



NATIONAL CONGRESS OF AMERICAN INDIANS

U.S. House of Representatives Committee on Natural Resources Subcommittee for Indigenous Peoples of the United States Legislative Hearing on H.R. 1884, the Save Oak Flat Act April 13, 2021

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President Fawn Sharp National Congress of American Indians Questions for the Record

Questions from Committee Chairman Raúl M. Grijalva:

1. You note in your testimony the long-standing opposition to the Southeastern Arizona Land Exchange (by both NCAI and tribal governments across the country) prior to its inclusion in the FY15 NDAA as a last-minute rider, without having passed the House or Senate that Congress.
 - i. Can you talk about Congress' responsibility to tribes, as well as Indian Country's response to the inclusion of Sec. 3003 in a "must-pass" bill with no opportunity to remove the provision by amendment?

Response:

Federally recognized Tribal Nations have a unique legal and political relationship with the United States. This relationship is defined by the U.S. Constitution, executive orders, treaties, statutes, court decisions, and Departmental policy. For example, the Supreme Court determined that the United States assumed a fiduciary obligation to Tribal Nations in exchange for the historic taking of the immense lands that are home to tribal cultural places, and natural resources necessary to establish the United States.¹

Consequently, the United States acts as trustee for tribal rights and interests. These responsibilities include protecting tribal cultural heritage when developing and implementing federal policies or actions. The National Historic Preservation Act, Executive Order 13175, and the American Indian Religious Freedom Act, for example, reaffirm the trust responsibility and require full and meaningful consultation as a method for meeting this obligation. When Tribal Nations are not given the opportunity to contribute to the development and implementation of policies, including proposed federal legislation, that have substantial and direct

¹ *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831). See also, Indian Tribal Justice Support Act of 1993, 25 U.S.C. §§ 3601-31 (stating, "The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government"); *United States v. Mitchell*, 463 U.S. 206, 225 (1983), (reiterating "the undisputed existence of a general trust relationship between the United States and the Indian People"); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

effects on their interests, the federal government has not met its fiduciary obligation; an obligation of the highest moral responsibility.²

Since 2009, NCAI membership, which is a strong representation of the many Nations, villages, communities, and individuals that constitute the whole of Indian Country, has passed seven resolutions directly opposing legislation that would transfer the Oak Flat area to Resolution Copper.³ Most recently, NCAI passed Resolution #ABQ-19-062, titled “Support for the Protection of Oak Flat and Other Native American Sacred Spaces from Harm.”⁴ This resolution expresses NCAI’s support for the repeal of Section 3003 of the 2015 NDAA due to its circumvention of federal laws that protect tribal sacred places from destruction and harm.

² *Seminole Nation v. U.S.*, 316 U.S. 286 (1942).

³ See, NCAI Resolutions #NGF-09-001, “To Protect Oak Flat and Apache Leap in Arizona from Mining”; #MKE-11-002, “[Opposition to Legislation Proposing a Land Exchange in Southeastern Arizona for the Purpose of Mining Operations](#)”; #PDX-11-001, “[Opposition to H.R. 1904, Southeast Arizona Land Exchange and Conservation Act of 2011, Which Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites](#)”; #SAC-12-006, “[Opposition to H.R. 1904, Southeast Arizona Land Exchange and Conservation Act of 2011, Which Would Transfer Federal Land for a Massive Block Cave Mine that Would Destroy Native American Sacred and Cultural Sites](#)”; #REN-13-019, “[In opposition to the Conveyance of Federal Lands to Foreign Mining Interests with Sacred and Cultural Significance to Tribes, Including H.R. 687 and S. 339](#)”; and #MSP-15-001, “[Support for Repeal of Section 3003 of the FY 15 National Defense Authorization Act, the Southeast Arizona Land Exchange.](#)”

⁴ [NCAI Resolution, #ABQ-19-062, “Support for the Protection of Oak Flat and Other Native American Sacred Spaces from Harm.”](#)

Questions from Representative Paul Gosar:

- 1. NCAI long supported the Sealaska land exchange bill (Southeast Alaska Native Land Entitlement Finalization & Jobs Protection Act), which was also part of the 2015 NDAA. It transferred 70,000 acres from the Tongass National Forest for timber harvesting that would result in economic development from Timber harvesting. As you know, the lands package in the 2015 NDAA is considered a major public lands compromise after 5 years of complete inaction. It included new parks, wilderness area and river protections, such as the Blackstone River Valley National Historical Park in Rhode Island (“the birthplace of the American Industrial Revolution”), expanding the Alpine Lakes Wilderness in Washington state, turning the Valles Caldera National Preserve in New Mexico into a national park. All of these were considered “late riders” into the defense authorization bill, all had been proposed for multiple congresses and all had opposition. The Southeast Arizona Land Exchange was the only one that required a NEPA analysis and additional consultation before the land exchange could take place. Since this bill was included in the NDAA, key aspects of which NCAI supported, with additional requirements that were the result of compromise, why do you single out this bill as having been added to the NDAA as a “late night rider” when in reality, the entire lands package that was added into the NDAA was a broad bipartisan late-night compromise agreement?**

