before the land exchange would greatly enhance the probability that answers to critical questions regarding subsidence would be forthcoming.

Second, there exists a responsible, administrative land exchange process in which the Secretary of Agriculture should be required to determine the effects of RCM's proposed mining activities on groundwater and surface water resources and water quality. Instead, RCM has been less than transparent in telling the public where it intends to secure the water necessary to operate its mine. RCM does tell us that the proposed mine will require 20,000 acre feet per annum. That is approximately one-third of the amount of water that sustains the City of Tempe for one whole year; a city with a population of approximately 167,000 people. RCM will not tell the public from whence it intends to secure that massive quantity of water.

So where will RCM get this water? Historically, mines just drill wells that are deeper than their surrounding neighbors' wells. Such deep water wells dry up neighboring wells, de-water surface waters and impact the entire region's water needs. As the members of this Subcommittee are aware, water is a critical resource in the State of Arizona. Only a complete NEPA review *before* the land exchange will provide answers to the critical issues surrounding Central Eastern Arizona's water resources and needs in the area of the proposed Resolution Copper Mine.

While some may applaud the transfer and protection of riparian areas along the San Pedro River provided by S. 409, insufficient attention has been paid to the effect of the RCM mine on groundwater and surface water quality. Mines pollute groundwater and surface water. Acid mine drainage leaking into groundwater and surface waters is a common fact of copper mining. Acid-generating mines pollute surface water and groundwater with toxins and carcinogens, requiring more expensive surface reclamation and long-term water treatment. RCM is currently dewatering an old mining shaft which has flooded. The water in that shaft is contaminated and loaded with heavy metals. That water is being treated at a water treatment facility which RCM has constructed. In order for that treated water to be reclaimed and re-used, it has to be diluted with 10 parts of Central Arizona Project water to each part of treated water prior to being transported to New Magma Irrigation District for use on crops in Pinal County.

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Then there is the issue of mine tailings. The ore body is estimated by RCM to consist of “1.34 billion tons, containing 1.51 percent copper and 0.040 percent molybdenum [or Moly].” What is going to happen to the tailings from this mining operation? RCM neglects to inform on this issue. The “fast-track” land exchange without meaningful NEPA review will not answer this question until it is too late.

S. 409 Neatly Avoids Critical Legislation Proposed by Senator Bingaman

We all understand that mines are the underpinnings of America’s greatness. They harness ore necessary for steel, cables, cars, computers, our very way of life. But any mining must be done responsibly. Senator McCain has said that “our Nation’s continued prosperity hinges on our ability to solve environmental problems and sustain the natural resources on which we all depend.” Senator Bingaman has introduced the Hardrock Mining and Reclamation Act of 2009 (S. 796 and H.R. 2262), which would establish substantial reforms to the 1872 Mining Law. This bill would establish a permitting process, protections for water quality and cultural resources, and financial assurances. However, not only would S. 409 circumvent existing law, but the exchange would emasculate the important reforms provided by the proposed Hardrock Mining and Reclamation Act.

We all have to ask ourselves how this bill will provide assurances that a future environmental catastrophe will be remediated. What if subsidence causes Highway 60 or the Queen Creek Tunnel to collapse? A few weeks ago, Arizona Governor Brewer executed the ASARCO settlement agreement. That agreement does not begin to solve the substantial, long-term costs of environmental damage. Neither does this bill – there are no financial assurances to address any potential environmental costs. RCM, as a limited liability company not required to post any financial assurances for mine cleanup, could “walk” away from hundreds of millions of dollars in cleanup costs if S. 409 passes before the Hardrock Mining Act.

S. 409 also attempts to avoid mining royalties – revenue to the American people and upon which this great county depends. Where the Hardrock Mining and Reclamation Act of 2009 would impose a royalty upon mine operators, RCM avoids that royalty under S. 409. That royalty, if calculated at the 8% royalty in the House version of the legislation, would result in a give away to two foreign mining companies of in excess of \$7 billion dollars based upon RCM’s own calculation of 1.34 billion tons of ore at a modest price of copper of \$2.00 per pound and molybdenum at \$10.00 per pound. S. 409 also avoids securing financial assurances for environmental remediation and cleanup. The billions of dollars which RCM and its foreign corporate parents, would realize in royalty and environmental compliance avoidance by the hasty and premature passage of S. 409 mentioned here are staggering.

Under S. 409, 5% of Tonto National Forest Will be Controlled by China

You should also consider that 9% of RioTinto, RCM's parent company, is currently held by China, by and through its state-controlled Aluminum Corporation of China, known as Chinalco. If the exchange goes through, China will thus end up holding a 4.5% interest in our Tonto National Forest without paying for it. A legislative transfer of land in essence to a foreign government as presented by S. 409 is offensive to us and to the rest of the country.

No Significant Job Increase Until 2020

We all understand the necessity of developing new, well-paying jobs in Central Eastern Arizona region. New jobs will bring concomitant economic benefits in the form of tax revenues and even wages to members of the San Carlos Apache Tribe. However, those jobs are needed now. RCM admits that full employment will not occur until 2020 or later. And, any retirement benefit potential for those workers may be completely negated by the cyclical effects on mining and resultant job layoffs.

