United Nations Declaration on the Rights of Indigenous Peoples: Understanding the
Applicability in the Native American Context

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This thesis titled

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Applicability in the Native American Context

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ABSTRACT

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United Nations Declaration on the Rights of Indigenous Peoples: Understanding the Applicability in the Native American Context

Director of Thesis: Debra Thompson

With the passing of the 2015 National Defense Authorization Act, a series of public land proposals also went into effect including the Southeast Arizona Land Exchange and Conservation Act. This particular act trades 2,400 acres of federal forest land to Resolution Copper, a mining company, for 5,300 other acres with various significances. Within the 2,400 acres, Resolution Copper plans to mine the largest copper deposit in North America today. However, the 2,400 acres are also home to San Carlos Apache sacred sites known as Oak Flat and Apache Leap. The goal of this thesis is to understand whether or not the UN Declaration on the Rights of Indigenous Peoples is being used to express opposition to such environmental and cultural destruction.

Documentary review was used to determine if the sentiments and language in the Declaration were reflected in stakeholder-issued legislation and/or comments. The result is that the wording of the Declaration is not being explicitly repeated by the stakeholders. Reasons why the Declaration is not being actively engaged and what this means for future U.S.-indigenous relations are discussed in the conclusion.
DEDICATION

This thesis is dedicated to my mother, father, and sister for providing constant love, support, and encouragement as I continually work to gain the knowledge needed to make a difference in this world.
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Much thanks and gratitude are owed to Dr. Geoffrey Dabelko, Dr. Yea-Wen Chen, and Dr. Debra Thompson for agreeing to be on my thesis committee and offering their time and knowledge. I especially want to thank Dr. Thompson for helping me organize my thoughts, patiently explaining concepts and ideas, and, most importantly, reassuring me when I got overwhelmed.

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CHAPTER 1: INTRODUCTION

From news reports about some group invading the territory of another to neighbors coming together to host a block party, physical territory plays a grounding role in how we define our identity. In the course of this thesis I hope to demonstrate what land means to a certain segment of the people living within the borders of the United States, why there is tension over land, and what tools can be employed to protect these lands if it is perceived that the federal government cannot or will not protect them on its own.

The focus of this thesis is Native American peoples, also known as American Indians or, in an even broader sense, one grouping of indigenous peoples in North America. Native Americans were spread throughout what is now the United States of America and Canada for centuries before the first European settlers arrived. Since their arrival there has been a consistent drive for more and more land on the part of the settlers who, upon arrival, subsequently established governments and borders where there were none previously. Borders and territories are key sources of tension between tribes and the U.S. federal government—who owns and/or has access to which portions of land? Taking the inquiry further, who controls the natural resources that come from the land, both surface and subsurface? These questions represent a segment of issues that are addressed in the United Nations Declaration on the Rights of Indigenous Peoples. The U.S. government and Native American tribes have different conceptions and expectations of the Declaration and the goal of this thesis is to determine which party benefits more from its adoption. Stated another way: 1) is the Declaration being used to assist Native Americans in their struggle for land rights and environmental protections; and 2) how
could the Declaration perhaps be used more effectively or differently to aid in protecting land and environmental rights?

The following paragraphs will formally introduce the specifics of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). From there, UNDRIP will be dissected starting with its background and concluding with an explanation of the tenuous concepts highlighted throughout the document. Then the case study will be introduced to paint a picture of indigenous rights in the United States. Finally, there will be an analysis of what the Declaration means for indigenous rights now, with respect to the case study, and in the future, followed by a conclusion addressing further research agenda items and final thoughts.

The United Nations Declaration on the Rights of Indigenous Peoples, when adopted by the United Nations General Assembly in 2007, represented the end goal of indigenous peoples who had spent decades on drafts and revisions in the name of legally formalizing the rights of indigenous peoples everywhere. Adoption was certainly a huge milestone for those who had dedicated precious time and energy, but some of the excitement was tempered by the abstentions from the United States of America, Canada, Australia, and New Zealand. Due in large part to repeated requests from Native peoples, in December of 2010, the United States declared its support for the Declaration (Assembly of First Nations, n.d. & Coulter, 2011). The Declaration, while not legally binding or a statement of current international law, has both moral and political force (Anaya, 2009; Stavenhagen, 2011). The document was seen as the crux of international recognition of indigenous rights needed by indigenous communities to more effectively
pursue concerns surrounding poverty, unemployment, environmental degradation, health care gaps, violent crime, and race/ethnic discrimination.

The 46 articles included in the document cover a broad range of issues addressing the human rights of indigenous peoples, including sovereignty, treaty rights, cultural preservation, education, freedom of religion, and the protection of sacred lands, to name a few. Scattered throughout are articles that pertain specifically to land, culture, and environmental rights—these articles are addressed in chapter 2. The UNDRIP is the central piece of global human rights legislation dedicated specifically to the rights of indigenous peoples that is seen as being all-encompassing and pushing the limits on what was previously deemed non-attainable (Davis, 2012; Engle, 2011). For example, UNDRIP stretches the limits of the human rights paradigm by explicitly referring to and expanding upon such key ideas as self-determination, collective land rights, and free, prior, and informed consent. These main ideas play a huge role in understanding and reconciling the interrelationship between rights to culture, land, and development (Engle, 2011).

The key question is whether or not the Declaration is living up to its original promise. Is the Declaration helping attain the goals envisioned by those who worked tirelessly for its adoption? Granted, the Declaration alone is simply another piece of paper—it takes the commitment and dedication of countries, states, and tribal governments to ensure that its principles and demands get worked into legally binding legislation. Now, almost five years removed from the adoption, it is time to see whether the United States and tribal governments have pursued such an agenda of meaningful
ratification and institutionalization. This thesis focuses specifically on the articles of the Declaration that can be directly associated with the environmental protection of indigenous lands.

A common practice throughout history has been the forced segregation and isolation of indigenous peoples on lands that were thought to be of little value, wastelands. However, once the existence of precious metals and minerals on indigenous lands was verified, tribes, mining companies, and federal and state governments have, in many cases, been embroiled in land ownership disputes and disagreements over the intensity of environmental damage that will result (Ali, 2003). Mining is a complicated venture for tribes because, on one hand, the need for job placement and income generation are great, but, on the other hand, the resources being mined are non-renewable and destructive on the physical and cultural landscape.

Today’s society, especially in developed countries, operates primarily through the use of electronic technologies, from smartphones to cloud file storage. These technologies are powered by various minerals sourced from many different parts of the world. Mineral resources are also the main raw materials and fuels used for production at all levels of industry (Ali, 2003). Mining can be advantageous as long as it is done properly and with the consent and full understanding of those whose land is being mined. Unfortunately, more times than not, proper planning and oversight do not happen (Gilbert & Doyle, 2011). Consultations required by law are held but the resulting questions and concerns are often disregarded. Instances like this occur frequently in disadvantaged communities, and are sometimes deemed acts of environmental racism (Bullard, 1993;
Jamieson, 2007; Naguib Pellow & Brulle, 2005). At the global institutional level, the United Nations High Commissioner for Human Rights (UNHCHR) holds that every human should be afforded certain rights that can only be properly provided by maintaining and allowing access to a stable environment, including the rights to life, adequate food, clean water, health, adequate housing, and the right to self-determination (Annual Report, 2009, p. 320-324; located in Green Planet Blues 5th Edition).

Guaranteeing these rights, however, continues to be a challenge for developed and developing countries alike. Certain communities and groups of people do not have access to the basic rights laid out above—not all communities are created equal. People of color (African Americans, Latinos, Asians, Pacific Islanders, and Native Americans) are disproportionately harmed by industrial toxins on their jobs and in their neighborhoods (Bullard, 1993). According to Robert Bullard (1993), “The most polluted urban communities are those with crumbling infrastructure, ongoing economic disinvestment, deteriorating housing, inadequate schools, chronic unemployment, a high poverty rate, and an overloaded health-care system” (p. 17). Communities in this sort of situation are more vulnerable to the pressures of big industry and government coercion because of their inability to say ‘not in my backyard’. Compared to those in the middle and upper socioeconomic strata, minority communities do not possess the resources to effectuate their opposition. (Bullard, 1993; Jamieson, 2007; Naguib Pellow & Brulle, 2005). Bullard (1993) makes the point that the ideal site for toxic industries and activities has “nothing to do with environmental soundness but everything to do with lack of social power” (p. 18). Indigenous communities fall under the spectrum of disadvantaged communities.
This thesis is worth undertaking because there have been quite a few critiques on the wording of UNDRIP but not much research looking at the communities and people it is supposed to be benefiting. If communities and organizations have successfully implemented and utilized aspects of UNDRIP, it needs to be known so others can learn from those experiences. If there are problems with UNDRIP or an underutilization of its articles, what are they and why are they occurring? This thesis will investigate how certain UNDRIP concepts are being cited by examining documents issued by stakeholders involved with the Southeast Arizona Land Exchange and Conservation Act. It is my hypothesis that thus far the UNDRIP is not being cited, and not utilized, by most members of the stakeholder groups and ultimately is not having a measurable impact.

Research Boundaries

The general statement of research is as follows: understanding how the Declaration is being used regarding environmental degradation on indigenous peoples’ lands by evaluating the language used in documents outlining the creation and implementation of mining projects. The goal is to understand what reflections of the articles are appearing in statements issued from various federal government entities, federal legislation, mining operation plans, and statements made by impacted Native American individuals and groups.

The definition of environmental degradation for the purposes of this thesis is: any deterioration of the natural environment through the depletion or destruction of resources, such as minerals, water, or soil, and ecosystem services caused by mining activities. Such mining activities could be occurring on lands owned either by the federal or a state
government (but having tribal significance and therefore contentious), a tribe, or ownership could be unclear (due to ongoing litigation). In the United States, the mining activity researched will be for copper.

The key underlying assumption is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a landmark piece of international indigenous rights legislation that should bear clout in policy-making arenas. As a significant international enactment, its ability to deal with environmental degradation must be periodically studied to determine how, if at all, it is making a difference in the lives of those it was intended to help.

Research Question:

• How have the intents, ideals, and concepts articulated in the articles of the UNDRIP manifested in discussions and/or documents pertaining to mining and/or mining-related projects, if at all?

Theoretical Introduction

The theoretical underpinning to this thesis comes from postcolonial theory. Postcolonial theory offers a language and a politics wherein the interests and ways of viewing the world of those who are non-western, or those who are subordinated by a classically dominant world power (i.e. Europe and North America), are put first. According to Robert Young (2003), postcolonial theory is “concerned with the elaboration of theoretical structures that contest the previous dominant western ways of seeing things” (p. 4). This theory supports my thesis because it keenly recognizes the right of non-dominant societies to “access resources and material well-being, but also the
dynamic power of their cultures, cultures that are now intervening in and transforming
the societies of the west” (p. 4). These colonized societies have been outcast and
overlooked because they do not meet the idealistic visions western nations have regarding
what their societies should look like. Postcolonial theory is one mechanism by which to
bring the disregarded voices to the table.
CHAPTER 2: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

This chapter is dedicated to explaining the articles of the United Nations Declaration on the Rights of Indigenous Peoples, henceforth the ‘Declaration’ or UNDRIP, that serve to affirm indigenous peoples’ access to and management of land and natural resources. The chapter begins with an expanded explanation of postcolonial theory and why it is the necessary lens through which to analyze everything going forward. Additionally, in describing what the Declaration says about land-related rights, it is necessary to shed light on the perceived weak spots of the Declaration that have received criticism, why these weak spots exist, and what can be done to minimize any negative effects. Prior to delving into the relevant articles of the Declaration that pertain to land, some background is offered on how the Declaration came to be and the process of transformation it underwent. This chapter shall proceed as follows: postcolonial theory, background context on UNDRIP, land-related articles and their significance, and weak spots and criticisms.

Postcolonial Theory

It is necessary to provide an expanded summary of postcolonial theory and the purpose it serves for this thesis before discussing the Declaration itself because the Declaration is a product of colonialism. Due to the colonial relationship Native Americans have with the U.S. federal government, many of their rights have been repressed entirely or inhibited in some manner which initiated the drafting, and ultimate adoption, of the Declaration. If we are to understand what the Declaration says, we must
first understand why there is a Declaration in the first place. Postcolonial theory offers a conceptual lens through which we can view the events of the past and present and grasp how United States societal and governmental structures influenced, and continue to influence, those events.

Kevin Bruyneel (2007, p. 1) cites the argument made by Martinique poet and dramatist Aimé Césaire that one of the fundamental dilemmas and defining traits of colonial rule is, “it is the colonized man who wants to move forward, and the colonizer who holds things back” (from Discourse on Colonialism, 1950, p. 179). The claim history books like to make is that the colonizer (i.e. the United States) is the progressive entity that wants to establish an advanced and modernized society and in order to do that must civilize any indigenous entities (i.e. American Indian tribes) or risk being stuck in the time-warped ways of the indigenous entities. Bruyneel (2007) likes to refer to the temporal and spatial boundaries placed on indigenous people as an attempt by the colonial government to locate indigenous people out of “colonial time, where they are unable to be modern autonomous agents” (Emphasis in original, p. 2).

