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REFORM OF THE MINING LAW OF 1872

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

TO

RECEIVE TESTIMONY ON REFORM OF THE MINING LAW OF 1872

JANUARY 24, 2008

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CONTENTS

STATEMENTS

	Page
Alexander, Ryan, President, Taxpayers for Common Sense	74
Barrasso, Hon. John, U.S. Senator From Wyoming	6
Bernholtz, Alan, Mayor, Crested Butte, CO	19
Bingaman, Hon. Jeff, U.S. Senator From New Mexico	1
Bisson, Henri, Deputy Director, Bureau of Land Management, Department of the Interior	8
Cantwell, Hon. Maria, U.S. Senator From Washington	2
Cobb, William E., Representing the National Mining Association, Phoenix, AZ	14
Cress, James F., Partner, Holme Roberts & Owen, LLP, Denver, CO	65
Dombeck, Mike., Ph.D., Representing Trout Unlimited, Stevens Point, WI	11
Domenici, Hon. Pete V., U.S. Senator From New Mexico	2
Murkowski, Hon. Lisa, U.S. Senator From Alaska	6
Otto, James M., Independent Consultant, Boulder, CO	59
Salazar, Hon. Ken, U.S. Senator From Colorado	4
Tschudy, Deborah Gibbs, Deputy Associate Director, Minerals Revenue Management, Minerals Management Service, Department of the Interior	55
Wanamaker, Randy, Executive Director, BBC Human Resource Development Corporation, Juneau, AK	25

APPENDIXES

APPENDIX I

Responses to additional questions 91

APPENDIX II

Additional material submitted for the record 117

REFORM OF THE MINING LAW OF 1872

THURSDAY, JANUARY 24, 2008

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m., in room SD–366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. All Right. Let's go ahead with the hearing. I thank everyone for being here. Welcome to the hearing regarding reform of the Mining Law of 1872. We're going to hear from two panels this morning: One will focus on surface management issues associated with hard rock mining. The other will address the topic of royalties. Witnesses from the Administration are here to provide technical information. Efforts to comprehensively reform the mining laws have been ongoing literally for decades and have repeatedly failed. When the mining law was enacted in 1872 in the aftermath of the California gold rush, Congress sought to encourage settlement in the West.

In 1920, Congress enacted the Mineral Leasing Act and reformed oil and gas and coal, and certain other minerals, from the removed oil and gas and coal and certain other minerals, from the operation of the Mining Law. In so doing, Congress enacted a management regime for the leasing of these other minerals and required payment of a royalty to the United States for oil and gas and coal. However, as we all know, the Mining Law of 1872 continues to govern the disposition of hard rock minerals from Federal lands. While Congress had stepped in and prevented the patents of land through annual appropriations riders, adding provisions allowing the transfer of mineralized Federal lands from $2.50 to $5.00 or $5.00 per acre continue to be found in the U.S. Code. In addition, under the mining law, billions of dollars of hard rock minerals can be mined from Federal lands without the payment of royalty. Federal Land Management Environmental Laws apply, but there are no specific statutory provisions under the mining law setting surface management or environmental standards. There are a growing number of people saying this Congress may well be the time to achieve the long-awaited reform. The House of Representatives passed a comprehensive reform bill in November.

I look forward to working with Senator Domenici and other interested Senators on both sides of the aisle in putting together a Sen-

ate version of reformed legislation. We will continue to work hard on this and see what progress can be made and require compromise on all sides. Again, thanks to all the witnesses. Let me call on Senator Domenici and briefly any of the other Senators who want to make short statements before we begin the testimony.

Senator Domenici.

[The prepared statement of Senator Cantwell follows:]

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, thank you for holding this important hearing on updating the 1872 Mining Law. I'd also like to thank each of the witnesses for being here.

135 years ago, President Ulysses S. Grant signed this into law and it still governs mining of hardrock minerals on more than 270 million acres of public lands in the West. In Washington state, our public lands provide enormous economic and conservation benefits that increase the quality of life for all our citizens, including clean water, clean air, wildlife habitat, and access to mountains and rivers for recreational users.

What is clear to me is that after 135 years the time is now to balance environmental stewardship with what's best for our economy. If we don't have meaningful reform, many of America's most treasured places, including Roadless areas, will continue to be claimed for mining. I have fought hard to preserve our nation's Roadless areas that provide clean drinking water, essential fish and wildlife habitats, and world-class recreational opportunities. These areas are no place for a large-scale mining operation. And yet, there are almost 13,000 existing mining claims in these areas, including more than 400 in Washington State.

While responsible mineral development is a legitimate use of our public lands, this outdated law allows mining in some of America's most environmentally sensitive areas.

The legacy of this archaic law can be seen throughout the West. Hundreds of thousands of abandoned mines litter our public lands—including an estimated 3,800 abandoned mines in Washington. The U.S. Environmental Protection Agency estimates a $50 billion price tag to clean them up, and also notes that 40 percent of western headwaters are contaminated by runoff from abandoned mines. Many mining operations continue to leave a legacy of perpetual water pollution and the 1872 Mining Law contains no environmental or reclamation standards to deal with this issue.

Under certain interpretations, mining is prioritized over all other land uses, leaving federal land managers unable to balance mining with other important public uses like recreation, wildlife conservation, and water quality. This prevents responsible federal land management and prevents local communities from providing their input on the impact mining may have on their quality of life.

This issue isn't just about proposals from years past. Just recently, it has been proposed to put a hardrock mine near Mount St. Helens National Monument. This clearly would put this treasured, and historical, place at severe risk. The 110,000-acre National Volcanic Monument allows scientists and more than 200,000 visitors per year to see the changes in the landscape and the volcano. Hiking trails provide breathtaking views of crystal clear lakes, pinnacle studded ridges and wildflower laden mountain slopes in the park's backcountry. If approved, this mine could jeopardize critical scientific research, family recreational opportunities, threatened salmon and steelhead runs in the river, and municipal water supplies.

The time has come to end the preferential treatment that hardrock mining receives under the 1872 Mining Law and to craft mining reform legislation that responsibly balances mineral development while protecting iconic places and western waters. Mr. Chairman, I look forward to working with you to pass legislation that manages our nation's natural resources in an environmentally and fiscally responsible manner.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Senator DOMENICI. Thank you. I apologize for getting here a little bit late this morning. I'm ready to proceed as you have indicated. We're here to receive testimony on this old law and changes to it that maybe will end it. This committee has received a biil H.R.

2262 from the House of Representatives. In reacting to their work I have been clear about my desire to start with a clean slate. The question remains what is appropriate for inclusion in the Senate bill to reform the Mining Law? I believe the list is a short one, not a long one like many, consisting of three things. One, a replacement of the patenting with a more modern form of secure tenure; Two, imposition of a perspective, profit-based royalties system; and three, the establishment of an abandoned locatable mine reclamation fund to clean up sites that threaten the environment and public safety.

You must remember that in addition to the House bill the committee has much more to consider and rely upon to inform our decisionmaking. They include several existing administrative and legislative processes for withdrawal of Federal lands from mineral activity. They reflect an increasing reliance on foreign countries for minerals and information about the danger of this trend. Dozens of laws including the Clean Water Act and National Environmental Policy Act, Endangered Species Act, which are written to protect the environment an do apply to hard rock mining. A 1999 report from the National academy of science concluded that existing environmental protections work together in a way that is "complicated", but "generally effective". Because this knowledge and experience is clear, efforts to expand and reform beyond patenting royalty and abandoned mine issues are merely solutions in seach of a problem.

I want to reform the mining law in this Congress. I agree with Mr. Chairman that this would probably be the appropriate time. For those who have mining in their states, I think they ought to be thinking also whether this an appropriate time. I think any deep thought on the subject would indicate to them that this is the right time. Given what is at stake in our efforts to reform the Mining Law I have significant reservations about supporting legislation that fails to strike an appropriate balance. The margin of error here is very thin. Extraneous provisions must therefore be regarded with a significant level of skepticism. Countries like China and Russia have undertaken a 50-year or longer view of the world and continue to lock down long-term supply arrangements to State mining company investments in places like Africa, Australia, and South America. This has created a new form of mercantilism that lies in the face of our own country's promotion of free trade. Whatever happens with U.S. mining law reform, it is going to have a long-term implication for all of North America. Absent development of new resources in the United States, the Chinese and Russians will have enormous pricing power by the next century. Minerals present the very basic bedrock of infrastructure technology for Defense and industry. The policies that we put in place must encourage some degree of self-reliance. It is for this reason that reform efforts must maintain or increase the viability of domestic minerals production. I look forward to working not only with your Mr. Chairman, but certainly under your leadership with other senators who together have shown that we can get things done in this committee. That will surprise people when we're finished. Thank you, very much.

The CHAIRMAN. Thank you, very much. I know some of our witnesses are from Colorado and Senator Salazar has indicated a desire to make a few statements, so I'll call on him at this point.

STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

Senator SALAZAR. Thank you, very much Chairman Bingaman and Senator Domenici for holding this very important hearing. I do want to at the outset note on this panel, as well as the second panel, we'll have three witnesses from the State of Colorado. We have on this panel, Alan Bernholtz, who is the Mayor of the Town of Crested Butte, where today they have 150 inches on the ground for those of you who are interested in skiing at Crested Butte. On the second panel, Jim Cress, who is from the very well-known and well-established western law firm of Holme Roberts & Owen, and Jim Otto who is a consultant and also a Professor at the Colorado School of Mines and the University of Denver. I would like to welcome those Colorado witnesses. I have a formal, written statement I will submit for the record.

Mr. Chairman, if I may make this comment, in my view it seems to me that the three issues that were laid out by Senator Domenici are issues that we can't grapple with, I think they are the kind of rifle shots that can help us deal with mining law problems that have too long alluded any possibility of solution. I think the tenure issues of patent reform are important. I think dealing with the royalty on the hard rock mineral mining could bring us into the same kind of approach we've taken since the 1920 Mineral Leasing Act is important. I think dealing with abandoned mines and trying to figure out a revenue stream to help us deal with the hundreds and thousands of abandoned mines we have across the west in this country is very important. Finally I would say, good Samaritan legislation is something that will help us get to a point where we clean up our watersheds and deal with hundreds of thousands of abandoned mines, many of which are located in my State of Colorado. Thank you, very much.

The CHAIRMAN. Thank you, very much.

[The prepared statement of Senator Salazar follows:]

PREPARED STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

Thank you Mr. Chairman and Ranking Member Domenici for holding today's hearing on reform of the Mining Law of 1872.

I would like to begin by acknowledging that three of our nine distinguished witnesses this morning are residents of my state of Colorado, highlighting the prominence of mining expertise in our state.

I would like to welcome the Honorable Alan Bernholtz, Mayor of Crested Butte, Colorado. Prior to his election as mayor, Alan served on the Crested Butte Town Council for six years. He is the owner of Crested Butte Mountain Guides, co-founder of the Crested Butte Avalanche Center, and has been a tireless organizer of town events through the years and knows his corner of the Western Slope inside and out. On our second panel, which will focus largely on the question of a new federal royalty system, we are fortunate to have two world-class experts on mining law and royalty systems from Colorado.

Mr. Jim Cress is a partner at the law practice of Holme Roberts & Owen in Denver. He has extensive experience in U.S. federal mineral royalty matters, and has advised clients on the development, implementation and interpretation of mining law in the U.S., Asia, the former Soviet Union, and Latin America.

Prof. Jim Otto wears two hats as both the director of graduate studies in the Environmental/Natural Resources Law Program at the University of Denver and as a

professor of mineral economics and director of the International Global Resources and Management Institute at the Colorado School of Mines. He has worked with the World Bank and the United Nations, and is the lead author of a World Bank study of mining royalty systems throughout the world. Welcome, Jim, and our other witnesses as well.

There is no denying that hard-rock mining has played a vital role in the development of the western States. When Ulysses S. Grant signed the Mining Law in 1872, few could have envisioned the growth and transformation the West has undergone in the 135 years that have passed since that moment.

In 1872 the West was a different world. The population of the free territory of Colorado was only about 50,000 people, but was growing rapidly largely due to the growth of the mining industry. Settlement of the West was the primary motivation behind the Mining Law and the other major federal land-grant laws of that period, and looking back those policies largely succeeded. In fact, the gold and silver rush of the late 19th century helped put Colorado on the map.

Today, Colorado and our neighbor states in the west are experiencing a new "mineral rush." As global market prices for molybdenum, gold, uranium, and copper have climbed rapidly, the pace of new mining claims has exploded. Colorado leads the nation in this claim surge: the number of active claims rose 240% between 2003 and 2007, from about 5,400 to about 18,400.

This surge in claims also makes many deeply uncomfortable due to the proximity of many of these new claims to some of our nation's most treasured national parks and natural monuments. Active claims within five miles of the Grand Canyon have grown from just five in 2003 to more than 800 today. Furthermore, local communities are becoming increasingly skeptical about the impacts of new major mining operations.

In some respects it is incredible that the Mining Law of 1872 still stands today. In 1872, hard rock mining was considered the "highest and best use" of mineralized lands. Over the years, mining has more or less maintained its position of priority over other land uses. An undeniable principle of our discussion today is that our land use priorities have evolved. Federal mining policy must acknowledge that our public lands are valued not only for their mineral content, but also for their water and natural resources, recreational value, and wildlife habitats.

Furthermore, I believe there is consensus that the hard-rock mining industry—like the oil, gas, and coal industries—must pay some kind of royalty or rent for the right to extract mineral resources from our public lands. The lack of a federal revenue stream from mining operations on federal lands has particularly hindered efforts to address the critical issue of the environmental, health, and safety risks posed by abandoned mines. There are of course many questions regarding the structure and implementation of a federal royalty system, and I look forward to an in-depth discussion of this issue.

Responsible development of our mineral resources is critical to our economy and our environment. Hard rock minerals are vital to the production of countless products, and the mining industry employs thousands of people across the country. We must find a way to ensure that mineral development occurs in a manner consistent with the needs of mining communities and the protection of the environment, particularly our water resources.

Finally, I am committed to making cleanup of abandoned and inactive mines a priority in this legislation. The EPA estimates that there are half a million abandoned mines around the nation, and that the cost of cleaning them up could approach $50 billion. Good Samaritans—the people and companies who are willing to clean up mine sites in whole or in part, even though they are not legally responsible—deserve greater certainty and reduced liability for actions they perform in the service of their communities. Good Samaritans are critical to addressing the less fortunate aspects of the history of the mining industry.

I believe we are closer than we have ever been in the past to moving forward with legislation that will allow Good Samaritan cleanups to take place. Toward that end, I plan to reintroduce a bill in this session of Congress that builds upon the work of the Western Governors' Association, the EPA, and the progress we made on the bill I introduced in the last Congress. I look forward to working with my colleagues to encourage the clean up of abandoned mine sites.

I welcome the members of our distinguished panels and look forward to discussing these important issues.

The CHAIRMAN. Let me ask if other Senators have some comments they want to make before we hear from the witnesses.

Yes, Senator Murkowski.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. I want to take just a brief moment to welcome one of our witnesses here this morning, Mr. Randy Wanamaker from the Community of Juneau, Alaska. He has been involved, and has been for some time, in the Kensington Gold Mine Project there. He's also a local official in Juneau as the Deputy Mayor of the City, and is thorough in working very hard to make sure that this project works for the local people, encouraging native hire, and doing all the right things in the community.

I am pleased, Mr. Chairman, to hear your comments and those echoed by Senator Domenici about how we intend to approach mining law reform. I think it is well recognized that it is long overdue and is important to be evaluated in assessing how we move forward. I had an opportunity in December to speak to the Alaskan Miner's Association. I will tell you from an industry perspective in my State, they're quite concerned about what they have seen come out of the House, and they have asked that the Senate review things, as Senator Domenici has said, basically from a clean piece of paper, that we truly look at this comprehensively, evaluate it very critically. Many of my constituents throughout the industry are quite concerned, again, as to some of the provisions they are streaming out of the House bill. I think we need to recognize not only the economic importance that we realize from within the mining industry historically in this Nation, but as has been noted, just the security aspect of a minerals industry and a recognition that with our very necessary and needed minerals, we are putting ourselves in the same position that we are currently with oil. We are 60 percent reliant on foreign sources, foreign nations, some are our friends, some not our friends, for this very necessary commodity. It is the same way with our minerals, and it allows for a level of vulnerability that I think we need to be discussed in this Nation. We need to be discussing what our policy is as it relates to hard rock minerals, and there are precious minerals rale that we need throughout industry. I'm pleased that this committee is moving forward with this, and I look forward to working with you and all members. Thank you.

The CHAIRMAN. Thank you, very much. Any other statements, Senator Barrasso.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you, very much Mr. Chairman. I appreciate your efforts as well as Senator Domenici's and your leadership on this issue. I am also I'm troubled, as Senator Murkowski is, with some of the things that have come out of the House. I'm very happy we're taking a fresh look at this and will make some decisions on our own, and I appreciate these series of hearings. I think, for the record, that I believe any mining reforms should be built on principles of competitiveness, certainty, and common sense.

I think that respect to competition, I understand first-hand that mining provides essential materials that are vital to our economy.

I'm concerned from a national security standpoint, as we just heard from Senator Murkowski. I spoke in some specifics in our meeting in December—alloy metals, that are necessary for the development of today's artificial joints, the artificial hips that I used in my previous experience as an orthopedic surgeon. I think domestic mineral production accrues significant benefit—labor, wages, benefits to consumers to goods in advanced technology, benefits to states and communities through tax revenue, and benefits to investors. For a number of reasons, specifically national security issues, I'm especially concerned with any provision that will result in pushing even more mining operations overseas. To me one of the most troubling provisions with respect to competition, includes expansive veto authority over mining operations by future administrations. I think Congress should be very careful in delegating such expansive authority to the administration. I believe that this industry must retain security of being able to mine long-term. Once commitments are made, they need to be able to rely on those decisions. Business plans have been predicated upon a well understood legal framework. They make decisions; they make contracts long-term based on those conditions and plans. Those should remain consistent.

I don't think we should punish today's operators by adversely changing the legal framework in the middle of the game. I think the taxpayers deserve certainty, certainty with respect to reclamation, and also with respect to community jobs, with respect to environmental protections, and certainty with respect to any future public compensation. A good dose of common sense is critical. Examples of this are liability reform, good Samaritan provisions, efficient and effective administration of environmental laws, and reclamation and revenue collection. Government policies should not stand in the way of creative reclamation efforts. We heard about that in September. I am also troubled, Mr. Chairman, with issues that affect the State of Wyoming with abandoned mine land funds from coal. I understand this is very different. The Federal Government still owes the State of Wyoming over $580 million dollars and we have still not seen one penny. So if we're talking about public revenue collection to do reformation in the bill, I think we need to make sure those funds are directed back to the states and the communities where it will do the most good. So again Mr. Chairman, I appreciate the opportunity to hear these panels and help work with the members of the committee to find good solutions. Thank you, Mr. Chairman.

The CHAIRMAN. Very good. I think that's the end of our statements. We'll welcome the witnesses. I will give the list of our witnesses on the first panel: Henri Bisson is Deputy Director with the Bureau of Land Management. We appreciate you being here. William Cobb is the representative from the National Mining Association. Thank you, for being here. Mike Dombeck, who is well-known to this committee, is here today Representing Trout Unlimited and is currently living in Wisconsin. Randy Wanamaker, earlier mentioned, is with BBC Human Resources Development Corporation in Juneau, Alaska, and Alan Bernholtz, who is the Mayor of Crested Butte is here. We appreciate all the witnesses being here. Why don't we start with you, Mr. Bisson, then go right across the table there and hear from each of you. If you would summarize your tes-

timony in about 5 or 6 minutes for us, tell us the main points that you think we need to know about, we will include the full, prepared statement in the record. Thank you.

STATEMENT OF HENRI BISSON, DEPUTY DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. BISSON. Thank you, Mr. Chairman. I appreciate this invitation to come up here and participate in the oversight hearing this morning. Members of the committee as well I thank you on mining Law reform and to share with you on current information on the BLM hard rock mining program on Federal lands.

I will summarize my testimony. We often take for granted the availability of gold, silver, copper, lead, zinc, and other minerals and their contributions to the quality of life we enjoy in this country, computers and cell phones tooth paste and cosmetics, medicines, cars, and appliances that make our home safe, convenient and comfortable, would not exist without the types of minerals discovered and developed under the 1872 mining law. For over 135 years the 1872 mining law has served to ensure reliable and affordable domestic supply minerals critical to our economy and national security.

The Federal Land Policy and Management Act, which was enacted in 1976, provides that the secretary shall take any action necessary to prevent unnecessary or undue degradation of lands and sets forth the BLM's multiple use mandate. These provisions of FLPMA are implemented alongside the 1872 mining law. Other State and Federal laws also play a critical law in ensuring that hard rock mining operations on public lands occur in an environmentally sound manner. Although, the 1872 Mining law itself is over 100 years old, statutory requirements that comply with State and Federal law, such as the Clean Water Act, Clean Air Act, Endangered Species Act, National Environmental Policy Act, Wilderness Act, and National Historic Preservation Act ensure that mining operations meet today's cultural and environmental needs. BLM service management regulations were issued under the authority of FLPMA in 1981, amended in 2000 and again in 2001. The regulations provide a sound framework to prevent unnecessary or undue degradation of public lands during hard rock mining reclamation. Under the regulations, all mining and milling activities are conducted under a plan of operations, approved by the BLM, following environmental analysis underneath it. A mining operator must also provide financial guarantees, recovering the full cost to reclaim the operation.

Currently, the BLM holds financial guarantees in excess of 1.1 billion dollars to cover the cost of reclamation of mining operations on BLM managed public land. We belive that the existing statutes and related regulations provide sufficient authority to regulate mining operations when properly monitored and enforced by State and Federal regulatory agencies. However, we recognize historic mining practices have had adverse consequences on natural resources and the environment. The current regulations are designed to avoid recurrence of that history. Abandoned mine lands, a legacy of past practices, are addressed through an active program. Between 2000 and 2007, BLM has inventoried 5,500 sites, remediated

physical safety hazards at more that 3,000 sites, and restored water quality at hundreds of sites on thousands of acres. BLM will continue its efforts to do this important work.

In conclusion, the Administration supports the environmentally responsible development of hard rock minerals on public lands and would like to work with Congress to update the mining laws, including the authorization of production payments, administrative penalties. The Administration also believes that any legislative solution must be accomplished in a way that provides a reasonable level of certainty for the industry, while pursuing goals to protect our environment. We appreciate your expressed interest in taking a fresh look at hard rock mining law reform, and we look forward to working with Congress, industry, and other interested parties as we move forward with this effort. Thank you for the opportunity to testify, and I will be happy to answer any questions.

[The prepared statement of Mr. Bisson follows:]

PREPARED STATEMENT OF HENRI BISSON, DEPUTY DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to participate in this oversight hearing on Mining Law reform and to share with you current information on the Bureau of Land Management's (BLM) hardrock mining program on Federal lands, including the various statutes and regulations that govern this program.

THE 1872 MINING LAW, THE FEDERAL LAND POLICY AND MANAGEMENT ACT, ENVIRONMENTAL STATUTES AND OTHER APPLICABLE LAWS

For over 135 years, the 1872 Mining Law has served to assure a reliable and affordable domestic supply of minerals—gold, silver, copper, lead, zinc, and uranium—critical to our economy and national security. The 1872 Mining Law also promoted the settlement of the western United States by providing an opportunity for any citizen of the United States to explore the available public domain lands for valuable mineral deposits, stake a claim, and, if the mineral deposit could be mined, removed, and marketed at a profit, patent the claim. Patenting results in the claimant acquiring ownership not only of the mineral resources, but also of the lands containing these mineral deposits at the statutory price of $2.50 or $5.00 per acre. A moratorium has been in place since 1994 on BLM's processing of new patent applications.

By 1976, when the Federal Land Policy and Management Act (FLPMA) was enacted, settlement of the West was no longer the primary force driving federal land and resource management policies. FLPMA provides that the Secretary shall take any action necessary to prevent unnecessary or undue degradation of the lands. Today, these provisions and the multiple use mandates of FLPMA are implemented alongside the 1872 Mining Law.

Other state and Federal laws also play a critical role in ensuring that hardrock mining operations on public lands occur in an environmentally sound manner. Although the 1872 Mining Law itself is over 100 years old, statutory requirements to comply with state and Federal Laws, such as the Clean Water Act; Clean Air Act; Endangered Species Act; National Environmental Policy Act (NEPA); Wilderness Act; and National Historic Preservation Act, ensure that mining operations meet today's cultural and environmental needs.

Mineral withdrawals provide a vital tool to protect special areas. Millions of acres of Federal land have been withdrawn from mineral entry through either statute or policy. Withdrawn areas include Federally-designated wilderness areas, national parks, national wildlife refuges, and many other specially-designated areas. In addition, through the public NEPA process, and compliance with other environmental laws, mining operators review alternatives to their processes, providing an opportunity to employ new methods and technologies.

BLM'S MANAGEMENT AND REGULATION OF MINING

Consistent with the statutes discussed earlier in this testimony, BLM offers the opportunity for responsible development that serves the economic, social, and environmental interests of the Nation. The BLM has accomplished this through the

principles of sustainable development, promulgation of surface management regulations, issuance of policy guidance, and implementation of an active program to remediate abandoned mine lands.

Sustainable development is the basis for a policy framework that ensures that minerals and metals are produced, used, and recycled properly. In the context of mining, the United States joined 193 other nations in 2002 in signing the Sustainable Development Plan of Implementation applicable to mineral resources.

BLM's surface management regulations were issued under the authority of FLPMA in 1981 and amended in 2000 and 2001. The regulations provide a sound framework to prevent unnecessary or undue degradation of public lands during hardrock mining and reclamation.

A congressionally-mandated study conducted by the National Research Council (NRC) Board on Earth Sciences and Resources examined the environmental and reclamation requirements relating to mining of locatable minerals on public lands and the adequacy of those requirements to prevent unnecessary or undue degradation of public lands. The NRC Report, "Hardrock Mining on Federal Lands (1999)" provided 16 recommendations, including nine recommendations for the BLM's surface management regulations. The 2000 and 2001 revisions to BLM's surface management regulations incorporated all nine of those recommendations.

Under the regulations, all mining and milling activities are conducted under a plan of operations approved by the BLM, and following environmental analysis under NEPA. The BLM must disapprove any mining operation that would cause unnecessary or undue degradation of the public lands. A mining operator, as well as an exploration operator (exceeding casual use), must provide financial guarantees covering the full cost to reclaim the operation. BLM may require an operator to establish a trust fund or other funding mechanism to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining reclamation and maintenance requirements after a mine is closed. In response to previous GAO recommendations, the BLM has implemented a tracking system under which BLM state directors are required to certify each fiscal year that the reclamation cost estimates for proposed and operating mines have been reviewed and are sufficient to cover the cost of reclamation. Currently, the BLM holds financial guarantees in excess of $900 million to cover the costs of reclamation of mining operations on BLM-managed public lands.

BLM policy guidance reinforces the surface management regulations. Originally set out in 1984, the internal policy was last updated by the BLM Director in 2006. This policy guidance emphasizes that mineral exploration and development can occur concurrently or sequentially with other resource uses. The policy promotes balancing environmental, social, and economic needs while practicing environmental stewardship and promoting stakeholder participation. These efforts include:

- reviewing and processing notices and plans of operations to prevent unnecessary or undue degradation;
- requiring financial assurances to provide for reclamation of the land; and
- considering alternative forms of reclamation after a mine is closed such as using the land for landfills, wind farms, biomass facilities and other industrial uses, in order to attract partnerships to utilize the existing mine infrastructure for a future economic opportunity.

We believe that the existing statutes and related regulations provide sufficient authority to regulate mining operations when properly monitored and enforced by state and Federal regulatory agencies. However, we recognize historic mining practices have had adverse consequences on natural resources and the environment. The current regulations are designed to avoid a recurrence of that history.

Abandoned Mine Lands, a legacy of past practices, are addressed through an active program. This year, the Forest Service and the BLM are celebrating 10 years of success with the hardrock abandoned mine lands program. The program seeks to mitigate hazards present at abandoned mines; restore watersheds for natural resources; and protect public health and safety, recreation, fish and wildlife. Between 2000 and 2007, the BLM has inventoried 5,500 sites and remediated physical safety hazards at more than 3,000 sites. The BLM has also restored water quality at over 280 sites through 2003 and on more than 3,000 acres between 2004 and 2007.

Addressing abandoned mine lands is a challenge and the BLM will continue its efforts to do this important work.

MINING'S IMPORTANCE TO THE UNITED STATES

We often take for granted the availability of gold, silver, copper, lead zinc and other minerals and their contribution to the quality of life we enjoy in this country.

In 2006, the total value from domestic metals production was approximately $23.5 billion. Computers and cell phones, toothpaste and cosmetics, medicines, cars, sporting equipment, and appliances that make our homes safe, convenient, and comfortable—none of these would exist without the types of minerals discovered and developed under the 1872 Mining Law. These minerals, and the capability to produce them domestically, are also vital to the United States' economic and domestic security.

As much as we enjoy these conveniences, it is the mineral products used in areas such as agricultural production, communication, transportation, technology, and national defense that make a truly profound contribution to our way of life. The phenomenal advance of culture, science and technology remains dependent on mineral resources. In an example that is close to home for Americans, the automobiles most of us drive every day contain nearly 50 pounds of copper, and the newly popularized hybrid vehicles require even more—about 75 pounds for each car, by some estimates. Most vehicle manufacturers specify that the copper used be "new" copper.

Metal mining is an international business, with purchasing and sales conducted through the London Metals Exchange, the New York Commodities Exchange and secondary exchanges. Metal marketing operates within a free market system, in which the price is determined by what a willing buyer and a willing seller agree upon. The international prices for the metals are fixed daily on the exchanges, and costs of production control the economics of particular companies. If operating and capital costs reach a certain point compared to the prevailing market price, the mining company may cease production until costs go down or the price goes up.

Mining companies that are affected by these global markets in turn impact small communities throughout the West where employment opportunities are often limited. By some estimates, for every direct job in mining, three supporting jobs are created. Producers must buy fuel, pipes, wire, and other industrial products, and these requirements are often contracted out to local fuel distributors, hardware suppliers, and related businesses. Producers pay Federal, state, and local income and property taxes.

CONCLUSION

The Administration supports the environmentally responsible development of hardrock minerals on public lands and would like to work with Congress to update the Mining Law, including the authorization of production payments and administrative penalties. The Administration also believes that any legislative solution must be accomplished in a way that provides a reasonable level of certainty to the industry while pursuing goals to protect our environment. We appreciate your expressed interest in taking a fresh look at hardrock mining law reform and we look forward to working with Congress, industry, the environmental community, and other interested parties as you move forward with this effort. Thank you for the opportunity to testify. I will be glad to answer any questions.

The CHAIRMAN. Dr. Dombeck, go right ahead.

STATEMENT OF MIKE DOMBECK, REPRESENTING TROUT UNLIMITED, STEVENS POINT, WI

Mr. DOMBECK. Chairman, Senator Domenici, thank you for the invitation to testify. It's good to be back. I'm now a Professor at the University of Wisconsin at Stevens Point. In addition to my years with the Forest Service and the Bureau of Land Management, I started out as a fishing guide and am a avid hunter and angler. In fact, I think of I have probably either fished or hunted in every one of your States, and still not enough, however. In fact, I a couple of years ago, I just got my first elk in Idaho. I understand that New Mexico has some really big ones as well. I haven't made that venture yet. At any rate, I'm here testifying on behalf of Trout Unlimited, the Theodore Roosevelt Conservation Partnership and the National Wildlife Federation and millions of hundreds of anglers and sportsmen and women that they represent. I also have a letter signed by about 22 of these organizations, including many of them businesses that I would like to ask be submitted for the record.

The CHAIRMAN. We'll include that in the record.

Mr. DOMBECK. I certainly want to emphasize that mining is a legitimate use of public land, and is incredibly important and has been for a long, long, time. Under the 1872 Mining Law, however, mining really does take precedence over other uses on public lands, including hunting and fishing and once claimed a mining operation, the public land managers in my view, really do not have the discretion as they do to prohibit mining under the current framework of the 1872 Mining Law like they have on the disposition of many other minerals, as you mentioned in your Opening statement, Mr. Chairman. The legacy of the 1872 Mining Laws from the standpoint of fish and wildlife and aquatic resources I think is extensive. For example, EPA estimates 40 percent of the western headwater streams are degraded by abandoned mines.

The public lands national forest BLM lands really are a treasure, a tremendous resource for hunting, fishing, recreation, outdoor activities. More than 50 percent of the Nations blue ribbon trout streams are on these lands. Eighty percent of some of the most critical habitats for elk are found on public lands. Many, many populations of imperiled species are also on these public lands. In addition, the national forests provide drinking water to about 60 million Americans in 33 States. Mr. Chairman, in your letter in invitation, you asked that I find that on five very important areas on how to modernize this law. I'll just very quickly summarize those areas. A fair royalty for any minerals taken from public lands, and a portion should be invested in abandoned mine clean up. Very important. Affirm the values of fish and wildlife habitat, water resources, and hunting and fishing on public lands and make it clear that they should be on equal par with mining on public lands as multiple uses. Agency managers should be given the discretion to make logical, science-based, decisions on land health and where to mine, as wells where not to mine. Funding and common-sense liability relief should be made available for those would be Good Samaritans and volunteers who want to help clean up abandoned mines on public lands. Finally, mining reform legislation should prohibit patenting or sale of public lands. I really commend this committee. You have a rare opportunity to improve this law, to modernize this law, and the sportsmen and women around the country are counting on you to help them with that. Thank you, for the opportunity to testify, and I'll be happy to answer any questions.

