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Congress of the United States
House of Representatives
Washington, DC 20515-0301

April 15, 2011

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The Honorable Terry Rambler
Tribal Chairman
San Carlos Apache Tribe
P.O. Box 0
San Carlos, AZ 85550

Re: *Land Exchange*

Dear Chairman Rambler:

I want to express my appreciation to the San Carlos Apache Tribe for taking the time to detail its concerns and to state its position on the proposed land exchange. It means a lot to me to have this dialogue, to share our views, and to explain our positions. As we discussed when we met in person, there will be many issues upon which we will fully agree and work together. And sometimes there will be an issue where, even in the end, we may have to simply agree to disagree. But we can do so respectfully and with understanding. I believe the letter sent on behalf of the tribe is consistent with that respectful dialogue we need, and I therefore want to thank you for taking the time to relay the tribe's position.

That being said, I want to address some of the particular concerns raised in the letter. It is neither necessary, nor appropriate, to address every issue, but there are some significant issues that should be further discussed. I start with the proposition that the land at issue here is not reservation land. It is land that is owned by the federal government on the one hand, and a private entity on the other. Under our laws, we must strive to allow all property owners to use their property in a lawful manner. I must further state that I represent all of the First District, including the town of Superior. The residents of that town overwhelmingly support this legislation. In addition, this mine will have a substantial economic impact on the State of Arizona and will provide copper for the nation as demand continues to increase due to the need for copper in the construction of new alternative energy projects. I have been seeking a way to balance the desire, and the need, expressed by Superior, with the concerns of the Tribe. Reconciliation of views may not be easy or possible. All we can do is try.

Many of the objections raised by the Tribe appear to be asserted as if there is a legal ownership to the land in question. Without such legal ownership, it is difficult to reconcile some of the comments objecting to any soil movement, site preparation or mining activities when those activities are expressly permitted under federal mining laws.

I also am not persuaded that the land exchange violates the San Carlos Apache Treaty of 1852, Article 11, which provides, in relevant part that "the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." The Supreme Court has repeatedly stressed "that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are 'a separate people' possessing 'the power of regulating their internal and social relations.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As the case law makes clear, the treaty rights pertain to the lands within the borders of the reservation or relative to the provision of sustenance and benefits from the federal government to the tribe. The land exchange here is not within the reservation.

Further, Article 1 of the Treaty is explicit in its expression of federal jurisdiction over the reservation. In Article 1 of that document, the Tribe submits itself "exclusively (to) the laws, jurisdiction, and government of the United States of America." Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). The view of the courts appears to be that the treaty language referring to ensuring prosperity and submitting to federal jurisdiction combine to create a trust relationship between the tribe and the federal government. Construing very similar language, the court in *Navajo Nation v. U.S.* (Fed. Ct. App. 2007), explained that "[t]here is no question the Treaty of 1849 establishes a general trust relationship. Specifically, the treaty states that the Navajo "tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection" and "that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." *Navajo Nation v. U.S.* (Fed. Ct. App. 2007). Applying that reasoning here to the land exchange, and with the knowledge that the Navajo Treaty terms are rather similar and almost identical, I am not persuaded that the land exchange here would in any manner violate the federal government's trust obligations to the San Carlos Apache. Thus, in my view, I do not find the Treaty to be a barrier to the land exchange or that the exchange would violate the spirit or letter of the Treaty. As a textual constructionist, I always appreciate reviewing the organic documents to ensure compliance.

Addressing some of the other points now, the tribe further asserts that the legislation bypasses normal administrative processes with which every other mine operator has to abide. This too is a misnomer. All administrative requirements, such as mine permits, OSHA, EPA strictures, etc. still have to be complied with by this mine operator. Nothing in this legislation exempts this mine or the operator from any other law or

administrative process. If the tribe is referring to an administrative land exchange governed under the Federal Land Policy and Management Act (FLPMA), that route is not invoked here. Administrative agencies cannot take action without Congressional authority. The proposed land exchange here has not been approved by Congress, so an administrative exchange is more problematic. From October 2004 through June 2008, BLM and the Forest Service processed 250 completed, pending, or terminated land exchanges. Of the 250 land exchanges, 47 were facilitated by third parties, 9 were conducted in multiple phases, and 20 were specifically legislated by Congress. Each land exchange is evaluated on its merits and the best manner and method to achieve it.