Postcolonial theory works to demonstrate that the history books are wrong. It is a theory that explains why Native Americans are in the situation they are in today. Native Americans are working to change restrictive, outdated laws and retrieve rights that were stripped away. The concepts of self-determination, collective land rights, and free, prior, and informed consent – in any other circumstance thought of as inherent rights – must be articulated and fought for in the Declaration because, in the Native American context, they are no longer such. Bruyneel champions a postcolonial perspective that can help
bring the boundaries of colonial rule “out of the shadows by shedding light on and also refusing, as a start, the binaristic reading of the U.S.-indigenous relationship in which indigenous people are seen as either inside or outside the United States” (2007, p. 6).

As is discussed further in the thesis, the presence of Native Americans calls into question the physical boundaries and governmental legitimacy of the United States. Postcolonial theory, related specifically to this thesis, highlights U.S.-Native American politics for what it really is, a battle between an American effort to solidify inherently contingent boundaries and a Native American effort to work on and across those boundaries, drawing on and exposing their contingency to gain the fullest possible expression of political identity, agency, and autonomy (Bruyneel, 2007). Working with Bruyneel’s postcolonial perspective, we can see that the Declaration represents indigenous peoples’ (including Native Americans) efforts to work across boundaries, particularly at the international level, to reaffirm and secure rights.

Background

The Declaration was adopted by the United Nations General Assembly on September 13, 2007 (United Nations, 2007). The final recorded vote count was 143 in favor, 4 against, and 11 abstentions (Davis, 2012; Engle, 2011). The final version came about after more than twenty-five years of negotiations and revisions dating back to 1982 when the Working Group on Indigenous Populations was established to prepare the draft of the Declaration (WGIP) (Engle, 2011). WGIP was developed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as authorized by the Economic and Social Council (ECOSOC) (Davis, 2012). The now-decommissioned
WGIP was a body of five experts whose mandate was to “review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations” and “to give special attention to the evolution of standards concerning the rights of such populations” (Davis, 2012, p. 20). The United Nations has a vast organizational structure and within the General Assembly there are six main committees, but many more programs, councils, and advisory committees. The WGIP was not a priority entity within the organizational structure. This institutional standing actually facilitated positive feedback by permitting and encouraging direct involvement from indigenous peoples. Up to this point, indigenous voices were not being heard in the international arena. As Augusto Willemsen Diaz (2009), former official of the Human Rights Centre of the United Nations in Geneva, recounted in his telling of the events of the drafting of the Declaration:

> Indigenous representation was lacking in both the UN’s conference rooms and its studies. Likewise, Indigenous people did not show much interest in working with the UN. They saw it as a complicated matter and felt they had enough problems on their hands with the actions being taken by their governments domestically. (p. 19)

The WGIP provided the forum for interaction—a place where genuine listening took place. Megan Davis (2012), highlights the functionality of the WGIP by stating:

> A unique feature of the WGIP was the frank and open environment of the meeting…. [This] enabled Indigenous peoples to air grievances about the state’s violation of Indigenous peoples’ human rights. This aided the WGIP’s role in
cultivating substantial evidence of the nature and extent of those violations in relative anonymity; very few states regularly attended the annual working group. (p. 20)

Relative safety was afforded those who attended the working group meetings and this aspect, along with the reduced protocol restrictions, allowed the panel of experts to hear testimony cementing the “universality to the narrative of oppression and racial discrimination described by Indigenous peoples as [a] consequence of colonization” (Davis, 2012, p. 12). The fact that there was a working group is testament to the progress made by indigenous peoples around the world at making their presence known; for example, in the United States, one might think of the American Indian Movement. Rodolfo Stavenhagen (2011) makes the connection when he says:

The Declaration is linked, on the one hand, to the emergence of the world-wide social and political movements of indigenous peoples in the second half of the twentieth century, and on the other, to the widening debate in the international community concerning civil, political, economic, social, and cultural rights. (p. 156)

The WGIP set to work drafting the Declaration, armed with the testimonies of indigenous peoples from all walks of life.

The first deadline for the WGIP was the ‘International Decade of the World’s Indigenous People’ (1995-2004) declared by the United Nations in 1994; by this point the working group had produced a draft for internal consideration (Engle, 2011). In 1994, the Draft Declaration got handed down to the Commission on Human Rights (CHR), which
then established an open-ended inter-sessional working group (the Commission on Human Rights Working Group; CHRWG) in 1995 to consider the Draft (Davis, 2012). It was in the CHRWG where negotiations basically reached a standstill. Firm positions were steadfastly held regarding such issues as: collective rights, self-determination, and the scope of rights pertaining to lands, territories, and natural resources. Additionally, indigenous representatives were maintaining a ‘no change’ approach to drafting in an attempt to not sacrifice fundamental wording (Davis, 2012). In the beginning, the UN made it clear that one of the decade’s explicit aims was for adoption of the draft, plus the creation of international standards and national legislation for the protection and promotion of indigenous peoples. However, at the close of the decade in 2004, no such goals were reached (Engle, 2011). To address this shortcoming, the United Nations declared a ‘Second International Decade of the World’s Indigenous People’ with the same goals. Perhaps more time was just what the working group needed to sort out the consternation surrounding certain articles and pieces of text. It was not until late in 2004 when a breakthrough was reached over the ‘no change’ policy, a move which subsequently ushered in significant negotiation progress (Davis, 2012). From there, it took the working group another two and half years to put forth a revised draft declaration (Engle, 2011). The revised draft declaration was then adopted by the newly formed Human Rights Council during its first session in June 2006 (Engle, 2011). The Council agreed to send the declaration to the General Assembly, but the momentum was halted when, in late November 2006, the Third Committee voted in favor of a “non-action resolution on the Declaration, deferring its consideration for a later date” (Engle, 2011, p.
The non-action resolution was borne from certain states’ reservations on self-determination and what that exactly meant. Engle (2011) explains:

Much of the controversy throughout the negotiations regarding the draft and the final declaration revolved around Article 3 of the 1993 draft, which was retained in the adopted declaration. It reads, “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” (p. 144)

Many states expressed concern that the right to self-determination might be read to include the right to statehood. What ultimately won over the naysayers was the inclusion of Article 46(1), which makes clear that the declaration does not support external forms of self-determination. Article 46(1) states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. (UN, 2007, p. 14)

As Engle (2011) explains, the compromise on the inclusion of Article 46 was unsettling to many indigenous peoples involved, but most ultimately decided to support it with the understanding that other key provisions would remain intact, “including those on land and resource rights and free and informed consent, which would in some sense protect indigenous peoples’ territorial integrity” (p. 146).
As the central piece of global human rights documentation for indigenous peoples, the Declaration was rigorously critiqued and did not arrive at adoption with exactly the same content with which it was conceived, compromises and concessions were made. Previous paragraphs have demonstrated the laborious path the Declaration took to come to fruition, and before moving forward to the focus on land-related articles it is pertinent to define what is meant by ‘indigenous peoples.’ Mattias Åhrén (2009) offers a useful definition when he states:

The indigenous rights discourse operates with a few working definitions of the term “indigenous peoples.” …[I]t is sufficient to note that, regardless of the definition used, particular emphasis is always placed on the requirement that a group – in order to constitute an indigenous people – must have occupied and used a fairly definable territory before present day state borders in the area were drawn. Indigenous peoples’ cultures are further marked by an intrinsic spiritual connection to that very territory, and the natural resources situated in such. (p. 202-203)

This definition draws attention to indigenous peoples’ connection to the land that goes beyond the traditional Western/European conception of a ‘connection’ to land simply through ownership. The well-being and sustained integrity of indigenous peoples is tied to their connection with their lands.

Declaration Articles

The 46 articles included in the Declaration cover a broad range of issues addressing the human rights of indigenous peoples, including sovereignty, treaty rights,
cultural preservation, education, freedom of religion, and the protection of sacred lands, to name a few. The focus of this thesis is on land and natural resource rights, thusly, the only articles taken into consideration are those dealing with the stated focus. I have separated the articles according to two categories: Environmental/Land Security and Economic Autonomy and/or Cultural Preservation. There are, in total, fifteen articles within the two categories. Within these articles is where the sentiments and ideals associated with the concepts of self-determination, collective land rights, and free, prior, and informed consent are articulated. These concepts are referred to as ‘contentious topics’ and are discussed in further detail following the presentation of the articles. For clarity purposes, the article portions directly mentioning or relating to the prior stated concepts are italicized.

**Environmental/Land Security**

**Article 10**
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the *free, prior and informed consent of the indigenous peoples* concerned and after agreement on just and fair compensation and, where possible, with the option of return.

**Article 19**
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.

**Article 25**
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their *traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources* and to uphold their responsibilities to future generations in this regard.
Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

   Economic Autonomy and/or Cultural Preservation

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 20
1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.
Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

The articles in the Environmental/Land Security category cover access, use, and protection related issues tied directly to lands either presently owned by indigenous peoples, and/or lands that house culturally relevant sacred spaces. Such issues addressed include: restricted military activity, the right to conservation and a healthy environment, the right to freely access lands for spiritual and ceremonial purposes, the ability to determine development priorities and strategies, and the right to redress and/or compensation. This section of articles is also where we see the concept of free, prior, and informed consent for the first time in Article 10. In complement, the articles in the Economic Autonomy and/or Cultural Preservation category address more of the institutional or organizational aspects associated with the protection of land and culture, and the furtherance of indigenous economic agendas. Specifically, the development of economic, social, and political institutions; management of ceremonial objects and human remains; and the prevention against any forms of forced assimilation are a few of the significant aspects addressed. Most of these provisions may seem like common sense matters, but in the case of indigenous peoples these rights must be explicitly articulated because they have been, and continue to be, systematically undercut by colonial governments.

As discussed previously, the Declaration did not come about easily. There were procedural complications, especially over indigenous peoples’ rights to lands, territories,
and resources (LTRs). Within the working group LTR amendments and provisions were not discussed or debated until the final week of the working group’s eleventh and final session (Åhrén, 2009, p. 206). While the procrastination might seem rather curious, given that land rights are so integral to indigenous claims and identities, it is for precisely that reason that LTR provisions were tabled, because there was so much contention and a lack of clear answers. Another key point regarding the Declaration, in general, is the text is viewed as only, “…extending already existing international human rights standards pertaining to the individual to the collective; extending existing human rights, rather than creating new ones” (Davis, 2012, p. 21). At the time of declaration negotiations, most states were in agreement that indigenous peoples had fairly far reaching land rights under pre-existing international law. However, even with that understanding, states were not ready to hand over all rights to LTRs and have them encapsulated within declaration articles. In other words, most states were simply not prepared to pay the price – in financial and political terms – for a complete recognition of indigenous peoples’ rights to LTRs in the Declaration. As Åhrén (2009) aptly notes:

Instead, state representatives’ message to indigenous peoples at the outset of the negotiations was essentially; “We are ready to acknowledge your rights to LTRs to a greater extent than we do today. But let’s be realistic and find a compromise partly based on law but that also takes political realities into account.” (p. 206).

With any legislation formed via democratic processes there will always be compromises resulting in additions and subtractions from the original version. The same holds true for
the Declaration, which received its fair share of criticism due to its perceived shortcomings. Primary areas of contention are discussed in the next section.

Contentious Topics

*Self-Determination*

A constant conceptual battle fought by indigenous peoples who have been subsumed into modern-day states is determining and justifying where they exist politically, economically, socially, and culturally. As stated previously, the concept of self-determination is a point of contention among states and indigenous peoples that was supposedly sufficiently quelled by the addition of Article 46 to the Declaration. Before diving into specifics, let it be noted that state sovereignty reigns supreme in the eyes of international law. As it stands, states, as all-encompassing entities, have complete authority over their jurisdictions. They are entitled to establish boundaries and within those boundaries they can set economic, political, cultural, industrial, environmental, etc. standards. The claim of self-determination by indigenous peoples challenges and complicates this taken-for-granted position of power. By asserting the right to make their own decisions, indigenous peoples are potentially taking that power away from the state, which is a challenge to its authority. By asserting their rights to land, indigenous peoples are questioning the state’s self-proclaimed boundaries and its right to rule in those spaces. In highly simplified terms, ‘sovereign’ can be thought of as ‘untouchable’, states do not have to justify their decisions; they were imbued with such power upon becoming into being. Most states cannot explain or reconcile indigenous peoples’ presence before state
occupation as deserving of the same sovereign status as they currently enjoy—this is why
tensions exist.

States view self-determination as something comparable to secession, a complete
break from, in this case, the colonial body. S. James Anaya (2006) explains states’ fear
when he states:

Indepedently of the subjective meaning attached to the right or principle of self-
determination by indigenous peoples themselves, a frequent tendency has been to
understand self-determination as wedded to attributes of statehood, with ‘full’
self-determination deemed to be in the attainment of independent statehood, or at
least in the right to choose independent statehood. (p. 59-60)

Indigenous representatives to the Declaration drafting sessions consistently claim,
however, that this is not what is meant by self-determination as they understand it.
Clearly, the issue is a complicated one that deserves further inspection.