[The prepared statement of Mr. Dombeck follows:]

PREPARED STATEMENT OF MIKE DOMBECK, REPRESENTING TROUT UNLIMITED, STEVENS POINT, WI

Mr. Chairman and Members of the Committee: Thank you for inviting me here to testify today. My name is Mike Dombeck. I am a professor at the University of Wisconsin-Stevens Point. Formerly, I served as chief of the U.S. Forest Service and director of the Bureau of Land Management (BLM). I'm a former fishing guide, and still an avid hunter and fisherman. I'm pleased to present testimony on the need to reform the laws that govern mining of hard rock minerals from public lands on behalf of Trout Unlimited (TU), the National Wildlife Federation and the Theodore Roosevelt Conservation Partnership, organizations that represent millions of sportsmen and women, wildlife and fish professionals, and outdoor recreation-related businesses.

Mining is a legitimate use of public lands, but there are few laws more in need of an overhaul than the 1872 Mining Law. The 1872 Mining Law, signed into existence 135 years ago by President Ulysses Grant, is the most outdated natural re-

source law in the nation. Under the 1872 law, mining takes precedence over all other public land uses, including hunting and fishing. The Secretary of the Interior must sell public land to mining companies, often foreign-owned, for as little as $2.50 per acre. Furthermore, mining companies pay no royalties for hard rock minerals including; gold, copper and zinc that belong to all citizens. The price of uranium, gold and other heavy metals continues to drive companies to stake claims across the West. Mining claims dot millions of acres of public land across the West. Once claimed, it is nearly impossible to prohibit mining under the current framework of the 1872 Mining Law, no matter how serious the impacts might be.

The legacy of the 1872 Mining Law is extensive, and the damage from mining is still ongoing today. For example, the EPA estimates that 40 percent of western headwater streams are degraded by abandoned mines. The following are some examples of impacts to water and fish and wildlife habitat caused by specific mines in the recent past as well as threats from proposed mines.

- A Canadian mining company is pushing to develop a large, open pit, cyanide leach gold mine at the headwaters of the Boise River. The Boise River is responsible for more than 20 percent of the city's municipal water supply, as well as supplying critical wildlife and fish habitat, irrigation for agriculture and recreational opportunities. The Mayor of Boise has opposed the mine.
- One of five known grizzly bear populations in the lower 48 states as well as imperiled bull trout may be eliminated due to a proposed silver mine in the Cabinet Mountain Wilderness in northwestern Montana.
- In 1992, the Summitville mine in Colorado released a toxic brew including cyanide and acid mine drainage, killing all fish and wildlife in a 17 mile stretch of the Alamosa River. Cleanup costs at the now-Superfund site exceed $150 million.
- Historic placer mining operations have affected Resurrection Creek in the Chugach National Forest, Alaska, by re-channeling the stream and separating it from its floodplain. These impacts degraded fish rearing and spawning habitat along the river, as well as adjacent wildlife riparian habitat for species like bears and eagles.
- The Beal Mountain Mine, located in the Beaverhead Deerlodge National Forest and operated from 1989 through 1998, has polluted valuable trout waters with cyanide, selenium and copper. Using more recent cyanide heap-leach technologies, the mining company promised that there would be no discharge of pollutants into receiving waters. The technologies failed and waters downstream have been contaminated with selenium and other heavy metals. The Forest Service and the Montana Department of Environmental Quality are working to contain the contamination which may have to be treated in perpetuity. With the mining company bankrupt, the taxpayers must pay the bill.

Professional resource managers at the Forest Service and BLM need to have the ability to make science-based decisions about where and when mining on public land should occur. Without this discretion, professional land managers cannot maintain their commitments as stewards of the public trust.

Public lands managed by the BLM and the Forest Service harbor some of the most important fish and wildlife habitat and provide some of the finest hunting and angling opportunities in the country. For example, public lands contain well more than 50 percent of the nation's blue-ribbon trout streams and are strongholds for imperiled trout and salmon in the western United States. More than 80 percent of the most critical habitat for elk is found on lands managed by the Forest Service and the BLM, alone. Pronghorn antelope, sage grouse, mule deer, salmon and steelhead, and countless other fish and wildlife species are similarly dependent on public lands.

The national forests are a major source of water and of particular importance in the West. Forest Service and EPA scientists have determined that the national forests alone provide drinking water to more than 60 million people in 33 states.

Mr. Chairman, in your letter of invitation, you asked that I comment on five very important questions about the types of environmental reforms that may be needed to modernize this law so that its provisions protect fish and wildlife resources, and hunting and fishing. I will summarize my responses by providing you with the five major ways the law needs to be changed.

Any reform of the 1872 Mining Law should contain the following provisions:

- A fair royalty from any minerals taken from public lands, a portion of which should be invested in an abandoned mine clean up fund. Since 1977, royalties associated with coal mining have generated $7.4 billion to help clean up abandoned mines and recover lands and waters and communities affected by coal

mining. We need a similar fund for hard rock mining. And a sensible reform should include all mining operations, present and future. Almost every commodity developed off public lands—coal, wood fiber, oil, gas, and forage—has dedicated funding for mitigation of impacts and restoration measures. The only commodity that lacks such a dedicated fund is hard rock minerals. As a result, non-profit organizations such as TU, local communities, and state agencies, are dependent on cobbling funding from an array of private, state, and federal sources to get work done on the ground.

- Affirm the values of fish and wildlife habitat, water resources, and hunting and fishing, on public lands and make it clear that mining should not be the dominant use of our federal lands. Professional land managers that work for the Forest Service and BLM believe the 1872 Mining Law makes hard rock mining a dominant use of public lands. Mining reform legislation needs to reaffirm the doctrine of multiple-use and recognize the inherent value of public lands for other important uses and values, including hunting and fishing opportunities and fish and wildlife habitat. This is a major priority for sportsmen, land management agencies, and other users of public lands.
- Agency managers should be given the discretion to make logical decisions based on land health about where to mine and where not to mine. Special places with important fish and wildlife and water values such as wilderness areas, National Parks, Fish and Wildlife Refuges, and inventoried roadless areas ought to be placed off-limits to mining entirely. Discretion ought to be afforded to managers on other lands to allow for balanced and reasoned decisions about ecological, social, and economic values. And on highly mineralized lands with low fish and wildlife values, and high levels of mining company investment, mining companies ought to have a higher degree of certainty that mining projects can proceed in accordance with other laws and regulations.
- Funding and common-sense liability relief must be made available for would-be Good Samaritans and volunteers to clean up abandoned mines. Abandoned mines are one of the single most important, least addressed environmental challenges in the nation. The geographic scope of the problem is staggering. EPA estimates that abandoned hard rock mines degrade nearly 40 percent of all western headwater streams. The enormity and scope of the problem have led to a collective sense of futility that has fostered inactivity in many places. Good Samaritans, who have no connection to the abandoned mine waste or interest in re-mining it for profit, should be provided with reclamation incentives and commonsense liability relief.
- Finally, mining reform legislation should prohibit the patenting or sale of public lands. The U.S. Government has practically given away more than three million acres of our public lands to mining companies through the practice of patenting. It is troublesome that anyone can stake a claim on public lands and then buy the land for as little as $2.50 an acre. With the increase in the price of metals, so have the number of claims staked. For example, in Arizona, the number of claims filed in the state has risen 80 percent since 2003. Thousands of these claims are within five miles of the Grand Canyon National Park, a crown jewel of the American public but also prime wildlife habitat for mule deer.

This Committee, and the Senate, have a rare opportunity to improve this law. The House has passed a strong reform bill. Key Senators have expressed their willingness to explore changes to it. We urge you to carefully consider our recommendations, draft a good bill, and move it through the Senate as quickly as possible next year. Sportsmen and women around the nation, especially in the West, are counting on you to end the long stalemate and reform the 1872 Mining Law.

Thanks for the opportunity to testify. I'll be happy to try and answer any questions that you may have.

The CHAIRMAN. Thank you, very much.

Mr. Cobb.

STATEMENT OF WILLIAM E. COBB, REPRESENTING THE NATIONAL MINING ASSOCIATION, PHOENIX, AZ

Mr. COBB. Good morning, Mr. Chairman, and members of the committee, my name is William Cobb, and I'm the Vice President of Environmental Services, Freeport McMoran Mining Company, which is part of Freeport McMoran Copper & Gold. We're the world's second largest producer of copper. I'm testifying today on

behalf of the national mining association. I appreciate the opportunity to testify before the committee on this issue of great importance for the domestic mining industry. I am a member supporting reform of the Mining Law and look forward to working with this committee to try and resolve this issue during this Congress.

Let me first start. The current environmental regulations demonstrate that the need for restrictive standards are unnecessary. Mining on public lands is an extremely regulated enterprise. There are a wide variety of Federal, State, and local environmental, regulations that govern mineral exploration, development, operation, closure and reclamation, including specific mining environmental standards administrated by the Bureau of Land Management and the Forest Service and there are similar standards at the State level. First of all, Federal environmental laws such as the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, Solid Waste Disposal Act, the Resource Conservation and Recovery Act, the Drinking Water Act, the Toxic Substances Control Act, and many others. While the protection statutes such as the Endangered Species Act and comprehensive western State Regulations that deal with the long-term protection of drinking water quality and quantity, the management of disposal of solid waste, and the reclamation of mining sites.

In addition, the Bureau of Land Management and the Forest Service have sufficiently strengthened their financial assurance requirements. These agencies require financial assurance which is periodically reviewed to cover the full cost of reclaiming the operation, assuming that a third party conducts the effort. There are similar requirements at the State level. There is no one size fits all regulatory approach that makes sense for the hard rock mining industry, particularly a means of eliminating future Superfund sites. Prescriptive standards lack the flexibility needed to address the wider array of mine sites and types. In lay terms a copper mine in Arizona has different operational life periods, different operational enclosure issues than a gold mine in Idaho. Even the National Academy of Sciences concluded that the establishment of a single Federal regulatory regime for hard rock mining is unnecessary and ill advised. Existing Federal financial insurance requirements when combined with sustained environmental compliance are what it takes to assure that public does not ultimately become responsible for reclamation of mine sites on Federal lands. We believe that existing authorities adequately protect special places and the right to deny approval is not necessary. Access to Federal lands for mineral exploration and development is critical to maintain a strong domestic mining industry. Efforts to amend to amend the Mining Law must recognize existing authorities to close certain special places to mining activity. Congress has already closed land to mining, to wilderness, national parks, national wildlife refuges, recreational ares, and wild and scenic rivers.

Congress has also granted additional authority to the executive branch to close Federal lands to mining. New closures of Federal land based on vague and subjective criteria would arbitrarily impair domestic mineral and economic development. Because there are existing tools available to protect special resources in environmental sensitive areas, it is not necessary to give the Secretary of

Interior the right to stop the mining project if it meets all environmental and other legal requirements. Mine projects that are capital-intensive undertakings and require years of exploration and development before projects realize positive cash-flows. Recently announced mining projects are being contemplated both within and outside the United States, including Freeport McMoran's restart of its Climax mine in Colorado, that range from hundreds of millions of dollars to multi-billion dollars. As witnessed in other countries, legal and regulatory uncertainties can chill the climate for large capital investments. We can see the same thing in the United States resulting in serious consequences for our economic and national security.

There is a growing reliance on foreign sources of minerals as the committee has kindly identified. Despite reserves of 78 important mine materials, the United States attracts only 8 percent of worldwide domestic dollars. Even with adequate domestic resources, our Nation is becoming more dependent on foreign sources to meet our country's strategic and critical minerals requirements. In conclusion, the U.S. mining industry is committed to conducting its operations in an environmentally and fiscally sound manner. For many companies, we have demonstrated this commitment, through the implementation of environmental management systems, which are a method of improving overall environmental performance, improving environmental compliance, achieving closure and reclamation success. The industry hopes and expects that mining law legislation will recognize and honor our commitments to continue this improvement in environmental performance, and the industry's contribution to our national well-being. NMA appreciates the opportunity to provide this testimony this morning and I am ready to address the questions when appropriate. Thank you.

[The prepared statement of Mr. Cobb follows:]

PREPARED STATEMENT OF WILLIAM E. COBB, REPRESENTING THE NATIONAL MINING ASSOCIATION, PHOENIX, AZ

Good morning, Mr. Chairman and members of the Committee. My name is William Cobb, and I am the Vice President of Environmental Services for Freeport McMoran Mining Company, part of Freeport McMoran Copper & Gold. I am testifying today on behalf of the National Mining Association (NMA). NMA appreciates the opportunity to testify before the Committee on this issue of great importance to the domestic mining industry. NMA members support reform of the Mining Law and look forward to working with the Committee to try to resolve this issue during this Congress.

NMA is the principal representative of the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms that serve our nation's mining industry. Our association and our members, which employ or support 170,000 high-wage jobs, have a significant interest in the exploration for, and development of, minerals on federal lands. The public lands in the Western states are an important source of minerals, metal production and reserves for the nation's security and well-being. Mining on federal lands provides for high-wage employment, vitality of communities, and for the future of this critical industry.

CURRENT ENVIRONMENTAL SCHEME

Mining on public lands is a pervasively regulated enterprise with a vast range of federal, state, and local environmental laws and regulations governing mineral exploration, development, operation, closure and reclamation. Under current law, companies that engage in hardrock mining and related activities on the public lands are subject to a comprehensive framework of federal and State environmental, ecologi-

cal, and reclamation laws and regulations to ensure that operations are fully protective of public health and safety, the environment, and wildlife including:

- Specific mining environmental standards administered by the Bureau of Land Management and the Forest Service, the federal surface land management agencies, and supplemented by state laws;
- All major applicable federal environmental laws such as the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the Solid Waste Disposal Act, the Resource Conservation and Recovery Act, Superfund, the Safe Drinking Water Act, the Toxic Substances Control Act and many others;
- Wildlife protection statutes administered by the Department of the Interior and/or States such as the Endangered Species Act.
- Comprehensive Western State laws and regulations dealing with the protection of groundwater quality and quantity, both for operations and closure, the management and disposal of solid waste, and the reclamation of mining sites, which typically focus on the establishment of post-mining habitat for wildlife.

As seen by the number of approvals and permits the typical mining operation on federal lands must obtain before commencing construction, mining is heavily and thoroughly regulated. Depending on a project's complexity, the environmental assessment and permitting process can take upwards of a decade to complete. Typical environmental permits and approvals include:

- A plan of operations from the BLM or Forest Service, requiring a reclamation plan, closure plan, and cultural resources plan. The plan of operations is scrutinized under the National Environmental Policy Act (NEPA), usually requiring the preparation of an environmental impact statement (EIS), which evaluates potential environmental impacts of the mining operation, assesses alternatives and requires the identification of mitigation measures to reduce potentially significant environmental impacts. The EIS process has evolved to address broader issues and many times it is known as the ESIA or Environmental and Social Impact Assessment.
- Air quality permits from EPA or state agencies with delegated programs under the Clean Air Act. The complexity of the air quality permits increases if there are substantial onsite processing facilities. All sites must have an approved fugitive dust control program. Water quality permits from EPA or state agencies with delegated programs under the Clean Water Act.
- Water quality permits can include discharge permits, stormwater management permits and section 404 permits. States also require permits to address potential impacts to ground water, both during operations and closure to protect the reasonably foreseeable beneficial uses of groundwater resources.
- Rights to use or consume water from appropriate state authorities
- Hazardous waste permits that govern storage, transportation and disposal of laboratory or processing wastes.
- Authorization under the National Historic Preservation Act if cultural or historic resources are present.
- Permits to construct tailings ponds or other impoundments.

These laws and regulations that govern mining on federal lands are "cradle to grave," covering virtually every aspect of mining from exploration through mine reclamation and closure. The National Academy of Sciences (NAS) reviewed the existing federal and state regulatory framework for hardrock mining and concluded that the existing laws were "generally effective" in ensuring environmental protection. Hardrock Mining on Federal Lands, National Academy of Sciences, National Academy Press, 1999, p. 89.

Since the NAS study was published, the federal land management agencies have acted to make this effective regulatory program even stronger. For example, BLM and the Forest Service have significantly strengthened their financial guarantee requirements. BLM's regulations now require financial guarantees for all mining and exploration disturbances, no matter how small, before activities can proceed. Both agencies require the financial guarantee to cover the full cost to reclaim the operation, as if the agencies were to contract with a third party to conduct reclamation. In addition, the agencies can now require the establishment of a trust fund or other funding mechanism to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining reclamation and maintenance requirements. State-specific regulations require the establishment of financial assurance using a variety of specified forms.

Furthermore, the agencies require periodic review of reclamation funding. BLM has implemented a tracking system under which BLM state directors are required to certify each fiscal year that the reclamation cost estimates for proposed and oper-

ating mines have been reviewed and are sufficient to cover the cost of reclamation. Similarly, the Forest Service requires annual review of financial assurances. The improvements in financial assurance requirements, combined with sustained environmental compliance, will ensure that the public will not ultimately become responsible for reclamation of mine sites on federal lands.

NEW PRESCRIPTIVE STANDARDS ARE UNNECESSARY AND INAPPROPRIATE

The existing comprehensive framework of federal and state environmental and cultural resources laws already regulates all aspects of mining from exploration through mine reclamation and closure. Additional federal regulation is unnecessary, duplicative and unreasonable.

Critics of the current regulatory framework often cite the lack of a single set of prescriptive standards for all mines as the impetus for new environmental regulations. Prescriptive standards lack the flexibility needed to address the wide array of site specific circumstances and mining sectors; in lay terms, a copper mine in Arizona has different operational and closure issues than a gold mine in Idaho. At least two studies conducted by the National Academy of Sciences have concluded that the establishment of a single federal regulatory regime for hardrock mining is unnecessary and ill-advised. See Surface Coal Mining of Non-Coal Minerals (1979); Hardrock Mining on Federal Lands (1999). Both studies cautioned against applying inflexible, technically prescriptive environmental standards because "simple 'one-size-fits-all' solutions are impractical as mining confronts too great an assortment of site-specific technical, environmental, and social conditions." Id.

EXISTING AUTHORITIES ADEQUATELY PROTECT SPECIAL PLACES

Access to federal lands for mineral exploration and development is critical to maintain a strong domestic mining industry. Federal lands account for as much as 86 percent of the land area in certain Western states. These same states, rich in minerals, account for 75 percent of our nation's metals production and will continue to provide a large share of the future metals and hardrock minerals produced in this country.

Efforts to amend the Mining Law must recognize existing authorities to close certain "special places" to mining activity. Congress has closed lands to mining for wilderness, national parks, wildlife refuges, recreation areas, and wild and scenic rivers. Congress also has granted additional authority to the Executive Branch to close federal lands to mining. The Antiquities Act authorizes the president to create national monuments to protect landmarks and objects of historic and scientific interest. Finally, Congress authorized the Secretary of the Interior to close federal lands to mining pursuant to the land withdrawal authority of the Federal Land Policy and Management Act. As a result of these laws and practices, new mining operations are either restricted or banned on more than half of all federally owned public lands. These existing laws and authorities are adequate to protect special areas. New closures of public land, based on vague and subjective criteria without congressional oversight, would arbitrarily impair domestic mineral and economic development.

In addition, the federal land management agencies have land use planning processes to identify natural or cultural resources or environmental and social sensitivities that require special consideration. These planning processes are used to identify areas that need to be withdrawn as well as any terms, conditions, or other special considerations needed to protect other resource values while conducting activities under the operation of the mining laws. Other mechanisms available to federal land management agencies for protecting valuable resources and sensitive areas include use of advisory guidelines to identify categories of resources or lands that deserve special consideration and the adoption of sitespecific mitigation measures in a plan of operations to protect cultural values, riparian habitat, springs, seeps, and ephemeral streams that are not otherwise protected by specific laws.

RIGHT TO DENY APPROVAL

With the existing tools available to protect special resources and environmentally sensitive areas, there is no need to provide additional federal authority to address where mining claims should be denied on federal lands due to environmental or other concerns. In particular, it is not necessary to give the Secretary of Interior the right to stop a mining project when all environmental and other legal requirements are met. Such authority is simply not needed to protect against unnecessary or undue degradation as the federal land management agencies have other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values. The Department of the Interior exercises

case-by-case discretion to protect the environment from any unnecessary or undue degradation through the process of approving or rejecting individual mining plans of operations.

Not only is such federal authority unnecessary to protect the environment or special resources, providing such authority creates significant uncertainty regarding ultimate mining project approval. Mining projects will not be able to attract investments if there is no certainty that the project can obtain approval even when the operator complies with all relevant laws and regulations. Investors need to know that a mining project in the United States can obtain approval and proceed unimpeded as long as the operator complies with all relevant laws and regulations. Mining projects—from exploration to extraction to reclamation and closure—are time- and capital-intensive undertakings, requiring years of development before investors realize positive cash flows. Recently announced mining projects being contemplated both within and outside the United States, including Freeport McMoran's restart of its Climax Mine in Colorado, have ranged from hundreds of millions of dollars to multi-billion dollars. Uncertainty in the legal regime applicable to mining projects can chill the climate for capital investments in domestic mining projects and have serious consequences for our economic and national security. If the investments critical for bringing a mine to fruition tend to migrate toward projects planned in other countries, the United States will become even more reliant on foreign sources of minerals.

GROWING RELIANCE ON FOREIGN SOURCES OF MINERALS

Despite reserves of 78 important mined minerals, the United States currently attracts only eight percent of worldwide exploration dollars and Freeport McMoran's greenfield exploration budget is the same. As a result, our nation is becoming more dependent upon foreign sources to meet our country's strategic and critical metals and minerals requirements, even for minerals with adequate domestic resources. The 2007 U.S. Geological Survey Minerals Commodity Summaries reported that America now depends on imports from other countries for 100 percent of 17 mineral commodities and for more than 50 percent of 45 mineral commodities. This increased import dependency is not in our national interest particularly for commodities critical to pending strategic programs such as reducing greenhouse gas emissions or undertaking energy efficiency efforts. Increased import dependency causes a multitude of negative consequences, including aggravation of the U.S. balance of payments, unpredictable price fluctuations, and vulnerability to possible supply disruptions due to political or military instability.

Our over-reliance on foreign supplies is exacerbated by competition from the surging economies of countries such as China and India. As these countries continue to evolve and emerge into the global economy, their consumption rates for mineral resources are ever-increasing; they are growing their economies by employing the same mineral resources that we used to build and maintain our 6 economy. As a result, there exists a much more competitive market for global mineral resources. Even now, some mineral resources that we need in our daily lives are no longer as readily available to the United States.

CONCLUSION

The U.S. mining industry has fully embraced the responsibility to conduct its operations in an environmentally and fiscally sound manner. For many mining companies, we have demonstrated this commitment through the implementation of environmental management systems, which are a method of improving overall environmental performance, environmental compliance, and closure and reclamation success. The industry hopes and expects that Mining Law legislation will recognize and honor both its commitments to continuous improvement in our environmental performance and the industry's contribution to our national wellbeing.

NMA appreciates the opportunity to provide this testimony.

The CHAIRMAN. Thank you, very much. Next is Alan Bernholtz, the Mayor of Crested Butte. Go right ahead.

STATEMENT OF ALAN BERNHOLTZ, MAYOR, CRESTED BUTTE, CO

Mr. BERNHOLTZ. Good morning. I want to start by thanking our humble Chairman and distinguished members of the committee for the opportunity to testify regarding the reform of the 1872 Mining

Law. I am the Mayor of the Town of Crested Butte, Colorado, and Crested Butte is a nationally registered historic district and world class ski and recreation community, with a resident population of 1,600 people. We are located 230 miles southwest of Denver, and Crested Butte is surrounded by federally designated wilderness areas. Crested Butte is concerned over a number of issues raised in the debate over reform of the 1872 Mining Law. Some of these issues paramount concerns for our community.

We respectfully submit that any reform must take into the critical importance of municipal watersheds in western communities. Watershed protection must take precedence over industrial mining development. Local governments must be given a much larger role of designation of where mining development can happen and be undertaken. The ability of local governments in certain critical areas withdrawn from entry and development, must be an essential tenet of any reform legislation. We believe Crested Butte offers plenty of examples of the problems with application of the 1872 Mining Law in modern times. At Crested Butte, it is our clean environment and our recreational opportunities on public land that allowed us to thrive as a prominent, international recreation destination. These values are threatened by a large-scale industrial mining project proposed on U.S. Forest Service Land on Mt. Emmons a/k/a as Red Lady, just one mile from our town boundary. This project is also known as the Lucky Jack Project proposed in the town's municipal watershed. The map you have in front of you this mornings depicts the location of the town's watershed overlaid by the projects proponents claims. We submit this map to the honorable chairman and the committee for the record.

Based on an initial understanding of the Lucky Jack Project, the mine will dump hundreds and thousands of tons of mine wastes and mine tailings into our watershed, disturb thousands of acres of prime wildlife habitat, and eliminate critical recreational areas from public use and essentially turn pristine National Forest lands outside of our town into a permanent industrial dump site. At present, the Lucky Jack Project will be regulated by the provisions of an antiquated 1872 Mining Law. Although we are just now beginning to understand, is clear to us the current law fails to protect the interests of our community. The residents of Crested Butte have been staunchly unified in any mine development since the late 1970s. We have businesses, reeves, and even ski lifts named after Red Lady. Red Lady is a a primary source of the town's water and popular recreational area, and an important part of the fabric of our community.

Crested Butte actually has a rich history in mining and we are not opposed to responsible mining. We are proud of our heritage. As a former miner community, we recognize the importance of a strong and stable mining industry. Times have changed. Today our community depends on a healthy, intact watershed and long-term and sustainable economic prospects based on recreation and tourism. Mining will not better our community; it would actually destroy it. Under the Government's interpretation of the 1872 Mining Law, the Forest Service is powerless to deny the Lucky Jack Project. At best, the Forest Service can only "minimize adverse impacts". In light of this, we ask the following: Why if the Lucky

Jack Project would so negatively affect or communities water supply and the local recreation-based community, of course, powerless to deny this project. The form of the 1872 Mining Law must at its course, contain a new environmental standards to protect public resources from adverse impacts. At a minimum, Congress must grant the BLM and the Forest Service the authority to balance other public needs, uses, and values on public land in evaluating a mining proposal. The Federal agency with public input must then decide that the mining is appropriate use of and suitable for those public lands in question.

In situations like ours, mining is not the preferred use of Federal land. The protection of our municipal watershed and the maintenance of our vital recreation-based economy must be the deciding factor. Each mine project and public resources impacted there must be only approved on a case-by-case basis. Certain lands must not be open for location or entry. At a a minimum, municipal water sheds and lands critical to local recreation-based economies must be withdrawn from entry because local communities are best able to ascertain the importance surrounding public lands. These communities deserve the right to have a direct say in withdrawal decisions. It is also important to recognize the critical need for local and State regulation of hard rock mineral development. It is imperative that Congress recognize State and local laws that regulate mineral development and its impacts. On behalf our community, we thank you, very much for the opportunity to come forward this morning. The future of Crested Butte is dependent on the protection of our water, our land, and our economy, which all are at risk without your comprehensive reform of antiquated 1872 Mining Law.

Accordingly, we request that Congress as expeditiously as possible to bring mining regulations into the 21st century. Thank you.

[The prepared statement of Mr. Bernholtz follows:]

PREPARED STATEMENT OF ALAN BERNHOLTZ, MAYOR, CRESTED BUTTE, CO

Honorable Chairman and Members of the Committee: Thank you for the opportunity to submit our comments and respond to the Committee's questions regarding reform to the 1872 Mining Law. As the Mayor of a small community in western Colorado surrounded by federal land, I understand the importance of sensible and effective public lands management that meets the needs of small communities like ours and all Americans.

Crested Butte is keenly interested in a number of issues related to the reform of the 1872 Mining Law, but several are of paramount concern. At the outset, any reform must consider the essential importance of municipal watersheds to the health and vitality of western communities. Watershed protection must take precedence over industrial mining development. Relatedly, state, local and tribal governments must be given a much larger role in the determination as to whether and where mining development can proceed. The ability of these governments to have certain critical areas withdrawn from entry and development must be a central tenet of any reform legislation.

CRESTED BUTTE, COLORADO

Crested Butte is a world-class ski town and National Historic District with a resident population of approximately 1,600 persons. We are located 230 miles southwest of Denver. Crested Butte is sandwiched between the Raggeds, Maroon Bells and West Elk Wilderness areas—50 miles directly upstream from the Black Canyon of the Gunnison National Park.

Crested Butte has a rich mining history and we are proud of our heritage. Times have changed though and our residents and economy no longer depend on mining. In our community, skiing, fishing, hiking and mountain-biking, to name a few, are

the life-bloods of our economy. It is our clean environment and recreational opportunities, enhanced greatly by our abundant public lands that have allowed us to thrive.

As a former mining town, we recognize the importance of a strong and stable mining industry. We are cognizant, however, that the future of our community depends on a healthy, intact watershed and long-term and sustainable economic prospects not subject to the boom-and-bust cycle of mineral development. We believe that comprehensive reform can achieve these goals.

THE LUCKY JACK PROJECT

Of all the issues facing Crested Butte, like those of most communities across America, none are more important than protecting our quality of life, the health of our citizens, our environmental values and the economic vitality of the community. Today, as we prepare to testify before the Committee, all of these values are threatened by a large-scale industrial mining project proposed on United States Forest Service (Forest Service) lands just one mile outside our Town boundary. This project, a/k/a the "Lucky Jack Project" is proposed in our watershed where the Town obtains its domestic water. A map depicting the location of the Town's municipal watershed is attached hereto. Currently, the Lucky Jack Project will be regulated by the antiquated provisions of the 1872 Mining Law. Although we have just begun our review of this proposed molybdenum mine, it is clear to us that current federal law materially fails to protect the interests of our community, local residents and businesses and the tourists that visit and sustain Crested Butte.

Based on our initial understanding of the Lucky Jack Project, the mine will dump hundreds of thousands of tons of mine wastes and mine tailings into Crested Butte's watershed, disturb thousands of acres of prime wildlife habitat, eliminate critical recreational areas from public use and essentially turn pristine National Forest lands outside of our Town—all of which are surrounded by federally designated wilderness—into a permanent industrial dump site.

As depicted in red on the attached map,* the project proponents (U.S. Energy Corp. and Kobex Resources, Ltd. (collectively, "U.S. Energy/Kobex")) have filed mining and millsite claims on large areas of the Gunnison National Forest right above the Town. We obtained the red highlighted portion of the map from U.S. Energy/Kobex's website on the date of this correspondence. These claims are slated for U.S. Energy/Kobex's network of waste dumps, pipelines, roads and related facilities.

1872 MINING LAW

Under the federal government's interpretation of the 1872 Mining Law, the Forest Service is powerless to deny the Lucky Jack Project. At best, under the agency's mining regulations located at 36 CFR Part 228A, the Forest Service can only "minimize adverse impacts", but cannot deny the proposed project to protect public resources and local interests.

Public resources and local interests are vital to Crested Butte. In addition to the need to protect our watershed, the Town relies heavily on various forms of tax revenues from tourists, local residents and businesses, second homeowners and other recreational users of public lands—the same lands that will be impacted by the Lucky Jack Project. None of these values are considered by the Forest Service in its perfunctory duties under the 1872 Mining Law. Due to the vital importance of reform of the 1872 Mining Law to this community, both the Town and Gunnison County passed unanimous resolutions urging the immediate and comprehensive reform of this antiquated law. We have attached the Town's August 7, 2007 resolution and the September 18, 2007 County resolution for your reference.**

SPECIFIC REFORM ISSUES AND RESPONSES

The resolutions cited above outline, in our view, the minimum conditions for reform—The Town's specific answers to the questions posed by the Committee in its January 7, 2008 correspondence are as follows:

> (1) Should legislation provide for new environmental standards for hardrock mineral activities? If so, what should those standards be and what transition rules would be appropriate for their implementation?

Reform of the 1872 Mining Law, must, at its core, contain new environmental standards to protect public resources from adverse impacts. The current regulatory

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*Map has been retained in committee files.
**Documents have been retained in committee files.

standards, especially the completely ineffective "minimize adverse impacts" requirement in the Forest Service regulations, must be substantially strengthened. At a minimum, Congress must establish the principle that proposed mining operations, in certain situations, be denied as a matter of sound public policy and law. Both the Bureau of Land Management (BLM) and the Forest Service must be given the authority to balance other public uses and values on public lands in determining whether a specific mining proposal can be approved.

For example, under the current mining law and regulations, mining in Crested Butte's watershed is considered by the Forest Service as "the highest and best use" of the public lands above our Town—regardless of the impacts to our watershed and other values. This is directly contrary to the health and vitality of our community. The decision whether mining can occur must be balanced with the needs of the community, especially regarding the protection of watershed integrity and the economic values inherent in high-quality waters and lands.

The federal land agencies must have the authority to consider and protect the non-mining values that are so important to towns like Crested Butte. Each mining proposal must be judged on its own merits. In some situations, such as ours, mining is not the preferred use of federal land. In this case, watershed protection, the maintenance of a vital recreation-based economy and similar values are paramount to the residents of this area. In other areas of the western United States, however, mineral development may be considered the best use of federal land and mining should proceed accordingly. Each situation is different and the federal land agencies must have the authority and discretion, with substantial input from the local communities affected thereby, to recognize that mining may not be the most beneficial use of public land.

Regarding the implementation of the much-needed authority to protect other valued public resources from mining development, any reform to the 1872 Mining Law must apply, at a minimum, to all projects that have not received required federal, state and local approvals and have not undergone thorough and comprehensive environmental reviews. Existing operations may be conducted under their current approvals, but any revision or expansion to existing operations must be subject to any new requirements.

> (2) Should legislation designate categories of lands as not available for-location and entry? If so, what categories should be designated?