Response:

Federally recognized Tribal Nations have a unique legal and political relationship with the United States. This relationship is defined by the U.S. Constitution, executive orders, treaties, statutes, court decisions, and Departmental policy. For example, Supreme Court case law has long recognized that Tribal Nations are distinct political entities that pre-date the existence of the United States and have retained inherent sovereignty over their lands and people since time immemorial.⁵ Furthermore, the Supreme Court determined that the United States assumed a fiduciary obligation to Tribal Nations in exchange for the historic taking of the immense lands that are home to tribal cultural places, and natural resources necessary to establish the United States.⁶

Consequently, the United States acts as a trustee for tribal rights and interests. These responsibilities include protecting tribal cultural heritage when developing and implementing federal policies or actions. The National Historic Preservation Act, Executive Order 13175, and the American Indian Religious Freedom Act, for example, reaffirm the trust responsibility and require full and meaningful consultation as a method for meeting this obligation.

Here, Tribal Nations were not provided the opportunity to contribute to the development and implementation of policies, including proposed federal legislation that will have substantial and

⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁶ *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831). See also, Indian Tribal Justice Support Act of 1993, 25 U.S.C. §§ 3601-31 (stating, “The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government”); *United States v. Mitchell*, 463 U.S. 206, 225 (1983), (reiterating “the undisputed existence of a general trust relationship between the United States and the Indian People”); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

direct effects on their interests, as directed by Executive Order 13175. Nor was Section 3003 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 supported by a majority of members from either the House of Representatives or the Senate.⁷ With respect to tribal participation, the federal government has not met its fiduciary obligation; an obligation of the highest moral responsibility.⁸

2. Were you aware that the following studies were conducted for the Resolution Land Exchange: an ethnographic/ethnohistoric study, 100% class III cultural resources survey, Native Pant survey and tribal perspectives surveys – tribal members worked on the ground alongside experts for job training and employment to cover over 60,000 acres with millions in employment benefits spanning three years? Yes or no? Why does NCAI not support these requirements as part of the land exchanges you have pushed Congress to approve?

Response:

Since 2001, NCAI has passed over 60 resolutions that speak to the broad concerns of Tribal Nations and their citizens regarding the need to protect cultural and holy places, ancestral remains, and historic resources. For example, in 2008, NCAI passed Resolution #PHX-08-069c, entitled, “NCAI Policy Statement on Sacred Places.” This Resolution calls for, among other things, the federal government to establish a policy requiring cultural surveys prior to any transfer or issuance of a federal land-use permit; that the cultural survey be undertaken in consultation with Tribal Nations as part of the initial stages of any federally-mandated identification process; and that the policy affirm the inherent rights of Tribal Nations and their citizens to access to and protect their historic, cultural, holy and sacred places; cultural patrimony; and ancestors.⁹ More recently, in 2017, NCAI passed Resolution #MKE-17-008, “To Support Moratorium on Leasing and Permitting In Greater Chaco Region.” Among other things, this Resolution calls for an ethnographic study of cultural landscapes within the Greater Chaco Region prior to the issuance of additional oil and gas leases.¹⁰

NCAI has long supported the completion of comprehensive cultural surveys of U.S. lands prior to any federal action that may affect their cultural and historic places and that these surveys be done in close and meaningful consultation with Tribal Nations.

3. Chairwoman Sharp, you mention in your testimony that the Oak Flat Area was placed on the National Register of Historic Places (National Register) in 2016, but this nomination and process seems to have been in direct response of the passage of the Southeast Arizona Land Exchange bill. The nomination as TCP has a very odd shape as it follows sharp angular boundaries that directly align to the land exchange boundary and unpatented mining claims held by Resolution Copper, yet specifically excludes and carves out private land holdings of Resolution Copper in the middle and State Land within and surrounding the nomination. Why is the nomination area such a strange

⁷ The Save Oak Flat Act, H.R. 1884 § 2, para. 5, as introduced.

⁸ *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942).

⁹ [NCAI Resolution #PHX-08-069c: “NCAI Policy Statement on Sacred Places.”](#)

¹⁰ [NCAI Resolution #MKE-17-008: “To Support Moratorium on Leasing and Permitting in Greater Chaco Region.”](#)

shape – historically did Native American Tribes follow sharp, odd, shaped boundaries to define sacred areas within a common landscape?