To start out, S. James Anaya (2009) simply defines self-determination as the
following: “Understood as a human right, the essential idea of self-determination is that
human beings, individually and as groups, are equally entitled to be in control of their
own destinies, and to live within governing institutional orders that are devised
accordingly” (p. 187). The key premise of this definition is that it is viewed through the
lens of human rights rather than states’ rights in the framework of international law. In
this regard, the concept of self-determination of peoples is one that, “envisions an ideal
path in the way individuals and groups form societies and their governing institutions”
(Anaya, 2006, p. 60). Having the right to make the best decisions for one’s self and/or
their community does not immediately invoke the notion of secession—there are much easier ways to accommodate and guarantee that right. Anaya affirms this insight by stating that in order to determine the essence of self-determination one need look at the core values contained within, such as freedom and equality in relation to the political, economic, and social configurations within which all segments of humanity live. “Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values—they are not the essence of self-determination for peoples” (Anaya, 2006, p. 60). Thus the claim by indigenous representatives that they are not out for complete separatism, which is a focus on the physical, but are rather focused on securing assurances to achieve the essence of self-determination. To further drive home the degree of distinction, Anaya (2006) explains why secession would be harmful to indigenous peoples when he states:

…[F]or most peoples—especially in light of cross cultural linkages and other patterns of interconnectedness that exist alongside diverse identities—full self-determination, in a real sense, does not justify a separate state and may even be impeded by a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states. (p. 60)

In theory and practice, the United Nations only recognizes the right to self-determination in strict cases of decolonization; and typically will not support any measure that might jeopardize states’ territorial integrity or political unity (Stavenhagen, 2011, p. 162). This is such because the UN was founded by and for the states and subsequently approaches
most issues through a states’ rights lens. The very existence of UNDRIP, and its explicit affirmation in Article 3 that indigenous peoples in particular have a right of self-determination, “represent recognition of the historical and ongoing denial of that right and the need to remedy that denial” (Anaya, 2006, p. 61). To this end, most observers and those who have critiqued the Declaration agree that an internal application of the right is most applicable. By ‘internal’ application, Stavenhagen (2011) describes that the intention is to interpret the right, “within the framework of an established independent state, especially when this state is democratic and respectful of human rights” (p. 163). The Declaration links the right to self-determination (Article 3) with the exercise of autonomy or self-government of indigenous peoples in matters relating to their internal and local affairs (Article 4). As Anaya (2006) so eloquently explains:

The affirmation of these dual aspects of self-determination—one the one hand autonomous governance and on the other participatory engagement—reflects the widely shared understanding that indigenous peoples are not to be considered unconnected from larger social and political structures. Rather, they are appropriately viewed as simultaneously distinct from, yet joined to, larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself. (p. 62)

Clearly acknowledging the right, but limiting its reach, the Declaration, therefore, calls on states to work with indigenous communities to secure the essence of self-government through contextually defined arrangements that accommodate their (states and indigenous peoples) diverse realities, while simultaneously protecting state sovereignty and
defending against any challenges that underlying indigenous title to land might pose. For indigenous peoples existing in states with colonial/settler backgrounds, securing the right to self-determination can be understood as an ongoing, continuing process which must be exercised on a daily basis because they have not overcome colonialism but rather are living through it.

*Collective Rights*

Another point of contention is the fact that there is even a declaration solely for the rights of indigenous peoples. Critics and scholars alike have questioned the need for and the purpose of a separate document when already the UN has the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. These two covenants comprise the seminal works of the foundation of individual human rights. Referring back to the definition of indigenous peoples from Åhrén, part of what defines such a group of people is their “intrinsic spiritual connection” to the territory and resources that have been under their purview for centuries. The key connection to make here is that an entire group has believed in and been dependent upon the same land since time immemorial, not just individuals scattered sporadically across a landscape. The human rights covenants are meant to address the basic needs of individuals to live prosperous and healthy lives, no matter their background or present circumstance, wherever they may be. All of this boils down to a disagreement over collective versus individual rights.

In the early days, the crafters of the modern UN human rights system perceived that the rights and interests of indigenous peoples, and other collectives, could be
adequately protected through a human rights system that focused solely on the rights of
the individual (Åhrén, 2009, p. 201). They didn’t want any one group to be privileged
above everyone else, thus they created the space for individuals to be treated equally but
did not provide the right to have distinct cultural particularities taken into account
(Åhrén, 2009). To put it simply, there was no right to be treated differently, even if a
group was distinctly different from the majority of the population. Åhrén (2009) goes on
to explain, “With time, however, international law has evolved to hold, beyond doubt,
that indigenous peoples – as distinct collectives – have the right to maintain and develop
their particular societies, side by side with the majority society” (p. 201). Staying in the
present, Anaya (2006) highlights the necessity of separate documentation stating:

By particularizing the rights of indigenous peoples, the Declaration seeks to
accomplish what should have been accomplished without it: the application of
universal human rights principles in a way that appreciates not just the humanity
of indigenous individuals but that also values the bonds of community they form.
The Declaration, in essence, contextualizes human rights with attention to the
patterns of indigenous group identity and association that constitute them as
peoples. (p. 63)

Furthering the point, when Rodolfo Stavenhagen (2011) was UN Special Rapporteur on
the situation of indigenous peoples’ human rights and fundamental freedoms he
demonstrated that, “differential compliance with the human rights discourse points from
the start to a situation of inequality between indigenous and non-indigenous peoples,
which results from a pattern of differential and unequal access to these rights” (emphasis
This pattern of unequal access stems from the many forms of prejudice against indigenous peoples – inter-personal to institutional discrimination – that cannot be easily changed. Stavenhagen is quick to point out that institutional prejudice is especially damaging to indigenous peoples because, “political decisions in any democratic society express group concerns, economic interests and structured power systems, from which indigenous peoples are usually quite distant in geographical as well as in economic, social and cultural terms” (p. 160).

Collective land rights comprise the main subset of the concept of collective rights which need to be explained for the purposes of this thesis. Historically, indigenous peoples were dispossessed of their lands because they were deemed “non-civilized” entities and as a result their traditional land laws and ways of managing or organizing traditional communal ownership were dismissed entirely. Gilbert and Doyle (2011) explain in greater detail:

A clear distinction between the “civilized” and the “non-civilized” served to assert that international law applied only to the sovereign states that composed the so-called “civilized family of nations”. With the assumption of the superiority of “civilized” states and the denial of the legal existence of so-called “non-civilized communities”, indigenous communities were refused ownership of their lands. (p. 292)

This has led to the Declaration working to meet dual goals when it comes to land and property rights. First, the Declaration works to facilitate the reinstatement of land that was traditionally owned by indigenous peoples to those indigenous peoples. Secondly,
the Declaration works to facilitate the formal recognition and utilization of indigenous peoples’ traditional land tenure systems by state and/or federal governments (Gilbert & Doyle, 2011). Amidst all of this, it is important to remember the inter-generational aspect related to land as indigenous peoples have insisted that not only is land not a commodity but it also part of their heritage to be transmitted from generation to generation—which directly impacts cultural survival, one of the big issues with regards to this thesis in particular.

Article 26 explicitly deals with determining land ownership and rights, of which there are past and present components of ownership that must be taken into consideration. Paragraph one affirms that, “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (UN, 2007). This paragraph is addressing lands historically owned by indigenous peoples and it is purposefully vague in using the phrasing “the right to”. Gilbert and Doyle (2011) term the ambiguity associated with the right to land traditionally owned but no longer occupied as an “ambiguous compromise” because such wording doesn’t automatically and definitively exclude land not presently occupied by indigenous peoples from ever being under their purview again in some capacity, but rather leaves the determination of what rights indigenous peoples have to the lands they traditionally owned, occupied, or used in the past to the different levels of governance within national jurisdictions. Paragraph two affirms the rights associated with land under present-day ownership. Here the wording is more specific by stating, “Indigenous peoples have the right to own, use, develop and control the lands, territories and
resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired” (UN, 2007). As Gilbert and Doyle (2011) point out:

Crucially, the Declaration recognizes that with ownership comes control over developments undertaken in indigenous lands. However, the recognition of indigenous peoples’ right to ‘own, use, develop and control’ their lands comes at a price: it is limited to present day occupation. (p. 297-98)

The main departure from other human rights instruments is that with the Declaration the rights-holders are not only individual members of indigenous communities, but the collective unit, indigenous peoples as living societies, cultures, and communities. As the Declaration brings to light, there are some rights that can only be enjoyed in community with others, such as the rights to language and to practice spiritual traditions. Many, if not all, of these rights are in direct association with the physical land belonging to indigenous peoples.

*Free, Prior, and Informed Consent*

Somewhat housed within the right of self-determination is the right to free, prior, and informed consent (FPIC), which is the last major issue of contention that will be discussed in this paper. In the Declaration, FPIC is first mentioned in Article 10 which states:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the
indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (emphasis added, UN, 2007)

One can quickly discern where the frustration on the part of the state comes into play. Territory, resources, and the ability to demarcate or separate one entity from another is what makes a state and provides it with power through wielding authority over those who dwell within the boundaries. States see FPIC as an infringement on their rights by inhibiting or limiting the actions they are allowed to take on ‘their own land.’

FPIC is especially timely with the increase in natural resource extraction taking place on indigenous lands under the authority of the state or third party corporations. According to Gilbert and Doyle (2011):

[The] widespread phenomenon of imposing projects on indigenous peoples without their consent has come to be termed by indigenous peoples as ‘development aggression.’ … The associated ongoing violations of indigenous peoples’ rights combined with increased demand and prices for minerals and the fact that much of the world’s remaining mineral resources are located in indigenous territories, has led many indigenous peoples to conclude that development aggression in the area of natural resource extraction poses a grave threat to their cultural survival. (p. 304)

Depending on which literature one reads there are different timelines proposed for the introduction of FPIC. To go strictly by national or international doctrine, FPIC was used in the legal realm as early as the 1970s (Gilbert & Doyle, 2011). Others, however, point to the fact that consent as a principle in relation to dealings with indigenous peoples has
been operational for hundreds of years, dating back to the original treaties negotiated by colonizers (Gilbert & Doyle, 2011). Regardless of when consent was initially established as a principle in relation to negotiations between states and indigenous peoples, it is clear that the adoption of FPIC as a general principle in negotiations with indigenous peoples has gained significant momentum in recent years as evidenced by its inclusion in the Declaration.

With regards to states’ opinions, The United States provided forceful comments in rejection of the FPIC principle being included in any format in the Declaration. One statement from U.S. representatives (2007) was:

The [Declaration] also could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples’ free, prior and informed consent before passage of any law that ‘may’ affect them (e.g., Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a ‘veto’ power over the legislative process. (p. 72)

Additionally, the U.S. only acknowledges the last part of Article 10, which briefly mentions the compensation of lands taken, and presumes that compensation is all the working group really requires of states. Specifically, the U.S. holds firm that the goal of the working group was to “encourage just, transparent and effective mechanisms for redress for actions taken by States after endorsing the declaration” (p. 72). This effectively means that the U.S. does not recognize its responsibility to acquire FPIC prior
to taking action on indigenous lands, but rather thinks it can do what it pleases as long as it compensates the affected parties afterwards. From this frame, the U.S. views indigenous peoples as simply having to accept whatever decision the state makes, but then allowing them some say in redress. Keeping the U.S.’s understanding of FPIC in mind, let us look into what the Declaration actually states as the criteria for employing the principle. According to Gilbert and Doyle (2011):

> Within the context of rights to lands, territories and resources the Declaration explicitly requires FPIC in four contexts. First, it is required prior to any relocation of indigenous peoples from their lands or territories. Secondly, FPIC must be obtained prior to the storage or disposal of hazardous materials in their lands or territories. Thirdly, the Declaration affirms that indigenous peoples have a right to redress wherever ‘lands, territories and resources, which they have traditionally owned or otherwise occupied or used…have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent’. Finally, Article 32 addresses the contentious issue of development projects…. It frames FPIC as a prerequisite for the realization of a self-determined development path premised on control over lands and resources. (p. 313-314)

From the contexts outlined above, it is clear the Declaration is meant to provide broad protection to indigenous peoples by providing them access to conversations and, ultimately, decisions.
CHAPTER 3: CASE STUDY

Having an understanding of what is textually encased within the Declaration, it is now time to move away from the 30,000 foot view and hone in on a specific example of what I would perceive as infringement on indigenous peoples’ rights. The case study I am focusing on highlights a struggle that recently made the headlines of major news networks but has been underway for over a decade. One of the Native American tribes involved in this struggle for land and cultural rights is the San Carlos Apache tribe of southeastern Arizona. The other major parties involved are the United States federal government and the mining company Resolution Copper, a subsidiary of conglomerates Rio Tinto and BHP Billiton. The source of the headlines is the Southeast Arizona Land Exchange and Conservation Act that was signed into law by President Barack Obama on December 19, 2014 (Obama, 2014). The first goal of this chapter is to portray the long-held legitimate cultural and spiritual connections the San Carlos Apache people have with the sacred sites now under threat from mining, and how these connections validate the intentions captured in the pertinent articles. By demonstrating that their cultural, spiritual, and environmental well-being are in jeopardy, I argue that the San Carlos Apache are being denied the rights laid out for them in the Declaration because they did not have a say in whether the Conservation Act was approved or not. The second goal of this chapter is to demonstrate the (in)frequency of Declaration wording found within stakeholders’ comments, legislation, official statements/documents, etc. that will ultimately determine whether or not the intentions captured in the articles are being reflected in such forms of communication surrounding the land exchange.
The Situation