Yes. Certain lands should not be available for location and entry. At a minimum, municipal watersheds must be withdrawn from location and entry. Other values, such as roadless areas, wild and scenic rivers, prime wildlife habitat, Native American sacred grounds, and lands important to local recreation-based economies, such as Crested Butte's, also deserve withdrawal. Because local residents, businesses and elected officials are best able to ascertain the importance of local public lands for these values, it is critical that states, counties and municipal governments (as well as tribal governments) have a direct say in these withdrawal decisions. Thus, H.R. 2262's provision enabling these governments to petition for withdrawal must be enacted. It is important that the standard for approving such a petition be reasonable and that such petitions be granted as a matter of course except in cases of a vital national interest that requires that lands be kept open for mineral entry.

> (3) Should the legislation address situations where mining claims should not be developed due to environmental or other concerns? If so, how should this he addressed?

Yes. As with the withdrawal of lands from mineral entry, certain lands, as a general matter, must be protected from mineral development. Each mine project, and the public resources to be impacted thereby, must be viewed on a case-by-case basis. This must occur at the outset of the permitting process. If existing claims are proposed for mineral development, the federal land agency, with the invited and comprehensive input from local communities and the affected public, must then decide if mining is the appropriate use of that public land. Some mining operations, due either to their significant impacts or due to the location of the proposed development, must be deemed unsuitable for those lands. Other projects, due to proposed environmental safeguards and the lack of important resources or public concern, should be permitted to go forward.

In the case of Crested Butte, it is clear that industrial mineral development of the public lands on Mt. Emmons and within the Town's statutorily established municipal watershed would result in significant adverse environmental impacts that are not addressed under the 1872 Mining Law. The Town's watershed represents a prime example of an area that is clearly unsuitable for mineral development.

It is also important to recognize the critical need for local and state regulation of hardrock mineral development. Some mining companies have argued that such close-tothe-ground regulations are pre-empted by federal mining policies and laws. That is wrong and frankly makes no sense as it is the local communities that are directly affected thereby. It is imperative that local and state statutes and regulations that limit or prohibit mineral development and its impacts under certain circumstances be recognized by Congress as an integral part of natural resource development and regulation in the western United States.

(4) What additional financial assurances, if any, should be required for mining operations?

Although the BLM and Forest Service regulations regarding financial assurances have improved in recent years, significant improvements are still necessary. For example, under current BLM and Forest Service regulations and policies, the agency and the mining company determine the amount of the financial assurance with little or no public input (i.e., the financial assurance amount is determined after the mine is approved and the National Environmental Protection Act (NEPA) process concluded). Further, the financial assurances only cover what the company is proposing to do as part of its initial plan of operations. These warranties never account for the potential for spills, leaks and other problems. Mining companies must be required to establish, in addition to the basic "reclamation" financial assurances, a trust fund or other mechanism to account for potential failures. The western United States, even in the "state-of-the-art" era of modern mining, is riddled with examples of such problems that were not predicted by the company or the regulator. The Summitville Mine disaster in Colorado is one of the most egregious examples, with cleanup costs exceeding $200 million and counting. In that case, the State of Colorado required only a bond for less than $5 million. The result of this disaster is that the taxpayer has been forced to largely foot the bill. This is unacceptable. Closer to home, Crested Butte residents live with the threats posed by a defunct silver/lead/zinc mine that continues (and has for the last 30 years) to discharge contaminated water directly into our watershed. While at the same time the Environmental Protection Agency (EPA) is in the process of re-mediating the Standard Mine Superfund less than one mile away. This Superfund site is also in the Town's municipal watershed. Yearly treatment costs for the water running out of the defunct mine exceed $1 million with no end in sight. State and federal reclamation laws failed to protect against this situation. We should not make the same mistake twice. Any reform of the 1872 Mining Law must account for such contingencies and should contain comprehensive provisions ensuring that in the future local communities do not have to deal with the mess left behind by inadequate financial assurances.

(5) What type of additional enforcement and compliance provisions, if any, are needed?

The current system of lax enforcement and compliance must be substantially strengthened. For example, under current regulations the agencies have little authority to issue cease and desist orders without complicated and lengthy legal proceedings, even in the face of clear environmental harm. The agencies must have the authority to curtail, or halt if necessary, any activity not in compliance with the applicable plan of operations.

Further, under current law, there are no citizen inspection or enforcement provisions, even on the public's land. At a minimum, a citizen suit provision similar to those contained in the Clean Water Act and the Surface Mining Control and Reclamation Act (for coal mines) is needed. Such provisions have been part of these laws since the 1970s and have worked well in the past. Communities such as Crested Butte must be able to seek legal redress for violations of federal mining and public land laws.

CONCLUSION

On behalf of the people of Crested Butte and all those that visit and enjoy our special place, thank you very much for the opportunity to bring our concerns to your attention. The future of Crested Butte is dependent on your protection of our water, our land and our economy. All of this is at risk without real, comprehensive reform of the antiquated 1872 Mining Law. We request that Congress act as expeditiously as possible to bring mining regulation into the 21st Century.

The CHAIRMAN. Thank you, very much. Our final witness on this panel is Mr. Wanamaker, from Juneau, Alaska, go right ahead.

STATEMENT OF RANDY WANAMAKER, EXECUTIVE DIRECTOR, BBC HUMAN RESOURCE DEVELOPMENT CORPORATION, JUNEAU, AK

Mr. WANAMAKER. Good morning Mr. Chairman and members of the committee. Thank you for this opportunity to comment with regards to mining law reform. I am an Tlingit Indian from general Alaska. I'm a Registered Environmental Assessor and Certified Professional Geologist with over 30 years of experience in State, Federal, and private service. I have served as the Executive Director for the BBC Human Resource Development Corporation for the past two-and-a-half years.

The BBC provides preemployment separation and preparation services to Alaska residents with an emphasis on helping Alaskan natives and other minority groups. Our tribe has 26,000 members and a 62 percent unemployment rate among young adult males. I also served as the Deputy Mayor of the City and Borough of Juneau, the capital of Alaska. Juneau is a community with a mining history. Mining is located in the heart of my tribe's ancestral lands, hard rock mining that operates to this day. As a tribal member and an as an elected official and as a science professional, I know both the challenges and the benefits of mining. With the help of my colleagues, we have prepared and submitted written answers to the important questions you are considering. I will not repeat those technical answers because they are available for later review. I will summarize my other issue that highlight three important points. The first point is the description of the social economic benefits responsible mining can bring to a town with tax revenues, social and economic stability. As a minority group member, keeping social economic parity to stimulate jobs with benefits. The second point is a short descriptions of how cities and county can effectively participate in the Federal State permit process.

It is possible for local governments to work closely with other agencies and with mining for the benefit of their community relative to due process and without compromising their governmental powers. Everyone wins when Government and industry forms strategic partnerships. The third point is a brief description of the value of simplifying, streamlining and rationalizing the overly-complex permit study and review process. This would benefit the public, the economy, the regulatory process, and the court system by helping to avoid the need for unnecessary appeals and litigation. The solutions to environmental management and reclamation issues can be achieved through the simplification and streamlining of the current Federal system so that a rational, easy to follow process is the result. To help illustrate my three points, I have provided you with supplemental information for your later review. That information tells me how the historic mine operators work with the Tlingit Indians when they encountered them.

Mr. WANAMAKER. This was a peaceful process in which both sides benefited. There were no wars, no bloodshed and there were no lingering environmental problems for our town. Different mines in our town are benefiting Juneau in many ways. Kensington operated by Coeur Alaska is the most successful Affirmative Action project in Alaska's history. The story of Kensington includes more than the expense of the Affirmative Action project. According to a

scientific pole conducted on behalf of the City and Borough of Juneau, 76 percent of the citizens of Juneau have answered from important to very important. The high level of acceptance is not as the result of trading solutions for jobs, but is the result of a public collaboration of Juneau citizens to ensure responsible projects that go beyond simply getting the permit. Coeur Alaska has earned this social likeness. In summary, I have provided you with another way to look at mining law reform, and the and social economic views describing how responsible mining can benefit a town and it's minority members, minority members who are usually a majority of the unemployed an the underemployed. Thank you for this opportunity to comment.

[The prepared statement of Mr. Wanamaker follows:]

PREPARED STATEMENT OF RANDY WANAMAKER, EXECUTIVE DIRECTOR, BBC HUMAN RESOURCE DEVELOPMENT CORPORATION, JUNEAU, AK

Here is my input by question, as requested.

Question 1. Should this legislation provide for new environmental standards for hardrock mineral activities? If so, what should those standards be and what transition rules would be appropriate for their implementation?

Answer. The Reform Bill should not contain environmental standards for hardrock mineral activities. There already exists a myriad of federal, state and local statutes, rules and regulations and required authorizations which place strict environmental criteria on mining activities. For example, the Clean Water Act regulates stormwater and discharges from mines and related facilities as well as dredge and fill activities. The Resource Conservation and Recovery Act, Clean Air Act and Superfund to mention a few regulate mining and protect the environment. Moreover, each state has its own set of statutes and regulations which "mirror" these federal requirements.

Kensington, for example, has over 50 individual state and federal permits. This does not include the local City and Borough Allowable Use Permit, grading and building permits, communications and transport authorizations. The project has a Plan of Operations, Monitoring and Mitigation Plans, a Reclamation Plan, a Spill Contingency Plan and a Transportation Mitigation Plan. All of these incorporate environmental best management practices. They are required by existing laws and regulations, which are often already duplicative and overlapping. No new regulations are needed in any Mining Law Reform Act.

Question 2. Should the legislation designate categories of land not available for location and entry? If so, what categories should be designated?

Answer. Legislation already exists that accomplishes this objective. The legislation includes the Alaska Native Claims Settlement Act and Alaska National Interest Lands Conservation Act legislation which establish Wilderness and Wild & Scenic Rivers, National Monuments, National Wildlife Refuges and others. These existing laws are more than adequate to accomplish such an objectives.

Question 3. Should the legislation address situations where mining claims should not be developed due to environmental or other concerns? If so, how should this be addressed?

Answer. The National Environmental Policy Act already accomplishes this objective. NEPA requires that mining claims located on federal lands must be evaluated for environmental and socio-economic impacts of developing that land prior to authorization of use by the administering agency. These evaluations are thorough and exhaustive. They address both adverse and beneficial impacts, as well as cumulative effects. In the case of Kensington, three of these studies were conducted at a combined costs of over $30 million. These required over 20 years of investigation and analysis, utilized highly qualified an even world renown scientists and engineers, and also involved separate risk analyses prepared by third-party (outside) experts. These NEPA-required evaluations further require that the applicant avoid, minimize and/or mitigate environmental impacts especially for sensitive areas. Examples include wetlands, streamside areas, wetlands, historic sites and others.

Question 4. What additional financial assurances, if any, should be required for mining operations?

Answer. There should be no additional financial assurances required by this legislation. Federal agencies like the Bureau of Land Management and US Forest Service already require "full cost" bonding. These costs are typically prepared by quali-

fied third-party consultants. They address the costs of reclamation, plus administration, plus regular updating, plus escalation factors. The agencies presume that a third-party will also conduct the reclamation activities. Any additional financial assurances would be duplicative and unnecessary, as most states also require full cost bonding, which already duplicates federal requirements for state, private and Native-owned land. Examples include: Alaska (ADNR), Nevada (NDEP) and Idaho (IDL and IDEQ).

Question 5. What type of additional enforcement and compliance provisions, if any, are needed?

Answer. No additional enforcement and compliance provisions are needed in any Mining Law Reform. Current enforcement is by USFS, BLM, EPA and Corps of Engineers. State enforcement in Alaska, as an example, is also provided by Alaska Department of Natural Resources, Alaska Department of Environmental Conservation and Alaska Department of Fish & Game. Further, most other states have similar oversight roles of enforcement. MSHA also administers the Mine Safety and Health Act.

OTHER COMMENTS

I am going to suggest an alternate way to conduct mining reform but first I am going to outline the benefits of mining to the Juneau Community along with a description of the problems experienced by one of the most studied and responsible mining development projects in North America, the Kensington Gold Mine.

The mining industry has brought a great many benefits to the Juneau municipality and our citizens. This is especially true of the good paying jobs mining has provided for our aboriginal population of Alaska Natives. In addition to the Alaska Natives, Samoans, Filipinos, Vietnamese, Black Americans and returning veterans have all enjoyed recent employment as a result of our local mining industry. This is significant when you consider that adult Alaska Natives currently experience a 62% unemployment rate in Southeast Alaska.[1] The mining industry pays an average wage of $70,000 per year plus health and retirement benefits. By contrast, in spite of Juneau being the home of state government, the average Juneau salary is $41,000 per year.

Juneau has two mines, Greens Creek and the Kensington Gold Mine.

Greens Creek is an operating silver lead zinc copper mine located on nearby Admiralty Island. It has been operating in this Wilderness and National Monument since 1988. It employs 260 people with a payroll and benefits worth 23 million dollars per year to the Juneau economy. It pays an average of $900,000 per year in property taxes and is a consistent contributor to local non-profit organizations and community activities. Greens Creek employees and family members volunteer for many community activities including the arts, youth activities and local government such as the Planning Commission or ad hoc City Commissions. In short they are the types of citizens every municipality wants.

The Kensington, owned and operated by Coeur Alaska, is a nearly fully constructed gold mine located 45 miles northwest of Juneau. It is awaiting a final round of permit review for a new tailings facility as a result of 11th hour litigation brought by environmental groups. It is in heart of the ancestral grounds of the Tlingit Tribes of Northern Lynn Canal and the Tlingit People are among its most staunch supporters. It has been in permitting and development since 1987 and it employed up to 410 people during construction from 2005 to 2007 at a cost to date of $238 million. It is expected to operate for about ten years with a work force of 200 people and payroll and benefits worth 18 million dollars per year. It will pay an estimated $1,450,000 per year in property taxes. Approximately 170 direct and indirect support jobs are expected. The mine will purchase an estimated 9.3 million per year in local goods and services and generate approximately $450,000 in sales taxes. Kensington will become Juneau's second largest private industry employer and Juneau's largest taxpayer.

The Kensington Gold Mine is also a consistent contributor to local non-profit organizations and a supporter of community activities. Kensington employees, family members and contractors also volunteer for many community activities including the arts, youth activities and ad hoc City Commissions. They also are the types of citizens every municipality wants. The Kensington enjoys broad based local support from the City Government, local minority populations, civil rights groups, non-profits, state and federal employees and many other citizens and organizations of Ju-

[1] These December 31, 2007 unemployment figures are provided by the Central Council of Tlingit and Haida Indian Tribes of Alaska TANF Program. The Tlingit and Haida Tribe has 26,000 members.

neau and Southeast Alaska. This support was earned through comprehensive community outreach and affirmative action programs to "Build Relationships of Trust" with the stakeholders of the Kensington Gold Mine area. The outreach and affirmative action programs are described in the attached document entitled "Community and Alaska Native Outreach". A partial list of Kensington supporters is attached entitled "Kensington Gold Mine Supporters".

Also attached are two official Economic Surveys conducted on behalf of the City and Borough of Juneau.* The first is entitled "2006 Economic Indicators" the second is "2007 Economic Indicators". Both surveys were conducted by the Juneau Economic Development Council through a contract with a professional socioeconomic survey firm, The McDowell Group. They are scientific and representative of the community.

The surveys show the economic value of the wages and taxes to the City and Borough of Juneau. The surveys also show the high level of citizen support the Kensington Gold Mine has in the Juneau Community. The 2006 survey shows that 76% of the households in Juneau think the Kensington is important to very important to Juneau's economy.

The Kensington is viewed as important to very important for a variety of reasons. But it is not a case of trading pollution for jobs. The overwhelming majority of Citizens of the community think that the Kensington has received rigorous review by the state, federal and local agencies and that the Kensington Operator, Coeur Alaska, has used the community input to more than meet the criteria for simply permitting the mine. In short the community and the City and Borough Assembly believe that Coeur Alaska has more than adequate safeguards for protecting the environment while operating and beyond.

Part of the reason the Kensington is viewed as so important is that a large part of Southeast Alaska is in economic and population decline. The loss of timber industry jobs, changes to the commercial fishing industry and the high cost of fossil fuel energy in rural Alaska have all contributed to the economic stagnation, severe unemployment and underemployment that affect rural Alaskans, primarily Alaska Natives. These Alaska Natives come to Juneau seeking employment but lack the vocational training skills needed for most employment. Coeur Alaska, through partnerships with the BBC Human Resource Development Corporation and the State of Alaska Department of Labor, University of Alaska Southeast, Central Council of Tlingit and Haida Indian Tribes of Alaska and local labor organizations has successfully recruited and trained a large number of Alaska Natives, other minority group members and other Alaska residents for the jobs at the Kensington Gold Mine. It is the most successful private industry, completely voluntary, affirmative action project in Alaska history.

The opening of the mine is jeopardized by an 11th hour litigation brought by Lynn Canal Conservation, Sierra Club Juneau Chapter and Southeast Alaska Conservation Council. To summarize, the environmental groups filed litigation over a regulatory definition of waste and lost in Alaska's Federal District Court. They promptly appealed and were successful in having the case removed from the Alaska District Court to the Ninth Circuit Court of Appeals where they obtained an opinion that the operating plan was flawed due to the definition of waste used by the Ninth Circuit Court of Appeals three judge panel. (Ironically, a different three judge panel of the Ninth Circuit Court of Appeals recently reached a different opinion in a similar case upholding the Rock Creek Mine also located in Alaska.)

The immediate result of this litigation by the environmental groups was that hundreds of Alaska Natives and other Alaska residents already employed or waiting for the job training and the opening of the Kensington lost their jobs or the opportunity for job training and jobs when the mine opens.

A severe public reaction and loss of popular support forced the environmental groups to offer to work with Coeur Alaska to develop a tailings disposal plan and an amended operating plan that they would support and help to permit. The amended operating plan has been developed by Coeur Alaska but it remains to be seen if the environmental groups will honor their public commitments to help facilitate the review and permitting of the amended mine plan. In the meantime the hundreds of unemployed people seeking job training for the Kensington jobs now face an uncertain future. There is simply no other long term family wage job available in the region and the permitting for an amended operation plan could take up to two years if the environmental groups try to obstruct the project further.

The negative public reaction was a surprise to the environmental groups but it should not have been. They did not pay heed to the public surveys showing overwhelming support for the Kensington, nor did they pay attention to the amicus

* Surveys and additional material have been retained in committee files.

briefs or intervenor status motions filed by numerous parties such as the City and Borough of Juneau, the State of Alaska and non-profit groups such as the Southeast Conference, a regional economic development organization representing legislators, tribes, cities, non-profits and private industry. All of these organizations or individuals believe in the integrity of the federal, state and local agency reviews used for the Kensington permits. They also overwhelmingly believe that the environmental groups true purpose was simply to prevent mining, not to protect the environment.

It is this type of activity by environmental extremists without regard for the integrity of the federal, state and local permitting process or the needs and rights of their neighbors that prompts my suggestion for meaningful mining reform. To best serve the public, the environment, the judicial system and the economy, mining reform should be to streamline, rationalize and simplify what has become a Byzantine and unnecessarily complex process.

Federal laws for clean water and clean air and reclamation are more than adequate to protect the environment. State laws mirror the federal laws and processes. In my experience municipal governments feel overwhelmed by the complexity and poorly understood mining permit process and they think they need to duplicate the entire Environmental Impact Statement process. That is not necessary.

What municipal governments can do is to participate fully in the federal-state study and mine permit review processes. They should provide the input they know best such as local socio-economic concerns. In mine permitting, municipalities should focus on traditional municipal responsibilities such as lights, dust, traffic, noise control and zoning requirements. In addition the municipalities can form strategic partnerships with the mining industry, labor, non-profit, state and university job training programs to identify, recruit, train and dispatch local citizens interested in good paying jobs so that their citizens can obtain those jobs if the mine is approved.

If the Senate Committee on Energy and Natural Resources is interested in detailed information as to how to simply, rationalize and streamline the current mine permitting process, my colleagues in the environmental and mining industries will gladly assist a prompt and comprehensive review in the interests of the common good.

Thank you for this opportunity to comment.

ATTACHMENT 1.—SUPPORTERS OF THE KENSINGTON GOLD MINE

The State of Alaska; The State of Alaska, Office of the Governor; Alaska State Legislature; Alaska State Chamber of Commerce; Alaska State District Council of Laborers; Alaska State Troopers; Alaska Department of Fish and Game; Alaska Department of Commerce, Community, and Economic Development; Alaska Department of Commerce; Alaska Department of Environmental Conservation; Alaska Department of Natural Resources; Alaska Department of Revenue; Alaska Department of Transportation; Alaska Brewing Company; Alaska Coastal Aggregates; Alaska Coastal Homes; Alaska Employment Group; Alaska Industrial Hardware; Alaska Marine Lines; Alaska Miners Association; Alaska Native Brotherhood Grand Camp; Alaska Pacific Bank; Alaska Public Entity Insurance; Alaska Travel Adventures; Alaska Department Of Labor; Alaska Electric Light & Power; AIH—Outside Sales; Allen Marine Alaska Marine; Lines; Alaska Native Brotherhood Grand President; Baxter Bruce & Sullivan, Attorneys at Law; BBC Human Resource Development Corporation; BEP Toner Recycling; Berners Bay Working Group; Bikin—Economic Development; Bureau of Land Management; Capital Office; Carlton Smith Co.; Carpenters Local 2247—Alaska Regional Council of Carpenters; Catholic Community Services; Central Council of Tlingit & Haida Indian Tribes of Alaska; City and Borough of Juneau; City and Borough of Juneau Assembly; City of Hoonah; Coastal Helicopters; Coldwell Banker Race Realty; Copy Express; Cycle Alaska; Department of Commerce and Community Economic Development; Delta Sigma Phi; Department of Education and Early Development; DeWitt & DeWitt, lobbyist; Don Abel Building Supply; Duran Construction; Extended Stay; Filipino Community Association; Gastineau Contractors; Goldbelt, Inc.; Greater Ketchikan Chamber of Commerce; Greens Creek; Gruening & Spitzfaden APC; Haines Borough; Haines Chamber of Commerce; Hangar on the Wharf; Holland America Westours; Huna Totem Corporation; Hyak Mining; IBEW Local 1547; ICMA; Inland Boatman's Union; Juneau Brass; Juneau Chamber of Commerce; Juneau Economic Development Council; Juneau Gold Rush Commission; Juneau Job Center; Juneau Board of Education; Juneau Urgent Care; Kake Tribal Corp.; KeyBank; Klukwan, Inc.; Kootznoowoo Corp.; Laborers Local 942; Legend Charters; Metcalfe Communications; Nature Conservancy; Northland Services; PacWest; Petro Marine; Princess Cruises & Tours, Alaska Region; R&M Engineering; Resource Development Council; Sealaska Corporation; Smith

Barney; Southeast Alaska Fishermens Alliance; Southeast Alaska Gillnetters; Southeast Alaska Native Economic Futures Coalition; Southeast Conference; Spickler/Egan Financial Services; SE Coordinator Knowles Campaign; Territorial Sportsmen; Tlingit Haida Central Council Job Development; Trucano Construction; Tyler Rental; University of Alaska Southeast; United Fishermen of Alaska; Wings of Alaska.

ATTACHMENT 2.—COMMUNITY AND ALASKA NATIVE OUTREACH FOR THE KENSINGTON GOLD MINE

Juneau, Alaska

Juneau is the Capital City of Alaska and is a unified city-borough government with a population of 32,000 people. Juneau, originally the fishing grounds of numerous Tlingit clans, is located I northern Southeast Alaska in Gastineau Channel. The presence of gold in Juneau was made known in the late 1800's when Kowee, an Auk Tlingit leader, brought gold to the attention of prospectors. Following prospecting work with the help of local Natives, Juneau was established as a gold mining town and numerous mines were built and operated. These mines paved the way for timber, fishing, and eventually government being located in Juneau as the population increased and it became a regional hub.

Coeur d'Alene Mines

Corporation Coeur d'Alene Mines Corporation is the world's largest primary silver producer, as well as a significant, low-cost producer of gold. The company has mining interests in Nevada, Idaho, Alaska, Argentina, Chile, Bolivia and Australia.

Coeur Alaska, Inc.

In 1987, Coeur Alaska, a wholly-owned subsidiary of Coeur d'Alene Mines Corporation, acquired an interest in the Kensington Gold Mine located 45 miles north of Juneau—in 1995 Coeur acquired a full interest in the mine. For over 20 years, Coeur has worked and invested over $238 million in the exploration, development and construction of the Kensington Gold Mine. Coeur has conducted a community outreach process best described as sound science coupled with an open dialogue with the affected community resulting in a project that goes beyond good engineering and permitting requirements.

The Kensington is located on Northern Lynn Canal, near Berners Bay, an estuary deemed an Aquatic Resource of National Importance by the U.S. Environmental Protection Agency. This area is also part of the ancestral land of the Tlingit People of Southeast Alaska. In addition the area has important fishery and recreation values enjoyed by many user groups. Coeur quickly realized the project would face unique challenges.

In order to meet the multiple challenges faced by the Kensington, Coeur initiated an ongoing community outreach program. This multifaceted program addressed the challenges through communications designed to identify the circumstances, problems or activities needing attention; working to find solutions and determine mutual benefits; and, seeking effective solutions. This approach resulted in solutions to community and user group concerns that are transferable and sustainable. A brief summary of the history, approach, solutions, effectiveness and transferability for some of the many challenges follow.

A hallmark of Coeur Alaska's exploration and development processes is the ongoing solicitation of comments from all segments of the local communities as well as from local, state and federal government agencies. The process of seeking comments goes beyond meeting permit requirements, the process is used to fully understand the many user groups and stakeholder interests in order to "Build Relationships of Trust" with the community.

Early on it became evident to Coeur that the user groups of the land in and around the Kensington Mine have this in common: While they would like to benefit from jobs and economic opportunity, they also have intimate ties to the land. These ties to the land are all different, each has sub-components and each requires working with different parties in order to understand and meet their concerns. In addition, the ties are sometimes competing interests so that solutions to meet the concerns of one group may not meet the concerns of another.

Coeur acknowledged these complex relationships by working with ALL of the user groups in order to understand their concerns and address them, rather than just follow the letter of the law in order to obtain our permits. By outreach and understanding, Coeur sought to "Build Relationships of Trust" and become part of the community. The ties to the land near the Kensington are based on the following interests;

- Environment
- Economic
- Recreation
- Historic
- Ancestral
- Subsistence

ENVIRONMENT

From the outset, Coeur recognized the area in and around the Kensington Mine is regarded as special to numerous environmental advocacy groups. From the beginning Coeur has met with the many interest groups to determine their concerns and to obtain their input for mitigation and project planning they could endorse, not just accept.

As part of the environmental community outreach, Coeur, in association with the Southeast Alaska Presidents Association, a non-profit Alaska Native Business Alliance, helped to organize and sponsor a successful two day regional environmental compliance conference. This conference, held in Juneau in 1995, featured environmental compliance obligations, problems and successes experienced by regional industries, non-profit and environmental organizations, municipalities, state and federal agencies. Conference speakers and participants included personnel from all levels of non-profit and agency organizations and private industry.

The goal of the conference was to bring together the public, the regulated community and the regulators in an effort to identify and better understand the obligations, practices, problems, successes and solutions for environmental compliance. It is thought that a better understanding of the needs and roles of the public, the regulated and the regulators will lead to improvements in the permitting and compliance process and increased community acceptance.

Topics of the conference included;

- Permitting Process and Environment
- Human Health
- Clean Air Act Amendments
- Fuel handling and Marine Oil Spill Response
- Water Quality
- Forest Practices Act
- Spill Response and Environmental Compliance Obligations
- Hazardous and Solid Waste

Participants included;

- Lt. Governor Fran Ulmer
- Alaska Department of Law
- Sierra Club Legal Defense Fund
- Alaska Department of Fish and Game
- Alaska Department of Natural Resources
- City and Borough of Juneau
- Southeast Alaska Conservation Council
- U.S. Coast Guard
- U.S. Army Corps of Engineers
- U.S. Environmental Protection Agency
- Southeast Alaska Presidents Association
- Douglas Island Pink and Chum Hatchery
- Health Sea, Inc.
- Alaska Department of Environmental Conservation
- Alaska Division of Governmental Coordination
- Echo Bay Mines
- Coeur d'Alene Mines
- Klukwan Forest Products
- Goldbelt, Incorporated
- White Pass Fuel
- Southeast Alaska Petroleum Response Organization
- Anchorage Municipal Power and Light
- First Bank Alaska
- Bayliss Environmental Services
- Easton Environmental

The Environmental Compliance Conference was a definite success. People traveled from across the state to attend and participate while the public gained a better understanding of environmental compliance issues. The goal of improved outreach

was met when the regulated community and the regulators identified key areas where they should form working groups to improve regulatory programs and requirements.

The increased understanding, communications and cooperation resulting from the Environmental Compliance Conference were key in helping to "Build Relationships of Trust" with the community.

The working group concept is effective, transferable and sustainable. It has since been used by the City and Borough of Juneau to address community needs and solutions for a wetlands mitigation banking program. Coeur Alaska was pleased to be part of the working group to help develop the Juneau Wetlands Mitigation Banking Program.

As a part of the outreach effort to environmental advocacy groups, over a period of several years, Coeur negotiated a mitigation and litigation avoidance agreement to address their concerns. The groups involved included local chapters of the Audubon Society, Sierra Club and local groups such as the Friends of Berners Bay. Although most of the environmental organizations were satisfied, two organizations declined ratification of the agreement. In spite of this, the benefits from this outreach were that the identified mitigation issues were adopted by Coeur anyway and the great majority of the people of the community and region appreciated and respected the reasonable approach Coeur had taken. The outreach was acknowledged by the general public for going beyond what was required, for doing more than meeting permit conditions.

As a part of the Kensington operations plan, Coeur and the public have formed the Berners Bay Working Group, a group of stakeholders, organized to monitor and advise Coeur as to the possible effect of mine operations on the Bay.

ECONOMIC

Economic interests are based on commercial fisheries, future access and utility corridors and a desire to expand the employment and economic base of the community. All of these modern economic interests began in the late 1880s' when gold, fish and timber drew explorers and developers to the Southeast Alaska Region.

Outreach efforts to commercial fishermen began at the outset of Coeur's involvement with the community. Meetings, focus groups and surveys were initiated with fishermen and fishermen organizations. These outreach efforts were held in order to properly understand the types, needs, seasons, practices and locations of the various fisheries. Through many one on one meetings and group meetings, Coeur and the fishermen discussed and planned for the mitigation for water quality, tailings disposal, facility locations and potential fishing and gear losses due to mining activities. As a result of this sustained outreach, fishermen and fishermen organizations are among the most consistent supporters of the Kensington Project. Supporting organizations include the United Fishermen of Alaska and United Southeast Alaska Gillnetters.

In other economic focus meetings, Coeur met with agencies, groups and individuals working on long term plans for road and utility corridors and ferry terminal sites in and around the Kensington area. These corridors and sites are considered key to long term economic development through improved access to Juneau, the State Capital. Due to the cooperative planning efforts, road and utility corridors and ferry terminals were designated that are not disruptive to the Kensington while meeting the needs of the transportation planning authorities.

The National Environmental Policy Act process for the Juneau Access Road is complete and it is proceeding towards construction.

Economic and employment interests includes the desire of the community to benefit from the jobs and economic opportunities once the environmental and land use concerns were satisfactorily addressed. These interests are of utmost importance as the region has entered a period of population loss and economic stagnation due to the loss of thousands of high paying jobs in the timber industry and major changes in the commercial fishing industry and markets. Other employment needs included the long term chronic problem of Alaska Native unemployment and under-employment and a lack of opportunity for high school graduates which results in the migration of youth out of the state.

To help realize the economic and employment needs of the community and region, and to help Coeur meet its manpower needs at the Kensington, a region wide employment and training project was established. This project was established with the support and in partnership with various Native Corporations, state agencies, nonprofit manpower training and labor organizations. This project is the BBC Human Resource Development Corporation.

In 1993 Coeur began working with local Tlingit leaders willing to help develop a cooperative relationship to address cultural and environmental concerns while ensuring the responsible development of the Kensington Project. After expressions of mutual interest, Coeur began working very closely with leaders from three of the Alaska Native Corporations based in Juneau. These corporations, formed pursuant to the Alaska Native Claims Settlement Act were Klukwan, Inc., Kake Tribal Corporation and Goldbelt, Incorporated. All of these corporation's Tlingit shareholders have ancestral ties to the land around the Kensington Gold Mine.

The Berners Bay Consortium (BBC) was organized in October 1994 by Goldbelt, Inc., Klukwan, Inc., and Kake Tribal, Corporation. Their goal is to increase business and Tlingit employment opportunities by working with Coeur, while protecting the cultural, subsistence and environmental values of an area long important to the Tlingit People of Southeast Alaska. All three Native Corporations realized it would be hard to offer their services to a major project such as the Kensington individually, but by cooperating and combining their resources and by partnering with local non-Native firms and other local organizations, they could offer much more.

Coeur d'Alene Mines and it's subsidiary Coeur Alaska the owner/operator of the Kensington Project, were seeking a partnership to accomplish important operational, environmental and public involvement goals. Their agreement with the three Native Corporations is not just for the purpose of business development, it includes the wise use of human, natural and business resources of all of the parties.

As part of the implementation of the agreement for business and employment preference, the BBC members and Coeur entered into an agreement in January 1996. This agreement led to the organization of the BBC-Human Resource Development Corporation in July of 1996. The BBC-HRDC members are Coeur Alaska, Inc., Klukwan, Inc., Kake Tribal, Corporation, and Goldbelt, Inc.

The BBC-HRDC is the organization that is responsible for identifying, recruiting, screening, training, and dispatching of qualified Alaska Natives and Alaska residents to the Kensington Project. It is important to note that the employment preference is binding on all contractors and subcontractors not just Coeur Alaska, Inc. and that it is the responsibility of all four members of the BBC-HRDC to assist all Kensington contractors and subcontractors to become aware of, and honor, this obligation.