This land exchange is extremely complicated and involves the Federal Government disposing of National Forest Service administered land and acquiring private land to be administered by the National Forest Service and the Bureau of Land Management. In addition, land is being conveyed to the Town of Superior. This exchange would be very difficult if not impossible to be conducted through the administrative process.

Legislative land exchanges do not bypass the processes laid out in FLPMA. In fact, the legislation passed out of the Senate Energy and Natural Resources Committee follows the basic rules established under FLPMA which includes equal value of exchange. The equal value of the exchange is evaluated on multiple occasions: in the appraisal process, when the land is conveyed to the town of Superior and the value adjustment payment every year Resolution Copper produces minerals

The one exception is the administrative costs are not being split between the federal government and the private entity. Resolution Copper pays all administrative costs under this legislation. The tribe raises concerns about the Oak Flat area. My proposed legislation will not change the fact that Rio Tinto will be subject to tough federal oversight. Use of the Oak Flat area will be managed with environmental and cultural concerns in mind.

The tribe also has concerns about meaningful access to the Oak Flat area. I am prepared to mediate an agreement between Rio Tinto and the Apache people, ensuring continued use of the Oak Flat Area. While it may be inappropriate for the federal government to dictate to a private land owner the terms of access to their land, Rio Tinto has pledged a meaningful dialogue for the benefit of the Apache people about the access to Oak Flat area. I am prepared to mediate this agreement to ensure government to government relations between the Tribe and the federal government, with the best interest of all my constituents in mind.

The Tribe also expresses a concern that the bill does not provide any "recourse" if the mine operator accidentally or purposefully damages "religious, historical and cultural sites." This bill does not need to since there are existing laws already in place. In the

event the mine operator, or any person for that matter, damages the property of a third party, there are laws in existence regarding trespass and negligence for harming others and their property. See ARS 13-1504 (“A person commits criminal trespass in the first degree by knowingly . . . 4. Entering unlawfully on real property that is subject to a valid mineral claim or lease with the intent to hold, work, take or explore for minerals on the claim or lease. 5. Entering or remaining unlawfully on the property of another and burning, defacing, mutilating or otherwise desecrating a religious symbol or other religious property of another without the express permission of the owner of the property”); ARS 13-370 (“ A person commits defacing or damaging petroglyphs, pictographs, caves or caverns if such person knowingly, without the prior written permission of the owner: 1. Breaks, breaks off, cracks, carves upon, writes or otherwise marks upon or in any manner destroys, mutilates, injures, defaces, removes, displaces, mars or harms petroglyphs, pictographs or any natural material found in any cave”). Accordingly, laws currently exist that provide civil and criminal recourse if anyone damages the property of another.

The tribe also expresses concern about water supplies in the area. All state and federal water laws and requirements remain in place under this bill. There are no exemptions or changes to water policy, water law or water allocation in this bill. However, I am also willing to mediate any additional concerns regarding this and make sure water supplies are not altered and remedied.

The Tribe also raises the concern that the land exchange would allow immediate mineral exploration in the Oak Flat withdrawal. The legislation allows the Secretary of Agriculture, at the request of Resolution Copper, to issue a special use permit to carry out mineral exploration under the Oak Flat withdrawal area from existing drill pads outside the area. The legislation specifically states the permit will only be granted if the activities would not unduly disturb the surface of the area. In addition, it would allow Resolution Copper to request the Secretary of Agriculture to issue a special use permit to carry out mineral exploration activities within the Oak Flat Withdrawal Area, but NOT 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 on the Campground. The Secretary is explicitly given the authority to revoke these permits if the exploratory activities do not meet conditions the Secretary of Agriculture requires. In addition, if these activities are authorized by the Secretary, they will not inhibit NEPA compliance.