Response:

A “Historic Property,” as defined in the National Historic Protection Act,¹¹ may be nominated to the National Register of Historic Places by a Tribal Historic Preservation Officer,¹² State Historic Preservation Officer,¹³ or a Federal Preservation Officer.¹⁴ The National Congress of American Indians does not have the statutory authority to function as a Tribal Historic Preservation Office, State Historic Preservation Office, or a Federal Preservation Office. NCAI supports the inherent right of Tribal Nations to define what is sacred to them, protect the confidentiality of information and traditional knowledge used to make that decision, and manage their traditional territories.¹⁵

4. Chairwoman Sharp, you mentioned that the US Government has “a legal and moral obligation to ensure tribal peoples have access to their ancestral lands to practice traditional religious freedoms, you even site religious freedom. In a February 2021 press release, Resolution Copper asserted once again that they “will maintain public access to areas within Oak Flat including the campground and recreational trails and climbing, after completion of the land exchange.” This was also mandated in the land exchange bill. The land exchange bill also mandated a number changes per testimony by Wendsler Nosie and Chairman Rambler including the permanent protection of Apache Leap through the creation of a special management area, the completion of a final EIS prior to the exchange of title and enhanced consultation provisions. The USFS has over 550 documented consultations over the last decade (FEIS Appendix S). Based on this, how is the government not meeting its legal and moral obligations?

Response:

Tribal Nations have a unique legal and political relationship with the United States as defined by the U.S. Constitution, treaties, statutes, court decisions, and executive orders. In fulfillment of this trust relationship, the United States “charged itself with moral obligations of the highest responsibility and trust” toward Tribal Nations.¹⁶ Congress expressly and continuously recognizes its fiduciary responsibilities as reflected in the fact that “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.”¹⁷ Additionally, the American Indian Religious Freedom Act states, “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise... traditional religions...including, but not limited to access to sites...and the freedom to worship through ceremonials and traditional rites.”¹⁸ Similarly, right of Tribal Nations to their culture practices and sacred places is also

¹¹ 36 C.F.R. § 800.16(l)(1).

¹² 54 U.S.C. § 302702; 36 C.F.R. § 60.6.

¹³ 36 C.F.R. § 60.6.

¹⁴ 36 C.F.R. § 60.9.

¹⁵ See e.g., [NCAI Resolution #SD-02-027, “Essential Elements of Public Policy to Protect Native Sacred Places,”](#) [NCAI Resolution #PDX-20-070, “NCAI Initiative on Sacred Places and Cultural Rights Laws and Developing Legislation.”](#)

¹⁶ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

¹⁷ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012).

¹⁸ *Id.*

recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Specifically, Article 19 requires that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹⁹ The voices of Tribal Nations must not only be heard, they must be heeded.

5. Chairwoman Sharp, you also refer to obligations under Section 106, specifically that consultation with affected Tribal Nations or their representatives is essential. Most of the other tribes meaningfully participated in good faith, in hundreds of consultations and have considerably influenced activities resulting in the complete relocation of facilities off National Forest System Lands, and the protection of specific TCPs, avoidance of medicinal plants, seeps, springs and ancestral sites, the implementation of a tribal monitoring program that has resulted in the employment of over 30 tribal members, and the creation of a program to protect and restore Emory oak groves. Additionally, compensatory funds for Native American tribes were developed in response to tribal consultation efforts between the affected tribes and the Tonto National Forest. The purpose of the funds is to support the exiting tribal monitoring program, the emory oak collaborative restoration initiative, tribal youth programs, tribal higher education programs, and a tribal cultural preservation program. The San Carlos Apache Tribe did not participate in this dialogue, but other Tribes did. Was their time wasted? Does their input and voice not matter?

Response:

In light of Appendix S of the FEIS, which charts the tribal consultation events for this project, and the extensive documentation of the San Carlos Apache Tribe’s participation in consultation, it is unclear as to what is being asked.

6. A number of San Carlos Apache members also depend on Resolution Copper for employment, directly or through local contractors – don’t they matter?