The target of the 1996 agreement and business plan is resources. The concept was and is to capitalize on the companies' developmental capabilities to achieve commercial successes, and environmental opportunities. The resources used to achieve these goals are: human, natural and business.

The 1996 agreement provides general areas of business preference for the Consortium and each consortium member with an opportunity to preferentially bid on previously identified services.

The State of Alaska has provided grants for training employees because of the effectiveness of the BBC-HRDC approach. In addition, numerous organizations including the University of Alaska, Department of Labor and the Department of Community and Regional Affairs and the Central council of Tlingit and Haida Indian Tribes of Alaska have all cooperated with the BBC-HRDC in order to utilize each other's strengths and to avoid duplication of services in training new employees for the project.

The sustainability, effectiveness and transferability of this employment and economic agreement have been proven. In the 10+ years since the agreement began, the BBCHRDC has been successfully identifying, recruiting, training and dispatching qualified employees to the Kensington and other projects. Coeur Alaska has consistently been able to exceed the Alaska Native employment goals established by the BBC Agreements.

Following the establishment of the BBC-HRDC, and as the innovative approach became known, invitations have flowed in for presentations to describe it's goals and accomplishments. Among others, the Executive Director of the BBC-HRDC has made presentations to the Alaska Miners Association, National Tribal Employment Rights Officers Convention, Alaska Tribal Employment Officers Rights Convention and the Yukon First Nations Economic Conference and Summit. In addition, presentation papers were prepared for the BC-Yukon Chamber of Mines Mineral Round Up and for Indigenous Peoples in New Zealand seeking information on working with mining interests.

RECREATION

The recreational users became known and familiar to Coeur immediately. The recreational users of Berners Bay, near the Kensington, are a varied group with different uses of the Bay. These uses include:

- Wildlife Watching
- Small boat family recreation
- Recreational fishing, crabbing and clamming
- Airboats
- Kayaking

Berners Bay, near the Kensington Mine is an estuary deemed an Aquatic Resource of National Importance by the U.S. Environmental Protection Agency. The estuary is rich in wildlife, marine mammals, fish and, it is an important recreation area for the community of Juneau.

In order to identify the needs and use patterns of the various Berners Bay recreation groups, Coeur reviewed agency recreational studies and management plans and met with the responsible agency personnel. In addition, Coeur conducted public meetings and an independent survey of recreational users and commercial recreational interests, in order to determine their reaction to Kensington plans and to obtain mitigation suggestions.

As a result of the input and understanding reached through the outreach, Coeur, the agencies and public have developed an operational plan that avoids negative effects to the various user groups. This avoidance was made possible by the survey and outreach work which identified Kensington facility sites and transportation routes that avoid the great majority of existing recreational user routes and sites in Berners Bay.

Wildlife watching, small boat family recreation, recreational fisheries, airboats and kayaking are all successfully avoided. These recreation activities, times and places have been clearly identified and will be avoided. In addition, Coeur and the public have formed the Berners Bay Working Group, a group of stakeholders, in order to monitor and advise Coeur as to the possible effect of mine operations on the Bay.

HISTORIC

Historic uses of Berners Bay include using the area for hunting, camping, hiking, exploring, logging and mining. At present, hunting, camping, hiking and exploring are the current uses of the area and they will not be affected by mine operations. Logging is not a viable use for most of the area while mining is relatively restricted in area due to current land use designations. The successful outreach to the historic user interests was largely accomplished through the recreational user group forums and processes.

ANCESTRAL

The area of the Kensington Project, on Lynn Canal and near Berners Bay, is part of the ancestral homelands of the Tlingit People of Southeast Alaska. Berners Bay is very important to the Tlingit People because of cultural values including village sites, numerous petroglyphs and burial sites. In addition, it is an important traditional subsistence resource area. The east side of Lynn Canal and the Berners Bay area are part of the Great Migration Route of the Tlingit Kaagwaantaan Clan. Berners Bay proper is a traditional trading and subsistence harvest area. Berners Bay was also an important gathering area where Coastal Tlingit Clans met to trade and renew social and economic ties with each other and with Interior Tlingit of Canada who came down routes along the icefields leading to Berners Bay.

In recognition of the ancestral ties to the lands in and around the Kensington, Coeur initiated and maintained contact with the leaders of the Tlingit People of the Juneau Region. The purpose of the contact was to determine any Tlingit concerns regarding the Kensington Project and to determine how to address those concerns. The outreach has been successfully maintained as Coeur is developing the mine with the participation of the Tlingit People through a combination of employment training, jobs, cultural awareness, mitigation, operations monitoring and business support programs.

The success of the cultural outreach effort to the Tlingit Community can be found in the letters from Mr. Austin H. Brown, an Elder of the Tlingit Dakl'aweidi Clan who actively supported the Kensington Project (Mr. Brown is recently deceased). According to traditional Tlingit Custom, Mr. Brown's family owns the Kensington land at Sherman Creek and his support for the Kensington and the ancillary Goldbelt Project was expressed through his letters to Tribal Governments, Native Organizations and Native Leaders as well as state, federal and municipal agencies. This outreach success is duplicated in the oral and written records of public testimony expressed by Tribal Governments, Elders and traditional leaders of other Principal Clans in the Kensington Gold Mine—Berners Bay area.

SUBSISTENCE

Subsistence is a integral component of the Tlingit Identity. It is more than the gathering of food, it is an essential part of Tlingit heritage. Subsistence activities feed, clothe and define key aspects of Tlingit Culture. The gathering and use of food and other natural resources are part of specific Tlingit Clan traditions and subsistence areas are often considered territorial clan or family areas with enforceable rights. Subsistence has been a part of the traditions in and around the Kensington and Berners Bay area for thousands of years and is practiced even today.

Due to the importance of subsistence and due to the legal protections for subsistence that exist in federal law, Coeur worked to ensure that Coeur understands and respects the subsistence tradition. This was deemed a critical issue by Coeur in view of the important ties to Berners Bay for the more than 5,000 Tlingits within the Berners Bay Region.

The Coeur outreach for subsistence understanding began with a review of the existing information available through federal, state and tribal governments. It was quickly learned that the most comprehensive understanding of the subsistence use patterns would come from meeting with the actual subsistence users.

Coeur went beyond the requirements of the National Environmental Policy Act and the National Historic Preservation Act by reaching out to the traditional cultural bearers and subsistence users of the Berners Bay area through personal interviews facilitated by the BBC leadership. Through the facilitated interviews, Coeur learned cultural aspects of clan history for the Kensington and Berners Bay area that did not come out through the usual permit process. Coeur was able to acknowledge and respect this history satisfactorily as evidenced by the letters of support from Mr. Brown and numerous Traditional Cultural Bearers, Clan Elders and federally recognized tribal organizations.

SUMMARY

Coeur identified and addressed many challenges in meeting community concerns regarding the Kensington Gold Mine. The success of the community outreach effort can be attributed to seeking an in depth understanding of the basis for the concerns and doing more than meeting permit conditions. Coeur set out to become a part of the community now and for the future by "Building Relationships of Trust".

ATTACHMENT 3.—KENSINGTON SOCIAL LICENSE

INTRODUCTION

"Earning a Social License" is a term for a community outreach program used by progressive mining companies. This program uses positive, informed communications and outreach to establish a mutually supportive relationship with all segments of a community near a mining project.

Three things form the basis for the success of Coeur d'Alene Mines Corporation in developing Alaska Native support for Coeur's reintroduction of mining in Southeast Alaska. These are, understanding the history of mining and its early relationship with the Tlingit People, the Alaska Native Claims Settlement Act, and a patient, open and cooperative approach on the part of Coeur to develop a positive and mutually supportive relationship with local Tlingit People near the Kensington Gold Project.

The cooperative outreach effort by Coeur included discussions with commercial fisherman, recreational users, municipal leaders and other local people of the Lynn Canal region of Southeast Alaska. Coeur recognized early on that an informed discussion with the local resource users, based on sound science and openness, would be necessary to ensure project success.

The Kensington Gold Project is located on the mainland approximately 45 miles north of Juneau and 38 miles south of Haines, along the east side of Lynn Canal. Coeur Alaska, Inc. is a wholly owned subsidiary of Coeur d'Alene Mines Corporation. Coeur Alaska is the project owner and operator of the Kensington, a completely constructed underground gold mine with a mill and numerous support facilities. The project is constructed and ready to operate but is currently engaged in operating plan revisions in order to meet environmental groups demands to end further litigation. Coeur Alaska hopes to begin recruitment and training for the final phase of construction in the summer of 2008, if a permitting schedule can be maintained.

The area of the Kensington project, on Lynn Canal and near Berners Bay, is part of the ancestral homelands of the Tlingit People of Southeast Alaska. Berners Bay is very important to the Tlingit People because of cultural values including village sites, numerous petroglyphs and burial sites. In addition, it is an important tradi-

tional subsistence resource area. The east side of Lynn Canal and the Berners Bay area are part of the Great Migration Route of the Tlingit Kaagwaantaan Clan while Berners Bay proper is a traditional trading and subsistence harvest area. Berners Bay was also an important gathering area where Coastal Tlingit Clans met to trade and renew social and economic ties with each other and Tlingits from the interior of Canada who came down routes along the icefields to Berners Bay.

During the late part of the 19th century and the early 20th century the mountainous areas of Juneau, Lynn Canal and Berners Bay were extensively explored and numerous mines, both small and large, were developed. Among these was the Kensington Mine.

According to family and clan oral history, as taught to the author, and based on interviews with descendants of Tlingits who lived through the development and the closure of mining in the early part of the 20th century, mining and mining companies were generally not disruptive to the traditional Tlingit way of life. The early mining companies employed Tlingits in all phases of mining and provided work schedules to accommodate the subsistence lifestyle of the Tlingit People and the seasonal lifestyle of the local commercial fishermen who worked in the mines. Tlingits were paid and treated the same as non-Tlingit employees. In fact, mining companies often hired local Tlingits for their knowledge of the region to help guide exploration parties and to build in difficult terrain and they often paid for the land when the land belonged to a Tlingit family or clan while other industries and the government did not.

Modern Tlingit Elders remember the fairness and benefits of past mining employment and many actively support the current efforts of Coeur to reopen the Kensington. They also believe the Kensington will provide good paying jobs and provide a path and encouragement for young Tlingits to pursue careers in technical fields and allow them to remain in our ancestral region with their families and culture. This is especially important because Southeast Alaska Natives suffer from a 62% adult unemployment rate. (* from Central Council Tlingit and Haida Indian Tribes of Alaska TANF figures for 2007)

In 1993 Coeur began looking for local Tlingits willing to help develop a cooperative working relationship to address cultural and environmental concerns while ensuring the responsible development of the Kensington Project. After expressions of mutual interest, Coeur began working with leaders from three of the Alaska Native Corporations based in Juneau. These corporations, formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), were Klukwan, Inc., Kake Tribal Corporation and Goldbelt, Incorporated.

HISTORY, GOALS

- The Berners Bay Consortium was organized in October 1994 by Goldbelt, Inc., Klukwan, Inc., and Kake Tribal, Corporation in order to increase business and Tlingit employment opportunities in Southeast Alaska, while protecting the cultural, subsistence and environmental values of an area long important to the Tlingit People of Southeast Alaska.
- All three companies realized it would be hard to offer their services to a major project such as the Kensington individually, but by cooperating and combining their resources and by partnering with local non-Native firms and other local organizations, they could offer much more.
- Coeur d'Alene Mines Corporation, and its wholly owned subsidiary Coeur Alaska, Incorporated the owner/operator of the Kensington Project, were seeking a partnership to accomplish important operational, environmental and community relations goals. Their agreement with the three Native Corporations is not just for the purpose of business development, it includes the wise use of human, natural and business resources of all of the parties.

THE PARTICIPANTS

- "Coeur the Precious Metals Company" is the largest primary silver producer in the U.S. and is the recipient of over 12 major national and international environmental awards since 1987. Their motto, and their corporate way of conducting business, is "producing and protecting".
- Kake Tribal Corporation is an ANCSA village corporation, headquartered near Juneau in Kake Alaska. It has approximately 600 Shareholders, 22,000 acres of land, operations in seafood, fueling, construction, timber and environmental remediation.
- Klukwan, Incorporated is an ANCSA village corporation headquartered in Haines Alaska near the Kensington Mine site. It has approximately 300 Share-

holders, 23,000 acres of land, operations in mining, construction, timber, barging, explosive sales and stevedoring.

- Goldbelt, Inc. is an ANCSA urban corporation headquartered in Juneau. It has over 3000 Shareholders, 33,000 acres of land, operations in tourism, passenger 8A government service operation companies, and Goldbelt owns a hotel and the Mount Roberts Tram.
- Together the corporations represent approximately 9,000 Shareholders, Shareholder spouses and other family members. More than half of all Shareholders and their families live and vote in the northern Southeast region near the Kensington Mine.
- The purpose of the Consortium is to provide environmental, cultural resource, and subsistence guidance, permitting and political support, and to promote community acceptance for Coeur Alaska's resource project, the Kensington.
- The Consortium members chose to work with Coeur because of Coeur's strong environmental record in its mining operations.
- In return for their guidance and support, Coeur Alaska negotiated and entered into an agreement to provide business and employment preference to the Consortium membership.
- Early on, the partnership was coined "The beginning of the future." by all of the parties.
- As part of the implementation of the agreement for business and employment preference, the BBC members and Coeur d'Alene Mines Corporation entered into an agreement in January 1996. This agreement led to the organization of the BBC-Human Resource Development Corporation in July of 1996. The BBCHRDC members are Coeur Alaska, Inc., Klukwan, Inc., Kake Tribal, Corporation, and Goldbelt, Inc.
- The BBC-HRDC is the organization that is responsible for identifying, recruiting, screening, training, and dispatching of qualified Alaska Natives and other Alaskans to the Kensington Project. It is important to note that the employment preference is binding on all contractors and subcontractors not just Coeur Alaska, Inc. and that it is the responsibility of all four members of the BBC-HRDC to assist all Kensington contractors and subcontractors to become aware of, and honor, this obligation.
- The target of the 1996 agreement and business plan is resources. The concept was and is to capitalize on the companies' developmental capabilities to achieve commercial successes, and environmental opportunities. The resources used to achieve these goals are: human, natural and business.
- The 1996 agreement provides general areas of business preference for the Consortium and each consortium member with an opportunity to preferentially bid on previously identified services.
- The contracting preference applies to any affiliation the BBC members may form but it does not preclude non-BBC companies from bidding for work.
- Affiliation means any person, corporation, partnership joint venture or other entity in which the BBC member(s) control at least 25% of the voting power.

GENERAL AREAS OF INTEREST FOR COEUR ALASKA PROJECTS

- During mine exploration and development; drilling, camp construction, camp services and expediting;
- Construction of mine infrastructure including secondary development facilities, including but not limited to power, water, sewer, transportation of supplies and production, warehousing, housing, community facilities, and various business establishments;
- Land Exchanges;
- Road construction;
- Assistance in permits; and
- Employment recruitment, training, orientation, and referral and labor dispatch services.

KAKE TRIBAL CORPORATION INTERESTS

- Construction and rehabilitation of fuel tanks-fuel supplies and fuel management services-surface rehabilitation-timber debris cleanup; Camp catering and camp operations;
- Environmental monitoring, and remediation;
- Operation of a fish buying station; and
- General construction contracts.

KLUKWAN, INC. INTERESTS

- Drilling contracting;
- Electrical work;
- Underground rehabilitation and construction;
- Barging services;
- Transportation of ore and concentrates;
- Camp and dock construction;
- Provision of explosives and mine supplies; and
- Provision of housing in the Haines community.

GOLDBELT, INC. INTERESTS

- Land use master planning and State access planning;
- Construction of and operation of fish buying stations;
- Marine terminal and related facilities;
- Construction of mining housing in Juneau;
- Terminal and camp construction and camp operations; and
- Waterborne transportation of workers either by high speed catamaran or other means.

EMPLOYMENT PREFERENCE OPPORTUNITIES

- Applies to prime contractors, subcontractors and Coeur;
- Preference applies to qualified shareholders, spouses, descendants, other Native Shareholders, Native Americans in Alaska, and Alaska residents;
- Preference does not apply to members of these groups that are not qualified for good reasons such as health;
- Preference applies to a goal of 13.5% of all employees during mine construction;
- Preference applies to a goal of 25% of all employees during mine operations;
- Preference is a goal and not a limitation because all shareholders are Alaska residents;
- Preference is for all levels and types of employment, not just entry level and blue collar positions;

EMPLOYMENT TRAINING

- The BBC-HRDC was established to provide an employment training and dispatch organization to meet the needs of the Kensington Project.
- The employment organization will and has recruited, screened, trained and dispatched employees from all over Southeast Alaska.
- The employment project chose to partner with existing Alaska organizations such as the Alaska Department of Community and Regional Affairs, the University of Alaska Southeast, the Tlingit and Haida Central Council and the Southeast Regional Resource Center rather than duplicate existing services.
- The employment project includes non-Natives in its recruitment, training and dispatch efforts, especially those Alaska residents displaced from their jobs in the fishing or timber industry.
- This open, non-discriminatory effort, helps to employ the maximum possible number of Alaskans on the project without regard to ethnic origin.
- One effort of the employment project is focused towards those residents seeking a career development path, especially high school graduates and women and other individuals facing barriers to employment.
- Coeur Alaska supports this employment concept and is helping by providing the employment project with its labor needs information, and has affirmed its support by financial contributions for funding of the employment project.
- Through a combination of all of these efforts, all residents of Alaska will benefit from the 1996 BBC and Coeur agreement.
- The BBC-HRDC conducted an employment training program for Natives and Southeast Alaska residents. This program is conducted in cooperation with organized labor, the Alaska Department of Labor, the Tlingit and Haida Central Council, the University of Alaska Southeast, and Coeur Alaska.
- Most students successfully complete the courses and most of the students are successfully placed with Coeur and subcontractors after the course. The remaining students gain employment as new openings occur or with other mining companies. Coeur achieved a 49% employment rate for Alaska Natives, spouses, descendents or affiliated employees during construction from 2005 to 2007 making this the most successful affirmative action project in Alaska history.

- The project continues to identify and enter new people into the employment skills database for future evaluation, training and referral. These new employees will be trained for new construction and actual mine operations.
- The database has over 500 Alaska residents in it. These people have low to high skill levels and, the database includes everything from the completely inexperienced, to geologists, biologists, water treatment plant operators, engineers and equipment operators.
- The mission of the BBC-HRDC is to provide employment ready people, capable of providing the highest level of consistent service, to the client, Coeur Alaska. The BBC-HRDC works to identify its strengths, weaknesses, opportunities and threats in an effort to improve how it implements the employment service.

JOINT ACCOMPLISHMENTS AND OPPORTUNITIES

- Joint Sponsorship of an Environmental Compliance Conference for Southeast Alaska
- Improved Access for Coeur to the Alaska Congressional Delegation, the State Legislature the State Executive Administration, and the Alaska workforce
- Implementation of a concurrent reclamation program at the Jualin and Kensington Mines, through contracts with Klukwan, Inc.
- Cooperative spill contingency training program at the Kensington with SEAPRO, a Southeast Alaska spill prevention and response organization.
- Implementation of a proactive environmental cleanup program at the Kensington-Jualin Property with Kake Tribal Corporation.
- Initial work activities with BBC members to implement a federal land exchange at the Kensington-Jualin Property to improve transportation and facilities access and management.
- Involvement in the development of the Goldbelt Cascade Point Master Plan including alternative planning and design for water-based transportation to the Kensington Mine property.
- Completion of a Phase One Commercial Fishermen's Acceptance for a Water Quality Plan for the Kensington.
- Successful Implementation of a Native Involvement Program for acceptance of the Kensington Mine Plan (enlisting BBC, Tlingit and Haida Central Council, Sitka Tribes of Alaska, Kootznoowoo, Inc., Juneau Alaska Native Brotherhood, et al support).
- Successful Approval of the Site Specific Criteria for the Kensington Mine National Pollutant Discharge Elimination System Permit (BBC, Tlingit and Haida Central Council, Sitka Tribes of Alaska, Kootznoowoo, Inc., Juneau and Haines Alaska Native Brotherhood, et al support).
- Initiation of discussions with two regional corporations to evaluate and explore Native subsurface mineral interests (Some delay has been experienced due to the recent market turmoil but Coeur's interest remains high).

The following is a partial list of positions that Tlingits and other Alaska residents successfully trained for and/or were placed in since the BBC-HRDC training programs began in March 1997:

- Coeur Alaska—Equipment Operator VI
- Coeur Alaska—Core Sampler
- Coeur Alaska—Lead Equipment Operator
- Coeur Alaska—Environmental Technician
- Connors Drilling—Drillers Helpers
- Coeur Alaska—Kitchen Helpers
- Redpath, Alaska Industrial Company, The Industrial Company—Laborers
- Connors Drilling, Kensington, Greens Creek—drillers helpers
- Coeur Alaska—Equipment Operator VI—Kensington
- Coeur Alaska—Water and Waste Water Treatment Plant Operator
- Coeur Alaska—Mining Engineering Assistants and Interns—Kensington
- Coeur Alaska—Core Sampler—Kensington-fourteen people

Initiation of project development activities at Kensington include:

- Contracting with Kake Tribal for the exploration program food catering and camp services.
- Contracting with Klukwan, Inc. to provide exploration drilling services Land Use Agreement with Goldbelt for transportation access and support

COEUR COMMITMENT TO THE BBC

The management philosophy at Coeur is focused and resolute. We know our business, and we understand the opportunities and challenges we must deal with in order to achieve our goal of enhancing the Companys value to our Shareholders.

We also recognize the individual Native Corporations' responsibilities to their Shareholders, namely—increased shareholder employment and the ability to offer fundamentally sound business opportunities.

Coeur is committed to environmentally sound mineral resource development in Southeast Alaska. Like land, water and minerals, employment and business opportunities are resources, "sources of wealth or revenue." We believe all these resources can best be developed through alliances or partnerships, and that the Native Corporations involved in or considering the Berners Bay Consortium must also protect and wisely manage the resources if they are to achieve economic and social self sufficiency.

For its part in the formation of a long-term business alliance, Coeur has attempted to open a constructive dialogue with Goldbelt, Kake Tribal and Klukwan. Coeur has identified (we believe) the foundation for what could evolve into an even stronger, mutually beneficial business arrangement.

Quotation above from a memorandum dated 11-2-98 to Randy Wanamaker from Rick Richins, Vice President Environment and Government Affairs, Coeur d'Alene Mines Corporation.

LETTER OF COEUR SUPPORT

Positioned for Future Growth in Southeast Alaska

Coeur d'Alene Mines Corporation through our wholly owned subsidiary, Coeur Alaska, Inc., is firmly committed to developing mineral resources in Southeast Alaska. With the ongoing activities at Kensington and our exciting new opportunities at the Jualin Mine Project, Coeur is convinced of its ability to adapt to local conditions and needs, and develop in an environmentally responsible manner.

While we have become an international producer of precious metals, much of Coeur's long term growth ambition lies in our desire to "produce and protect" locally. To do this will require not only a local presence, but also local partnerships which can in turn maximize the use of local resources. Those resources are the people, their capabilities and their services they provide.

Coeur knows our business, the mining business. We understand the combined resources of Berners Bay Consortium are needed to achieve our goal of project development. We (Coeur and the Consortium) also share a common goal—enhancing the economic well being of our Shareholder. With your support, I am confident we can achieve both our goals through the successful implementation of this "Business Plan."

DENNIS E. WHEELER,
Chairman, President and Chief Executive Officer.

Above contained in a memorandum from Rick Richins dated 11-2-98 to Randy Wanamaker.

CURRENT STATUS—FUTURE OUTLOOK

For its efforts, Coeur achieved its goal of successfully permitting and constructing the Kensington, through community involvement, community acceptance, and local hire by using the services of the Alaska Native Partners of the Berners Bay Consortium. However due to recent last minute litigation by environmental groups, Coeur has conducted additional economic and engineering feasibility studies and will re-permit the tailings disposal option with Alaska Native and Juneau Community support in order to begin operations. The only uncertainty is the end of new demands by the environmental groups.

The overall outlook for the Kensington re-permitting is good and the Consortium of Alaska Natives and the people of Juneau are ready and willing to assist Coeur with all of their resources once a final tailings plan is approved. For its part, Coeur has expressly stated its intent to fully implement the Alaska Native Social License in the form of its business and employment agreements with the Berners Bay Consortium.

The commitments to the Consortium were honored in the preference for contracts and subcontracts for mine construction valued at $238,000,000 (USD). In addition

Coeur Alaska achieved approximately 49% hire of Alaska Natives, Native Spouses, descendents or BBC company affiliated employees during construction. This is the most successful private industry affirmative action project in Alaska history.

Once operations begin there will approximately 225 permanent jobs with an annual estimated payroll of $18,000,000 (USD) plus retirement and benefits, 150 to 190 indirect and contract positions and annual mine support contracts. Alaska Natives and other locals are eagerly awaiting the beginning of operations in this economically distressed region.

In recognition of its community outreach and economic importance, Coeur Alaska received the Bureau of Land Management "2006 Hardrock Mineral Community Outreach and Economic Sustainability Award".

The support of the City and Borough of Juneau is demonstrated in the amicus briefs filed in support of the Kensington during the litigation brought by the environmental advocacy groups.

The CHAIRMAN. Thank you, very much. We will start with a few questions. It seems to me we have a disagreement about the extent of current authority in Federal agencies to deal with potential degradation of public lands. Mr. Bisson, you make it clear in your testimony, I believe; you say the statutes and regulations provide sufficient authority to regulate mining operations when properly monitored and enforced by State and Federal regulatory agencies and current regulations are designed to avoid recurrence of what problems have existed in the past. What's your view of the claims that Mr. Bernholtz is making about the lack of authority of the Forest Service to do anything other than go ahead and approve the mining operation. As he states in his testimony current law does not give the Forest Service authority to do anything to deny the proposed project. It can take action to minimize adverse impacts, but it cannot deny the project. What is your thought on that?

Mr. BISSON. Senator, I'm not aware of the specific facts regarding the Mr. Emmons project at this point. I know that the Forest Service, like the BLM, has to make undue, unnecessary degradation standards and they must comply with that standard. The company through a plan of operations must comply with it. I'm frankly not aware of that specific case.

The CHAIRMAN. Now, is it your thought in order to comply with that standard, you can deny them the right to mine?

Mr. BISSON. If, in fact, based on information that I've been provided, if in fact the company cannot meet that standard, then a mining plan of operation can be denied. What normally happens is through mitigation, through the NEPA process, sufficient mitigation is included in the package, that most frequently those mining operations are permitted with significant mitigation, but there are situations such as, you know, if there's an impact on an endangered species that would lead to a jeopardy opinion that, in fact, there are situations where a point of operations had been denied.

The CHAIRMAN. Are there examples where a plan of operation has been denied on the basis of the type of concerns that the Mayor of Crested Butte has raised about endangerment of the water supply?

Mr. BISSON. I'm not aware of one.

The CHAIRMAN. Dr. Dombeck, what is your take on this difference of opinion as to what authority? You've been a head of both the Forest Service and the BLM. Do you believe those agencies currently have authority to deny mining operations if they think there's undue degradation of the environment?

Mr. DOMBECK. I would refer to authority on that.

I think what we have is, we have the 1872 Mining Law perceived and operationally viewed by most employees as under a different umbrella than the disposition of other minerals. I'm certainly not the expert in this, but these other authorities, the other minerals sort of the law lays out a sequence of things that we don't see in the 1872 Mining Law. So my understanding is when a claim is invalidated, then it becomes much more difficult to prohibit that if there's a serious problem as the Mayor of Crested Butte indicated.

The CHAIRMAN. Any of the rest of you have views on that we ought to hear? I don't remember hearing anybody volunteer. Mr. Cobb, did you want to make a statement?

Mr. COBB. I just would like to add to that. As we have heard about concerns about protecting watersheds, again recognize we have the Clean Water Act. That is the fundamental mechanism in terms of taking a look at discharges from the mining operation and the potential impacts associated with those. Again, there is a lot of public involvement in the Clean Water Act process. As we take a look at permits that might be issued underneath that Act. Again, that is a fundamental mechanism in terms of regulating those impacts. Of course, you can either get amendments to a plan of operation or a denial of a permit out of the Clean Water Act as it pertains to protecting watershed.

The CHAIRMAN. So, it's your view that there are circumstances where the ability of a mining company to proceed with the development of a mine have been prohibited, but under the Clean Water Act more likely than under other statutes; is that what I understood you to say?

Mr. COBB. The Clean Water Act is one mechanism. That mechanism would also been be considered through NEPA in terms of the types of issues that would be evaluate in the EIS, for example.

The CHAIRMAN. OK. Yes, Mr. Bernholtz.

Mr. BERNHOLTZ. Let me make a comment on that. The NEPA process is a factual-based information that is done and studied and paid for by the proponents of the mining operation. Are don't have an unbiased or balanced view of what impacts are really happening. As far as the Clean Water Act, the Clean Water Act really goes in effect once something has actually gone wrong. If we see a problem with the water the Clean Water Act goes into effect but it doesn't actually stop actions from happening. The mining company operations are going to come in and say, well, we are going to have a problem, so the Clean Water Act will take into effect. The Clean Water Act needs to go into effect after there is some kind of leakage or problem with the water.

The CHAIRMAN. Let me ask just one final question, Mr. Bisson, is it your testimony that there are circumstances where the head of BLM has denied the ability of a mining project to go forward because of some determination the BLM director has made?

Mr. BISSON. That determination was probably not made at the directors level. It was probably made by a field manager or by a district manager or by a State director in the process of revealing a plan of operations.

The CHAIRMAN. But there are cases where in reviewing the plan of operations, the BLM says, we're not going to let you mine here?

Mr. BISSON. Yes, sir.

The CHAIRMAN. Could you give us some examples?

Mr. BISSON. I would be happy to follow up in writing but I can tell you when I was district manager of the California Desert District, my recollection is that I made the decision to deny some mining plans of operations because of conflicts of with the desert tortoise, which was a listed species.

The CHAIRMAN. OK. So, in case there is a conflict with the Endangered Species Act, you personally are aware of that. If you could give us a list of those circumstances, that would be very useful.

The CHAIRMAN. Senator Domenici.

Senator DOMENICI. Thank you, Senator Bingaman. Thanks to all your witnesses. Dr. Dombeck, I just wanted to share with everyone here that you and I had the occasion to meet each other on a very, very, wonderful day. You were celebrating with some of your friends at a local, small hotel, and I came in there to see if the room you were in would be big enough for us to celebrate our golden wedding anniversary. You saw me looking around and you generously got up and introduced yourself, and I felt very comfortable, and I had almost forgotten about you.

Those years past, I now remember you quite well, and I thank you for recommending that we use that room because we had a marvelous occasion just a day later, and it was good to see you. Let me start my questioning by quoting from what I stated in my opening remarks, I said a 1999 report from the National Academy of Science which concluded that existing environmental protections work together in a way that is "complicated but generally effective". Now, I think what we have is a series of environmental laws that have been adopted after the mining law, obviously, and that have been held to apply, but it's not as clear cut and as clean as if you had a bunch, a group of laws that just applied to mining. That people are somewhat scared about these laws and whether they're going to apply to the satisfaction of the opponent. I'm satisfied that the environmental laws of the United States apply to mining. Now, Dr. Dombeck, you were in both the Forest Service and the BLM. I don't know if you remember, but is it not true that the Clean Water Act and all these other acts that we have applied in your day to mining operations and application for mining operations or do you not remember?

Mr. DOMBECK. I would say that it's view differently.

Senator DOMENICI. What is?

Mr. DOMBECK. The mining and the hard rock mining under the 1872 Mining Law as viewed as under somewhat of a different umbrella. I think the professionals in the agencies, and there are lots of really, really good employees that applied the thing that Henri had indicated and continually tried to do better, but it seems as though we still lack the force of law or the level of putting hard rock mining on the same plane, as say, oil and gas and all other multiple uses, whether it be grazing, hunting, fishing and so and the water quality issue, well the Clean Water Act I assume is an after the fact. I think an example might be the Montana example of the Beal Mountain Mine, an apparently modern mine which touted some of the best technologies, and yet both the State of

Montana and the agency they're stuck with a really, a major, major problem as a result of things not working, so something isn't working.

Senator DOMENICI. You can't tell by looking at all mines when they were started with reference to the new laws we're talking about. If you go back far enough, we didn't have a Clean Water Act, right? We didn't have a Clean Air Act. We didn't have any. I wonder if these words, "undue and unnecessary degradation" where do they apply? You used those words, I think, or somebody did.

Mr. BISSON. I did. They come right out of our regulations. I can't define it right off top of my head, a definition that describes what it means. It is a standard that must be met before we approve a plan of operations.

Senator DOMENICI. Doesn't a mine have to apply for a Clean Water Act application before it proceeds?

Mr. BISSON. To do any mining on Federal lands, they have to submit a plan of operations, and they have to submit a plan for how they will address the requirements of other laws like Clean Water, like Endangered species. We don't do a NEPA process. We look at the projected impacts. We require certain mitigation to mitigate those impacts. It's a very extended process.

Senator DOMENICI. I want to state for myself and then I will yield, and I thank you again, Mr. Chairman, for the hearing. From my standpoint, I'm fully aware that we have many mines that were started in an era when we did not have appropriate regulations of defining them. We even had laws that were far too generous in terms of patented land when the government gave up much too much land to mining operations. Those all have to be fixed. Many of them already have, but I'm not interested in writing a new mining law that intentionally makes it so difficult to mine, that you don't mine. If there are people who want that kind of law written, then I'm not their brother. I'm not going to be helping them. I think we need to write the right kind of law to assure that the right kind of environmental laws will apply, but not so excessive and so multiple that you won't be able to mine. That's what I'm looking for. I say to the young Mayor, I was a mayor in not such a small town, I was in Albuquerque, so we didn't have any miners coming in and mining in our town. I respect your enthusiasm and your forthrightness and I think you must be protected. But I also think you have to understand we have to have laws, it can't be just your wishes, there have to be some rules that apply to everybody, including those who are working in your area. I note you want to say something to me, so go right ahead.