It was important to me that, as your Congressional Representative to the Federal Government, I engage with you on this issue prior to introducing any legislation. After next week’s meeting, we will have met on three different occasions to discuss the San Carlos Apache tribe’s concerns. I think we have consulted in good faith. The Tribe’s views have been well explained. I have considered these views closely and spent a lot of time on this—and I was happy to do so. But, in addition, the legislation explicitly

requires, within 30 days of the date of enactment the Secretary engage in government-to-government consultation with affected Indian tribes concerning issues related to the land exchange, in accordance with applicable laws (including regulations).

The land exchange actually transfers the final portion of Apache Leap owned by a private entity *to* federal ownership so the sacred site, in its entirety, will fall under the protection of federal land ownership. I think this will ensure its cultural future far better than the current status. The legislation specifically states the Secretary shall manage Apache Leap to preserve the natural character of Apache Leap and to protect archeological and cultural resources located on Apache Leap. The exchange will allow the Secretary of Agriculture to manage Apache Leap in its entirety.

In addition, Apache Leap is specifically withdrawn from entry, appropriation, or disposal under the public land laws; location, entry, and patent under the mining laws; and disposition under the mineral leasing, mineral materials, and geothermal leasing laws. The Secretary of Agriculture may authorize a special use permit for underground activities (excluding commercial mining) as long as the Secretary determines would not disturb the surface of the land.

In fact, under part (c) of Section 5 explicitly requires that “In addition to the conveyance of the non-Federal land to the United States under this Act, and as a condition of the land exchange, Resolution Copper shall surrender to the United States, without compensation, the rights held by Resolution Copper under the mining laws and other laws of the United States to commercially extract minerals under Apache Leap.

The tribe is concerned that there is insufficient NEPA review. However, Section 4, part (j) of the legislation requires compliance with the requirements of the National Environmental Policy (42 U.S.C. 3421 et seq.) In addition, Section 4 part (i) expresses the intent of Congress for *the land exchange* to occur within 18 months. Regardless of the time period in which the exchange occurs, no commercial mining can occur until **NEPA COMPLIANCE IS MET**. The federal land exchange does not mandate, but federal mining law does.

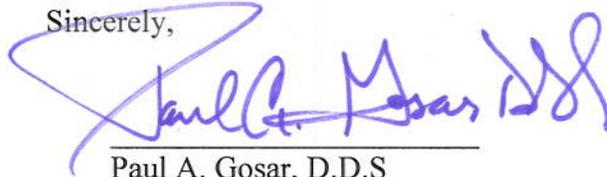
The tribe questions whether the land to be conveyed by Rio Tinto will be conveyed in full. Part (c) of Section 5 explicitly requires that “In addition to the conveyance of the non-Federal land to the United States under this Act, and as a condition of the land exchange, Resolution Copper shall surrender to the United States, without compensation, the rights held by Resolution Copper under the mining laws and other laws of the United States to commercially extract minerals under Apache Leap.

Finally, federal Mining Law requires bonding and clean up of the project and Rio Tinto has fantastic record of cleaning up sites. In fact, the company has purchased land in the

area that was not properly remediated or reclaimed by other companies and has conducted reclamation work at their expense.

In closing, I look forward to seeing you and the Tribal Council next Tuesday, on this and other issues. I so welcome your insights and value our dialogue. When people create an atmosphere where open dialogue is the mantra, new ideas, well thought out plan and teamwork all are facilitated in achieving the best solution benefiting all.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul A. Gosar", with a large, stylized flourish extending from the end of the signature.

Paul A. Gosar, D.D.S
Member of Congress

cc: San Carlos Apache Tribal Council