It would be appropriate to first provide some insight into who the San Carlos Apache people are. The San Carlos Apaches comprise one tribe which, along with ten other tribes, make up the Chiricahua Apache Nde Nation. These are a people originally spread throughout the southwest from Arizona to New Mexico and across the U.S. border into Mexico. According to the Arizona Office of Tourism (2015), the Apache peoples are descendants of the Athabascan family, which migrated to the Southwest in the 10th century. Evidence of entrance into the colonial legal system comes from the ‘Treaty With the Apache, 1852’ (United States Government, 1904, courtesy of Oklahoma State University Digital Library). Upon further colonization and the establishment of reservations, the bands of Apache who were residing in San Carlos became recognized as the San Carlos Apaches. According to reproduced legal documents on the Chiricahua Apache Nde Nation website (2015) and in the Oklahoma State University Digital Library, the San Carlos reservation was established in 1871. Today, the San Carlos Apaches are one of 566 federally recognized tribes (DOI/BIA, 2015). The reservation encompasses 1,834,781 acres spanning across Gila, Graham, and Pinal Counties in southeastern Arizona, roaming over regions of mountain country, desert and plateau landscapes and is home to approximately 12,000 people (Arizona Office of Tourism, 2015). According to the Inter-Tribal Council of Arizona (2015), which acts as a concerted voice for 21 Native American tribes, “over one-third of the reservation land is forested (175,000 acres) or wooded (665,000) acres.” This type of environment, coupled with the jumbled topography, creates a superior habitat for many wildlife species such as
elk, mule deer, turkeys, black bear and mountain lion to be at home on the reservation (ITCA, 2015). The San Carlos Apache tribe, specifically, and the Chiricahua Apache Nde Nation, more broadly, see themselves as a “culturally rich society with a heritage tied to Mother Earth…[an] existence steeped with thousands of years of clanship lineage and knowledge passed down for centuries” (Chiricahua Apache Nde Nation, 2015). It is also worth stating the goals and purpose of the Chiricahua Apache Nde Nation as identified in their charter because they demonstrate where this group of indigenous people has been, how they see themselves, and provide greater insight into the foundational connection with the land. According to 2003 Charter:

The Nation is to rebuild and strengthen relations among Chiricahua Apache people, wherever they are, to pursue goals and objectives common among them as do all other sovereign nations of the earth. In particular, the purposes of the Nation are to:

- Develop and reestablish the Chiricahua Apache Land Base to promote the growth of our culture and traditions.
- Develop solidarity among the Chiricahua Apache people through continued projects such as Red Paint Pow Wow.
- Promote and defend Chiricahua Apache Self-Determination, Prosperity, and Culture throughout the Chiricahua ancestral territory, in a spirit of respect for the other peoples now living within that territory.
- Develop and reestablish the Chiricahua Apache Trade Alliances under Self-Determination and Historical Rights of Trade.
- Advance strategies to obtain redress for historical and ongoing grievances.
- Compile and disseminate, as appropriate, information about the Chiricahua Apache people and their history.

As the situation with Resolution Copper is outlined in the following paragraphs, keep in mind the land-related goals of the San Carlos Apache people in order to compare them
with the goals of other involved stakeholders. One will quickly be able to discern that the
San Carlos Apache people are connected to the land for spiritual and cultural reasons,
while Resolution Copper, along with the majority of the federal government, is connected
to the land strictly for economic reasons.

The National Defense Authorization Act (NDAA) is one of the must-pass pieces
of legislation that the U.S. Congress moves every year. This package of legislation
includes spending measures for everything from fighter jets to office telephones. The
2015 NDAA package is valued at more than $585 billion (McAuliff, 2014b). This year
the NDAA included provisions other than those directly designated for national defense,
in particular a federal lands package that gives away 2,400 acres located in the Tonto
National Forest to Resolution Copper, a subsidiary of the Australian-English mining firm
Rio Tinto and co-owned by another international mining giant, BHP Billiton (McAuliff,
2014c). The land was given in exchange for 5,300 acres that the company owns
throughout Arizona with recreational, conservation and cultural significance (Sanders,
2014). The name of this controversial trade is ‘The Southeast Arizona Land Exchange
and Conservation Act’, and over the course of the last decade it had twice failed to win
support in the House of Representatives, blocked by both conservatives and
conservationists, so this time it was discreetly inserted near the end of the defense bill
(McAuliff, 2014b). Conservationists opposed the bill because of the obvious detrimental
environmental side effects associated with such a massive mining operation.
Conservatives frowned upon the bill because they saw it as providing ‘sweetheart’ deals
to a select few and felt that the accounting numbers couldn’t be trusted—both public and
private coffers were threatened to be gypped, from their vantage point. Looking at the House of Representatives’ Rules Committee print from December 2, 2014, which includes the entire text of the NDAA and amendments, the land exchange does not start until page 1103 and ends on page 1130 of 1648 total pages. To say the Act was inconspicuously hidden in the NDAA might sound prejudicial, but one of the legislators key in supporting the Act and making sure it got attached as it did, Arizona Republican Senator Jeff Flake, acknowledged that the Act never would have made it through on its own (McAuliff, 2014b).

The Act had faced previous opposition due to the nature of what is to take place on the 2,400 acres—a copper mine, tapping the largest copper deposit ever to be discovered in North America (Sanders, 2014). Tonto National Forest is comprised of roughly three million acres which places it as the fifth largest forest in the United States. Its boundaries are Phoenix to the south, the Mogollon Rim to the north and the San Carlos and Fort Apache Indian reservations to the east (USDA/USFS, 2015). The copper deposit sits below Apache burial, medicinal, and ceremonial grounds currently within the bounds of Tonto. This sacred area is known as Oak Flat and has been under federal protection from mining since 1955 by special order of President Eisenhower (Fang & May, 2015). Additionally, the mine is to be located adjacent to a spot known as Apache Leap, a summit that Apaches jumped from to avoid being killed by settlers in the late 19th century (McAuliff, 2014a). A basic depiction of where the mining is to take place can be seen in Figure 1. A portion of Oak Flat is currently a campground within the national forest (‘Campground Boundary’ designated by a yellow outline). The
campground will subsequently be closed and any sort of public access eliminated upon initiation of mining activities (Courey Toensing, 2015b). The other area outlined in yellow is Apache Leap. The location has been designated as a special management area, according to the wording of the land exchange legislation, which means it is spared from direct mining but not necessarily associated activities nor the estimated aftermath. The special management area designation requires that a separate management plan be developed for Apache Leap, which includes the installation of seismic monitoring equipment above and below surface. Additionally, due to the close proximity to the mining site, the legislation also allows for the installation of “fences, signs, or other measures necessary to protect the health and safety of the public” (U.S.A NDAA, 2014). Access to Apache Leap might not initially be restricted but as mining progresses there will be real challenges faced in order to get to the site to pray and perform sacred ceremonies (Bregel, 2014).

**Figure 1.** Diagram of proposed copper mine operations. Courtesy of the Tucson Sentinel.
There are further concerns being raised about the method of mining to be used—“panel caving”, a subset of the method known as “block caving” (McAuliff, 2014a). This method (seen in Figure 2) involves drilling down miles below the ore body, creating more tunnels underneath the ore body, and then allowing gravity to push the rock down where it can be trucked away. This sort of mining has resulted in massive sink holes where the land above the ore body eventually subsides (McAuliff, 2014a).

Figure 2. Panel caving mining technique. Courtesy of Resolution Copper.

There are serious environmental concerns that surround any mining project, but especially one of this magnitude. According to the National Research Council (1999), mining may affect, to varying degrees, “groundwater, surface water, aquatic biota, aquatic and terrestrial vegetation, wildlife, soils, and air quality” (p. 27). Of special
concern to the San Carlos Apache people and other surrounding communities is the threat of significant long-term impacts to surface water and groundwater quality. As noted by the National Research Council (1999), “Hardrock mining of metalliferous deposits can release to the environment metals, metalloids, sulfate, cyanide, nitrate, suspended solids, and other chemicals. Acid drainage has been considered one of the most significant potential environmental impacts at Hardrock mine sites” (p. 28). Not only is there worry about toxic discharge, but, especially in the arid west, there is great concern over mining activities reducing or eliminating sources of freshwater. “Groundwater withdrawal for mineral processing and to prevent filling of open pits and underground mines can affect local and regional groundwater quantities and levels” (National Research Council, 1999, p. 29). Ultimately, actions can be taken to control, limit, or offset many potential impacts, but mining will, to some degree, always alter landscapes and natural resources.

The mine is slated to create around 3,700 direct and indirect jobs and bring in an estimated $61 billion in economic benefit to the state of Arizona and the U.S. government over the next 40-60 years, depending on the lifespan of the mine (Sanders, 2014; McAuliff, 2014a). However, even these numbers are not guaranteed, especially since Resolution Cooper will be employing relatively new technology, part of what is known as the autonomous haul truck (AHT) project, that is meant to increase efficiency and reduce costs (Els, 2013; McAuliff, 2014a). Local tribes, including the San Carlos Apaches, are worried about the irreversible damage that will be done to the land, especially the scarce water supplies, and whether or not they will have access to sacred places within and just beyond the border of what is now private land.
Stakeholder Insights

In order to establish whether there is any connection between the Declaration and what is happening at the national and local/regional levels, I am choosing to employ discourse analysis as my method. Discourse analysis is not only concerned with how texts are structured sentence-wise, but also with the relationship between language and the social and cultural contexts in which it is used (Gee, 2005; Jones, 2012; Paltridge, 2006). According to Paltridge (2006), discourse analysis “considers the ways that the use of language presents different views of the world and different understandings” (p. 2).

Within discourse analysis, researchers are provided with tools to evaluate texts and discover the norms, values, positions, and/or perspectives that may not be overtly stated, but are rather ‘hidden’ within the text itself (Gee, 2005; Jones, 2012; Paltridge, 2006). The importance of being able to perform discourse analysis in the context of U.S.-Native American relations is reinforced by Bruyneel (2007) who states:

[D]iscursive practices shape the meaning and impact of institutional and political developments in U.S.-indigenous relations, whether these developments take the form of federal policies, legal decisions, the actions of governmental and nongovernmental political actors, or the contested definitions and practices of sovereignty. (p. xxi)

With respect to this thesis, portions of stakeholder statements were extracted and analyzed. The wording of the land exchange act was also analyzed to see if any elements of the Declaration were incorporated. The role of ‘stakeholder’ in this context was restricted to the United States federal government, Resolution Copper and its parent
companies, the San Carlos Apache tribe, and any other Native American person or entity that is in some way impacted by the land exchange. Detailed stakeholder accounts may be found in the Appendix, but in an attempt to keep this section concise only a select few quotations from each stakeholder will be provided along with a brief analysis. The segments of conversation, written statements, and legislative documents paint a more complete picture and are perhaps easier to compare when laid bare in their entirety, as they are in the Appendix, but I hope to do each stakeholder group representational justice in this section. I make no claim guaranteeing that all comments/statements/legislation regarding the land exchange are included in this paper—simply a representative segment from each stakeholder group.

The first stakeholder group to be represented is the San Carlos Apache tribe, along with other Native American affiliations who may be impacted by the land exchange. Many of the statements from this stakeholder group make direct calls for recognition of the right of religious freedom as the way to protect their lands and cultural identity. This is evidenced by the following portion of a statement from Yavapai-Apache Nation Chairman Thomas Beauty when he states:

In the United States, our constitution grants each and every one of us the freedom of religion. We speak about this freedom, yet the first people of the United States, the Native American population, are continuously denied the freedom of religion and the preservation of religious sites, such as Oak Flats. As Indian people, we hold many places as sacred and holy, and we are the stewards of the Earth, taking care of the environment just as the Creator gifted it to us, so we don’t build
churches and temples. However, these places, like Oak Flats, are important to us religiously and their preservation and protection is critical for the survival of our culture, our people and our way of life.

San Carlos Apache Tribal Chairman Terry Rambler also frequently cites religious freedom when explaining the centrality of sacred lands in the continued operation of the culture and fighting for their protection. In addition to specifically citing religious freedom, there is also some mention to human rights, in general. However, there is no direct mention of collective land rights. Some stakeholders, such as the Great Plains Tribal Chairman’s Association, also mention the need for meaningful consultations and spurned the passing of the land exchange prior to engaging in such consultations and guaranteeing the transfer of land regardless of the outcome of an environmental impact statement. There was only one stakeholder in this group that discussed one of the key concepts from the Declaration. S. James Anaya (2014) discussed FPIC in an op-ed he released online, stating:

The owners of the Resolution Mine project, Rio Tinto and BHP Billiton, subscribe to guidelines adopted by the International Council on Mining and Metals establishing, in keeping with United Nations standards, that mining companies should work to obtain the free, prior and informed consent of indigenous peoples and ensure full respect for their rights, as preconditions to the implementation of mining projects that affect them. … But the land swap authorization for Resolution Mine was not predicated on the San Carlos Apache's consent or widespread local support. Instead, the congressional authorization
came amid continuing disagreement about the environmental and cultural impacts of the land swap and eventual mining, through a truncated legislative process that altogether avoided confronting the points of disagreement.