Mr. BERNHOLTZ. I understand what you said, Senator Domenici, and I agree with you there should be regulations to allow mines to happen. We are not opposed to mining. But you had mentioned that those Beal mines were really old and we didn't have laws in effect then, but there are examples of mines approved under the Clean Water Act, such as the Summitville Mine, that was a huge disaster with leakage, and it destroyed the watershed in that area after the Clean Water Act was enacted. So it does still happen. We need to protect our water, especially in the western States where water is still important to us, we have to be extra careful. We're following a law that is over 100 years old right now that just

should be updated to current regulations just like we did with oil and gas coal, we did it with coal, we did it with ranching, we did it with logging. We're just asking that those laws be updated and take into account the watersheds of local communities.

Senator DOMENICI. You didn't hear what I said. I said that the Clean Water Act that applies was not written in 1892. It was written to apply today, and it's modern, and if it applies it ought to work. The NEPA is a new law. It's not a law after the fact. If it didn't work in some cases it doesn't mean we didn't have a law. It means that perhaps it wasn't properly executed. But we're not too far apart—you and I in our thinking. I just don't want to write whole new code for every single item if you already have two rules of law for everything.

Mr. BERNHOLTZ. I agree. I may look young but I understand how laws work, too.

Senator DOMENICI. You are great. You are terrific.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman. I have not met Dr. Dombeck like you have. Thank you, Senator Domenici, but I will tell you that the Beal Mine started in 1989, and it went through 1998. The upshot of all of it is that ultimately now the taxpayers are going to be paying for part of it. So, the Clean Water Act didn't work. I agree with you, though. We need to make sure it does work. I don't think there's a person on this panel who doesn't understand that water is pretty damn important for everybody and also understand that there's room for everybody to make a living here.

We need to make sure the regulations are streamlined and work as well as possible. I've got a few questions that deal with the priority for clean up. We've got a lot of mines in Montana, a lot of abandoned mines. This could be directed to Mr. Bisson, but it can be to anybody on the panel, does the Federal Government currently have a priority list on mine clean up?

Mr. BISSON. Senator, I have a document which was prepared in late 2006. It identifies the priorities for every western State. So, this is really not abandoned mine lands.

Senator TESTER. So it is a pretty complete inventory?

Mr. BISSON. It is as complete as we have currently.

Senator TESTER. It is complete like the States have?

Mr. BISSON. Yes, sir.

Senator TESTER. OK. Is there a clean up cost associated with that priority?

Mr. BISSON. The estimates are in there.

Senator TESTER. All right. Right now we can continue with you if you want, Henri, since patenting was put on a hold in 1994, what mechanisms does the industry use at this point to ensure the security of tenure they desire?

Mr. BISSON. I'm trying to understand the question.

Senator TESTER. The patenting is put on hold.

Mr. BISSON. Yes, sir.

Senator TESTER. What do you do to give the company some solace that they're able to mine to recap their investment, recoup their investment.

Mr. BISSON. A patent is irrelevant in terms of whether they can proceed with mining or not. The only patents issued are the ones that were grandfathered in 1994.

Senator TESTER. OK.

Mr. BISSON. All but 38 of those have either been issued or contested because we didn't feel they had a valid existing right.

Senator TESTER. How do you transfer the mineral? Have the claims gone up or down since 1994?

Mr. BISSON. I can tell you last year we had an increase of 92,000 mining claims on BLM lands.

Senator TESTER. So the claim is all you need? You don't have to have a transfer of minerals?

Mr. BISSON. If you have a mining claim, in a valid discovery you can submit a plan of operations to develop that mineral. You don't need a patent to be able to develop that mineral.

Senator TESTER. OK. Which agencies are involved in clean up of mines and things like that?

Mr. BISSON. You know, I think it depends on the State where the mine may be. In some cases it maybe be BLM, the Forest Service, E.P.A., other agencies.

Senator TESTER. Are there jurisdictional boundaries clearly delineated?

Mr. BISSON. I think there's probably a lot of overlapping jurisdiction.

Senator TESTER. How about communication?

Mr. BISSON. I know there are examples of excellent communication involved in clean ups, and I don't know, but I would expect there are samples of bad communications in terms of these efforts to clean sites up.

Senator TESTER. All right. One of the things that Dr. Dombeck alluded to, and then the Mayor alluded to it, but one of the things that came out of State legislature panel is we spend at the State level a lot of money on mining clean up. What happens in the end is the mining company goes broke and the bonding was either insufficient or something else happened, and you end up with technologies that failed and you have got a mess. With the Clean Water Act being recently changed by Court decision to imply only to navigable waters, does this have an impact? Mr. Cobb, I would like you to respond to this and anybody else. Does this have an impacted on how now the clean up is treated and how the claims are granted and how the reclamation process moves forward?

Mr. COBB. Let me just start with the reclamation and the clean up part of the question.

Senator TESTER. Sure.

Mr. COBB. The issue is really, and we see this at the State level and the State of New Mexico is on my mind because we're doing $100 million worth of reclamation in the State of New Mexico right now. You're trying to protect both surface water and ground water.

Senator TESTER. Right.

Mr. COBB. Those standards have not changed relative to the definition. We are still trying to achieve the perfection of downstream usage. The usage includes fisheries, recreational use, drinking water purposes, a whole range of things goes into what we are trying to achieve from a reclamation perspective. That will come to

bear in terms of what we're trying to do with abandoned mine lands. I think one of the issues that we have to deal with is this because of the number of abandoned mine lands. Were are in essence going to be addressing watersheds on a piece-by-piece basis. We are going to make incremental improvements, and one of the issues we will have to wrestle with going forward is, you can't necessarily try and overlay a Superfund clean up mentality on abandoned land mines and try to swallow the whole whale. We have do this one bite at a time. Of course that is the vision on that, how you get a public/private partnership and incrementally improve watersheds in the United States.

Senator TESTER. My time has run out. Just real quickly, Mr. Chairman, if I might. The issues in this industry are around any industry that is out there. Whether it is wildlife or impacts on our highways or whatever; the main issue from my prospective is indeed water. I guess because of mines like Beal and Zortman-Landusky in terms of water, there's been some failures, let's put it that way. I would be interested in talking with any of the members of this panel on how we can streamline the regulation and make it effective so that we don't have taxpayers paying for clean up for perpetuity on waters that quite honestly more closely resemble battery acid than they do drinking water. That's all. Thank you.

The CHAIRMAN. Senator Barrasso.

Senator BARRASSO. Thank you, very much, Mr. Chairman. Mr. Bisson, you refer to the list of the priority, the list of the clean ups that I think Senator Tester asked about. As I was looking through one of the documents we had in preparation for this meeting, they talked about abandoned mind land issues. The number seemed to be staggering to me. I was visiting with Senator Martinez about it. It said some estimates placed abandoned mine sites at over half a million nationwide, with 65 thousand abandoned mine sites on BLM lands alone, and I guess testimony from the EPA and the House Committee on Energy and Minerals. Do those numbers seem accurate to you, sir?

Mr. BISSON. I can't speak to abandon mines, other than on BLM lands. Our current inventory is in the vicinity of 12 to 15 thousand. We believe there are substantially more. We had a team assembled in the mid-90s that estimated it was somewhere between 70 and 90 thousand sites. Some of those are in a mine shaft that is unprotected. There are different kinds of sites that are left out there.

Senator BARRASSO. This is from Tony Ferguson, U.S. Forest Service October 2 hearing in 2007. Sixty-five thousand there, another 38.5 on Forest Service land. I was curious. The numbers just seemed large. I didn't know if there was any national inventory. It didn't sound like there really was.

Mr. BISSON. There is a Web site the committee staff can go and take a look. I think the best information is probably on the BLM Forest Service communicator website and we're trying to get tribes and states and others to put sites up there as well so the public can learn where these sites are and be aware of them.

Senator BARRASSO. Mr. Cobb, in my opening statement I referred to a section that has to do with the ability to reject or veto a mining claim by the Secretary of the Interior. I don't think you would specifically addressed that in your statement. I don't know if you

have thoughts on that. Even if all other environmental and legal requirements are met, should the Secretary have the right to accept or veto a mining claim?

Mr. COBB. I thought I had gotten to that, but we believe that is not necessarily, and given the multitude of environmental regulations out there in terms of protecting public health and environment, we don't think you necessarily need special veto authority for that to be accomplished.

Senator BARRASSO. It just seems if everything else is met it would be inappropriate that you would want to give the Administration the opportunity to make those decisions.

Mr. COBB. Right.

Senator BARRASSO. Mr. Bernholtz, I don't question any of your community's concern for protecting the watershed. It just seems very appropriate. I just want to follow up a little bit on the exchange with Senator Domenici and with what we have heard here today. Are your concerns, do they fall under enforcement issues rather that authority issues? I note from your written testimony I think you said you kind of suggest a system of lax enforcement and compliance. Could you give some examples of that, obvious State or Federal regulations where this is lax?

Mr. BERNHOLTZ. Currently in our watershed, we have a Superfund site that is actually ongoing right now in the same area on the same mountain, Mt. Emmons, that was just abandoned, like Senator Tester said, the company went belly up and went broke and the left the taxpayers to pick up the burden. It's right in our watershed. That's one example.

Senator BARRASSO. Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you, very much.

Senator Corker.

Senator CORKER. Thank you, Mr. Chairman. We were discussing earlier we didn't know whether Dr. Dombeck exists in all our states. The Mayor from Crested Butte had the best deal. We thank all of you for being here. I'm very interested in this balance that needs to exist, and having been a mayor I can understand your concern especially about the water issue that you were talking about. I know it has been discussed by Mr. Bisson that those things have to be done in advance. Mr. Wanamaker said that local government was able to be involved. I would love for any of you all again to respond. I know we talked a great deal about the quality of water issue, but is it easily done in advance or is it usually done after there's a problem? I think that's something that's very key to what we would be looking at down the road.

Mr. BISSON. If I could respond to that, Senator, and certainly if somebody else wants to go first, that's fine. When a mining company wants to mine on Federal lands, they have to submit a plan of operations. They go through a process to look at what impacts could be projected from it. We attempt to include mitigation. We require them to submit data, frequently require significant amounts of data to determine what the baseline is and what the impacts might be from various actions. The other thing that I really feel I need to say is that we have a financial assurance requirement. We require these companies to put down sufficient financial assurance to allow us to reclaim any of the damage that they may

do throughout the life of the mine, and at the end of the mine. We have 1.1 billion right now. We have the ability to require companies to set up trust funds to take care of these problems should we anticipate some problems in the future. I'm not aware of any mining that we permitted since 2001, when we put the new regulations in place where a company has simply gone belly up is what I have heard expressed and left a mess for us. I'm just not aware of any. Everything were are dealing with abandoned mines preexist those 2001 regulations.

Senator CORKER. Mr. Mayor, do you feel like on the local level, you all have the ability to be involved in that in a way that keeps any water, if the water issues occur and they're bonded that's fine, except you already have the damage to your community. So, do you feel like there are proper assurances on the front end to deal with this?

Mr. BERNHOLTZ. No, sir, Senator Corker, we don't believe that's actually true. We currently have a water treatment plant that is operating in the mine that we talked about, the Red Lady Mine. We have a 48-hour notification process, so if the water plant were to stop operating at current level, then we wouldn't know for 48, hours, and we're talking about our watershed and our drinking water and the creek that runs through the center of our town that we have events in, people plan, people have picnics by. We would know that the water is contaminate. We wouldn't be alerted for 48 hours, and I don't believe that's sufficient.

Senator CORKER. Mr. Cobb, you obviously feel like a number of laws that we have in place already deal with this issue. I think there's going to be some focus on this down the road. Are you saying in essence we do not need to in any way focus on regulations relating to the new mining law?

Mr. COBB. That would be correct. There are no other industry specifics other than environmental laws that I can think of. Environmental laws we have in the United States apply to everybody. I want to echo prior statements about NEPA and what needs to be done during the environmental review process and taking a look holistically at all the issues and addressing those issues. Again, I come back to if there are environmental issues associated with watersheds and water quality, those issues have to be addressed prior to a permit being issued. You cannot go to construction without directing those issues. Again, my point is, we've learned a lot since those Summitville mines in the 90s and in discussions in which the EPA is one of the receivers of clean up of abandoned mines in this country, sustained environmental compliance is what is necessary to make sure we don't have those issues, and from a personal perspective, our company in the Climax mine in Colorado, we have three watersheds that come off that mine, one of which goes to Don reservoir which represents 7 percent of the city of Denver's water supply. We have operated that facility for decades. There's not been an issue. We maintain sustained environmental compliance because we understand what the downstream issues are associated with that watershed. Again, there are no needs to go back and create a new environmental set of regulations associated with development of the mine projects.

Mr. BERNHOLTZ. Senator, as a former mayor of a town, if were to tell the townspeople that the water has been contaminated but don't worry, we have sufficient money to clean that up, how do you think your constituents would feel about that? They wouldn't be very appreciative of that fact. The Climax Mine is a great example in the State of Colorado where there are many acres of acid leech fields that there is no fish living in and there is no aquatic wildlife, and there are no people playing there. You don't even have any kind of recreational opportunity for anyone. I believe that the regulations should be to a higher standard, and that we should have regulations to prevent mines from actually happening if they are not appropriate for the use of public lands, if they are not suitable.

Senator CORKER. Thank you.

Mr. BISSON. I would like to add if I could, I think most of the laws at least it is my understanding regulate impact except for maybe the Endangered Species Act, and I think what is missing is of the discretion for field manager to balance the multiple uses. Again that for some reason under the 1872 mining law the perception is that hard rock mining is sort of under a different roof. Obviously, none of us need more of the things we have to comply with that aren't necessary. The thing we really have to do is avoid the impact up front and avoid the problems we need to fix things like the Beal mine and the problems you have perhaps, Mr. Mayor.

Senator CORKER. Thank you for your testimony. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman and thank you gentlemen for you testimony this morning. It is interesting to hear the back-to-back comments from the Mayor from Crested Butte and the Deputy Mayor from Juneau. I have never been to Crested Butte and really want to go. It sounds like you rely on recreation and tourism for a good part of your economic base. Certainly the community of Juneau is also a tourism-based town. Juneau is also surrounded by wilderness area I see here on your map that you've got wilderness on two sides of your community here, and yet Mr. Wanamaker, you have indicated in your testimony that through whether it is efforts at Affirmative Action to make sure that local people in the community enjoy the economic benefits of the mining operation or whether it is the balance that has been achieved one way or another.

You have used the terminology, the social license to mine. Go into that a little bit more in detail because I think this is where ultimately we find this balance that Senator Corker is talking about. It is a balance with the laws, the regulations, the permits that put in place, the an then a level of commitment by the local people that this is an industry that we welcome. This is an economic opportunity that we want to have. In a community like Juneau that is perhaps as politically diverse as any in the State of Alaska and many would say it braces a very green approach to economic livelihood to have 76 percent of the people there to say this is very important to our community. It is significant. Can you just speak to how you get to this social license to mine?

Mr. WANAMAKER. Thank you, Senator. The process that would be used, when the Coeur Mining Company came to Juneau, they reopened the old Kensington Mine. They looked at the community and saw a well educated government town, 30,000 people that were not automatic acceptors of an industry like this. So what they looked at, they identified all the different user groups that would be affected by their operations, commercial fishermen, recreational fishermen, sports fishermen, guided tours, kayakers, subsistence users, native people who use the land to live on according to traditional ways and resources. All of these groups should be affected and the area of the mine is surrounded by land that subsides for nondevelopment purpose, not wilderness, not noticing the classification. Too, they looked at it, and they said, well, we have to work with the people and find out what it is we need to do to be accepted and to become part of the community because we're going to affect the stakeholders.

So they met with the different stakeholders and they explained to them what they want to do, the kind of mine they thought think would build, and they asked for their input continuously, how can they avoid impact issues, what could they do to mitigate fishery concerns? What could they do for subsistence concerns? What could they do to avoid impact in identifying, potential impacts on cultural and historical resources from native villages and the burial sites that were in the area. We went through all these groups and met with them continuously and brought them at together public meetings and went beyond what is required in the permitting process.

They engaged the community and different stakeholders continuously, and because they genuinely adopted the ideas and concerns and explained how they could meet them from the different user groups, they were able to gain acceptance, and they put them into their operating plan they submitted to the Forest Service. They showed the community how they would meet those concerns, how they would be addressed, and the agency of the community agreed that these were appropriate solutions, and they were beyond what the permit environments would have demanded of them. So in the end, they have a community that is united with them. They're in an important watershed for fisheries, for recreation, for guided tours and cultural and historical resources, they're in ancestral lands with burial sites, and the tribes, the commercial fishermen, the recreationalists, the city assembly itself, and the various recreational user groups have all accepted and endorsed the project. That's because they took their concerns to heart and made them part of their mine operating plan.

Senator MURKOWSKI. Again, it sounds like they went above and beyond what was actually required by law. Mr. Chairman, I know that I am over my limit. I have one very quick question to Mr. Cobb if I may. I mentioned in my comments, along with several others here this morning, about the national security aspect of mining and the resources, and in your written testimony you speak to the fact that we are competing with China and India for the minerals on which we depend. You state that right now our country is dependent on imports from other countries for more than half of 45 mineral commodities and all of 17 other mineral commodities. You also stated that we only attract 8 percent of worldwide develop-

ment dollars into this country for mineral exploration and activity. Is this because of what is viewed as a more cumbersome permitting process? In your opinion, why do we see that imbalance there?

Mr. COBB. You have the statistics correct. It's a variety of factors. As I said before in the testimony, there are certainty elements and whether that is legal, regulatory or political, those all come to bear in terms of attracting exploration investments around the world. The United States competes for those dollars. We are a worldwide mining company. Those statistics apply to us as well. It is a balancing amongst all those things. We have a great resource in the United States. What we need is certainty around access, certainty for tenure to be able to develop these projects because, again, as I indicated in my oral testimony, recently it was asked from major mining projects around the world, hundreds of millions of dollars to multi-billion dollars. For companies to put that kind of money into a project, you need to understand that for the socializing to operate and community acceptance, the ability to get permits, the ability to maintain permits, and of course, if you're demonstrating sustained compliance, do you have the longevity to recoup the money. All those factors come together to play out today in terms o where exploration dollars go.

Senator MURKOWSKI. Thank you, Mr. Chairman. I appreciate the extra time.

The CHAIRMAN. Senator Craig.

Senator CRAIG. Thank you, very much Mr. Chairman. Mike, it's great to have you back before the committee in a different capacity. I've not lost track of you, but I'm glad you're enjoying your new professional involvement. Mr. Wanamaker, I also want to say, I watched it very closely over the last decade the development of the Kensington Mine because that is owned by a parent company out of Idaho, the Coeur d'Alene Mining Operation, which is a very responsible citizen, as you reflected, in their efforts to develop properties across the country that are in compliance with all the laws.

Mr. Chairman, what I thought I might do instead of asking question is offer a little reflection because since 1981 I have been involved in efforts to change the 1872 Mining Law, and I've changed along with the effort a little bit over time. First of all, I think it is important to say, that the 1872 Mining Law, and Mike, you don't need to hedge around it, it has a bias in it. Its bias is development. That's why it was put in place. Its biased was the right to discover, the right to develop a property right and the right to develop. That's what the intent of the law was. That bias still exists today. There's no question about that. The problem that the Mayor expresses, we, some, I don't want to change the bias. We want to give a Federal agency the right to deny discovery, or should I say valid, existing right and claim based on the discovery because it's incompatible with the surrounding area or a watershed or something like that. That right does not exist today. What does exist are the changes that I've watched happen since I've been here. I'm in my 28th year here, NEPA passed in 1969, was signed in 1970 and started getting regulated into law in the 1970s. When I got here in the 1980s, the National Environmental Policy Act was in place. What was rapidly coming behind it was FLPMA. That's the undue and unnecessary language that Mr. Bisson speaks about. That be-

came a new part of it. What is left of 1872 Mining Law today? When I first entered the debate and looked at it, the only thing that's left is the right to discovery, the right to develop a valid and existing right.

We're denying patents, basically, anymore except for the bias, what we put into the law, except for the 38 patents that were grandfathered in; so, patents don't exist anymore largely speaks in new discovery. The reason, in part, they don't exist is the multi-billions of dollars it takes to develop a mine. A patent existed in 1872 so that if a discovery was found, a discoverer could take it to the bank, and say, I have a property right and I want to borrow money against the property to develop the sub service. That's largely why patents existed. Of course, a lot of people from mega homes in the west now exist on old patents and for some environment interests that is a disturbing fact that it is a reality of private property that a patent ultimately becomes. What is significant today, the National Academy spoke to it in 1999, is there are now some 30-plus laws across the board that entered the arena of the 1872 mining law, to move a claim, and a valid right and a discovery to a permitting process and ultimate operation, and that's why the millions and billions exist today. It costs a lot of money to get into compliance. I disagree with you, Mayor, only in the way you praised the concern about the EISs.

The reason mining companies pay for them today is because they would wait a century for the government to pay for them and they can't. So they go out and hire a professional company that does EISs quite often, overviewed by the government, overviewed by the BLM, monitored very closely by them to complete the process for them, and to submit that to the Government. Is there a bias because they paid for it? You might argue that; I disagree with that. I disagree with that because the Federal Government has the right to say, no, it's wrong and you ought to change, this, and this, and this, and it goes to public process and it goes to public theory. I see that as the environment in which mining operates today on public lands in the continental United States. It has become a very complicated, very expensive process. What's lacking is what has changed in Crested Butte. Crested Butte is no longer an old mining town. It is a modern, sophisticated, recreational community. You love it; it is beautiful; and you don't see mining as compatible to the current Crested Butte environment. I am not going to dispute that. If I were a Crested Butte resident, I may agree. I have to argue with you though property rights are property rights. That still exists within the bias of the Federal Law based on the development concept of 1872. Here is how I have changed.

I no longer insist on patents, and I think land ought to revert back to the Federal Government. I think we ought to be much stricter on bonding so we don't have walkaways and we don't have legacies. I think we ought to develop a royalty system on our part, and I think it ought to be part applied to abandoned mine lands so we can clean them up. I also think there would be partnerships on clean up. You know, in the residue and tailings of old mines that were operated very inefficiently 100 years ago or 80 years ago or 60 years ago or 70 years ago, there may be valid mineral today. A partnership between the Federal Government and a mining com-

pany to go in and clean up a property and glean from it residue that's valuable ought to exist. I've run out of my time. I really believe for the sake of our country, we're talking about energy today. Are we're talking about new technologies. We're talking about filtering systems and dynamics to make a cleaner world exist and it all takes metals and minerals. I don't want to be dependent on China or them, especially if in China they're mined in an environmentally unsound way and that often is the case. But let's simply give the right of denial because we don't like the color of the cloth.

Let's make sure that all laws are in compliance, let's expand the bonding process, let's protect our environment, let's make sure reclamation after the fact is there and a reversion is involved to return that property to the Federal Government and the citizens of the country. That's the kind of mining law I will support. I will not support arbitrary and capricious denials that are based simply on the color of the cloth. I don't think that is fair. I don't think it can work in our country today effectively if we are to sustain a mineral industry which is underlying our ability to become a cleaner world and it clearly is. Thank you all, very much for your testimony. We'll work you and your interest as we try to resolve this. I want to be right straightforward with you, there are conditions that can be expected. There are changes that can be made, but the bill that came over from the house has phenomenally unacceptable things to this Senator, and I'll fight it and oppose it. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much. We have another panel waiting to testify. Let me just clarify one thing. Mr. Cobb, you said earlier that it is inappropriate to write in environmental requirements in this legislation because whether industry has that kind of specific standards if I understood your testimony. The Surface Mining Act that applies only to coal does contain quite a few requirements, as I understand it that don't apply to hard rock minerals. So it's not unprecedented for the Congress to consider those types of issues in determining how to regulate a permit, development of a mineral; Would you agree with that or not?

Mr. COBB. I would agree with that.

The CHAIRMAN. I guess what I was trying to explain was that in a broad context, take a look at the application of the whole ranges of regulations that identified my oral testimony, that was quite everybody. Unless there's some other burning question, let me thank this panel very much for your testimony and we will call forth the second panel. On this second panel, we have four witnesses. First is Deborah Gibbs Tschudy, who is the Deputy Associate Director of Minerals Review Management in the Minerals Management Service; James Cress, who is with Holme Roberts & Owen, a law firm in Denver, Colorado. James Otto, who is an independent consultant from Boulder, Colorado, and Ryan Alexander who is for Taxpayers for Common Sense here in Washington, DC. The main focus of this panel is to talk about the royalty issue, so we very much welcome all of you here. If you could each summarize your statement, and then we will undoubtedly ask some questions. Ms. Tschudy, why don't you start? Is that the correct pronunciation?

Ms. TSCHUDY. Yes, sir it is.

The CHAIRMAN. If you could go ahead, please.

STATEMENT OF DEBORAH GIBBS TSCHUDY, DEPUTY ASSOCIATE DIRECTOR, MINERALS REVENUE MANAGEMENT, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

Ms. TSCHUDY. Mr. Chairman and members of the committee thank you for the opportunity to appear here today to provide technical information regarding the possible reform for the Mining Law of 1872. Through its Minerals Revenue Manage program, the Minerals Management Service collects, accounts for disbursements being verified, royalty payments from all leasable minerals, which includes oil, natural gas, coal, oil shale, sodium, potash, phosphates, and all minerals on acquired land. The Bureau of Land Management administers these leases. The revenues collected MMS are one the largest sources of non-tax revenue for the Federal Government. In physical year 2007 MMS collected over $11.4 billion in mineral revenue, including nearly $1 billion from Federal and Indian coal leases and over $59 million from Federal and Indian non-coal solid mineral leases.

My written testimony provides a description of the statutory basis for the current mineral royalty program on Federal leases, as well as the description of the key components for oil, gas, and coal, non-coal solid minerals, and hard rock minerals on acquired land. In general, royalty payments in the context of oil, gas, and coal are based on the production volume, the lease royalty rates and the value of the product. The royalty rate is the percentage of the value of the production removed or sold from the lease and is generally 12.5 percent for oil, gas, and surface coal mines, and 8 percent for underground coal mines. Federal and Indian oil, gas, and lease terms provide for the Secretary of Interior to determine the value of production. The Secretary does so through the promulgation of regulations. Having the value determined by regulations, allows the flexibility to change the valuation methodology in response to changes in either market conditions or operations.

Valuation regulations for oil, gas, and coal allow deductions for the cost of processing natural gas or washing coal and transporting production to the point-of-sale. The costs that are not deductible include one production-related costs, for example, the costs of exploration, drilling or mining; two, marketing costs; and three, placing oil gas or coal in marketable conditions. Those are the costs associated with field processes that take place on or near the lease such as separation, heating, cooling, dehydration, compression for natural gas and crushing and sizing for coal. Royalties for non-coal solid minerals such as the sedimentary minerals of the sodium and potassium are based on the growth value of primary products. Royalty rates for sodium and potassium are generally five to 6 percent of the gross value, and the minimum royalty rage of 2 percent is set by statute. Unlike oil, gas, coal or sedimentary minerals, hard rock minerals such as gold, silver, uranium and the base metals like lead, zinc, and copper, must generally undergo physical processing and intensive chemical processing to produce salable products. The MMS currently collects royalties from a large lead, zinc, and copper operation on Federal Land in Missouri. The lessee sells the zinc and copper concentrates at arms-length prior to smelting. In this case, the lease document, itself, actually defines gross value

as the price paid in an arms-length sale of the zinc and copper mineral concentrate without deduction for processing and mining costs.

The lease terms allow for deductions for transportation from the mine to the mill. The lead concentration on the other hand, is smelted by the lessee prior to sale of the final lead product. In this case the lease term states that gross value is based on the net smelter return methodology. You take prices received for the metals, less the cost to ship, smelt, and refine the mineral concentrate. MMS verifies the first value calculation by auditing the lessee's sales records and the costs of transportation. Verifying the net smelter return calculation requires an audit of the sales records, the transportation costs and the smelting costs. If a royalty program is to be established for hard rock minerals, we offer five basic principles that should be considered. First is simplicity. Based on our experience, a successful royalty program must be clear and well defined in the statute, assure care contemporaneous compliance, minimize administrative costs and litigation both to the Federal Government and to the industry by reducing the complexity of the royalty calculations and associated deductions. It must be applied prospectively, and it must provide a fair return to taxpayers.

Second, a successful program must have adequate audit and compliance resources. Today we ensure compliance for about 150 coal mines and other solid mineral mines with approximately 35 audit and compliance staff. Third, a successful program must be effective and efficient and have an automated reporting system. We have in place a flexible and easy-to-use web-based system for companies to report royalties and production for solid mineral leases today. However, implementing a royalty for hard rock minerals on Federal leases, would require system modification. Fourth is audit and investigative authority. The MMS currently has authority under the Federal Oil and Gas Royalty Management Act to conduct audits and inspections, demand records, require record keeping, conduct hearings and investigations, issue subpoenas, and assess interest on late payments. This authority would be necessary to carryout an effective audit and investigative program for hard rock minerals. Finally, a strong and effective enforcement program is a key component of a successful royalty program for any mineral. The civil and criminal penalty authority covered under sections 109A and B of the Federal Oil and Gas Royalty Management Act is sufficient to carry out an effective enforcement program.

In summary, the Administration would like to work with Congress to update the Mining Law, including authorization for a clear and effective royalty program that is easily verifiable. The Administration also believes that any legislative solution must be accomplished in a way that provides a reasonable level of certainty to the industry while pursuing goals to protect or environment. Finally, the Administration believes that royalty provisions should be set at a level that does not threaten the continued, reliable domestic mineral production upon which this Nation relies. Thank you.

[The prepared statement of Ms. Tschudy follows:]

PREPARED STATEMENT OF DEBORAH GIBBS TSCHUDY, DEPUTY ASSOCIATE DIRECTOR, MINERALS REVENUE MANAGEMENT, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear here today to provide technical information regarding possible reform of the Mining Law of 1872.

Through its Minerals Revenue Management (MRM) Program, the Minerals Management Service (MMS) collects, accounts for, substantiates, and disburses revenues associated with leasing and mineral production from Federal onshore and offshore lands and Indian lands. In Fiscal Year 2007, MMS collected over $11.4 billion in mineral revenues.

STATUTORY BASIS FOR CURRENT PROGRAM

The Mineral Leasing Act of 1920 (MLA), (30 U.S.C. §§ 181 et seq.) established a type of mineral category called "leasable" minerals. Under the MLA, deposits of coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas were made subject to disposition through a leasing process. This leasing process allowed the United States to maintain title to the land and establish the type of lease, the duration of the lease, acreage limitations, and royalty and rental terms. MMS collects and disburses revenues from these leases including royalties on these types of minerals.

The Materials Act of 1947 established another type of mineral category called "salable" minerals for which minerals commodities are sold by the Bureau of Land Management (BLM). Under this Act, deposits of common varieties of sand, stone, gravel, pumice, pumicite, cinders, clay, and petrified wood were made subject to disposition through a sales process. The Bureau of Land Management collects revenues from sales of this type.

The Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. §§ 351 et seq.) extended the mineral leasing laws (the Mineral Leasing Act, etc.) to all lands acquired by the United States. The Act allowed the United States to maintain title to the land and establish lease terms for all minerals found on acquired land. MMS collects and disburses royalties on these types of minerals.

All minerals found on Indian tribal and allotted lands are administered using a leasing process under the Tribal Lands Leasing Act, Indian Mineral Leasing Act, and other statutes. Solid mineral leases on Indian lands are negotiated between the mine operator and the tribe or an allottee on a case-by-base basis. Neither the general mining laws nor the Federal leasing laws are applicable to Indian lands; however, MMS accounts for these mineral royalties on behalf of Indian tribes and allottees.

The Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA) (30 U.S.C. §§ 1701 et seq.) required the development of comprehensive fiscal and production accounting and auditing systems to accurately determine oil and gas royalties, interest on late payments, fines, penalties, and other payments owed, and to collect and account for such revenues in a timely manner.

DESCRIPTION OF THE CURRENT ROYALTY PROGRAM

The MMS collects, accounts for, disburses, and verifies royalty payments from all leasable minerals, which include oil, natural gas, coal, oil shale, sodium potash, phosphate, and all minerals on acquired lands. The term "hardrock mineral" is often used as a synonym for locatable minerals and includes the base and precious ores, ferrous metal ores, and certain classes of industrial minerals. Examples include gold, silver, platinum, copper, lead, zinc, magnesium, tungsten, bentonite, barite, feldspar, fluorspar, uranium, and uncommon varieties of sand, gravel, and dimension stone.

Following is a summary of the key components of the current royalty program for 1) oil, natural gas, and coal, 2) non-coal solid minerals, and 3) hardrock minerals on acquired lands.

Oil, Natural Gas, and Coal

Royalty payments in the context of oil, gas, and coal are based on the production amounts, the lease royalty rate, and the value of the product. In general, all production is subject to royalty payments, except in limited cases where royalty payments are statutorily or administratively waived for policy reasons, for unavoidably lost production, or for production used on or for the benefit of the lease. Royalty is computed on the basis of the quantity and quality of production at the point of royalty determination.