Response:

Through treaties, statutes, executive orders, and legal decisions, the United States has undertaken a trust obligation in exchange for hundreds of millions of acres of homelands. Yet the federal government has not sufficiently met these obligations to provide essential services, programs and benefits to Native people. Tribal Nations invest in and develop economies within their local and regional communities in order to create infrastructure and opportunities that self-sustain the general welfare of their citizens and fill gaps left by the federal government. Tribal Nations face unique challenges in attracting and leveraging private sector investment, creating jobs, and increasing economic activity due to unique jurisdictional and property law complexities of tribal lands. At the same time, Native small business owners and entrepreneurs lack support and incentives to invest in businesses on tribal lands, and struggle to find opportunities to gain expertise, business acumen, and advantageous partnerships to help develop economies within their

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/259 art. XIX (Oct. 2, 2007).

communities. NCAI is committed to supporting the efforts of Tribal Nations to develop their economies and support their citizens.²⁰

- 7. After a decade of opposition from the Carlos Apache Tribe to a new open pit mine and land exchange a few miles from the eastern border of the San Carlos Apache Reservation (Dos Pobres/San Juan), the San Carlos Apache Tribe and Freeport McMoran found a path forward through sales of San Carlos Apache water from the Black River and job / skills training. A recent expansion of that mine (Lone Star EIS) with a new open pit mine, waste rock dumps and a new leach facility was completed in less than 3 years with no opposition from the San Carlos Apache Tribe (or ITAA or other mine opposition groups). We see this as a positive example where mines and Tribes can work together for mutual benefit – Chairwoman Sharpe would you be willing to help bring the 2 sides together to initiate a mutually beneficial dialogue on how to shape this mine?**

Response:

The duty to consult and resolve disputes is a federal responsibility. For example, the NHPA states that federal agencies “*shall consult* with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance” to properties that might be affected by a federal undertaking.²¹ The NHPA also contemplates the challenges of consultation and provides a process for assessing, resolving, and failing to resolve adverse effects on “historic properties.”²² As part of this process, in a letter dated February 11, 2021, and pursuant to its authority under 36 C.F.R. § 800.7(a)(4), the Advisory Council on Historic Preservation terminated the consultation process because it determined additional consultation would not be productive. In a letter dated March 29, 2021, the Advisory Council on Historic Preservation communicated its final comments regarding the Resolution Copper mine to the Secretary of Agriculture. Pursuant to 36 C.F.R. 800.7(c)(4), the Secretary of Agriculture has a non-delegable responsibility to respond.

NCAI supports the inherent right of Tribal Nations to define what is sacred to them, protect the confidentiality of information and traditional knowledge used to make that decision, and manage their traditional territories.²³ Here, a number of Tribal Nations oppose the citing of the Resolution Copper mine in the Oak Flat area and have made it clear that they did not consent to Section 3003 of the 2015 NDAA.²⁴ NCAI recognizes and supports the sovereign decisions and position of these Tribal Nations.

- 8. In 2017, NCAI Resolution MOH-17-053 ‘Continued Support for the Paris Climate Agreement and Action to Address Climate Change’ was passed resolving that NCAI will continue to support and advocate for initiatives intended to reduce greenhouse gas**

²⁰ See e.g., [NCAI Resolution #MSP-15-045, “Calling on Congress to Create Tribal Empowerment Zones.”](#); [NCAI Resolution #MSP-15-005, “Calling on the President to Issue a New Executive Order on Native Nations.”](#)

²¹ 54 U.S.C. § 307706(b) (emphasis added).

²² 36 C.F.R. § 800.5; 36 C.F.R. § 800.6; 36 C.F.R. § 800.7.

²³ See e.g., [NCAI Resolution #SD-02-027, “Essential Elements of Public Policy to Protect Native Sacred Places,”](#) [NCAI Resolution #PDX-20-070, “NCAI Initiative on Sacred Places and Cultural Rights Laws and Developing Legislation.”](#)

²⁴ [NCAI Resolution #MOH-17-001, “A Call on Congress to Enact Legislation that Will Ensure Uniform, Effective and Meaningful Consultation with Indian Nations and Tribes whenever Federal Activities have Tribal Impacts.”](#)

emissions and promote climate resiliency including increased investment and use of renewable energy resources. In 2021, NCAI passed Resolution #PDX-20-30 ‘Development of a 2021 Tribal Climate Crisis Action Plan’ finding that “federal action must be taken to support the efforts of [American Indians and Alaska Natives] to adapt to climate change impacts and to reduce their carbon footprints through a range of mitigation approaches, including renewable energy development and energy efficiency.” Given that Resolution Copper will produce copper and tellurium for renewable energy production here in the United States, how does NCAI reconcile the resolutions supporting clean energy and the resolutions opposing the development of the Resolution Copper Project?

Response:

NCAI supports the sovereign right of tribal governments to determine how they manage their own resources. For some Tribal Nations, there is a complicated history that makes traditional energy resources the best – and in some cases only – way to generate the funds to provide governmental services to their citizens. In other cases, Tribal Nations have made a conscious, and sometimes economically disadvantageous choice to forego extracting valuable mineral resources on their lands. NCAI recognizes that governance is difficult; that ultimately, Tribal Nations have the sovereign right to manage their own resources. As tribal leaders often and poignantly state, we have lived here forever, we know how to manage our lands.