RCM currently employs 70 people with the employment estimate rising to only 200 employees by 2014. Those same jobs will continue to exist through 2014 even without the passage of S. 409 at this date. The administrative land exchange process can go forward and answer the critical questions which the legislative land exchange process would cripple. The RCM jobs will still be there. If RCM were instead required to pass through the administrative land exchange process, the American people, Arizonans and Native Americans are afforded a proper means of evaluating the benefits and substantial liabilities of the proposed mine. By contrast, S. 409 presents a win-win situation solely for the benefit of a single special interest, while the American people and her descendants would derive no benefit.

S. 409 Destroys Religious Sites

I devoted a substantial part of my last testimony before the House Subcommittee in 2007 on H.R. 3301 to the cultural, spiritual and historical significance to the Apache and Native American people of the lands to be exchanged. I will not repeat that testimony here, but I would be remiss if I did not mention these concerns in the context of our religion, because religion is at stake here. The difference in this new bill is that while there is an exchange of riparian areas along the San Pedro River, we lose three sacred, religious sites. Moreover, this bill took out the conservation easement that would have protected Apache Leap.

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Apache spiritual beings, our Gaan, exist within the three sacred sites of Oak Flat, Gaan Canyon and Apache Leap affected by S. 409. These sites become RCM property and subject to its proposed mine. Yet, to Apache, the Gaan live and breathe in those sites. The Gaan are the very foundation of our religion; they are our creators, our saints, our saviors, our holy spirits. Imagine if this same type of mine as proposed by RCM lay 7,000 feet beneath the National Cathedral here in Washington, D.C. Imagine further that the mine was affected by a major subsidence, one that shook and swallowed the National Cathedral. Everyone would be outraged. Every person of every faith would fight to their last breath to prevent that mine from happening. Every American understands that the desecration of any one religion affects all religions, and that such an act even threatens the free exercise protections afforded under the First Amendment of the Constitution.

A member of the other chamber recently confronted me when discussing this legislation asking, what has Apache religion done for my people's alcoholism? How will our religion feed our people? How will our religion deal with the social ills faced by our people? How will our religion help our elders? These questions astounded and perplexed me and, of course, they are completely unrelated to the bill at hand. If I thought that this bill would rid Native American peoples of the disease of alcoholism, or alleviate hunger or social ills, or help our elders, I would not be testifying against it. Instead, the issue is how can America stand by and allow RCM's mine to destroy such key parts of our religion – Apache Leap, Gaan Canyon and Oak Flat. Without such foundational underpinnings, our children will lose the benefit of our Gaan, our beliefs, our spirituality, our religion, our very being.

In retrospect, however, the religious significance of these lands and what this body does with this legislation is important not just to Apache religion, but to future generations of Apaches, to other Native Americans and to all Americans. Whatever God we worship, whatever tributes we pay to our ancestors, we all have the obligation not to desecrate our religions or our descendants' futures.

S. 409 Is Irresponsible Development

Without safeguards, S. 409 leads only to irresponsible development. In the words of Theodore Roosevelt: "To waste, to destroy, our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them." Theodore Roosevelt was a champion of Edmund Burke's ideal that a moral partnership exists between the living, the dead and those to be born. That view helped instruct his passion for conserving

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America's natural resources. That view is also parallels the Apache way of life. We should all honor this vision.

There are those who claim that our coalition who oppose this land exchange are radical environmentalists. We are not opposing business for the sake of doing so. As I stated at the beginning of my testimony, this is instead about our future generations of Americans, Arizonans and Apaches. Theodore Roosevelt also observed that: "Conservation means development as much as it does protection. I recognize the right and duty of this generation to develop and use the natural resources of our land; but I do not recognize the right to waste them, or to rob, by wasteful means, the generations that come after us." That sentiment is what propels the San Carlos Apache Tribe's opposition to this legislative land exchange without safeguards. That sentiment is shared by a substantial coalition of Americans.

Conclusion

In summary, the language of S. 409 and its companion in the House, as currently drafted, do not adequately address: 1) the appraisal of the Federal parcel to assure the parity of the land exchange; 2) the weakness of Federal and Arizona's current statutes or laws governing copper mining and reclamation protocols; 3) the lack of an extensive mining plan, reclamation protocols, or bonding assurances; 4) groundwater and surface water issues; 5) subsidence issues; 6) Federal environmental and cultural protections afforded public lands are no longer applicable once the land is conveyed; 7) the desecration of the foundation of our religion, and 8) the clear threat of destruction to Oak Flat, Gaan Canyon and to Apache Leap that would result from the block and cave mining method RCM intends to utilize because it is cheaper than older methods that have less cataclysmic impacts on the Earth.

Clearly there are more questions than jobs associated with RCM's proposed mine. There is no need to rush this land exchange legislation to the detriment of our future generations.

Mr. Chairman, members of the subcommittee, on behalf of the San Carlos Apache People, I thank you for the opportunity to express our deep concerns regarding this proposed legislation. It is our hope that you will stand with us and oppose S. 409.