The San Carlos Apaches and other Native American groups are overwhelmingly against the land exchange and see it as a violation of their fundamental rights. However, it is not readily clear whether or not the wording of the Declaration is influencing their understanding of how to cope with the situation at hand. There is an understanding that consultations and the right of religious freedom play a part in working against or with the other stakeholder groups, but aside from Mr. Anaya mentioning FPIC the main concepts of the Declaration are largely missing from the discourse.

The next stakeholder group under analysis is the Resolution Copper Mining Company and its parent companies, Rio Tinto and BHP Billiton. In an interview with Al Jazeera’s ‘America Tonight’ (2015) news team, Resolution Copper submitted this prepared response to a question regarding the company’s plans, if any, to accommodate Native American groups with religious and cultural ties to the mining site:

Resolution Copper is committed to strong partnerships and to seeking continued input from the Native American community. Our permitting process requires government-to-government consultation with Tribes, and we will continue to build solid partnerships with Native Americans that will last for decades to come.

This response from Resolution Copper demonstrates that it is playing by the rules and saying all the right things to deflect as much criticism as possible. The Company says that it is willing to hear input from affected tribes and wants to build strong partnerships, but
they do not provide specific details describing what such a partnership would look like or how involved they are willing to let the tribes be. In the Mining Plan of Operations, Resolution Copper lays out a plan that ideally follows all federal and state of Arizona level protocols for navigating tribal consultations and handling the discovery of cultural artifacts. From complying with the proper sections of the National Historic Preservation Act of 1966 to preparing a Historic Properties Treatment Plan, Resolution Copper covers all the technical and legal basis. What is missing from the interview responses and the Mining Plan of Operations is explicit recognition of the rights of the San Carlos Apache people. There is no mention of needing tribal approval prior to the start of any sort of activity, nor is there any mention of the right to compensation or redress. The Declaration was clearly not a guiding document during the creation of the Mining Plan of Operations, rather the Company is choosing to operate strictly within the domain of the United States where mining regulations are more industry friendly and the economic incentives promote leniency. Not many statements have been issued by the company but all of them contain similar wording, which also happens to be the same wording found in their mining plan of operations—there are guidelines in place and by working together with different government agencies and affected tribes everything will work out to the best degree possible.

The final stakeholder group being represented is the United States federal government. One key comment comes from Secretary of the Interior Sally Jewell (2014) when she states:
With that said, I am profoundly disappointed with the Resolution Copper provision [the Conservation Act within the NDAA], which has no regard for lands considered sacred by nearby Indian tribes. The provision short circuits the long-standing and fundamental practice of pursuing meaningful government-to-government consultation with the 566 federally recognized tribes with whom we have a unique legal and trust responsibility.

Secretary Jewell’s words demonstrate that there are people at the highest levels of government who understand the importance of respecting tribes and the lands they hold sacred by making them active members of the conversation. She also highlights one key attribute of the colonial experience—the legal and trust responsibility. On the one hand, her statement acknowledges the need for FPIC, but on the other it implicitly dismisses the capacity to truly be self-determining entities. On the extreme opposite end of the spectrum come a couple segments from a press release issued from the office of U.S. Republican Senator John McCain of Arizona (2014) stating:

The public lands title in NDAA will help address our strategic national interest in copper by advancing the Resolution Copper Mine project, which has potential to meet 25% of U.S. demand by developing the largest copper deposit ever discovered in North America. … We look forward to continuing our efforts to help realize the immense potential of this project for the people of Arizona and America.

Nowhere in the entire press release is anything from the Declaration mentioned. Native American tribes are not seen as having a voice in the discussion regarding the project or
the impacts. The way the release is worded makes it sound as though the kinks and concerns were worked out prior to the passage of the bill so tribes don’t have anything to complain about because there obviously cannot be any problems. The specific segments of the release cited above demonstrate a very state-centric vantage point on the part of McCain and his allies. The populations that matter are the people of Arizona, specifically, and the United States of America, broadly—there is no recognition given to the unique needs of the San Carlos Apache people. Senator McCain and Secretary Jewell’s comments are polar opposites, but not all representatives fall distinctly in either camp—there are some indifferent voices present in the federal level. Generally speaking, the majority of Congress either supports or is indifferent towards the land exchange. However, there are a handful of people both in Congress and scattered throughout various federal government departments that resent the deal and the tactics involved in its passing.

With this information (i.e. the portions of quotes and statements from above) one can determine whether or not the Declaration is having any influence by searching for specific phrases and key words. Many of the key words and phrases directly emanate from the issues of contention discussed in the previous chapter—self-determination, collective or group rights, and FPIC. Additionally, I am looking for the ideas embodied in the articles to come through in the wording of these statements and documents, either through quoting the articles directly or through some specific application resulting in rewording but maintaining the same concept. The Declaration, especially the articles singled out previously, has a heavy emphasis on fairness, transparency, direct
involvement, and approval by indigenous peoples with regards to anything impacting their cultural, political, economic, and/or social wellbeing. The question of whether or not the Declaration is being utilized on other political levels will now be broken down and analyzed in the next chapter.
CHAPTER 4: ANALYSIS

The first part of the analysis involves figuring out how the contentious topics of self-determination, collective rights, and FPIC are represented in the relevant bits of legislation and statements presented in the case study. Individual pieces of legislation and/or statements from each set of stakeholder insights (i.e. United States Federal Government, Resolution Copper Mining, and San Carlos Apache Tribe & Other Native American Affiliations) will be critiqued. Subsequently, there are bound to be short paragraphs as not all statements/legislation were directly related to aspects of self-determination. There are also some generalized inferences made about group statements, particularly in the ‘San Carlos Apache Tribe & Other Native American Affiliation’ section of insights.

Self-Determination

The right to self-determination is most clearly represented in the legislation and statements through the associated right to free, prior, and informed consent. As will be demonstrated, explicit references to self-determination are rare to nonexistent, but the ideal is semi conveyed through demands for cultural and religious freedom and the right to be consulted prior to any decisions being made.

In the first portion of statements from Secretary Jewell, she acknowledges self-determination when she references the “government-to-government relationship” the federal government has with Native American tribes. Conversely, the statement from Senators McCain and Flake acknowledges no form of self-determination. They attribute the passing of the land exchange as a victory for the state of Arizona and the United
States military—nowhere is there mention of any benefits accruing to affected Native American tribes. They close out the statement by reaffirming the immense potential the mining project has for the “people of Arizona and America” and one could reasonably assume that indigenous peoples are not categorized as a distinct, rights-holding entity within their framing of “people of America.”

The retired archeologist from the U.S. Forest Service, J. Scott Wood, also doesn’t acknowledge the right of Native Americans to have any steadfast claim to land or resources, which is part of self-determination. He mentions a couple different times that he believes the land exchange is harmful to the “American people” and the “American public” because they’re losing out on a beautiful landscape and huge financial gain. For someone who spent forty years working for the Forest Service, a federal agency in Tonto National Forest, surrounded by Native American tribes, I would argue his views represent the implicit understanding behind most dealings between the federal government and Native American tribes. The understanding that Native American peoples have somehow melded with the rest of society and therefore don’t really need nor deserve ‘special’ accommodation or decision making privileges is communicated in the general language referencing the American population at large.

The comments from the Arizona congressmen are a toss-up. The Representatives who provided key support needed for passage do not recognize the self-determination of tribes, only the self-determination of the state of Arizona. They see the land exchange and subsequent mining venture as the ticket to a lifetime of success and prosperity for Arizona—an Arizona that doesn’t leave its fate in the hands of tribes. On the other hand,
Representative Grijalva acknowledges the need to exercise prudence in such critical situations. He respects the necessity of transparency and consultation, which demonstrates support for a degree of self-determination.

The text of the land exchange itself only superficially acknowledges a tribe’s right to some form of self-determination. In the first part of the relevant text there is reference to government-to-government consultations between affected Indian tribes and the Secretary of the Interior, but further reading reveals that the tribes aren’t sitting at the bargaining table with the rest of the big players at the end of the day. After consultations with the tribes, the Secretary meets with Resolution Copper to see how, if at all, they can address/minimize the concerns of the tribes. The consultations serve to make tribal concerns known but one is left to wonder what tribal role exists after those are complete. The text of the Act makes it sounds as though the “affected Indian tribes” don’t have any role in discussing solutions or making agreements. Additionally, by using the word “affected” the federal government has from the start deemed the tribes as the disadvantaged party bearing the brunt of an already guaranteed project. If there were real recognition of the right to self-determination, Native American tribes would be at the bargaining table from day one as an equal party, before any land exchanges were made official. As it stands, tribes are not in control of their own destinies which is the fundamental premise of self-determination. In contrast, the rights of the corporation, Resolution Copper, to self-determination are clearly defined—most plainly by stating that nothing shall interfere with, limit, or otherwise impair the scope of actions undertaken by Resolution Copper.
Resolution Copper reiterates multiple times that it wants to have a strong partnership with the “Native American community” but it does not acknowledge nor grant any decision making power to said community. Additionally, it acknowledges that consultations must take place but desire to have no part in them. In their responses to Al Jazeera, representatives of Resolution Copper state that part of the permitting process by the federal government requires government-to-government consultations but, in its Mine Plan of Operations, Resolution Copper cites the Forest Service as the responsible party for ensuring NEPA and NHPA guidelines are followed and consulting with the state historic preservation officer (SHPO), the Advisory Council on Historic Preservation (ACHP), any affiliated tribes, and other consulting parties as part of the Section 106 process. Nowhere are there defined instances for the tribes and Resolution Copper to meet face-to-face so as to have a chance to communicate directly their concerns, demands, and/or alternative propositions.

Different Native American parties, whether that be San Carlos Apache Tribal Chairman Terry Rambler or S. James Anaya, also fail to mention self-determination by name, but the sentiment is present in their outcry for the right to religious and cultural freedom. In every section of relevant text there is some mention of how the threatened sacred sites are of cultural and/or religious significance. Multiple statements mention the importance of the sites for generations to come. There are also references to human rights as a general categorical description. From the information present in the excerpts it can be implied that Native American leaders are not demanding for any form of secession
from the U.S., but rather are appealing to the international rights frameworks and calling for dialogue so they may be part of the decision making process.

Collective Rights

Earlier in the paper there was a discussion on collective rights, which dovetailed into a discussion on collective land rights, more specifically. Before jumping into the analysis of the stakeholder insights, I think it is prudent to revisit what is meant by collective land ownership and how it is portrayed in the Declaration. Upon colonization, Native Americans were deemed to be “non-civilized” peoples and as such their land tenure systems were dismissed and they were refused any sort of ownership over lands which they had been dispossessed of. As a result, the Declaration works to address both concerns: the return of indigenous lands to the tribes, and the formal recognition and utilization of indigenous land tenure systems. Meeting these ownership needs of tribes is particularly important because cultural and spiritual practices, and overall identity, are tied to specific lands.

Article 26 tries to respond to both the needs of the tribes and the demands of the state. The first paragraph in Article 26 states that tribes do have rights to lands they traditionally owned but remains vague in stating which specific rights apply to such lands. The second paragraph affirms the rights associated with present-day ownership of lands and is explicit in stating what types of rights (e.g. right to own, use, develop, etc.) apply. The third paragraph declares that states must give legal recognition and protection to these lands and must do so through traditional systems of land tenure. Paragraph one was left purposefully ambiguous in an attempt to allow states and tribes to work out
ownership disputes independent of the international arena. This reasoning might strike some as comical because history shows us that, in most cases, tribes and state and federal governments within the United States have not been able to independently and fairly resolve their conflicts. Rather, it is safe to assume the ambiguity was left in paragraph one to satisfy the colonial powers that be, and respect their current control over lands within their borders.

With respect to the particular case study of this thesis, the intent outlined in paragraph one is more applicable since the sacred places are not on present-day owned San Carlos Apache land, but rather on federal property. However, just because the San Carlos Apache people don’t own the land currently and the U.S. hasn’t explicitly outlined what is meant by “the right to” doesn’t mean the sacred sites can’t or shouldn’t be protected. Paragraph three in Article 26 states, “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned” (UN, 2007). This affirmation, along with Article 27, is where the Declaration can be seen as pushing states to formally recognize traditional institutions and land tenure systems in conjunction with protecting culturally valuable places. The Declaration continues in Article 28 by outlining that indigenous peoples have the right to redress, to include restitution or equitable compensation, for anything taken without their free, prior, and informed consent. Under this logic, the land exchange was made without the consent of the San Carlos Apaches and they, therefore, should be entitled to some sort
of redress. This now leads us into an examination of the stakeholder insights to see exactly what is mentioned.