The BLM establishes the royalty rate for oil, gas and coal produced from Federal onshore leases. The royalty rate is a percentage of the value of the production removed or sold from the leased lands and there is a statutory minimum of 12.5 percent for oil, gas, and surface coal mines, and 8 percent for underground coal mines. The MMS establishes royalty rates for Federal offshore resources.

Federal and Indian oil, gas, and coal lease terms provide for the Secretary to determine the value of production. The Secretary does so through the promulgation of regulations. Having the value determined by regulations allows flexibility to change the valuation methodology in response to changes in the market conditions and operations.

In general, the royalty value of production from Federal leases is based upon the gross proceeds accruing to the lessee from its arm's-length sale of oil, gas, or coal. An arm's-length sale is a bona fide transaction between independent parties. If production is not sold at arm's-length, then the value is determined by other market indicators such as comparable sales, publicly available prices, etc. Valuation regulations allow deductions for the costs of processing natural gas or washing coal and transporting production to the point of sale. The costs of that are not deductible include: 1) production related costs, 2) placing oil, gas, or coal into marketable condition, and 3) marketing (i.e., finding or maintaining a market for the oil, gas, or coal production). The costs of placing production in marketable condition are generally field processes that take place on or near the lease such as mechanical separation, heating, cooling, dehydration, and compression for natural gas; and crushing and sizing for coal. These activities are distinguishable for 1)natural gas processing in which elements or compounds (e.g.: natural gas liquids) are removed from the natural gas stream and sold or otherwise disposed of, and 2) coal washing in which the value of the coal is enhanced.

Non-Coal Solid Minerals

Royalties for non-coal solid minerals, in this case the sedimentary minerals sodium and potassium, are based on the gross value of primary products, defined as naturally occurring components of ores or brines and the first marketable products produced from the processing of raw ore or brine. The royalty value of an arm's-length sale is the actual selling price, less deductions. Royalties on products sold under non-arm's-length conditions, are generally based on the weighted average sales price of the lessee's arm's-length sales of the same product, sold in bulk at the mine. Secretarial guidelines for sodium and potassium allow three types of deductions:

- When the sales price includes delivery to a destination remote from the mine, the lessee may deduct transportation costs from sales price.
- When the sales price includes the cost of packaging, the lessee may deduct packaging costs from sales price.
- When the product sold contains material not derived from the Federal lease, the lessee may deduct the cost of purchasing those non-lease materials from the sales price.

The BLM establishes royalty rates for sodium/potassium leases—generally 5 or 6 percent of gross value. The minimum royalty rate set by statute is 2 percent.

Hardrock Minerals on Acquired Lands

Unlike oil, natural gas, coal, or sedimentary minerals, hardrock mineral deposits must generally undergo physical processing and intensive chemical processing to produce salable products, such as gold, silver, uranium, or copper. Final products are the purified base or precious metals.

MMS has no role in the oversight of hardrock mining operations for mining claims on original public domain lands because companies are not currently required to pay royalties on production from these lands. However, MMS does collect royalties from hardrock operations on certain acquired lands authorized under the Reorganization Plan No. 3 of 1946 (5 U.S.C. Appendix). For example, the MMS currently collects royalties from a large lead, zinc, and copper operation on Federal acquired lands in Missouri. The royalty rate established in the lease is 5 percent of gross value of the lead, zinc, or copper mineral concentrates processed from the ore. The lessee sells the zinc and copper concentrates at arm's-length prior to smelting. In this case, the lease defines gross value as the price paid in an arm's-length sale of the zinc and copper mineral concentrates without reduction for processing or mining costs. The lease terms allow for deductions for transportation from the mine to the mill.

The lead concentrate is smelted by the lessee prior to sale of the final lead product. In this case, the lease term states that gross value is based on the net smelter

return methodology using prices received for metals less the costs to ship, smelt, and refine all mineral concentrates.

MMS verifies the gross value calculation by auditing the lessee's sales records and costs of transportation. Verifying the net smelter return calculation requires an audit of sales records, transportation costs, and smelting costs.

CHALLENGES ASSOCIATED WITH IMPLEMENTING A ROYALTY PROGRAM FOR ALL HARDROCK MINERALS

If a royalty program is to be established for all hardrock minerals, we offer five basic financial management principles that need to be considered.

1. Simplicity. Based on our experience, a successful Federal royalty program should:

- be clear and well defined in statute,
- minimize litigation,
- minimize the complexity of royalty calculations and associated deductions,
- assure contemporaneous compliance,
- minimize administrative costs to the Federal Government and lessees,
- be applied prospectively, and
- provide a fair return to taxpayers.

2. Adequate audit and compliance resources. Today, MMS, State, and Tribal auditors ensure compliance for about 150 coal and other solid mineral mines with approximately 35 audit and compliance staff. BLM inspectors also inspect mines and verify the production reported to MMS. The BLM currently administers approximately 350,000 hardrock mining claims and estimates that there are 620 active plans of operations; these are claims or mines that are either producing or have development drilling occurring on the claim. Additional audit and compliance resources would be needed to implement a royalty program for all hardrock minerals.

3. Efficient and effective automated reporting system. The MMS has in place a flexible and easy-to-use web-based system for companies to report royalties and production for solid mineral leases. Both large mining operations and small hardrock reporters use this system. Implementing a royalty program for all hardrock minerals would require modifications to MMS's system including establishing an interface with BLM's systems.

4. Audit and investigative authority. The MMS currently has authority under FOGRMA to conduct audits and inspections, demand records, require record keeping, conduct hearings and investigations, issue subpoenas, assess interest on late payments, etc. (30 U.S.C. 1701 et seq.). This authority would be necessary to carryout an effective audit and investigative program for hardrock minerals.

5. A strong and effective enforcement program is a key component of a successful royalty program for any mineral. For example, the enforcement provisions in FOGRMA, at 30 U.S.C. §§ 1719 and 1720, provide a starting point for creating an effective enforcement program.

CONCLUSION

The Administration would like to work with Congress on any update of the Mining Law and believes that any legislative solution must be accomplished in a way that provides a reasonable level of certainty to the industry while pursuing goals to protect our environment. The Administration believes that if Congress chooses to apply royalties to hardrock minerals, the royalty provisions should be set at a level that does not threaten the continued, reliable domestic mineral production on which this Nation relies.

The CHAIRMAN. Thank you, very much. Professor Otto, go right ahead.

STATEMENT OF JAMES OTTO, INDEPENDENT CONSULTANT, BOULDER, CO

Mr. OTTO. Thank you for the opportunity to present my views concerning the issue of royalties. I appear here today as a private citizen, expressing my own views, not representing any group. I have worked on mining law and fiscal issues in about 40 nations,

and have assisted many of the world's largest mining countries in the development of mining, laws regulations, and fiscal systems. In some cases, my mining taxation works only by the consumed Government, other times by the United Nations, the World Bank, and occasionally by the private sector. My most recent book is entitled, Mining Royalties and distributed by the World Bank to the ministries of finance and mining in different countries.

You have invited me here today to give my opinion on several very specific questions, and I'll go through those now. How should a royalty on hardrock minerals be structured, should they be net or gross or a combination of the two. In my experience, I highly recommend that a gross proceeds-type of royalty be considered. It is transparent, easy to administer, and avoids most tax minimization strategies. Should the rate be variable depending on the commodity? There are many types of minerals and the profit margins differ quite substantially. Many nations do discriminate the clean mineral types. Some nations have long lists of minerals with a different royalty rate and a different royalty basis defined for each, and in other nations they classify minerals into groups and have a uniform approach to each group of minerals. In other nations, they have a uniform system to all minerals. My recommendation is to have a uniform system for all hardrock minerals. What should the royalty rate be? The key to deciding an appropriate royalty is to set it at a rate most minds can bear and still make reasonable profit.

In most countries, that royalty is about 2 to 5 percent, based on its proceeds. Rates higher than 5 percent are exceptionally rare. The House has the rate around 8 percent. That would be the highest in the world and across the board for those proceeds from royalty. I'm unable to offer a third opinion as to whether that's an appropriate rate for the United States because the United States has depletion allowance. In fact, this is a negative royalty, and I haven't done the models to determine what the different royalty rate would be. My recommendation is that if the gross proceeds basis is used, the royalty rate should be no higher than 5 percent. If you use a form of net back or profits-based royalty, the rate should be greatly in excess of 5 percent. How should the royalty be administered? The royalty can be based on a system of self-assessment on paper. A standard reporting form should be developed and an agency of Government familiar with mining and royalty payments, such as the Minerals Management Service, should be assigned the responsibility and provided funding to put in place support and resources be required. What types of enforcement and compliance provisions are needed? Law should cover at least the basic topics as the requirement for the royalty payer to keep and hold certain types of sales records; empowerment of the Government to inspect records, audit returns, and adjust returns; the ability of the royalty payers to challenge adjusted returns, or the penalty for false returns or no returns.

Of key importance, as said today, is the necessity to control transfer of pricing practices where the minerals are sold at less than that an open market value to affiliated companies. What should the transition rules for new royalty be? In almost all nations where I have assisted in fiscal reforms, there are rarely any

special transition provisions provided. I would recommended that royalty be applied equally to all hardrock mines as of an effective date. Would a royalty put U.S. producers at a disadvantage to producers in other countries? The impact of the overall tax system is going to decide the competitiveness of the U.S. industry. In taking a look at what is competitive, generally a total effective tax rate, the combined effect of all the income taxes, State taxes and so forth should be in range of 40 to 60 percent. If the effective tax rate is in excess of about 60 percent, over the long-term industry will dwindle and the revenues will decline. My concluding remarks, the current mining law is out of date and it suffers from a host of problems and among these there is does not lay the groundwork for social license to operate. By this I mean the acceptance by our society that the mining industry can play a positive role. The public perceives the industry as a polluter and creator of ugly scars on the landscape, and is inherently unsafe.

Today many communities view proposed mines as not an engine of economic growth, but an industry that must be kept out of their back yard. The imposition of a royalty, especially one where revenues are earmarked for reclamation and local investment, may help the industry to regain a social license to operate. Finally, I recommend that royalty based on gross proceeds or net smelter returns and be applied to all minerals at a uniform rate and that the rate not exceed 5 percent. Thank you.

[The prepared statement of Mr. Otto follows:]

PREPARED STATEMENT OF JAMES OTTO, INDEPENDENT CONSULTANT, BOULDER, CO

Thank you for the opportunity to present my views concerning the issue of royalty considerations to be taken into account with regard to reform of the Mining Law of 1872.

I appear here today as a private citizen, expressing my own views, and not representing any group. I have worked on mining policy, law and fiscal issues for twenty five years. I have assisted many governments in the development of their mining policies, laws, agreements and fiscal systems including many of the world's most important mining nations. Examples of my recent mining taxation related work includes: lead consultant to the Treasury on the bill to introduce royalties in South Africa, mining sector fiscal analysis for the Peruvian government prior to the introduction of royalty, analysis of the mining fiscal systems including royalty in Australia, Bolivia, Egypt, Guinea, Indonesia, Mali, Mongolia, Mozambique, Papua New Guinea, Philippines, Saudi Arabia, Yemen, Zambia, and others. In some cases my mining taxation work is funded directly by the concerned government, other times by multi-lateral agencies like the World Bank, IFC or United Nations, and occasionally by the private sector. My books on the subject of mining laws and mine taxation are considered by some as standard references worldwide. My most recent co-authored book is titled Mining Royalties and it has been distributed by the World Bank to most mining and finance ministries and departments worldwide.

In my work for governments who are undertaking mineral sector fiscal reform, I advise that when designing a tax system, law-makers should be aware of the integrated impact that all taxes, royalties and fees can have on mine economics and potential levels of future investment. When determining which types and levels of taxes to apply to the mining sector, policymakers should consider not only ways to achieve individual tax objectives, but also take into account the cumulative impact of all taxes. Such awareness should recognize the importance of each tax type in achieving specific objectives. The overall tax system should be equitable to both the nation and the investor and be globally competitive.

(1) How should a royalty on hardrock minerals produced on Federal lands be structured?

—Should it be net or gross or a combination of the two?

In its simplest forms, a royalty tax liability is calculated based either on a set amount per unit volume ($/cubic foot) or per unit weight ($/ton), or is based on a percentage of the value of the mineral commodity being extracted or sold (% x value). In the first instance, unit based royalties, the determination of the royalty liability is straight forward being solely dependent on the physical quantity or volume of the material produced but in the second case, value-based royalties, the assessment is more difficult because a value must be assigned to the commodity being sold. A third and more complex method relies on some measure of net profit or net back. For a net profit royalty, a measure of sales revenue is reduced by the deduction of certain allowable production and other costs to determine a net profit, and in a net back scheme some costs are allowed as deductions but usually not primary mining costs. Net profit and net back royalties are calculated as a % times net profit or net back.

The advantage to government of unit and value based royalties is that they are fairly straight forward to calculate and pose fewer opportunities for tax minimization strategies. Their weakness is that low profit mines will have the same royalty basis as high profit mines, and this may impact them with regard to decisions about mine life, ore cut-off grade, and whether to continue operations when prices are low. Most Canadian provinces levy a form of net profits royalty, as do a few other jurisdictions including Nevada. In my experience, when a country is considering royalty reform, companies will argue strongly for a net profits type of royalty. However, most governments apply royalties based on units and/or on gross value (or net smelter return). Unit based royalties are in common use mainly for construction minerals and sometimes coal but are less often applied to most other minerals.

Determining the value of the commodity for a value based royalty is not always straight forward. Different commodities each pose their own special problems and a nation may use several different valuation methods. Not only will different commodities often be valued by different methods but even a single commodity may pose assessment challenges depending on the condition to which it has been processed. For example, take the following situation. A copper deposit is located which contains some ore suitable for recovery by smelting and some which is recoverable by leaching. The mine management determines that three products will be produced for sale: raw ore, a copper concentrate, and from an electro-winning plant, copper metal. The three copper products will obviously command very different sales values in the market. How should the three sales products be valued for royalty purposes? I usually advise nations that when devising a value based royalty to use a sales invoice (gross proceeds or net smelter return) based system for most minerals. A net smelter return (NSR) reflects the value of the mineral after deducting certain restricted costs not related to mining operations (such as the transport costs of the mineral to a third party facility that processes the mineral to a higher valued state and the charges associated with that processing).

Recommendation: I suggest that a gross proceeds type royalty be considered. It is transparent, is simpler to administer than other royalty types, and avoids most taxpayer tax minimization practices. The approach could be stated as an election by the taxpayer to pay based on either a pure gross proceeds basis or a net smelter return basis, with net smelter return carefully defined in the law.

—Should the rate be variable depending on commodity?

There are many different types of minerals and their extraction costs, prices received and profit margins may differ substantially. For example, the average gold mine probably has a higher profit potential over the long run than an average copper mine. Should not the royalty for gold thus be higher than for copper? Many nations do discriminate between mineral types. In some nations like India and Indonesia, long lists of minerals appear in their laws along with separate rates or amounts for each mineral type. Other nations classify minerals into groups and apply a different royalty to each mineral group. Still others apply a uniform system regardless of the mineral type. In my visits with tax authorities in many nations, those responsible for tax collection almost invariably prefer a uniform system, with the one exception being construction minerals. There are a variety of reasons for preferring a uniform system, and I will illustrate two reasons. Many mines produce one or more multi-metal concentrates. For example, a zinc concentrate may contain recoverable amounts of zinc, lead, silver, and gold. If different royalties apply to each mineral, how can the amount of royalty be calculated? A second reason to avoid royalty discrimination between mineral types is that it invariably leads to sustained efforts by producers of one mineral type to lobby for a reduction in their rate to the lowest rate on any other mineral so that there is a "level playing field." My

advice to most governments is to have a uniform royalty approach to all minerals, with the exception of construction type minerals and coal.

Recommendation: a uniform royalty rate should apply to all hardrock minerals.

(2) What should the royalty rate be?

This is a difficult question. For marginally economic mines, any royalty may result in them becoming sub-economic leading to closure. For highly profitable mines, a low rate may see the government needlessly forgoing revenue. The key is to achieve a royalty that most mines can bear and still make reasonable profits. The experience of many nations with substantial mining industries has been that for most minerals a royalty rate of between 2 and 5% of mineral value (gross proceeds or net smelter return) works well. Rates higher than this may over the long run result in lower income tax and royalty yields because fewer new mines will meet minimum rate of return decision criteria in times of average prices and some will not be built (the income tax base will be smaller). Additionally, capital may flow to lower taxing jurisdictions. Almost all companies would view a gross proceeds royalty of greater than 5% as punitive. A draft bill considered by the House of Representatives (H.R. 2262) would impose an NSR of 8%, one of the highest value based royalty rates that I have encountered in my work. Is this rate too high? I am unable to offer a firm opinion on that without further study, and the main reason is another feature of the US tax system—the depletion allowance. Very few nations have a depletion allowance for mineral production. Such an allowance is viewed by most nations as a form of negative/reverse royalty and most nations have rejected this concept. In most nations, the concept of a royalty is that payments should be made to government as non-renewable minerals are mined. Conversely, a depletion allowance allows an income tax deduction as non-renewable minerals are mined. Thus, over the life of a mine the impact of a high royalty is offset to some extent by lowering income tax through a depletion allowance (assuming that most mines pay income tax). Even given the depletion allowance there is a strong argument in favor of a royalty rate much less than 8%. While taxpayers with multiple operations may be able to take advantage of depletion allowances in most years because they are taxed on income from all operations, the taxpayer with a single mine will not enjoy the benefits of depletion during the early years of the project when it already has substantial other deductions or when its taxable income falls to zero because of low commodity prices. An 8% gross value type royalty will have a major impact on independent mines. If the U.S.A. did not offer a depletion allowance, I would certainly counsel that a net smelter royalty should be set in the 3 to 5 percent range.

Recommendation: if a gross proceeds/net smelter return royalty basis is used the royalty rate should be no higher than 5%. If a form of net back or net profits tax is used, the rate should be substantially higher than 5% and the optimal rate would depend on what types of costs are allowed in calculating the royalty basis.

(3) How should the royalty be administered by the Federal Government?

—How can administration be simplified?

The royalty can be based on a system of self-assessment and standard reporting forms should be developed. An agency of government familiar with mining and royalty payments, such as the Minerals Management Service, should be assigned responsibility and provided funding to put into place requisite administrative support. Royalty can be paid annually.

—What types of enforcement and compliance provisions are needed?

The basic provisions should cover at least basic topics such as: the requirement for the royalty payer to keep and hold sales records; the empowerment of government to inspect records, audit returns, and adjust returns; the ability of the royalty payer to challenge an adjusted return; penalties for false returns or no returns. Consideration could be given to incorporating by reference relevant provisions in the income tax law. Of key importance is the necessity to control transfer pricing practices.

Transfer pricing is a major and growing concern with regard to royalty in many nations. The term transfer pricing refers to a practice where the mine product is sold to an affiliated company at a price less than the product would have been sold to an unaffiliated party. It in effect transfers profit from one tax entity to another. If a royalty is based on some measure of sales value (such as a gross proceeds/net smelter return) this is a concern. The industry is consolidating, and sale of minerals between affiliated companies is common. In mining laws and model agreements that I have recently drafted I strive to reduce the potential for transfer pricing with re-

gard to royalty. For example, I may require special reporting of any sale to an affiliate, with affiliate being defined very aggressively (for example a 5% ownership interest test, rather than a just a control test).

(4) What should the transition rules for a new royalty be?

In nations where I have assisted in mineral sector fiscal reform efforts, there are rarely any special transition rules. The one exception is where a special agreement has been negotiated between a company and the government and the agreement contains fiscal stabilization provisions. If the agreement has gone to their Congress (parliament) and been ratified as a law, the usual practice is to grandfather that agreement, often with the intent to avoid future litigation. The Congress has substantial experience with the introduction of new features in other aspects of the national tax system and could follow its usual practice.

Recommendation: The tax should be equally applied as of an effective date.

(5) Should the U.S.A. impose a royalty on locatable minerals?

Most nations impose some form of royalty on minerals when the nation is the owner of the mineral. There are very few exceptions and over the past few years some countries that previously had no royalty now either have one or are planning to introduce one. Almost all new or recently amended mining laws include a royalty provision. The rationale for a royalty varies from country to country. In some, it is perceived as a form of ownership transfer tax, where the nation is provided a fiscal payment as the mineral moves from national ownership into private ownership. In other nations, it is justified as a form of usage fee—the royalty is considered as the regulatory fee paid in exchange for the "right to mine" in much the same way as a driver pays an annual registration fee to register and use a car on public roads. In this later case, questions about minerals ownership are mute which may be an important factor in the U.S.A. where for perfected claims minerals may no longer belong to the government. Regardless of the rationale, the primary reason behind imposing a royalty in most nations is to increase the amount of money flowing to the government, either to the general budget or for earmarked purposes. Most nations impose royalty and it is time for the U.S.A. to do so also.

(6) Will a royalty put U.S.A. producers at a disadvantage to producers in other nations?

Any increased cost, such as a royalty, puts a U.S.A. producer in a worse off position to compete. Increased costs may discourage investment into the sector both by US and foreign firms. However, almost all nations have royalty. In my advice to governments, I urge policy makers to take into account the complete tax system when considering a change in any part of it. It is the impact of the tax system as a whole that will determine whether most mines are able to operate profitably, and with sufficient profits to reinvest in new exploration to replace reserves. In extensive studies by myself and by the International Monetary Fund it has been determined that many mineral producing nations impose a fiscal system on mines that results in a total effective tax rate (ETR) in the range of 40 to 50%. ETR is simply the amount of all taxes and fees paid to government divided by before tax profit, calculated over the life of the mine. In my mining fiscal studies for other nations, I typically use a cashflow spreadsheet for one or more model mines and build in all the various taxes and fees and incentives. The model then calculates the ETR and the investor's rate of return. Such models are very useful to assist lawmakers in understanding the impact on a typical mine of various royalty rates in times of high and low commodity prices. They also allow a better understanding of the ways that the tax system works in a holistic way. For example, to what extent does the depletion allowance offset the impacts of a high royalty? To what extent does the ability to deduct a royalty from income subject to income tax affect profits? I don't know if such modeling has been done to assist in setting a proposed royalty method and rate in your reform effort. If the method and rate is contentious, I suggest that such modeling may be a useful tool for lawmakers to have so as to understand whether the rate is reasonable. Taken alone without reference to the rest of the tax system, a gross proceeds or net smelter return royalty applied to all minerals at rate of 8% will perhaps be the world's highest (rates on individual minerals are sometimes higher than 8%). Lawmakers should take care to create a royalty system that provides a real and fair return to the government but that allows the industry to make adequate profits to invest in new tax paying mines.

CONCLUDING REMARKS

The current mining law is badly out of date. It suffers from a host of problems and among these is that it does not lay the groundwork for "a social licence to operate." By this I mean the acceptance by our society that the mining industry plays a positive role in our well-being. The public perceives the industry as highly polluting, causing a proliferation of abandoned eye-sores, putting workers at high risk, and contributing little to the national or local economy. Today, many communities view a proposed mine not as an engine for economic growth, but an industry that must be kept out of their back yard. The imposition of a royalty, especially one where revenues are earmarked for reclamation and local investment, may help to regain the industry's social licence to operate. Since 1990, over 100 nations have replaced or made major amendments to their mining laws. It is time for the U.S.A. to do the same.

The CHAIRMAN. Thank you, very much.

Mr. Cress.

STATEMENT OF JAMES F. CRESS, PARTNER, HOLME ROBERTS & OWEN, LLP

Mr. CRESS. Thank you, Mr. Chairman, and members of the committee. I appreciate the opportunity to speak to you today on the issue of hardrock mining royalties. I am a lawyer. I have been in private practice for about 20 years. I have during that time represented landowners and mining companies in their negotiations both with the U.S. and governments in other countries. I would like to start by talking about the difference between a gross royalty and a net royalty, and then talk a little bit about some of the comparisons we did with oil, and gas, and coal, even though it is not the best comparison. A gross royalty, I believe, is a blunt instrument. It's not the best or fairest measure of the value for minerals contained in Federal lands. That Government brings to the table millions of acres of Federal lands of generally unknown mineral potential.

There's some knowledge, but to some extent it is really unknown. The way the hardrock industry works, you have got to discover those minerals. You have to expend millions of dollars to discover a mineral body. They tend to be very small, and then to determine whether that mineral body is recoverable, you have to look at the metallurgy. I brought a sample that almost didn't get through security of what comes out of these mines. Which is ore. It is a chunk of rock that has to be processed, as Ms. Tschudy said, considerably from the point at which it comes out of the ground. If you are lucky, it looks like this. This is an sample of molybdenite, and you can actually see the higher concentration of molybdenite on the surface of this side of the rock. But often these days it looks like this. So the amount of processing that goes into hardrock minerals is just a quantum, absolutely different that what you have with oil and gas and coal.

The other thing to consider is, how are minerals found? There's an entire segment of the industry that finds mineral deposits. These tend to be individual geologists or people working in small groups together and small businesses. The Northwest Mining Association consists of a lot of these folks, and they find mineral deposits that are promising and then interest from a larger company or a company with mining ability to develop those. They can't mine them themselves. How do they get paid for that activity? They get paid through a royalty, in an overriding royalty. So, you have got

to leave room for that system to continue to work, and it relates also to why you can't just impose the transition rules. Those agreements are in place on existing claims on many of them. The gross royalty will also take a larger percentage of profit when prices are low, and commodities are notoriously volatile in terms of their up and down prices. Even at $900 gold today, we haven't seen the heights of the 1980s when gold was over 2 thousand in current dollars. Gross royalty discriminates more among types of minerals and among high and low cost operations. For this reason, I would recommend that you look at a net royalty system similar to what Nevada has in their net proceeds of mine tax. That doesn't take care of the all inequities of the gross. If you apply a uniform rate, that allows each operation to deduct a particular cost structure.

For a molybdenum mine, that structure is one complete set of processing streams, and for a gold mine it is a completely different set, and for a copper mine it completely different. Then so, a net royalty that allows these cost deductions is probably the best way to go. The reason that oil, and gas, and coal pay this amount, and I have added to my package today a small picture that depicts this, is that those products are valued essentially at the mine mouth. The oil comes out of the ground and there is a market for in its true form when it comes out of the ground and there is a market for it when it comes out of the ground and the royalty is assessed at that point. Similarly, coal typically comes out of the grown and it is crushed and there is a market for the coal at that point. Some coal has to be washed because it contains a lot of ash. That cost is deductible. As Ms. Tschudy has indicated, gas can sometimes be put directly in the pipeline to the point intended. If it needs to be processed, that cost is deductible under the current law.

So, what you really have is a valuation of coal and oil and gas at right here about the mine mouth. What is proposed in H.R. 2262 using gross income for mining a definition not really designed for royalty at all, is considerably in excess of that. It really is an unfair burden to put on the royalty producers or mining companies. Finally, I think that if you're looking for comparisons, private royalty negotiations and individual examples that have been made as I listed in some of my written testimony, are really an unfair comparison. I think they need to look at what the states have been doing. You should look at successful regimes and one that has collected revenue over decades like Nevada's and look at what it's been doing there. Finally, for administration, I believe that although a net royalty is complex, our MMS is capable of handling it I believe. In Canada, they tried the net smelt return royalty, and it was a disaster in British Columbia, and they adopted developed a profits-based approach. We have the luxury of the administrative capacity to administer those. In developing countries they often do not. I understand that recommendation of Professor Otto as to this. I would be happy to answer any questions. Thank you.

[The prepared statement of Mr. Cress follows:]

PREPARED STATEMENT OF JAMES F. CRESS, PARTNER, HOLME ROBERTS & OWEN, LLP, DENVER, CO

Mr. Chairman and members of the committee, my name is Jim Cress, and I am testifying today as a mining lawyer in private practice on the subject of mining royalties. I am a partner at Holme Roberts & Owen, a 109-year old law firm that rep-

resented miners in Colorado in the late 1800's and today represents mining companies around the globe. I have specialized for nearly 20 years in U.S. and international mining law, as well as oil and gas and coal law. I have represented mining companies and landowners in negotiating royalties for gold, silver, copper, coal, uranium, oil and gas and other minerals, and have advised clients on royalty compliance for private, federal and state royalties and severance taxes. In my international practice, I have negotiated royalty and tax sharing agreements with governments from Asia to the Americas. I have taught in the Graduate Studies program in Natural Resources and Environmental law at the University of Denver Sturm College of Law, am a contributing author to the Rocky Mountain Mineral Law Foundation's American Law of Mining treatise, and am the former Chair of the Mineral Law Section of the Colorado Bar Association. Thank you for the opportunity to appear and speak on the important issue of hardrock mining royalties.

A royalty on hardrock minerals can and should be structured to promote a fair return to the public and a viable domestic mining industry. Fairness and continued viability of hardrock mining on federal lands should be the cornerstone of any royalty regime.

SIGNIFICANT PROBLEMS WITH A GROSS ROYALTY

A gross royalty will adversely impact investment in mining projects compared to a net royalty

A royalty assessed on gross income increases the economic risk of a given mining investment, and acts as a disincentive to investment. As a consequence, a company looking to develop a project will require a higher required pretax and after-tax rate of return to accommodate the increased risk. Because a royalty assessed on net income has a smaller effect on the variability of after-tax rates of return, it is a better basis for assessing a royalty.

The difference between these two royalty methodologies becomes even more evident when volatility in commodity prices are taken into consideration. Simply put, as commodity prices decrease, the rate of return required to justify a mining investment increases more dramatically under a gross royalty than under a net royalty. Because the other costs of the mining operation are relatively fixed, the gross royalty takes a bigger bite out of the shrinking income pie as prices decrease.

Because the royalty assessed on gross income will cause a larger reduction in after-tax income when profits are low (or negative) than a royalty assessed on net income, the royalty on gross income can exacerbate industry downturns by causing a greater reduction in the cash flows of mining companies when profits are low. In this way, gross royalties are inconsistent with the principle of sustainable development. A gross royalty reduces the volume of an ore deposit that can be recovered. Each deposit of metallic minerals will have varying grades of mineral, generally requiring extensive concentration and refining to be marketable. The portion of the deposit with grades too low to be recovered economically is either removed as waste or left undisturbed in the ground. A gross royalty raises the "cutoff point" between recoverable ore and waste, shortening the life of a mine by causing what otherwise would be valuable minerals below the cutoff point to be lost. These lost reserves generally can never be recovered, because once the mine is closed and reclaimed, the stranded reserves are usually uneconomic to recover on their own.

A gross royalty is not a fair measure of the value of hardrock minerals in federal lands

Any royalty payment to the United States for hardrock minerals should be based on the value of the United States' ownership interest in the land. That interest is limited to the minerals in the ground, and it cannot justifiably be extended to require a royalty to be paid on values added by the mining company after mining, through processing, refining and selling the mineral products. The United States makes available raw land, and any minerals in the land for development, but the United States contributes nothing to the costs and effort of discovering, mining, processing and transporting the minerals to market. In addition, the mineral potential of the millions of acres of federal land is not uniform, and a royalty needs to be set low enough to provide an incentive for mineral exploration across a broad range of lands with differing mineral potential.

A gross royalty is punitive in periods of low commodity prices

Since a gross royalty approach generally does not allow deductions for mining costs, a mining company would have to pay the royalty regardless of how high those costs may be for difficult mining situations or for low grade ores. This would require a mining company to continue paying a royalty even when it is operating at a loss, and that royalty could even cause the loss. No mine can be operated long at a loss.

The result would be that some mines would shut down prematurely, creating loss of jobs, federal state and local taxes not paid, and suppliers of goods and services suffer. The result is lost economic benefits affecting both those directly involved in the mining activity and the governmental entities, including the United States, that are sustained by those activities.

Moreover, the premature loss of a mine before maximum economic recovery of the mineral deposit is achieved is a blow to the sustainable development of our natural resources, since some of the impacts of the operation will be felt without maximizing the benefits to society and affected communities. In times of high prices, mining operations can be expanded to recover lower grade or harder to process minerals, because the higher prices support the additional costs of recovering these minerals. A gross royalty can erode this ability to maximize recovery of the entire deposit.

A net proceeds or net income royalty, in contrast, does not cause a mining operation to operate at a loss. A net royalty automatically reduces during periods of low prices and increases again when prices are higher, permitting mining operations to weather periods of low commodity prices and maximize the recovery of marginal ore during periods of high prices.

Due to the cyclical nature of demand for mineral commodities, there have been and will always be periods of lower commodity prices. A net royalty provides the best incentive to explore for minerals on federal lands throughout economic cycles.

A gross royalty unfairly imposes a different levy on different minerals, while a net royalty is generally more equitable among minerals

Gross income is closer to net income for some minerals than for other minerals, resulting in a distortion between minerals if the royalty is based on gross income. For example, the end of the on-site mining process for a gold mine is typically a "doré" of 90% gold mixed with silver and other metals, which is then refined into 99.5% pure gold at an offsite refiner. The end of the on-site mining process for a copper mine is a typically a concentrate that is much further from the final refined copper product. A gross royalty applied at the end of the on-site mining process thus has a disproportionate impact on these two very different mineral products.

A net proceeds or net income royalty cannot overcome the fact that income for royalty purposes will be determined at different points for different minerals, but it promotes more equal treatment of minerals by allowing deductions for the differing cost structures of various minerals, mining methods and scales of operation. If one mineral requires more extensive processing than another, this will automatically be taken into account by permitting a deduction of the higher costs of the more processing-intensive mineral.

ROYALTY RATE

Determining what rate is appropriate to apply across dozens of commodities and millions of acres of federal land with differing mineral potential should not be a matter of opinion or guesswork. Congress should look closely at the type and rate of hardrock mineral royalty that has worked in states and countries that have maintained vibrant mining industries. Nevada's net proceeds approach is particularly worth studying, as an example of a regime that has been in place for decades during which time mining has remained a critical part of the state's economy.