In general, especially with this case study, I think it is fair to observe collective rights and self-determination on the same plane as the two concepts go hand-in-hand. By that I mean, they are separate ideas but collective decision making is fundamentally a part of self-determination for tribes. Having the ability, or right, to control what happens on land (whether the land is owned currently or in a historic sense is inconsequential in this regard) is subsequently also one realm of decision making that factors into how sustainable and meaningful life can be. With that being said, for the most part, the portions of statements and legislation cited above in the self-determination section are also applicable here because recognizing, or failing to recognize, the concept of self-determination can also be read as an acknowledgement, or lack thereof, of the concept of collective land ownership. However, there are some specific bits from the stakeholder statements and legislation that are worth mentioning independently of self-determination.

Secretary Jewell, in admonishing the handling of the land exchange, noted that the time for consultation with tribes was prior to passing legislation and she goes on to say that, “The tribe’s sacred land has now been placed in great jeopardy.” This statement acknowledges the cultural, and subsequently the historical, claim to ownership by the San Carlos Apache people. Further acknowledgement comes from Secretary Jewell’s closing remark wherein she speaks of looking forward to see how Rio Tinto (parent company of Resolution Copper) works with tribes and what they work out to make the situation right for everyone involved, “including forgoing development in these sacred areas.” This
closing remark also supports the concept of FPIC but I insert it here to show the magnitude of relevance these areas have had to the tribes for generations. Following this line of reasoning, one might argue that if a place has amassed such cultural value there must be a temporal component factored in because places typically become more important as time passes and people develop memories and a sense of associated nostalgia, leading to the understanding that the area was “owned by” or under the stewardship of indigenous peoples before it became U.S. federal land.

It is also worth highlighting the portion of the press release from Senator McCain’s office (2014) that states, “Third, our bill guarantees that Apache Leap, which is celebrated by Native American lore, is not part of the mine and is permanently protected through a special management area designation that the Forest Service will manage.” I highlight this section because ‘lore’ seems like a condescending word choice, equating these areas with fairytales or fables rather than as foundational cultural building blocks. Additionally, there is some implicit acknowledgement of the historical nature of Apache Leap by agreeing to spare it from direct impact, but yet the area that remains will be managed by the Forest Service and not the San Carlos Apache People, despite it being in “their possession” culturally for millennia.

Of course, there is no mention of collective land ownership in the land exchange text itself or in anything issued by Resolution Copper. The San Carlos Apache, along with other Native American tribes and interests, do not insist that ownership should be explicitly transferred to them in present day terms, but they also do not ever mention formally releasing title to the land at any point in time. In any case, they seem less
concerned with whether the tribe owns the land or the federal government as long as it is not transferred into the private possession of Resolution Copper. We can see evidence of collective ownership in the first statement issued jointly by The Spirit of the Mountain Runners and Apache Stronghold (2015) wherein they write:

Chich’il Bildagoteel (also known as Oak Flat) is a sacred site for our Apache people and many other Native Americans. … We have never lost our relationship to Chich’il Bildagoteel, though the U.S. Government, at times in our history, has imprisoned us on our Reservations and not allowed us to come here. … All of these [mining] effects desecrate land sacred for our people for countless generations. In addition, the privatization of Chich’il Bildagoteel would block our access to a site crucial to the cultural and religious identity of our peoples. … [The land exchange] demonstrates a profound disrespect to our religion, cultural traditions, and our peoples—the first inhabitants of the land.

These are strong words clearly suggesting that these sacred places have been under the purview of Native American tribes since long before the establishment of the U.S. government. The same sentiment is captured again and again within the assortment of statements. It is easy to see that the connection/argument being made to the land is spiritual and cultural. As San Carlos Apache Tribal Chairman Terry Rambler says, places like Oak Flat and Apache Leap are equivalent to a manmade structure built for spiritual worship, like a Catholic church, and as such they should be reserved from any physical harm. Gilbert and Doyle (2011) summarize the role of the Declaration and land rights when they state:
…[N]ot only does the Declaration recognize that indigenous peoples have suffered in the past, it also affirms that such historical dispossession still has some impact on indigenous peoples’ lives nowadays. This underlines one of the philosophies behind the Declaration, which is to recognize past wrongs and to address present day situations by building a bridge between them. Land rights are the cornerstone of such a bridge. (p. 299)

Rights to land does not necessarily mean that an explicit title must be in-hand, but rather that there should be enforceable and meaningful decision-making capabilities conjoined with documented and acknowledged “belonging” and use of the land in question. This leads into the discussion of how FPIC is portrayed in the stakeholder segments.

FPIC

As clarified above, free, prior, and informed consent is seen as troublesome by states because they see it as relinquishing some form of veto power to a segment of the population; but indigenous peoples understand FPIC as the right and ability to have a say over matters directly affecting them. FPIC is a sub-segment of self-determination and, as mentioned above in that section, indigenous peoples want to engage in meaningful dialogue and be part of the decision making process, which is what FPIC represents.

When we look at the statements made by those connected with the U.S. federal government we see calls for consultation but not consent. There isn’t even any stipulation in the land exchange legislation that says that what is negotiated throughout the consultation process actually has to be enacted or followed through upon. Secretary Jewell notes there is a long-standing practice of “pursuing meaningful government-to-
government consultation” but there is no hint at the force leveraged behind the deals/compromises made in consultations by the Native American tribes. FPIC calls for the ability to outright deny anything that isn’t agreeable with San Carlos Apache, but even if that were not the case, FPIC should be understood as having significant decision making leverage throughout the course of any project. This understanding of the concept of FPIC is not reflected in any statements, legislation, or documents associated with the federal government or Resolution Copper. FPIC is not mentioned by name until we get to the op-ed written by S. James Anaya. Anaya makes known that as subscribers to the guidelines adopted by the International Council on Mining and Metals, Resolution Copper and its parent companies should work to obtain FPIC and guarantee the tribe’s rights as preconditions to implementing any project that may affect them. Additionally, Anaya (2014) says Resolution Copper should be ready to change its plans or abandon the operation altogether, “if the company cannot obtain the social license that broad local support and agreement with the tribe would provide.” The line drawn by Anaya is clear and firm, FPIC or nothing. Yavapai-Apache Nation Chairman Thomas Beauty, on the other hand, sees consent as allowing some leeway. Beauty (cited in Courey Toensing, 2015b) says Native Americans:

[M]ust demonstrate our willingness to come to the table with Rio Tinto and the Arizona congressional delegation for discussion on how all parties can put forth effort collaboratively to not only protect Oak Flats, but to also create jobs and enterprise in a more responsible way that leaves minimal impacts to the environment and region.
Here, Beauty is recognizing the need to compromise intermingled with consent and consultation by stating that there should be a “willingness to come to the table.” Also, there is the recognition that there are other needs which need to be met in addition to preserving cultural sacred sites, mainly job growth. Obviously, the role and degree of FPIC is undetermined at this point but it is clear that the current participation level is not serving all stakeholder parties fairly.

Theoretical Premise

After analyzing the various texts and understanding how the contentious topics of self-determination, collective land rights, and FPIC are reflected the question of “Why?” still remains. I don’t purport to be an expert on indigenous relationships with outside governing bodies, but with the particular case of American Indians and the U.S. federal and state government system it is helpful to look at the information through a postcolonial lens. In this sense I am not suggesting that colonialism is over, or that American Indians being conquered is an event that occurred in the past and now everything is harmonious. Anyone even slightly familiar with politics and the situation faced by Native Americans knows the U.S. still today imposes its will in a variety of different manners over a whole slew of issues. For example, aside from land rights, the U.S. flexes its sovereign muscle with regards to Native Americans by shielding non-native persons from any repercussions if they commit crimes on tribal land—essentially inhibiting the ability of tribes to protect their land and people. Another example would be how the U.S. restricts border access by indigenous peoples who have been split up by the national boundaries of the U.S., Canada, and Mexico. Some Native American tribes and
First Nations peoples have attempted to issue and use their own passports and have faced rejection at the hands of obstinate border security guards. There are examples such as these in the 21st century because of the way colonialism exists and operates as a function, or construct, of society today. As Kevin Bruyneel (2007) so accurately explains:

…Postcoloniality denotes the idea that complete socioeconomic, cultural, and political colonization and decolonization do not occur in the purest sense of the terms; that is, the colonizer’s impositions, be they cultural, economic, or structural, are never fully exhumed from the colonial context, and the so-called colonized are never fully without agency or independent identity. …In all, a postcolonial perspective contests the idea that American boundaries are coherent, impermeable colonial impositions on indigenous people while acknowledging and shedding light on the repressive practices and consequences of the persistent American effort to impose colonial rule. (Emphasis in original, p. xviii)

The United States may be the more powerful entity in this relationship between Native Americans but just the fact that there are Native American tribes that are not assimilated with ‘American’ culture signals that the historical and physical boundaries of the country are not quite set in stone. We see this in the ‘trust’ or ‘caretaker’ relationship the U.S. has with the 567 federally recognized tribes—because this sort of relationship exists it demonstrates that there is not a clear definition of what it means to be an American citizen. The tribes are their own unique bodies and fundamentally different from other groupings of people based on geographical or religious characteristics (e.g. townships or counties, and Methodists). This unique relationship between the U.S. and tribes provides
the space that Bruyneel terms a “third space of sovereignty” that resides neither inside nor outside the American political system but rather exists on the boundaries. In this space, Native American political actors work wherever they see openings to secure funding for education on reservations or push for greater self-determination. What they fight for, and how successful they are, depends on the general feeling the U.S. has towards indigenous people at any particular time. Throughout history there have been periods, as Bruyneel describes, where the U.S. has been indifferent toward tribes and periods where the U.S. has cared greatly about the goings-on with tribes for better and for worse. Essentially, what is going on is as follows:

The imposition of colonial rule denotes the effort of the United States to narrowly bound indigenous political status in space and time, seeking to limit the ability of indigenous people to define their own identity and develop economically and politically on their own terms. In resistance to this colonial rule, indigenous political actors work across American spatial and temporal boundaries, demanding rights and resources from the liberal democratic settler-state while also challenging the imposition of colonial rule on their lives. (Bruyneel, 2007, p. xvii)

We can see this exact situation playing out within the case study. The U.S. federal government decided to pull rank to get what it wanted by passing the NDAA with the attached land exchange to Resolution Copper. The government also greatly diminished the power of Native American voices by setting the terms of the land exchange without any sort of consultation process prior to the deal going through. The U.S. is highly
uncomfortable with the arrangement it has with Native American tribes, no matter how commonplace and secure the arrangement may seem to the common eye. Forcing tribes onto reservations was one way to limit their abilities and secure the land base overall, but there is still the question of sacred places which are often, as we see with Oak Flat and Apache Leap, not under direct tribal ownership. The past ten years, approximately, that the land exchange was halted in congress we can deem as the U.S. being quasi disinterested in the matters regarding Native sacred lands. There were other pressing matters at hand (i.e. the War on Terror and the financial crisis) to deal with and environmental concerns associated with the proposed project provided constant headaches, so Native political actors were able to persuade congress not to act.

Fast forward to the last remaining months of 2014 when the NDAA was passed and signed by President Obama. Does the passing of the land exchange mean the U.S. government is now once again directing more focus on tribes? Not necessarily. Rather, it could be argued the U.S. is capitalizing on present day circumstances to accomplish a couple of goals. Allowing the mining venture to go through opens up a new source of revenue and jobs for the national and state economies demonstrating another measure to put the effects of the recession in the past and solidify economic standing in the global marketplace. Additionally, copper is a pricey natural resource that is needed throughout different facets of our industrialized society, and it would seem as though the government is playing on America’s role in the global war on terror to usurp more and more natural resources solidifying its standing as supreme military power both at home and abroad. Basically, the United States has an image to maintain and they want to make it seem as
though this particular image is effortless to maintain. All this is done by the U.S. while subtly reinforcing their colonial prowess by asserting control over land within their borders, or the borders defined arbitrarily by them.

Self-determination (and issues of sovereignty), and by association collective land rights and FPIC, are calculated in every move made by both the U.S. and tribal governments. Here, the federal and state governments have the right to pursue economic endeavors that are seen as beneficial to them, but the same cannot be said of tribes, thus, fundamentally restricting their right to self-determination. This brings our attention to how tribes should combat this situation. Yes, political leaders are working within the fringe spaces of boundaries, but what happens when tribes demand that they be recognized as nations and thus have rights as distinct peoples (outlined in the Declaration) that need to be respected? As Coulthard (2014) points out, indigenous assertions of nationhood call into question a couple features of colonial domination that often go unquestioned and/or assumed: “the legitimacy of the settler state’s claim to sovereignty over Indigenous people and their territories on the one hand, and the normative status of the state-form as an appropriate mode of governance on the other” (p. 36). So while the U.S. doesn’t, nor ever did, have to ask anyone to acknowledge their rights as a nation, tribes, as one tactic of asserting self-determination, are asking the federal government to acknowledge them as quasi-independent nations. With this recognition comes the hope that perhaps relations between the two parties will resume some semblance of the pre-1871 era when tribes were seen as external nations and
agreements were made via treaties. But this scenario will never be realized due to the extreme power imbalance between the two parties. Coulthard (2014) explains:

[I]n relations of domination that exist between nation-states and the sub-state national groups that they “incorporate” into their territorial and jurisdictional boundaries, there is no mutual dependency in terms of a need or desire for recognition. In these contexts, the “master”—that is, the colonial state and state society—does not require recognition from the previously self-determining communities upon which its territorial, economic, and social infrastructure is constituted. What it needs is land, labor, and resources. (p. 40)

What ultimately ends up happening due to this power imbalance is that degrees of recognition are only granted if there is something the colonial nation-state wants, which ultimately undercuts any power transferred in the recognition (Coulthard, 2014). Additionally, “…colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political, and economic framework of the colonial relationship itself” (p. 41). It is safe to assume that this is not what indigenous representatives had in mind when arguing for the elements of self-determination, collective rights, and FPIC in the Declaration. They did not want to give colonial nation-states another way to control and assimilate them. These points of contention are meant to give power to the tribes and reinforce their nature as distinct entities. When working in the “third space,” or championing recognition, it becomes vital for tribes to monitor their strategies so that
they do not “erode the most egalitarian, nonauthoritarian, and sustainable characteristics of traditional Indigenous cultural practices and forms of social organization” (p. 42).
CHAPTER 5: CONCLUSION

The question then becomes, is pursuing rights through the international arena in the form of United Nations declarations a tactic that will ultimately harm the traditional foundation of tribes in the U.S.? As I said in the introduction, the U.S. adopted the UNDRIP in 2010 and promised to proceed along a path of formal integration—but will true integration ever be achieved and if everything in the Declaration were to be integrated in its current state would it be of useful value? These are heavy questions that will only be answered through the passage of time. The Declaration is still too new to really know whether or not it will have detrimental effects similar to those associated with the politics of recognition. One argument is that working with the United Nations is still essentially working within the dominant colonial nation-state framework since the most powerful states end up dictating what does and does not happen. With this in mind, who knows whether actual change can be affected from declarations in general. I do not believe true integration will ever occur in the United States because, well, frankly, the U.S. does not have to, and they have no reason to, compromise their status on any level, all thanks to Article 46, which gives ultimate decision-making authority to the nation-state. Article 46 renders every other article, and the intents therein, effectively useless accept to act as guidelines and recommendations. Perhaps it is a combination of Article 46 and the lack of time passed that has resulted in the Declaration failing to be adequately reflected in the stakeholder statements and associated land exchange legislation. From the observations documented above I would argue at this point in time the Declaration is not being represented to the fullest extent. S. James Anaya was the sole stakeholder to
directly mention FPIC. The extent to which other stakeholder comments reflected specific aspects of the Declaration was nil except for references to consultations. Reflecting on the ideas put forth by Bruyneel and Coulthard, I would argue that references to consultations are made most frequently because that is the maximum benefit or level of involvement most tribal leaders believe they can ‘win’—the right to be consulted (a degree of recognition) even if none of their concerns or recommendations are addressed in the final outcome. The line of reasoning that follows is consultations represent the highest form of self-determination tribes will be granted, and it might as well be taken because tribes have to be doing something to meet the needs of the community. Tribal leaders and political actors must see beyond the current realm of possibilities if they hope to bring about substantial self-determination rights.

Perhaps I am being too harsh on the abilities of the Declaration. As has been pointed out by numerous scholars and critics, the Declaration is meant to act as a frame of reference, a guiding document, to assist nation-states as they seek to reform relationships with indigenous peoples. The following is a lengthy, albeit precise, quote from Stavenhagen (2011) that captures the idealistic nature of the Declaration, as perceived by some:

Here, as in other issues, the rights in the Declaration can be seen as a frame of reference, a point of departure leading perhaps, among other things, to new legislation, to a different kind of judicial practice, to institution building and also, whenever necessary, to a different political culture…and a different citizenship regime. Each of the articles in the Declaration must be analyzed not only in terms
of its origins and provenance, nor solely in terms of its fit within the general
structure of the UN human rights edifice, but particularly with regard to its
possibilities as a foundation upon which a new kind of relationship between
indigenous peoples and states can be built. Besides methodology and skills, this
requires imagination and will. The Declaration must be wielded by indigenous
peoples and their advocates in government and civil society as an instrument for
the pursuit and achievement of their rights. (p. 153)

Stavenhagen puts the onus of making the Declaration work on nation-states, tribes and
civil society. Despite the rosy glow being emitted from the words above, I do not think it
is as easy as asking tribes and civil society to fight for true and complete implementation
of the Declaration because both factors are working within a postcolonial structure that
favors some while disadvantaging others. I do not believe it is enough to appeal to the
consciences of those benefiting from the dispossession of Native American lands and
cultures.

However, there is positive work taking place within indigenous-centric civil
society organizations across the United States. Take, for example, the Indian Law
Resource Center which has been fighting for indigenous peoples of the Americas since
1978. The Center engages in litigation and advocacy efforts to assist indigenous peoples
in achieving genuine self-government and realizing their human rights. The Center
operates from the premise that Native peoples can solve their own social and economic
problems if they have a fair opportunity to do so within a just legal framework that
respects their human rights. Regarding the U.S.-Native American context, the Center
spent over 30 years working on and championing the Declaration and now works to use it to revise or correct aspects of federal law that are outdated and prejudicial. Upon adoption, Center staff organized training sessions for tribes throughout the United States over the Declaration: how to interpret the articles, what it can do for tribes, and next steps for using it to revise federal law. The best way forward might just be working on or within the boundaries of the American political system because, as Bruyneel might argue, that is the area most susceptible to change at the current time. It could be argued that now that the Declaration has been adopted, the international community might turn its attention to other matters, designating states as prime arenas for further change and progress.

My hope for the Declaration lies on an enforcement mechanism being developed and implemented. This too sounds idealistic to a certain degree, but making the Declaration legally binding might be the first step in colonial nation-states and the rest of the international community showing that they are ready and dedicated to leveling the playing field and correcting previous wrongs for indigenous peoples. This type of work is already taking place at the international level. Following the World Conference on Indigenous Peoples in September of 2014, one of the outcomes in the resolution called for a Declaration implementing and monitoring body within the UN to track its own progress of incorporating the Declaration (United Nations General Assembly, 2014). The UN General Assembly is set to vote on the recommendation at the end of 2015. It is hard to tell how strong the mandate and guidelines of such a body would be, but at least it is a step forward. Drastic changes might not come right away and they would not return
things to the way they were pre-American Civil War, but holding oneself accountable can make all the difference.

Opportunities for Future Research

This thesis only involved a discourse analysis and the resulting conclusions would be better supported by hands-on research done in the field. It would be beneficial to conduct interviews with members of the various stakeholder groups in order to gauge whether or not there is more information or different information being shared behind the scenes that isn’t coming through in the legislation, press releases, etc. This type of research inquiry deserves to be approached from both fronts, documentary analysis and semi-structured interviews.

If time allowed, one could accumulate and comb through a substantial amount more of stakeholder statements than I used, but I would argue that in this situation quality, not quantity, of the statements is more important. Analyzing more statements from each stakeholder group would only serve to reinforce the conclusions I drew and explained in the analysis chapter. Additionally, from the technical side of things, it might be useful to try and find another way to incorporate the portions of stakeholder statements (the quotations found within the ‘Stakeholder Insights’ section of the case study chapter) so that they could be more visible and compared together, side-by-side. Perhaps a table or diagram of sorts could be properly formatted to meet such a goal. The quotations used in that section support the brief analyses that accompanies each of them, but to break up the text and provide a snapshot of the big picture a graphic could be inserted in the future.
It would also be interesting to do a comparative study and look at whether a case study in Canada yields different results or not. They dynamics between indigenous peoples and the federal government operate differently in Canada than they do in the United States. I’m curious whether First Nations peoples use different tactics in defending themselves and their land against environmentally degrading activities.
REFERENCES


APPENDIX: DETAILED STAKEHOLDER INSIGHTS

San Carlos Apache Tribe & Other Native American Affiliations

Portion of the signed joint statement issued by The Spirit of the Mountain Runners and Apache Stronghold (2015) against the land exchange:

Chich’il Bildagoteel (also known as Oak Flat) is a sacred site for our Apache people and many other Native Americans. This is a place that has special significance—a place where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. We have never lost our relationship to Chich’il Bildagoteel, though the U.S. Government, at times in our history, has imprisoned us on our Reservations and not allowed us to come here.

Our children and future generations will be destroyed along with the water, which is life, without Chich’il Bildagoteel intact. Our religion and cultural ways will be relegated to pages in a book rather than being a living, breathing process.

Chich’il Bildagoteel is threatened by the passage of the National Defense Authorization Act. In more recent years, a private mining company (Resolution Copper, a creation of Rio Tinto, UK and BHP Billiton, Australia) has persistently attempted to remove this sacred land from the protection of the federal government and take title to it. Resolution Copper would destroy the structural integrity of the land, causing the dramatic collapse of the land surface, the contamination and substantial depletion of the water table in southeast Arizona, and the destruction of the animal and plant life in the area. All of these effects desecrate land sacred for our people for countless generations. In addition, the privatization of Chich’il Bildagoteel would block our access to a site crucial to the cultural and religious identity of our peoples.

Given the history of our removal from our sacred lands, the violent repression of our peoples by the U.S. military, and countless broken treaties, this act of Congress, especially its attachment to a military authorization act, constitutes a human and religious rights violation that re-traumatizes our people. It demonstrates a profound disrespect to our religion, cultural traditions, and our peoples—the first inhabitants of the land. This is not the act of a government that claims to hold our land in trust for its protection and ours.

If the federal government will not protect this sacred land, we will.

Portion of an op-ed written by S. James Anaya for release on azcentral.com (2014):

In any case, most Americans understand that the prospect of jobs or economic gain for some cannot alone carry the day, lest all those places rich in natural or cultural bounty that have been set aside as national treasures would be at risk.

The owners of the Resolution Mine project, Rio Tinto and BHP Billiton, subscribe to guidelines adopted by the International Council on Mining and
Metals establishing, in keeping with United Nations standards, that mining companies should work to obtain the free, prior and informed consent of indigenous peoples and ensure full respect for their rights, as preconditions to the implementation of mining projects that affect them.

Rio Tinto, especially, has worked to follow these guidelines with a number of its projects around the world, building what many human rights and environmental advocates consider to be good practices.

But the land swap authorization for Resolution Mine was not predicated on the San Carlos Apache's consent or widespread local support. Instead, the congressional authorization came amid continuing disagreement about the environmental and cultural impacts of the land swap and eventual mining, through a truncated legislative process that altogether avoided confronting the points of disagreement.

Any chances of now meeting local concerns and coming to an agreement with the tribe have been severely damaged.

The only way that those chances might be bettered is for the company to make clear it understands that some places, because of their religious or cultural significance or environmental sensitivities, are simply off limits to mining, and to commit to refraining from moving forward with the land swap or any mining without broad local community support and agreement with the tribe.

The company should be prepared to alter its planned land swap and mining activity, or altogether abandon it, if the company cannot obtain the social license that broad local support and agreement with the tribe would provide.

Assortment of statements collected from four different Indian Country Today Media Network online news articles (Allen, 2015; Courey Toensing, 2014, 2015a, 2015b):

What was once a struggle to protect our most sacred site is now a battle. –San Carlos Apache Tribal Chairman Terry Rambler

What the system doesn’t know, what Resolution Copper doesn’t know, is there is nothing that can break our spirit and keep us from moving forward to victory. This is a protracted struggle, but if we stay true to task, we will win. A single flame can start a large fire, and we’ve created a fire that cannot be extinguished. – Activist Preacher John Mendez

This issue is among the many challenges the Apache people face in trying to protect their way of life. At the heart of it is freedom of religion, the ability to pray within an environment created for the Apache. Not a manmade church, but like our ancestors have believed since time immemorial, praying in an environment that our creator god gave us. At the heart of this is where Apaches go to pray—and the best way for that to continue to happen is to keep this place from becoming private land. –San Carlos Apache Tribal Chairman Terry Rambler
If we do not [stand together and fight], our beliefs, our spiritual lives, the very foundation of our language, our culture and our belief will no longer be in balance, and we will become undone. If we do not, the taking of one people’s human right threatens all human and religious rights. –San Carlos Apache Tribal Chairman Terry Rambler

In the United States, our constitution grants each and every one of us the freedom of religion. We speak about this freedom, yet the first people of the United States, the Native American population, are continuously denied the freedom of religion and the preservation of religious sites, such as Oak Flats. As Indian people, we hold many places as sacred and holy, and we are the stewards of the Earth, taking care of the environment just as the Creator gifted it to us, so we don’t build churches and temples. However, these places, like Oak Flats, are important to us religiously and their preservation and protection is critical for the survival of our culture, our people and our way of life. The holy sites at Oak Flats are central to our Apache spiritual beliefs.