ADMINISTRATION OF A ROYALTY

Complexities exist in any royalty approach, so the goal should be a fair return

The gross royalties currently imposed on oil and gas, coal, and trona, potassium and other bedded deposits are not simple to administer. Detailed regulations of the Department of the Interior contain complex processing deductions for gas, coal washing allowances, and transportation deductions. Any royalty regime for hardrock minerals is likely to be even more complex, because the Department will be faced with a greater number of mineral commodities, disparate mining and processing methods, and differing scales of operation. Complexity is thus unavoidable, and the priority of Congress in fashioning a hardrock royalty should be achieving a fair return rather than chasing the illusory goal of simplicity of administration.

Even the gross royalty proposed in H.R. 2262 will not avoid controversies in administration. H.R. 2262 contains a gross income royalty based on the definition of "gross income from mining" for depletion purposes under Section 613(c) of the Internal Revenue Code. Currently, the Federal courts are split on exactly where the "mining" process ends under Section 613(c) for the solvent extraction/electrowinning (SX/EW) method of recovering metals from solution. One federal circuit has held that the end of the mining process occurs after solutions are extracted and concentrated (the end of the solvent extraction phase). Sunshine Mining Company v.

United States, 827 F.2d 1404 (9th Cir. 1987). Another circuit has held that "mining" concludes only after the metal is deposited onto cathodes from solution using an electrolytic procedure (the end of the electrowinning phase). Ranchers Exploration & Dev. Corp. v. United States, 634 F.2d 487 (10th Cir. 1980). H.R. 2262 incorporates all of these complexities into the federal royalty system, along with the potential for different interpretations by the Department of the Interior and the Internal Revenue Service on the same issues. H.R. 2262's approach is not a recipe for either fairness or simplicity of administration.

A net proceeds royalty can more fairly be applied uniformly across different minerals and mining methods

The "fairest" royalty regime would be tailored to the individual characteristics of each mineral deposit after the characteristics of the deposit were known, but such a system would be difficult if not impossible to administer and the uncertainty regarding the amount of the royalty would act as a disincentive to mining investment. A royalty based on net income or net proceeds can be applied to many different minerals, mining methods and sizes of mining operation without the need to differentiate between the types of minerals being produced. Because it is based on revenues less allowable costs, the net calculation can be applied across different minerals, mine methods and scales of operation.

A net proceeds royalty can be structured to ameliorate concerns about administration of the royalty

Specifying the definition of "income" for royalty purposes and permissible types of deductions in the statute itself can help provide an appropriate balance between ease of administration and maintaining a strong, viable domestic mining industry. For example, the Nevada net proceeds of mine tax is based on a list of permissible deductions contained in the statute itself, with some of the details of those deductions elaborated in the Nevada regulations. A federal hardrock royalty should also specify the definition of income and permissible deductions.

Hardrock royalty enforcement provisions should not slavishly follow oil & gas precedent

Royalty enforcement and compliance provisions should be simple and designed to give the Department of the Interior adequate enforcement authority. They should not be slavishly modeled on existing enforcement statutes, or some royalty enforcer's "wish list" of enforcement authority as H.R. 2262's provisions appear to be. Many of the enforcement provisions of H.R. 2262 appear to be closely modeled on the provisions of the Federal Oil & Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. §§ 1701 et seq., Pub. L. No. 97-451, § 2, 96 Stat. 2448 (1983). FOGRMA was enacted to address the historical problem of theft of "hot oil" from federal lands as documented by the Linowes Commission. See Report of the Commission on Fiscal Accountability of the Nation's Energy Resources, U.S. GPO 1982-0366-617/523 (1982). No such historical abuses exist for hardrock mining operations, and some of the provisions of FOGRMA (duties imposed on third party transporters, for example) make little sense in the hardrock context.

Other royalty enforcement provisions of H.R. 2262 go well beyond FOGRMA's requirements, for no apparent reason. These include the requirement that any "person paying royalties" essentially assume all liability for correct payment on behalf of the claim owners. H.R. 2262 also exceeds the requirements of any other federal royalty statute by requiring retention of royalty records for seven years after bond release for a hardrock mining operation, which may mean decades of record retention for any mine that operates for 10 or 20 years, a back-door attempt to avoid any meaningful statute of limitations for royalty audits. The Department's audit authority is also inexplicably broader than under FOGRMA, extending to all third parties that are directly or indirectly involved with production or sale of minerals. The Department is authorized to impose penalties for underpayment that far exceed the penalties provided under FOGRMA, again without any legislative history or basis for these more onerous requirements. Penalties are provided for without FOGRMA's six year statute of limitations on enforcement of those penalties. H.R. 2262 imposes joint and several liability on all owners of any interest in a claim for royalties on "lost or wasted" minerals from a claim, which will inject both the Department and every owner of an interest in a claim into second-guessing the mining and processing methods for development of the claim. This provision in FOGRMA addressed a documented issue with unauthorized flaring or venting of gas from oil and gas wells, which has no parallel in hardrock mining operations. These provisions appear to be solutions to problems not shown to exist in the hardrock context.

Enforcement provisions for a hardrock royalty should include a reasonable statute of limitations, not exceeding six years, for record retention and government claims

for underpayment of royalties. The enforcement provisions should also allow for a hearing on the record in the event that penalties are imposed for underpayment. Interest should be chargeable for both underpayments and overpayments of royalties, at the same rate. Congress should not incorporate wholesale provisions from oil & gas statutes that were designed to redress problems that have not been shown to exist for hardrock operations.

Any hardrock royalty legislation should allow for royalty reductions and waivers on a case by case basis

All current federal royalty statutes for oil and gas, coal and other minerals permit the Department of the Interior to grant royalty waivers and reductions on a case by case basis. The same flexibility should be provided in any hardrock mining statute. In order to avoid administrative complexity, any hardrock royalty will probably have to be applied in a fairly uniform manner across a large number of commodities and mining and processing methods. Any inequities created by this broad brush approach can be partially addressed by providing a mechanism for specific operations to apply for royalty relief, in order to address economic hardships or to maximize the economic recovery of minerals from each deposit.

TRANSITION RULES FOR A NEW ROYALTY SHOULD BE LEGALLY DEFENSIBLE AND FAIR TO AVOID POTENTIAL TAKINGS LITIGATION AND PROMOTE CERTAINTY

A grandfathering of at least some existing unpatented mining claims from the new royalty is both required by law and required to treat fairly parties that have made significant investments in federal lands prior to the enactment of the royalty. Moreover, it may be advisable to grandfather some claims that may not constitute fully vested property rights, in order to have a simple, bright-line test for which claims are subject to the new royalty, which will reduce uncertainty, reduce administration and litigation costs for the government and promote mining investment.

It is settled law that unpatented mining claims supported by a "discovery" of a "valuable mineral deposit" create Constitutionally-protected property rights in the owner of the claim. Imposition of a royalty on such claims is likely to trigger significant "takings" litigation against the government. A royalty is in no way comparable to the imposition of simple federal filing requirements on unpatented mining claims, which was upheld by the Supreme Court in United States v. Locke, 471 U.S. 84 (1985). Grandfathering claims with a valid discovery as of the date of enactment from the royalty is thus the minimum transition approach that is legally defensible, as Professor Leshy agreed in his prior testimony before this Committee.

The problem with protecting only claims with a valid discovery is that determining which of the hundreds of thousands of mining claims has a discovery would be an unprecedented administrative challenge for the Department of the Interior. Under a long line of court cases and administrative decisions, a mining claim does not have to be currently producing to support a "discovery"; a reasonable prospect that the claim could be profitably mined is sufficient. Currently, the Department requires an administrative hearing in order to contest claims for lack of a discovery. Due process requires a hearing for claimants on this issue. The Department has limited staff trained in the specialized rules applicable to determining whether a "discovery" exists. It would be unworkable for the Department to adjudicate hundreds or thousands of these mining claim validity cases to determine which claims can be legally subjected to a new federal royalty.

To avoid the royalty transition becoming an administrative gridlock, Congress should apply the royalty only to claims located after the enactment of the law or to claims that are not included in a plan of operations approved by the Department prior to the date of enactment (without a requirement for commencement of commercial production). Having a "bright line" test will save administrative costs and will also promote certainty about the application of the new royalty, which will encourage investment.

IT IS INHERENTLY UNFAIR TO APPLY APPROACHES FROM COAL, OIL AND GAS OR PRIVATELY NEGOTIATED ROYALTIES

Hardrock minerals are different, and should be treated differently than coal and oil and gas

Why should hardrock minerals not be subject to the 8 percent or greater royalty imposed on oil & gas and coal? The dramatically different characteristics of the minerals themselves and the ways in which they are explored for and developed justifies different treatment.

Oil and gas are fluid and usually collect in sedimentary basins. Exploration for oil and gas usually consists of seismic studies to detect the type of structures where

oil and gas are found. These studies are conducted at relatively low cost and usually without the need to acquire more than an easement over the property to be explored. When a promising prospect is identified leases are acquired, a well is drilled and core samples, drill stem tests and logs are taken to determine whether the well is successful. The costs of drilling can sometimes be quite high, but a single well can also drain a large area because of the fluid characteristics of oil and gas. Development of a field is usually accomplished through initial exploratory wells followed by development wells that are drilled in locations reasonably expected, as a result of the information gathered from seismic studies and the initial wells, to maximize production from the same reservoir. Once one or more exploratory wells have discovered an oil and gas pool, identification of the size and shape of the reservoir can be conducted with relatively low risk and expense.

After extraction, oil must be processed and refined before it is ultimately consumed as vehicle fuel or other product. The royalty on oil produced under federal leases is not based upon the value of these refined products, however; it is measured by the value of the crude oil at the lease or wellhead, prior to such processing and refining. Unlike many other minerals, there is a market for oil in its crude, unrefined state and therefore a ready value for royalty purposes before the value added by refining and processing. Most oil is sold at the wellhead into this crude oil market and that wellhead sales price establishes the value of the oil for federal royalty purposes. Thus, it is somewhat misleading to call the federal royalty on oil a "gross" royalty. Because the royalty is typically based on the value of the crude oil prior to processing and refining, the royalty is, in essence, "net" of those costs, equivalent to a net or mine mouth royalty on the value of raw ore in a hardrock operation.

Similarly, federal royalty on gas is also based upon the value of the gas at the lease. After gas is extracted, often the only thing required for consumption by the ultimate end-user is transportation (the cost of which, if paid by the producer, is deducted before royalties are calculated). Sometimes further processing is required to remove sulfur and separate gasoline, butane and other constituents from the gas. The royalty, however, remains payable on the value of the gas at the lease or wellhead and the processing costs incurred by the producer downstream of the lease are deducted under the federal rules before calculating royalty, to arrive at essentially a "net" value at the lease.

Coal is a solid mineral of generally uniform quality and composition. In the West, where most federal deposits exist, coal beds often consist of vast deposits of great thickness, in Wyoming averaging 80 feet and up to 200 feet. Little exploration for coal is required, and it is relatively easy to determine the quality of the coal and the thickness of a seam prior to mining with drilling and sampling. The western coal miner thus knows much about the characteristics of the mineral he has to sell prior to actual mining. At the same time, coal mining is an extremely labor and capital-intensive enterprise. Because of the need to construct facilities, obtain equipment, employ workers, and comply with substantial permitting requirements, it can take years to design, permit and construct a mine. For these reasons, coal from federal lands in the West has often been sold under fixed, long-term contracts entered into prior to construction of a mine. Based on the certainty of a market provided by these contracts, the coal miner can lease sufficient reserves to mine over the life of these long-term contracts and make the considerable capital investments required to construct the mine. Additionally, many long term coal contracts and state utility laws allow for the pass through of the royalty burden to the consumer, while no such pass-through is available for many hardrock minerals, which are sold and priced in global markets.

While the 12.5% royalty imposed on coal in 1976 was a considerable increase over the coal royalties typical at the time, the royalty did not take effect for many federal coal leases until they were readjusted, which occurred over a period of 20 years. In the meantime, the demand for low-sulfur western coal boomed due to the increasingly stringent requirements of the Clean Air Act, and transportation costs out of the Powder River Basin decreased, which permitted the large surface coal mines developed in Wyoming during this period to bear the increased royalty burden, which in any event was generally passed on to utilities (and consumers) under long term coal contracts. The higher-cost coal production in Colorado and North Dakota did not fare as well as Wyoming. Colorado's production initially plummeted, and North Dakota's fared little better, and only because North Dakota mines are associated with mine mouth power plants and because the state made efforts to prop up the industry by lowering taxes and discouraging import of coal from Wyoming. The higher BTU or heating value and low sulfur content of Colorado coal has allowed the market to rebound since that time, and to bear the 8% royalty applicable to

Colorado's underground coal deposits (although some Colorado mines have operated under royalty reductions during economic downturns).

In addition, the federal coal royalty regulations permit the deduction of the most material processing cost, coal washing, and transportation. Thus, the federal coal royalty is not a gross royalty in the strictest sense, and is more akin to a net or mine mouth royalty on the value of raw ore in a hardrock operation.

Oil and gas and coal are not the only leasable minerals on federal lands. Sodium, potash, and phosphate are also leasable minerals. These minerals are commonly occurring, low margin industrial and fertilizer minerals the economics of which cannot support a 12.5% or even an 8% royalty. The statutorily established base rate for phosphate is 5% and for sodium and potassium is 2%. That is because the nature of these commodities and the economics around their extracting and marketing differ from oil and gas and coal. In practice, these mines have operated under government-sanctioned reduced royalties during periods when economic conditions and foreign competition threatened to close the mines.

These examples demonstrate clearly why prevailing royalties differ from mineral to mineral. Specific analyses can be made for many other types of minerals. It is clear, however, that application of a gross royalty at a rate of 8% to hardrock minerals simply because that is what is done with coal and oil and gas would be overly simplistic and dangerously naive.

Hardrock minerals are, by comparison, scarce and hard to find. Unlike oil and gas and coal, the size and shape of a hard rock ore deposit, the quality of the ore, the mineral composition, the value of the mineral products, the metallurgical processes required, the mining methods, the commodity prices and the capital costs all vary for each operation. Commercial ore bodies may be found under as little as a few acres of land. Exploration is conducted through exploratory drilling which gives initial clues regarding the deposit, followed by many expensive development drill holes to define a deposit for development and expensive feasibility studies of the metallurgical and other processes that will maximize production of the target mineral. Once a prospect is identified, development commences at considerable cost, with the capital and labor intensiveness of large coal mines, but without the geologic or metallurgical certainty of coal mines nor the economic certainty and incentive of long-term coal sales contracts, which are not customary for most hard rock minerals. The prices of hard rock minerals have historically been subject to great fluctuation. Because hardrock deposits were often concentrated by ancient subsurface magma flows which have been altered by subsequent faulting, the concentration of metals and their location can vary considerably over relatively small distances, unlike the relatively constant quality of western coal deposits. As a result, portions of a hardrock deposit may be economic while other portions may contain near- or sub-economic ore that is extremely sensitive to the addition of royalty and other burdens. The combination of price volatility and the variations in the concentration and the chemical and geological characteristics of the minerals within an ore body can turn a profitable mine into valueless rock with a sudden downturn in the market.

Hard rock minerals, therefore, require considerably different approaches to exploration and extraction than do oil and gas and coal. Oil and gas and coal are relatively plentiful, and occur over relatively large areas where found. Hardrock minerals are scarce and occur in small concentrations, and must be discovered by expending considerable money pursuing elusive geological clues. The period between exploration and extraction for hard minerals is much more lengthy than with oil and gas or coal, and since hard minerals prices are not stable, the risk of the project becoming uneconomic before production begins is substantial. These factors are some of the reasons that hard rock mining transactions and agreements are considerably different from each other and from those dealing with oil and gas and coal. These factors also weigh in favor of a royalty reduction provision in the bill, so that site-specific determinations can be made to reduce costs and achieve the maximum economic recovery from federal mineral deposits.

While individual royalties for specific commodities would theoretically be the best approach, such a system might be too difficult to administer. The most reasonable approach given the large number of commodities to be covered would be a uniform net royalty that permits deduction of mining and processing costs. The Nevada net proceeds tax provides a model that has been tested in practice, and you should consider a similar approach for federal lands.

Gross or net smelter return approaches used in private negotiations are inappropriate comparisons

A negotiated royalty between private parties is not analogous to the federal government's imposition of a royalty on millions of acres of unexplored federal lands. Private royalties are negotiated on a case by case basis for each property. Usually,

the royalty negotiated depends on what information is known about the property at the time of the negotiation. The less that is known, generally the lower the royalty.

An 8% gross royalty, such as contained in the H.R. 2262, for lands not proven to contain a mineral deposit is unheard of. I am aware of only one royalty of this magnitude in 20 years of practice. At the time Newmont's Gold Quarry royalty was negotiated, there was a known ore body containing eight million ounces of gold on the property, Newmont had existing mine facilities already built on adjacent land, and the owner conveyed the mineral rights to the surrounding area (measuring roughly 25 miles by 15 miles), free from any royalty. That royalty-free land has since proven to contain millions of ounces of additional gold. Clearly, this is not the typical case on unexplored federal land.

Other examples of large "gross royalties" cited by mining opponents (see, for example, Earthworks "Fact Sheet," H.R. 2262's Royalty: Industry Charges Itself Higher Rates (10-29-07)) turn out on closer examination not to be gross royalties at all, or are explained by the circumstances of the individual negotiation. They are in no way "typical" private royalties.

For example, the AU Mining Inc. royalty cited by Earthworks was on a small underground mine (producing only 133,000 ounces in the last 10 years) that has average grades of more than 16 ounces per ton of ore, considerably higher than most operations. Moreover, the royalty burden apparently could not be sustained even with these ultra-high grades, forcing AU Mining to give the property back to the owner, LKA International, in a transaction providing for a much lower royalty capped at a maximum of $12 million.

The Barrick Pipeline royalty cited by Earthworks is actually a highly-negotiated series of royalties covering different areas in the mine, consisting of sliding-scale gross smelter return royalties (GSR1 ranging from 0.40% to 5.0% and GSR2 ranging from 0.72% to 9.0%), a 0.71% fixed gross royalty (GSR3), and a 0.39% net value royalty (NVR1). The 9% royalty was granted on lands adjacent to an existing mine, known to contain millions of ounces of gold, in exchange for other royalty interests in an adjacent mine that was going into production at a later date. The Pipeline royalties resulted from an exchange of royalties in proven reserves with determinable values, and are in no way comparable to a royalty negotiated when the mineral value of the property is unknown.

The "gross royalty" paid by High River Gold on its Taparko-Boroum mine in Burkina-Faso is not a royalty at all, but a form of financing known as a "production payment" (an arrangement similar to a loan, with larger repayments of the "principal" in the form of gold at the beginning of the operation, decreasing to a much smaller royalty "tail" after recovery of the principal). The company receiving the royalty provided $35 million to High River Gold to construct the mine. High River Gold will repay this with $35 million in gold through a temporary gross smelter royalty, which will then terminate and be replaced by a 2% royalty.

These atypical royalty arrangements in fact prove the point that a royalty on specific mining properties is negotiated based on what is known about the mineral value at the time of the negotiation (unlike the federal royalty, which must be designed to encourage exploration on millions of acres of land with unknown mineral potential). Private royalties are generally negotiated based on existing information about the particular property, including drill hole data and studies or analyses of the target mineral body. The purpose of the federal royalty is to encourage exploration and discovery across millions of acres which are not yet proven to contain mineral deposits.

In privately-negotiated royalties, there are almost as many royalty rates and calculations as there are minerals. Each is dependent upon the nature of the product that is produced and sold, customs and practices in the industry, the strength of the market for the particular mineral, the mining cost/processing cost ratio, the specifics of the property for which the royalty is being negotiated, and many other factors. Use of a net royalty for federal lands avoids the need for extensive, mineral-specific legislation. All mines measure net revenues, or profits, and bear determinable operating costs. Therefore, a reasonable percentage net proceeds royalty can be applied and achieve a reasonable return for the use of federal lands, without disproportionate impacts on any particular mineral industry.

In my experience, other countries are paying considerable attention to the appropriate royalty and tax burden to encourage mineral exploration and development. The United States has relatively low grade deposits of many hardrock minerals, relatively high labor and production costs, and stringent environmental and operating requirements. These costs must also be balanced in determining whether a royalty is necessary on federal lands and if so, how much royalty should be charged. Congress should not impose a royalty without careful consideration of the economic and competitive impacts.

States have not generally adopted gross royalties, and states that have gross royalties use much lower rates than H.R. 2262

Another "fact" cited by opponents of mining is that a "majority" of states have adopted gross royalties. See, for example, Earthworks "White Paper," "A Hardrock Mining Royalty: Case Studies and Industry Norms" (102-07). In most cases where "gross royalties" are allegedly imposed by states, the royalty percentage is a fraction of the 8% royalty in H.R. 2262 or the royalty is imposed on ore or an earlier stage product, in some cases after deduction of mining and processing costs. See, e.g., Ariz. Rev. Stat. § 425201—5202 (2 ½% royalty on 50% of net proceeds); Colo. Rev. Stat. § 3929-101 et seq. (2.25% of gross value of ore, excluding any value added subsequent to mining, subject to an exemption of first $19 million in in come and credits for property taxes paid); Idaho Code § 47-1201 et seq. (1% of the gross value of the ore, after deducting costs of mining and processing); Mont. Code Ann. §§ 15-6-131, 15-23-503, (1.6% net smelter return royalty on gold doré and bullion); New Mexico Code, Chapter 7, Art. 26 § 7-26-4 and 7-26-5 (0.5% for copper, 0.2% for gold and silver, and 0.125% for lead, zinc and other metals, on 50% of the value of the minerals). These state royalties are considerably lower than the 8% gross income royalty in H.R. 2262 and in some cases are essentially the equivalent of a net proceeds royalty.

BRITISH COLUMBIA'S FAILED EXPERIMENT WITH A "NET SMELTER RETURNS" ROYALTY IS INSTRUCTIVE

In 1974, British Columbia enacted the Mineral Royalties Act, which imposed royalties on mines located on Crown Lands and the Mineral Land Tax Act and subjected owners of private mineral rights to royalties equivalent to those applied to Crown Lands. The government imposed a net smelter royalty of at 2.5% in 1974, and 5% thereafter.

The results were devastating for British Columbia mineral development. During the period the royalty was in effect, no new mines were developed, several marginal mines ceased operations, and non-fuel mineral output fell, despite increased prices. As a result, revenue collected from royalties on metal mines declined from $28.4 million in 1974 to $15 million in 1975. During the two year period the royalties were in effect, nearly 6,000 mining-related jobs were lost. In 1972, $38 million Canadian was spent on exploration expenditures. In 1975, exploration expenditures fell to $15.3 million Canadian (a 60% decline) while exploration expenditures in the Pacific Northwest—outside British Columbia—increased. New mine exploration and development spending (excluding coal) decreased from an annual average of $131 million in the years 1970-1973 to an estimated $20 million in 1975 (an 85% decline). In 1972, 78,901 new claims were staked. In 1975 the number of new claims staked fell to 11,791 (an 85% decline).

The royalty was repealed in 1976. After the royalty was repealed, BC Mine Minister Tom Waterland said that "[t]he Government's decision to introduce royalties in 1974 was the result of inadequate understanding of the realities of mineral resource development and the economic characteristic of that development."

I thank the Committee for the opportunity to address this important public lands issue, and I am happy to answer any questions you may have.

The CHAIRMAN. Thank you, very much.

Ms. Alexander.

STATEMENT OF RYAN ALEXANDER, PRESIDENT, TAXPAYERS FOR COMMON SENSE

Ms. ALEXANDER. Thank you, Chairman Bingaman. As you know, my name is Ryan Alexander and I am President of Taxpayers for Common Sense, were a national, non-partisan, budget watchdog group. I'm going to address just a few taxpayer concerns about the existing law. Public lands are taxpayer assets, and we believe they should be managed in a way that preserves their value, ensures a fair return from private interests using them for profit, and avoids future liability. The 1872 Mining Law has failed on all these counts. Three are primary ongoing injuries to taxpayers under the current law, the giveaway of Federal lands; the extraction of Federal mineral assets without taxpayer compensation; and the cre-

ation of taxpayer liability by allowing for abandonment of contaminated mine lands.

Under the Mining Law of 1872, as I think you all know, a claimant can patent or purchase mining claims for either $2.50 or $5.00 an acre. The public is prohibited from charging market value and put that into perspective, the 2006 purchasing power of $2.50 from 1872 is just 15 cents, $5.00 is 31 cents. The transfer of public funds to the private sector and affect and bargain basement prices needs to be stopped permanently. The one-year patent moratorium is not a good solution for either the mining industry or for taxpayers. In the current system, the United States retains title to minimal land as a result of several land. The taxpayers receive no compensation. Since enactment of the 1872 law, the total value of minerals systems taken without compensation is estimated at $245 billion dollars. Continuing the practice of simply giving these away is irresponsible stewardship of some of our most valuable assets. The oil and gas industry generally pays 12.5 percent in royalties on what they extract from onshore Federal lands.

Private landowners and states routinely require payments for mining on Federal lands. Taxpayers for common sense would like to see Congress pass a royalty income, 12.5 percent income royalty for hardrock minerals commensurate with other extractive industries. A gross income royalty is value-based and ensures the royalty will automatically adjust to changes in the marketplace. TCS is not aware of other proposals such as net revenue or net profits royalty, because we believe these offer too much opportunity for gamesmanship on what deductible costs will be. As one expert said, the distinguishing feature of a net profits royalty is that, depending on the exact definition in the mining lease and the actual calculations, it will very often be zero. The royalty based on gross income will be easiest system to administer for the Government and will require the least complex enforcement systems. Finally, failure to reform the Mining Law today, will leave taxpayers with a huge and growing liability for toxic waste and water contamination left behind by abandoned mines. The potential unfunded liability for remediation of hardrock mining ranges from 20 to 54 billion. Senator Barrasso said that people don't have a great number on this, but those numbers are also cited as low numbers, although regulations for bonding were tightened with the section 3809 rules, we believe they are still too weak to adequately protect taxpayers.

To address these unfunded liabilities, we ask the Senate to require financial assurance and operations plans, and restrict mining in areas where the risk of extensive clean-up is too great. We urge the Senate to consider legislation that would enable a portion of revenue to be generated by mining fees and royalties to be deposited in the General Treasury, once liabilities at the time of enactment have been discharged. Mining fees and royalties collected should also be directed toward the highest priority clean-up sites: ones with the greatest public safety concerns or highest risks for further environmental damage, rather than directed to States with the largest current production. In closing, no private landowner would set a price for land and stick with it for 135 years, no private landowner would simply give away the minerals on their land for nothing. No private landowner would give away land for nothing.

No private land owner would allow it, especially without paying for clean-up. Taxpayers deserve better and the time for reform is now. Thank you.

[The prepared statement of Ms. Alexander follows:]

PREPARED STATEMENT OF RYAN ALEXANDER, PRESIDENT, TAXPAYERS FOR COMMON SENSE

Good morning Chairman Bingaman, Ranking Member Domenici, members of the Subcommittee. Thank you for the opportunity to testify before you this morning on reform of the Mining Law of 1872. My name is Ryan Alexander and I am President of Taxpayers for Common Sense, a national non-partisan budget watchdog group.

Since its inception in 1995, TCS has advocated reform of the General Mining Law of 1872 for one simple reason: this anachronistic law is a clear example of taxpayer injustice. Public lands are taxpayer assets, and should be managed in a way that preserves their value, ensures a fair return from private interests using them for profit, and avoids future liability.

Unfortunately, the system of "management" set out in the 1872 law has allowed public lands and valuable public assets to be exploited for private profit at the expense of taxpayers. There are three primary ongoing injuries to taxpayers under the 1872 law that must be addressed by any meaningful reform effort: the giveaway of federal lands; the extraction of federal mineral assets without taxpayer compensation; and the creation of taxpayer liability by allowing the abandonment of contaminated mine lands.

Under the 1872 Mining law billions of dollars of gold, uranium, silver, and copper are taken from public lands by mining interests each year. Unlike other extractive industries, companies that mine for gold, silver, copper, uranium and other precious metals do not have to pay a fee when operating on federal land, essentially allowing these valuable minerals to be given away for free. In contrast, the oil, gas and coal industries pay more than a 12% royalty, and they and the hardrock mining companies may pay even more when mining on private, state or tribal lands.

The law also allows the sale of federal lands at 19th century prices. Under the law, federal lands are sold for no more than $5 an acre—considerably below today's market value. Not only have mining companies been able to gain title to land valued at tens of millions of dollars for as little as tens of thousands of dollars, but the land can be developed for other purposes, including commercial enterprises, such as condominiums, ski resorts and casinos.

The 1872 law also saddles taxpayers with the hefty clean-up costs of the toxic aftermath of mining operations. Not only do American taxpayers underwrite the profits, but they are also forced to pay for the damages left behind. These damages have been estimated to cost upwards of $50 billion.

GIVEAWAY OF FEDERAL LAND

Under the Mining Law of 1872, a claimant can "patent" or purchase a mining claim for either $2.50 or $5.00 per acre—the public is prohibited from charging market value for land subject to a claim. Just to put that in perspective, the 2006 purchasing power of $2.50 from 1872 is just 15 cents, $5.00 is 31 cents. That's how little we are valuing taxpayer's property. Staking a claim on federal land simply requires an annual maintenance fee of $125 per acre plus an additional $30 location fee and $15 new mining claim service fee for first timers.

A couple examples of taxpayers getting soaked by patenting:

- In Crested Butte, Colorado the federal government sold 155 acres to the Phelps Dodge mining company for approximately $790, despite a company estimate that the land could produce up to $158 million in after-tax profits over 11 years. This is in an area where land prices range as high as $1 million per acre.
- In Nevada, in 1994, American Barrick paid $9,765 for 1,950 acres that contained an estimated $10 billion in gold.

In some cases, it appears that mining patents have been little more than a ruse for developers to get their hands on valuable federal property before flipping it for other, more lucrative uses. A few examples:

- In 1983, the Forest Service sold 160 acres near the Keystone, CO ski resort for $400. Six years later the land sold for $1 million.
- In 1970, a businessman bought 61 acres in Arizona for $153. Just ten years later he sold it to a developer for $400,000, plus a share of future profits

In FY1995, Congress began enacting one-year patent moratoriums. Patent applications that were in the pipeline have been grandfathered, but new patents have not been issued since then. However, continuing the decade-long practice of one-year extensions makes little sense for the mining industry or taxpayers.

We urge the Senate to permanently end the patenting of federal land. The Congressional Research Service points out a critical fact: ending the practice of patenting "will not stop the production of valuable mineral resources from the public lands, but will prevent the further transfer of ownership of public lands to the private sector." Transfer of public lands to the private sector at bargain basement prices should be stopped permanently.

GOLD AND OTHER VALUABLE MINERALS FOR FREE

After charging a pittance for the land, the Mining Law of 1872 gives private interests valuable minerals for free. Despite the private sector extracting public assets from the ground, taxpayers receive no compensation whatsoever. Since enactment of the 1872 law, the total value of minerals that have been taken without compensation is an estimated $245 billion.

By comparison, the oil and gas industry generally pays 12.5 percent in royalties on what they extract from onshore federal lands. Private landowners and states also routinely require payment for mining on their lands. Taxpayers for Common Sense would like to see Congress pass a 12.5% gross income royalty, commensurate with other extractive industries.

A gross income or net smelter return is essentially the gross income for the mineral product that the mine receives from a refinery or smelter. This ensures that the royalty automatically adjusts to changes in the market and does not over -or undercharge. TCS is aware of other proposals such as net revenue or net profits royalty, but we believe these offer too much opportunity for gamesmanship on what the deductible costs will be. A royalty based on net smelter or gross income will be the easiest system to administer for the federal government and will require the least complex enforcement systems. In a recent report the World Bank recently found more than 68% of the countries imposing a royalty use the gross income or net-smelter system.

Mineral Business Appraisal, geologic and mining experts in the appraisal of all types of mineral property, describe net profits royalty, noting "[t]here are virtually no buyers for this type of royalty because of the creative accounting that the mining operator can use to depress the royalty payment amount. The distinguishing feature of a net profits royalty is that, depending upon the exact definitions in the mining lease and the actual calculations, it will very often be zero."

The state of Alaska provides a glaring example of how big a loss a net-proceeds royalty would be for US taxpayers. The state imposes a 3% net-proceeds royalty on mining operations on state lands. Over the last ten years Alaska has collected only $1.2 million in royalties despite the extraction of more than $1.2 billion worth of gold from state lands. According to these figures provided by the Alaska Department of Natural Resources, Alaska has imposed a less than one/tenth of one percent royalty on mining operations. Clearly, this type of royalty would continue the federal government's massive giveaway.

According to Mineral Business Appraisal, net smelter "royalty payments are also fairly simple to calculate and administer in that only the selling price and quantity of mineral product produced or sold are required for their determination." In addition, "this type of royalty will usually have the highest market value of all the royalty types." Simple, predictable, and valuable—that is the way to calculate royalties in the best interest of the taxpayer.

HIGH COSTS OF CLEAN-UP

Finally, failure to reform the General Mining Law of 1872 will leave taxpayers with a huge and growing liability for toxic waste and water contamination left behind by abandoned mines. Too often, after all the minerals have been removed, mining operations cease, move their jobs out of town to another—often related—mining operator, and leave communities with a mess and taxpayers holding the bag to pay for clean up. A 2004 report by the U.S. Environmental Protection Agency (EPA) Inspector General indicated that the Superfund National Priority List contained 63 hardrock mining sites and another nearly 100 sites could be added in the future. The price tag for cleaning up all of these sites was $7—$24 billion, with more than half of that amount likely to be stuck on taxpayers. Because clean-up takes such a long time, it is likely that some of the businesses currently on the hook will no longer remain viable and the taxpayer's share of clean-up will increase.