As the Chairman of the Yavapai-Apache Nation, I feel it is my responsibility to my people, my elders and our future generations to always fight for the things that have been important to our people since time immemorial and to continue to fight for my people’s future and the continued existence of our culture.

We know that as Indian people, fighting these battles is challenging. It is my initial thought, that in this fight, we must focus on solutions that will protect Oak Flats, and we must demonstrate our willingness to come to the table with Rio Tinto and the Arizona congressional delegation for discussion on how all parties can put forth effort collaboratively to not only protect Oak Flats, but to also create jobs and enterprise in a more responsible way that leaves minimal impacts to the environment and region. –Yavapai-Apache Nation Chairman Thomas Beauty

At what point do human rights and justice stop taking a backseat to profiteering in this country? –Fawn Sharp, President of the Quinault Indian Nation and Affiliated Tribes of Northwest Indians (ATNI) and Area Vice President of the National Congress of American Indians.

An excerpt from a letter submitted by the Great Plains Tribal Chairman’s Association to eight different members of Congress (emphasis in original, 2014):

Despite what Section 3003’s proponents say, Section 3003 does not address tribal concerns. The proponents of Section 3003 claim that the bill was amended to address tribal concerns with protection of tribal sacred areas and environmental concerns. This is not the case. Despite changes to require consultation with affected tribes and NEPA compliance, the provision still mandates the transfer of tribal sacred areas into the private ownership of Resolution Copper regardless of the results of the consultation or information and recommendations resulting from the NEPA process. A mandatory conveyance defeats the purpose of tribal consultations and the NEPA process that are designed to help provide information before decisions are made. In Section 3003, the outcome is pre-determined,
rendering tribal views and public comments meaningless. Further, Section 3003 would not require Resolution Copper to mitigate impacts on tribal sacred areas after conveyance and contains no repercussions/penalties on Resolution Copper for harm/destruction to tribal sacred areas.

Resolution Copper Mining

Prepared responses to Al Jazeera’s ‘America Tonight’ news team’s questions (Fang & May, 2015):

1. How does the company respond to assertions by a number of Native American nations and organizations in Arizona that the Oak Flat site is sacred to their cultures and religions and therefore should be off-limits to mining?

Response: “Resolution Copper is committed to strong partnerships and to seeking continued input from the Native American community. Our permitting process requires government-to-government consultation with Tribes, and we will continue to build solid partnerships with Native Americans that will last for decades to come.”

2. How would the company proceed with mining at the site without causing irreparable environmental damage?

Response: “We have submitted over 2,000 pages of information to the US Forest Service as a starting point for the rigorous environmental review required by US law. The land exchange legislation passed by Congress and signed by President Obama requires Resolution Copper to complete the environmental review process prior to the exchange of land. We are fully engaged in the regulatory process and committed to protecting the Arizona environment while also providing much needed economic development and job creation to the region.”

3. What are the company’s plans, if any, to accommodate Native American groups with religious and cultural ties to the site, as well as recreational users who customarily visit the site for outdoor activities?

Response: “Resolution Copper is committed to strong partnerships and to seeking continued input with the Native American community. Our permitting process requires government-to-government consultation with Tribes, and we will build solid partnerships with Native Americans that will last for decades to come.”

Part of the Mine Plan of Operations, under the Cultural Resources section located in Volume 1 on page 89 (Resolution Copper Mining, 2013a):

For the Project, the FS will be the lead agency for both NEPA and the NHPA for cultural resources, and in this capacity will consult with the SHPO, the Advisory Council on Historic Preservation (ACHP), affiliated Tribes, and other consulting
parties as part of the Section 106 process on how to avoid, minimize, or mitigate of the undertaking.

All cultural resources reports and related data will be transmitted to the appropriate agencies for review. To comply with Section 106 of the NHPA of 1966, as amended, all cultural resources (historic properties) that are listed in or eligible for inclusion in the NRHP will be identified, and a Historic Properties Treatment Plan (HPTP) will be prepared for any resources that cannot be avoided by Project activities. Through consultation, a Memorandum of Agreement (MOA) will be signed and executed by all consulting parties, and this MOA will stipulate all conditions of cultural resources treatment, including the incorporation of the HPTP, and also including appropriate final curation of all cultural resources-related reports, data and materials.

Part of the Mine Plan of Operations, under the Preservation of Cultural Resources section located in Volume 2 on page 34 (Resolution Copper Mining, 2013b):

Adverse effects to cultural resources that are listed in or are eligible for listing in the National Register for Historic Places (NRHP), and that cannot be avoided by Project activities, will be mitigated through monitoring, testing, data recovery, or a combination thereof. Resolution Copper will continue to include efforts in the design and construction of the overall footprint of the Project to avoid identified cultural resources to the maximum extent practicable.

United States Federal Government

Statement issued by Secretary of the Interior Sally Jewell related to the public lands provisions in the NDAA:

I applaud the many members of Congress who worked on this bill to strengthen our nation’s public lands and to build the support for our nation’s second century of conservation. The legislation enacted 70 public lands proposals, many of which were the result of communities working with members of Congress to establish protection for places important to local economies, histories and people.

There’s a lot more to do to when it comes to ensuring that our national parks and public lands reflect the full diversity, history and natural beauty of our country. I’m hopeful that this progress is the kind of bipartisan support we can expect in the next two years when it comes to protecting special places for the next generation.

With that said, I am profoundly disappointed with the Resolution Copper provision, which has no regard for lands considered sacred by nearby Indian tribes. The provision short circuits the long-standing and fundamental practice of pursuing meaningful government-to-government consultation with the 566 federally recognized tribes with whom we have a unique legal and trust responsibility.
Although there are consultation requirements in the legislation, the appropriate time for honoring our government-to-government relationship with tribes is before legislating issues of this magnitude. The tribe’s sacred land has now been placed in great jeopardy.

I look forward to working with Rio Tinto to better understand their plans for development and to see what additional measures they can take to work with the tribes, including forgoing development in these sacred areas.

Press release from the office of U.S. Republican Senator John McCain of Arizona regarding his and Senator Jeff Flake’s (R-AZ) thoughts on the passage of the Resolution Copper land exchange (2014):

We are extremely proud that, with the support of Republicans and Democrats in both Houses of Congress, the Resolution Copper land exchange today passed the Senate and is now heading to the president’s desk for signature. This is a great victory for the State of Arizona, after years of hard work.

There is clearly a strategic national interest in increasing America's domestic production of copper. To maintain the strength of the most technologically-advanced military in the world, America’s armed forces need stable supplies of copper for their equipment, ammunition, and electronics. In fact, copper is the second-most utilized mineral by the Department of Defense, and the Pentagon has labeled it an ‘essential mineral.’

The public lands title in NDAA will help address our strategic national interest in copper by advancing the Resolution Copper Mine project, which has potential to meet 25% of U.S. demand by developing the largest copper deposit ever discovered in North America.

Most importantly, Resolution Copper represents a game-changer for an area of Arizona facing grave economic challenges. It is estimated to create some 3,700 mining-related jobs in and around the Town of Superior and generate more than $61 billion in economic value to our state over the life of the mine.

The Resolution Copper land exchange legislation has been stalled for many years over environmental questions and Native American concerns. As part of the bipartisan, bicameral negotiations and weeks of meetings among members and staff of the committees of jurisdiction involved in crafting the NDAA lands title, several key bipartisan compromises were made to the land exchange bill we introduced last year. First, the bill requires a full environmental impact study on the mine in compliance with the National Environmental Policy Act (NEPA) before the land is officially transferred to the mine. Second, while a number of Arizona tribal governments raised concerns about the closure of a Forest Service campground called ‘Oak Flat,’ the bill guarantees that Native Americans can continue to access the campground for many years until the mining company needs to mine underneath it. Third, our bill guarantees that Apache Leap, which is celebrated by Native American lore, is not part of the mine and is permanently
protected through a special management area designation that the Forest Service will manage.

For nearly a decade we have worked to advance this issue with the longtime support of Senator Jon Kyl as well as local and state leaders. We want to recognize the unwavering efforts of Congressman Paul Gosar and Congresswoman Ann Kirkpatrick, who were vitally important to today’s outcome.

We look forward to continuing our efforts to help realize the immense potential of this project for the people of Arizona and America.

Assortment of comments from J. Scott Wood, a retired archeologist who spent 40 years working for the U.S. Forest Service in Tonto National Forest (Fang & May, 2015):

[The land exchange has] bypassed all the normal kinds of analysis that [the USFS] would have done for this kind of project. [USFS] were actually looking forward to the idea of running the project as a normal mining project, instead of a land exchange, since the bill kept not being passed and not being passed, where we could look at alternative mining methods.

Everybody could have walked away with what they needed. Apaches could have access to a place that isn't going to be destroyed. The mining company could get the profits from the copper.

At the end of the day I think the American people are getting short-changed badly. They are going to lose an exquisite, beautiful piece of landscape that belongs to them. And yet a foreign-owned company is going to manage to make billions of dollars of profit off of resources that belong to the entire American public, and that’s the ultimate description of what happened here.

Comments from United States Representatives Ann Kirkpatrick (D-AZ) and Paul Gosar (R-AZ), rivals who came together to support the passing of the land exchange (Sanders, 2014):

Arizona is just one momentous step from the finish line. –Rep. Kirkpatrick

Arizona can celebrate the holiday season with a copper Christmas. –Rep. Gosar

Comments from United States Representative Raul Grijalva (D-AZ) (McAuliff, 2014c):

The bill restricts environmental reviews to applicable federal laws, which rarely apply to private lands. Even if we find that there’s going to be effects on the watershed, effects on groundwater, effects on sacred sites, that there is not an equitable trade in terms of net value, then there’s no remedy or mitigation that we can ask for because it’s on private land.

Information regarding what the net value is is proprietary. How much is this federal asset worth? Is this a fair trade or not? We don’t know.
This is a prime example of an earmark for a foreign company.

It completely circumvents the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act and the laws that require consultation with impacted tribes before the land is transferred. There’s no transparency and there’s no consultation.


(3) Consultation with Indian Tribes.
   (A) In General.—The Secretary shall engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange.
   (B) Implementation.—Following the consultations under paragraph (A), the Secretary shall consult with Resolution Copper and seek to find mutually acceptable measures to—
      (i) address the concerns of the affected Indian tribes; and
      (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper under this section.

(9) Environmental Compliance.
   (A) In General.—Except as otherwise provided in this section, the Secretary shall carry out the land exchange in accordance with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).
   (B) Environmental Analysis.—Prior to conveying Federal land under this section, the Secretary shall prepare a single environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), which shall be used as the basis for all decisions under Federal law related to the proposed mine and the Resolution mine plan of operations and any related major Federal actions significantly affecting the quality of the human environment, including the granting of any permits, rights-of-way, or approvals for the construction of associated power, water, transportation, processing, tailings, waste disposal, or other ancillary facilities.
   (C) Impacts on Cultural and Archeological Resources.—The environmental impact statement prepared under paragraph (B) shall—
      (i) assess the effects of the mining and related activities on the Federal land conveyed to Resolution Copper under this section on the cultural and archeological resources that may be located on the Federal land; and
(ii) identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources, if any.

(g) Apache Leap Special Management Area.

(1) Designation.—To further the purpose of this section, the Secretary shall establish a special management area consisting of Apache Leap, which shall be known as the “Apache Leap Special Management Area” (referred to in this subsection as the “special management area”).

(2) Purpose.—The purposes of the special management area are—

   (A) to preserve the natural character of Apache Leap;

   (B) to allow for traditional uses of the area by Native American people; and

   (C) to protect and conserve the cultural and archeological resources of the area.

(4) Management.—

   (A) In general.—The Secretary shall manage the special management area in a manner that furthers the purposes described in paragraph (2).

   (B) Authorized Activities.—The activities that are authorized in the special management area are—

      (i) installation of seismic monitoring equipment on the surface and subsurface to protect the resources located within the special management area;

      (ii) installation of fences, signs, or other measures necessary to protect the health and safety of the public; and

      (iii) operation of an underground tunnel and associated workings, as described in the Resolution mine plan of operations, subject to any terms and conditions the Secretary may reasonably require.

(i) Miscellaneous Provisions.—

   (1) Revocation of Orders; Withdrawal.—

      (A) Revocation of Orders.—Any public land order that withdraws the Federal land from appropriation or disposal under a public land law shall be revoked to the extent necessary to permit disposal of the land.

      (C) Rights Of Resolution Copper.—Nothing in this section shall interfere with, limit, or otherwise impair, the unpatented mining claims or rights currently held by Resolution Copper on the Federal land, nor in any way change, diminish, qualify, or otherwise impact Resolution Copper’s rights and ability to conduct activities on the Federal land.
under such unpatented mining claims and the general mining laws of the United States, including the permitting or authorization of such activities.

(3) Public Access in and Around Oak Flat Campground.—As a condition of conveyance of the Federal land, Resolution Copper shall agree to provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable, consistent with health and safety requirements, until such time as the operation of the mine precludes continued public access for safety reasons, as determined by Resolution Copper.