The potential unfunded liability from hardrock mining sites is even larger. A 2004 report by the EPA put the cost of remediation of hard rock mines at $20—$54 billion. Although regulations for bonding were tightened with Section 3809 rules, they are still too weak to adequately protect taxpayers. According to a June 2005 report by the Government Accountability Office (GAO), the Bureau of Land Management (BLM) indicated that 48 hardrock operations on BLM land had ceased without reclamation since the agency began requesting some form of financial assurances in 1981. BLM estimated the costs of reclaiming 43 sites at $136 million, which the GAO says is a low-ball estimate.

To address these unfunded liabilities, TCS asks the Senate to require financial assurance and operation plans, and restrict mining in areas where the risk of an expensive clean-up is too great. Moreover, we urge the Senate to consider legislation that would enable a portion of the revenue generated by mining fees and royalties to be deposited in the General Treasury, once liabilities at the time of enactment have been discharged. Mining fees and royalties collected should also be directed towards the highest priority clean-up sites: ones with the greatest public safety concerns or highest risks for further environmental damage, rather than directed to states with the largest current production.

Over the years, the Department of Interior has had to be prodded repeatedly to require adequate financial assurances in the form of surety bonds and other tangible assets. Clearly, further legislation to ensure taxpayers are not stuck with the tab for cleaning up mining messes is required.

OTHER CONSIDERATIONS

In addition to not paying a royalty for the valuable resources they extract from public lands, hardrock mining companies enjoy preferential tax treatment that other industries do not receive. They are allowed to expense certain costs for exploration and development; they receive a depletion allowance, which is a fixed percentage deduction against gross income; and, they are allowed to deduct the costs of closing a mine and the associated reclamation costs before a mine is actually closed.

Because of the way the depletion allowance is applied, mining companies may actually receive more in deduction credits than their investment in the mine. And the combination of tax preferences and other more standard deductions available to them means that mining companies often pay an effective tax rate much lower than the statutory corporate rate of 30 percent.

Taxpayers for Common Sense also supports the end of the percentage depletion allowance tax break for the mining industry. We support the Elimination of Double Subsidies for Hardrock Mining Industry Act of 2007 introduced by Senators Feingold and Cantwell and urge the committee to include this in their larger mining reform legislation.

PROGRESS TOWARDS REFORM

Taxpayers for Common Sense believes there are many lessons to be learned from the recent efforts towards reform of the 1872 General Mining Law. We were pleased to see the inclusion of a royalty on all mines in the recently passed reform bill in the House of Representatives. As a means to ease the transition, H.R. 2262 implements a 4% royalty on existing mines—half of the royalty payment required of new mines. We do not believe this is the most appropriate way to address the concerns of ongoing operations concerned with an adjustment to a royalty payment for the extraction of taxpayer-owned minerals. Rather, this approach deprives taxpayers of compensation from operations that have long been exploiting our assets while at the same time failing to address the underlying transition concern of a sudden change in the cost of doing business. Instead, we would support a three year graduated phase in of a royalty for existing mines. While this may present a short term increase in administrative costs, we believe it is a more fair approach for both the taxpayer and the mining industry.

The House passed bill establishes two trust funds which absorb all of the revenue generated by the royalties and other fees associated with the legislation. As the Senate considers this legislation TCS urges Congress to direct a portion of the revenue generated by mining reform legislation to be deposited in the General Treasury. The minerals are extracted from land owned by all taxpayers, and all taxpayers should reap the financial benefits.

Finally, two arguments that were offered by those fighting reform in the House of Representatives are worthy of a brief mention in order to save the Senate from lengthy consideration of these specious arguments. First, many advocates of the status quo argued that mining operations in the United States would be dramatically undercut by the implementation of a royalty for minerals extracted from public

lands. The evidence simply does not support this claim: mining companies continue to mine state lands where royalties are required and routinely pay royalties to owners as a part of structured agreements to mine private lands. Moreover, the mining industry is hardly an industry on the margins of profitability. To quote PriceWaterhouseCoopers' 2007 annual report on the mining industry, which covers over 80 percent of the industry, "net profits increased by 64% compared to 2005, and are now 1,423% higher than their 2002 level."

In addition, the contention has been made that the imposition of a royalty on future revenues from mining operations on public lands would give rise to legitimate claims under the Takings Clause under the Fifth Amendment of the U.S. Constitution. This contention is frivolous and it should be rejected. Property rights in general, but in particular when it is based on a grant of rights in public lands, do not create immunity from reasonable regulation to protect the public interest. Moreover, the imposition of fees, royalties, and other similar monetary assessments, including taxes, has generally been viewed as outside the scope of the Takings Clause. A royalty on minerals extracted from public lands is especially appropriate given the fact that the claims at issue are based on a grant from the federal government. Actual title to the minerals and the lands on which they are located remain with the United States, and the exploitation of these interests has significant effects on other publicly owned lands.

CONCLUSION

Taxpayers have waited far too long for real reform of the Mining Law of 1872. Taxpayers for Common Sense forward to working with the committee to ensure key taxpayer reforms to the General Mining law of 1872 are enacted into law.

The CHAIRMAN. Thank you, very much. Let me start with a few questions. Professor Otto, one of the suggestions that I think I understand you have been making is that if we adopt a law that imposes a royalty as it applies from the effective date of the law to all mining operations, so that existing mines that were put in operation without any royalty applied would still have to pay that royalty. That's something which I understand many of the mining companies would object to strenuously claiming that they have some kind of a legal basis for objecting. Have you looked into that? Is there any legal basis for objecting to the enactment of a royalty on existing mining operations that are in place for some time?

Mr. OTTO. I have not looked into it.

The CHAIRMAN. You have not looked into it. Mr. Cress, is this an issue that you have looked into?

Mr. CRESS. Yes, sir it is, Senator. You're absolutely right, and I believe Professor Lesche spoke to this committee about the same issue. Do mining claims, unfounded mining claims that have a discovery of valuable minerals are protected property rights under well settled law. The problem is that it's difficult to determine which claims have a discovery and which claims don't, but a producing mine, I would tell you, I have to be very careful about trying to impose a royalty on a producing mine because I think It clearly is claimed to be under discovery, but there are also operations so far along in development with reserves so large that they would qualify as well under the law. The legal minimum, I think, to exempt, we have to exempt existing claims that have a discovery. That, however, would be administratively very difficult. Currently the Department of the Interior has a process requiring an administrative law judge in a hearing to challenge whether a particular claim has a discovery. They have even done so in a number of cases, generally high profile claims in wilderness areas and recreation areas. It is an expensive, time-consuming process that requires experts to understand economics, the metallurgy and all

the things that go into determining whether you have a discovery. I don't think that's workable for the number of claims we have out there. That is one reason for my recommendation that we either start, propose the royalty on new claims that are located after the date of the Act. That would be a very bright line test for claims that are subject to an approved plan of operations as of the date of enactment because that would also be evidence that they were pretty far along in discovery, but wouldn't require you to go to the administrative hearing on each and every one of those claims.

The CHAIRMAN. Mr. Cress, you testified that one of the problems with the gross royalty on gross value is that it would take a higher percentage of profits when commodity prices are low.

That's what we have today in the case of oil and gas. We have 12.5 percent royalty on oil and gas production in the continental United States, even a higher royalty now in offshore production. When the price of oil comes down, it does represent a higher percentage of profits, that's correct, but no one has ever, I guess some have complained that is unfair but at the same time others have thought it's not unreasonable for the Government to get some reasonable return for the resource regardless of the price of the commodity.

Mr. CRESS. I agree with that. I think the real question is what is reasonable. That's the most difficult question. For oil and gas the cost structure is just completely different and in deep waters there are different provisions that would apply there, and there have been some relief provisions to encourage additional exploration there. I think that's one reason that I also recommend in my written testimony that there be in the bill a discretionary royalty relief provision, exactly what is in the Mineral Leasing Act of 1920. That has been quite important for a number of industries. One, in fact, is the potash industry in New Mexico. That industry mines about 90 percent or more of the potash mine in the United States. It's used for fertilizer. They worked for many, many years subject to dumping and competition from mainly Canadian exporters into the United States. They went through some hard times. The way that was administered by the BLM and the MMS was to allow for some reductions in the royalty there to keep the industry going. That's succeeded and today the industry is thriving and is now paying royalties of 5 percent. I think royalty relief got them down to 2 percent for a period, but those operations have stayed open. I think that safety valve is very important.

The CHAIRMAN. Senator Barrasso would be next.

Senator BARRASSO. Thank you, very much, Mr. Chairman, Ms. Tschudy, Senator Domenici left a question if I could ask—mining companies annually submit corporate income tax forms to the Internal Revenue Service. Could that administration help simplify the administration of profits-based royalty?

Ms. TSCHUDY. As far as I know, the I.R.S. corporate income taxes are on a corporate basis based on their income. Royalties by definition are a percentage of the value or the amount of production extracted from the lease or their mine or property specific so those I.R.S. corporate income tax forms may not be of significant benefit in a royalty program.

Senator BARRASSO. There is a situation in Wyoming where Congress has imposed an administrative fee of 1 percent of the total, which should be split 50/50 on $2 billion, which has cost the State of Wyoming about $20 million to figure out how you divide the money. I know our State does it a lot cheaper than what the Federal Government is imposing. I am looking for any way that we minimize the overhead and minimize the expense to the States and certainly minimize what is happening in the State of Wyoming. I know Senator Tester from Montana is in a similar situation trying to deal with some of these significant costs that the Federal Government is imposing on the State. We are going to try to fight those sorts of things.

If I can ask Mr. Cress and Mr. Otto, Mr. Otto, you had talked about the royalty, the gross royalty, and Mr. Cress handed out a nice sheet as to bentonite which is a big product in Wyoming, where they are almost manufacturing the bentonite. They dig it out and then process it. Where do you draw that line. Are you further down the line than Mr. Cress is in terms of the added expense that goes into a production of a product this is like gold or silver? It has value out there.

Mr. OTTO. Virtually all minerals require some processing before they can be sold, so the question with regard to royalty is at what point in that value change do you make the assessment, and in keeping with one of the objectives that was brought out here in terms of simplification of administration, usually the first point of sale is often used as that benchmark, with no deductions for various costs, unless they're associated with the next smelter return. So, mine mouth value is used by many, many countries. It works very well. It's simple to administer, tax avoidance is quite minimal because there's no reduction or costs. If any costs are aloud as a deduction, they should be on the next smelter return basis not dealing with the cost of production.

Senator BARRASSO. OK. We talked about the first point of sale, wouldn't there then be an incentive to mine at one location sell there, and then conduct the value added process elsewhere?

Mr. OTTO. Could be.

Senator BARRASSO. Might be there. You talked about trying to look at the total taxes that are on something. You made some comment about 5 percent—shouldn't be more than 5 percent of gross. Is that on top of the taxes already being paid? When I look at local taxes, State taxes, ad valorem property taxes, State corporate income taxes, sales taxes, is it 5 percent on top of all of those other taxes or do you take that all into consideration?

Mr. OTTO. I would recommend that the 5-percent royalty or whatever royalty would be assessed would be allowed as a tax deduction when computing income tax, which is the standard practice in all countries. In terms of being competitive worldwide, if you want the U.S. industry to flourish, one of considerations companies look at is the tax load. Do we invest here, to do it in Chile? Do we make more profit here. Does it make more sense to mine it here versus copper mines in Chile. Take a look at what the overall tax load is. There are not so concerned about is it royalty or income tax or export duty but what is the total impact on my project. Now, in the studies I do, I do comparative studies worldwide, most coun-

tries are taxing, the total effective tax rate is between 40 to 60 percent on the mining industry; so, too much above that, industry is not going to flourish. It's not going to develop in mines. If it is lower than that, the political pressures drop there, to raise the tax rate into that range.

The last time I included U.S. in my studies is the year 2000 we did a global study for the mines. It showed that for the State of Nevada for a typical gold mine they're right around 50 percent of the effective tax rate. Arizona in copper is around 50 percent also and that's without royalties. It is right in the middle of the 40 to 60 percent range. I have not run those models for Arizona and Nevada since 2000. Things changed. I have not taken a look at what the impact of the royalty would be. I think if we were to take a look at an 8 percent royalty, 10 percent royalty, certainly when prices are low you have a lot of mines closing down. You also have fewer mines being developed because they wouldn't be able to meet their minimum rates of return required for investment. An 8-percent royalty would be the highest in the world, of general gross proceeds.

Senator BARRASSO. My time is up. I'd like to comment that you touched on one aspect why a company may make a decision to use the taxation and there are also clearly litigation liability issues companies may take into consideration, as well as regulations that impact all of these companies. So, as we look about sending things overseas and the national risks and national security risks that we talked about earlier, I think it's not just taxation. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Tester.

Senator TESTER. Thank you, Mr. Chairman. I appreciate the testimony of each of the witnesses, even though some are diametrically opposed to one another, you all make very good points. My first question is for Debra Gibbs Tschudy. It goes back to the chairman's comments at the very beginning about the applicability to a royalty tax. In the previous panel, I think Henri Bisson said that there were 93 thousand additional claims this last year for mining. Would those be eligible for this royalty if it was implemented now or would that, since the process has been already been started, would we end up, from your perspective, end up in some sort of court problem if we tried to apply it even to the ones that are not started but made the point?

Ms. TSCHUDY. It depends on how the law is ultimately modified. In the statement of Administration policy last November, the Administration did say that they strongly opposed the H.R. 2262 because the bill would impose a royalty where property rights have already been invested. I believe our solicitors are concerned that there might be and would generally be a takings cross challenges by the industry if we were to apply the royalty to existing mining claims.

Senator TESTER. OK. This question is for both Mr. Cress and Mr. Otto. It doesn't matter if we're talking about gross or we are talking about net on the application of royalty, but there are a lot of different minerals out there, many, many, many, you guys know that. Some are worth a lot of money, and some not that aren't

worth much money, and some that are harder to get to than others, but do you think that the royalty, if applied, whether it's on net or gross basis, should be the same across the board whether you're talking about bentonite as Senator Barrasso talked about or gold or silver or copper or do you think that it should vary and tell me why, no matter what your thought is. If it should vary, why if it should be left the same. Go ahead, either one Mr. Cress or Mr. Otto.

Mr. CRESS. Senator, I think that in terms of most States that have imposed either royalty or severance taxes have differentiated to some extent, some have and some haven't, they all get to, however, if you look closely at the language I spent some time trying to get this out of my written testimony, often even when you are talking about a gross, it's gross value of ore, which is this stuff that comes out of the ground or gross value at the mine mouth that they are trying to get to. I think differentiating between minerals theoretically might be a good idea. I think in States they do it because they're targeting sometimes specific mines and operations because each State in Colorado molybdenite, for example, bears it's own tax.

Senator TESTER. Do you think it's good idea to differences in the royalty percentage?

Mr. CRESS. If your goal is simplicity, you should set the bar at a reasonable rate for everybody and then have single rate. That's my recommendation that's why. I came out.

Senator TESTER. Mr. Otto.

Mr. OTTO. I agree. Let me give you just one example of how to best simplify things quite dramatically. If you have a mine that's operating, a mass of sulphide deposits, oftentimes they will be producing a zinc concentrate that will also contain silver and lead, and they have a lead concentrate that also has zinc and gold and you may have a silver concentrate that has a mixture of different minerals. If you have a different royalty rate for each mineral, things get complicated in trying to determine what the royalty liability would be. This is common for many, many, types of mineral deposits. Where I would speak to the usefulness of differentiation would be, for example, coal versus hardrock minerals or construction minerals versus hardrock minerals. They don't have the same source of production.

Senator TESTER. Got you. Thank you, very much. Both you fellows have both worked in other countries or at least monitored what other countries are doing. Can you give me an idea whether most other countries go with gross proceeds or net proceeds when applying for royalty? What are other countries doing?

Mr. CRESS. I think Professor Otto can speak to this because this study exhaustingly talks about this. I think many, many countries do have small gross royalties. I guess I would look at some of the more developed countries for which maybe our system is more analogous, they tend to have more complex systems; that is in Canada and several of the provinces have net profits based royalties which they're able to administer apparently just fine. There is a problem in developing countries with the lack of administrative capacity.

Senator TESTER. So you are saying most developing countries use probably the gross proceeds, most of the countries like the United States, Canada, more developed countries are using that net profits.

Mr. CRESS. You see more of a net approach.

The CHAIRMAN. Mr. Otto, very briefly.

Mr. OTTO. Very few countries either developing or developed use a net profit basis with. The exceptions would be Canada, which has very successfully implemented a profit-based approached, one state in Australia. It is very, very rare. Almost everybody uses some sort of net smelter or gross approach with just a few exceptions.

Senator TESTER. I want to thank the panel once more. Ms. Alexander, I didn't ask you any questions, but I want to tell you that I really appreciate the last comments you made comparing private landowners to publicly owned lands.

Ms. ALEXANDER. Thank you, very much.

The CHAIRMAN. Next is Senator Corker. I think we have a vote starting about 12. So, if we can get all the questions done before we all leave for the vote, that would be great. Senator Corker.

Senator CORKER. Thank you, Mr. Chairman. This has been an outstanding panel. I think each of you have been very clear in your comments and insights, and I just want to thank you. I think it has been excellent testimony. I have a bias toward simplicity. Mr. Cress when talking about the royalties and how when obviously prices are low for commodities or minerals then royalty would be a bigger piece of the profits. That would be true of every expense that exists. I mean, that would be true of labor; that would be true of insurance; that would be true of power. That would be true of every single expense that exists. So I would have some so difficulty understanding why it need be any different, if you will, as it relates to the royalty application.

Mr. CRESS. I think because few of those costs really literally can be and they are fixed costs. So, you're turning the royalty also into a fixed cost, and the result of that is the premature closure mines and the loss of reserves. To me I can use sustainable development in the context of hard rock mineral development as once you have opened the mine, getting every last ounce out the ground you can because you have got the impact of that mine there, and royalty, having a net royalty, is a way to try and ride out those difficult periods.

Senator CORKER. Just as an observation, I was saying that 5 percent royalty would be somewhat minimal compared to the other costs, and that maybe we're making a bigger thing out of the price stage, if you will, and the effect on profits, but I would just tend to lean on the side of such, yet, I have enjoyed some of your other arguments. I would think that your bureau, Ms. Tschudy, would have a difficult time on net profits basis in that I assume mining entities own different companies, and apply overhead and apply administrative costs unevenly, and depending on how they wish, obviously, as a corporation or a conglomerate it has to be done appropriately, but it seems to me cost shifts could occur to lower profits coming out of the mine; is that correct?

Ms. TSCHUDY. Yes, sir. In general the more deductions you allow, the more resources will be required, and the more difficulty in au-

diting those resources. We look first to an arms-length sale of the first marketable product. If you have an arms-length sale, that is easy and simple. That's the gross value method, but if there is a transfer to an affiliate we may have to do a net smelter return calculation. But again as long as a product sold at arms-length, we can look to the gross value which is relatively simple. If start to you allow a lot of deductions, it does get costly and complex. We spend most of our time in the courtroom today arguing about what are allowable deductions.

Senator CORKER. Speaking about those courtroom costs we all have in business, relating to just dealing with issues and the complexities and some of the gamesmanship, if you will, to sort of drive down the actual profits coming out, would there be some benefit to the mining operations, Mr. Cress, if it was just simple and you didn't have to deal with the auditing issues, the court cases that come from that and also just the internal gymnastics that might need to be played to keep the profits already coming out of the mine?

Mr. CRESS. There is obviously a benefit to not having litigation, but the cost differential between a gross and a net depending on what you're talking about can be such a large percentage of operating margin, that the complexity from the companies perspective is worth it. The other thing I would point out, when you talk in terms of a net profit, royalty, the type British Columbia has, for example, that's not really what I'm proposing. The Nevada model is not a clear net profits under which you can deduct all kinds of corporate overhead, going all the way up to the mother ship. The net proceeds royalty actually limits the deductions and defines then in the statute. On a scale of royalties, net profits is at one end and the total gross is at the other. Net proceeds is somewhere over here to the left.

Senator CORKER. It is sort of semi-gross?

Mr. CRESS. It is semi-net, but it's not an unlimited net as Ms. Tschudy says, that defining those deductions carefully in the statute, which Nevada did is the key to minimizing that litigation that you're talking about.

Senator CORKER. Our time is almost up. I didn't hear something that was in the background about the cut-off time from when we actually apply this royalty. Would you state that one more time as to when that should begin so that there isn't litigation based on previous entitlements?

Ms. TSCHUDY. The Administration believes that the law should be applied perspectively to avoid taking challenges of the law, so they should not be applied to existing claims but rather to new claims.

Senator CORKER. So the 93 thousand claims would all be grandfathered in without royalty?

Ms. TSCHUDY. I'm sorry. I'm not familiar with the number of claims. I'm not an attorney as well. I know the Administration office and the Department of the Interior had been concerned about H.R. 2262 and possible takings challenges. Again, the Administration supports a royalty system that would be applied perspectively. I don't know what affect that has on 93 thousand, where those stand.

Mr. CORKER. Thank you, and again Ms. Alexander I will say the same thing as Senator Tester, thank you.

The CHAIRMAN. Senator Murkowski, I was confused about the 12 vote; it is at 2. You can take all the time you want.

Senator MURKOWSKI. I hadn't gotten the message, but I appreciate you correcting that, I thank you. Thank you to those of you here this morning. I do want to take just a moment and correct the record. Ms. Alexander, in you're written testimony you didn't indicate, in oral testimony, but in your written testimony you refer to how Alaska operates their net proceeds royalty and indicate that in your opinion, it is an example of something that doesn't work, and you've indicated that the State imposes a 3-percent net proceeds royalty on mining, and that over the past 10 years we've only collected $1.2 million in royalties. You do specifically state this is as to gold from the State. It's my understanding in addition to 3-percent net royalty from the State land, we also have the 7 percent net proceeds tax on all the mining in the State, so essentially the State's revenue takes from mining operation is a combination of the royalty and the special mining license tax, and eventually the income tax, and that total is a total approximately of $420 million. It does not include payments to municipalities that total approximately $110 million. So I did want to make sure it was clear in the record that we are in fact receiving more through our State royalties there in the State of Alaska.

Mr. Otto, I wanted to ask you about the whole aspect of competition. You've heard my concern that in the area of minerals I fear that we're going the same way or that we are already in the same direction as we are with oil in being so reliant on foreign sources. As we talked about being competitive in a world marketplace within the mining industry, you've indicated that the gross royalties should be in the area of 2 to 5 percent, but we also recognize all of the other costs that are associated. In an effort to be competitive, if we had a rate such as 8 percent which is what the Rahal Bill is advocating, that would put us in the category of being the highest royalty, effective royalty rate in the world; am I correct in that?

Mr. OTTO. It would be the highest gross proceeds royalty across the board. There are a few exceptions here and there of individual minerals in other countries. In terms of the total effective tax rate, I don't know what it would be because I haven't run that model.

Senator MURKOWSKI. That leads to my question because I have looked at your background. It is extremely impressive, extremely extensive in so far as the mining taxation work, and you have great credibility as you sit before us and offer your opinions here most certainly. You've indicated in response to Senator Barrasso's questions that you haven't had an opportunity since 2000 to look at the U.S. situation in terms of how we stack up to other nations, and if you haven't, who has? I don't want us here in Congress to be embarking on an comprehensive mining law reform where we're basically picking numbers out of the air because it is a round number and it looks good, but then to find out that effectively we're cutting ourselves out of a global marketplace because that number wasn't a number that allows us to be competitive. Is there anybody out there who is really doing a critical analysis. I think mining law reform is going to move. I am hopeful that something positive hap-

pens. I really don't want us to make a mistake in misjudging in what a reasonable and fair royalty would be. So, is there anybody else out there that we should be talking to?

Mr. OTTO. I have undertaken fiscal reforms in probably 20 countries now dealing with the mining industry. In every single instance they have done some modeling to determine what the impact would be on typical mines, how that would effect not only that individual mine but how that would look in comparison to the fiscal systems in other countries.

Senator MURKOWSKI. Do you know of anybody?

Mr. OTTO. I don't know of anybody who has done that recently and included the United States. The International Monetary Fund had some models that I've worked with, the World Bank. They do not include the United States in those models.

Senator MURKOWSKI. Why do they not?

Mr. OTTO. I think it comes down to funding. If you take a look at organizations like the World Bank and IMF their and clientele does not include the United States. A person like myself I release these studies from time-to-time. The last time I raised the funding to do a global study was in 2000. I'll probably do another one in 2010. In 2000 I included the U.S. I don't know of anybody else who is doing international comparative tax studies.

Senator MURKOWSKI. Mr. Chairman, that might be something that we would like to look into so again we don't make a mistake from a legislative perspective.

The CHAIRMAN. I think it is a very good suggestion. We do expect to ask CBO to do an analysis on the royalty models. They did that back in the 90s when this issue was seriously debated and we are going to ask the do it again.

Senator MURKOWSKI. Thank you.

Mr. OTTO. I would add if you do want some examples the royalty book published by the World Bank last year, in the back was a diskette that has the specific royalty legislation from about 35 countries, and it has examples of net proceeds, net back, profits gross, all the different types of approaches. If you're looking for some concrete examples, that might be a very good place to look.

The CHAIRMAN. We appreciate that good suggestion.

Senator Craig.

Senator CRAIG. It has been a very fascinating panel. I must tell you, over the years in trying to understand net versus gross, you all bring a lot of fascinating information to the table. I will also say, Ms. Tschudy, I always thought it ought to be simple because we don't want it gamed. Clearly, a way of enforcing in a clean and simple manner is critical I think overall. We just here in this committee in the last few years got into an interesting dispute over what we meant and what you all meant when we were enforcing deep water royalties. There are a lot of nuances that are part of the regulation and what was the congressional intent of the time and the implementation versus somebody today saying somebody is ripping us off or getting too much money out there. That we ought to try to avoid it for a lot of reasons, credibility with the taxpayer, Ms. Alexander is awfully important here, and that there appears to be and is a fair return to the taxpayer for the allowance of the

use of the resource, for the development of and the exploitation of the resource.

Let me go back to claims versus permits and the issue of property and taking. That fascinates me because I'm little bit concerned that if we're trying to get our act together and attempting to apply a royalty, I've been willing to think prospectively, but at the same time, when does a claim become a property right, at the moment a stake is driven into the ground? When does the taking occur? I guess that's part of what the Justice Department is a little worried about. I can understand a permitted property because the government gives it away for X amount of money, not a lot. So that becomes private property, so when the Federal Government reaches in and on top of it after the fact places a royalty, I can see that as arguably opaque. I see some difference between a patent and a claim in my own mind. Now do you know, and maybe I should have asked this of Mr. Bisson, of those 90 thousand, were most of those uranium? Do we know what they were?

Ms. TSCHUDY. I'm sorry. I don't know.

Senator CRAIG. I don't know there has been a flurry because of what we're doing in nuclear, and the potential of uranium and all of that, but none of them have been developed. There's been a lot of filings out there, some might be developed in time based on all of the proceedings, what we discussed with the earlier panel. So that is something that obviously we would have to clarify. There's no question about it and I'm not too fearful of running some legal challenges when we draw our line. That oftentimes happens with what we do here, when public policy changes. At the same time, I don't want to see us taking property. I think that's wrong. I have always been a defender of private property rights, whether it is the owning of the mining claim versus fee simple property. So I think that is something Mr. Chairman, that obviously, we don't necessarily needlessly need to stumble into a hassle of litigation if we attempt to bring down a royalty on hardrock.

The CHAIRMAN. Mr. Otto, is your book available? Can I go to Yahoo and get it?

Mr. OTTO. Yes.

The CHAIRMAN. Good. How much will it cost me? Let me put it this way, is it fine print and multiple pages?

Mr. OTTO. It was written with the intent to be used by policymakers. So, it tries to cover all the various issues including the one you just brought up dealing with ownership.

The CHAIRMAN. OK.

Mr. OTTO. If I might say a word on that.

The CHAIRMAN. Please do.

Mr. OTTO. When you think about what is a royalty, countries take two basic different approaches. Some view it as an ownership transfer tax in which case you have all the property issues. Others view it merely as an administrative charge, in the same the way you would charge for a license plate on a privately owned car. It is the right to use or the right to mine the mineral, in which case there is no property interest whatsoever involved. So if the concern is litigation depending on how the legislation is written, you may be able to avoid the property issues by not forming it as an owner-

ship transfer type of tax, but rather an administrative user's fee type of charge.

Senator CRAIG. My staff just handed the book to me. I've got some weekend reading. All right.

That's obviously part of the debate we've got to get involved in because I clearly understand, as most on this committee understand and as our staff understands, there's a world of difference in a variety of resource developments from oil to gas to coal obviously to hardrock minerals my interests primary have been because of the geologic character of the State of Idaho are the mineral costs involved to get them out to mine mouth or beyond.

At the same time, if we're going to do this and do it right and develop a revenue stream for the right reasons, we've got to show flexibility to the market and the variances in world pricing and at the same time a reasonable return to the taxpayer for the exploitation of this resource, so, well, I thank you all very much for your time in this. Mr. Chairman, I think that I'm glad to hear that we're going to look at some application. I mean the moment I saw 8 percent gross, I thought the game here is to eliminate mining. It is not to allow a reasonable return for mining to exist and remain so in a competitive world because it is a world market as the Senator from Alaska has clearly shown. That remains important for all of us. Again, thank you.

The World Bank book, this is your book and you did this for the World Bank and the CDs?

Mr. OTTO. Yes.

Mr. CHAIRMAN. All right. Thank you all very much. Thank you, again for being here. I think it's been very useful testimony. That will conclude our hearing.

[Whereupon, at 12:15 p.m. the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

RESPONSES OF RYAN ALEXANDER TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. You've suggested that mining fees and royalties should be directed toward the highest priority clean-up sites. What is your view of the provisions included in the House-passed bill on this topic?

Answer. Taxpayers for Common Sense opposed the inclusion of an amendment offered by Representative Heller regarding this issue. Before final passage, the amendment was accepted altering the House-passed version to direct 50% of the royalty revenue in the abandoned mine clean-up fund to the state from which the royalty revenue was generated.

We are gravely concerned that this provision, if passed into law, will have detrimental effects on states that have many abandoned mines sites but are producing fewer minerals today. This amendment will send nearly 50% of all clean-up funds to the state of Nevada. While Nevada has abandoned mines, other states like Arizona, Colorado and California have more sites, many very close to population centers, and should be higher priority clean-up sites. These abandoned mine sites jeopardize public watersheds, threaten community safety and create numerous taxpayer liabilities. For these reasons, directing 50% of the funds to the highest producing states rather than the highest risk sites is not in the best interest of federal taxpayers.

Question 2. Mr. Cress has suggested that mining reform legislation should simply grandfather existing mining claims rather than set up a process for administratively determining which current claims support a valid "discovery." How do you view this suggestion?

Answer. Taxpayers for Common Sense believes all existing claims on federal lands should be subject to a royalty. While we are sensitive to the industry concern about certainty and the conditions under which their plans were made, we believe grandfathering existing mines in perpetuity exacts too great of a cost to taxpayers. While our preference would be for a gross royalty imposed on all mines at the same time, we would be open to a phase-in for existing mines to allow them to adjust their operating plans.

To address the question about Mr. Cress's suggestion directly: the suggestion that grandfathering all existing claims presents the easiest administrative option is inaccurate, unfair to taxpayers, and bad policy. There is an existing and orderly process for determining whether there is a valid claim, which is a well defined term under the mining law; no additional administrative process need by created. Mining cannot commence on public lands without an approved plan of operations, and the vast majority of mining claims are never proposed for development. Moreover, to grandfather in all claims expands the taxpayer giveaway rather than limits it. Finally, grandfathering all existing claims would create a perverse incentive for speculators to rush to stake claims prior to final enactment of the law.

Question 3. Do you agree that transfer pricing may be a greater concern given mergers and consolidation within the mining industry? What additional safeguards may be necessary to prevent this result? What other suggestions do you have for improving the transparency of hardrock royalty collections, for purposes of ensuring a fair return to U.S. taxpayers?

Answer. Taxpayers for Common Sense agrees with Professor Otto that the trend towards consolidation, and the subsequent increase in transactions between related parties poses challenges to using transfer pricing as the basis for royalty calculation.

To best ensure a fair return for the taxpayers, royalty calculation for arms' length transactions should be based on the transfer price itself; calculation for transfers between related parties could be based on average quarterly prices for arms-length transactions for the same mineral.

In addition, mining operators should report, on an operation by operation basis, the quantity of locatable minerals extracted from public lands, along with the quantity realized for sale. These figures are already calculated by mining companies for the Securities and Exchange Commission, but SEC reporting groups public and private production together. The disaggregation of these figures would provide an added safeguard against gamesmanship. Operators should also report the acreage of public lands consumed for mining as well as for other ancillary uses, including waste disposal and staging.

RESPONSE OF RYAN ALEXANDER TO QUESTION FROM SENATOR CANTWELL

Question 1. The state of Alaska imposes a 3% net proceeds royalty on minerals taken from lands owned by the state. According to the Alaska Department of Natural Resources, the State of Alaska has received $1.2 million over the last 10 years from the net proceeds royalty. Over that time, more than $1.2 billion worth of gold was extracted from mines operating on state lands—meaning less than 0.10% of the value of gold mined was returned to Alaskan taxpayers. There are over a half million abandoned hardrock mines across the west, including thousands of mines in my state of Washington. Local communities and Native American tribes have to bear the costs of pollution created by these mines, but there is no dedicated federal funding source for clean up.

Do you believe a net proceeds royalty could generate enough money to clean up the estimated $50 billion in abandoned mine liability?

Answer. The Congressional Budget Office estimates that the 8 percent royalty included in H.R. 2262 which is an ad valorem type royalty based upon the value of production, not the value of profits, will generate $40 million per year in the near term, and would gradually increase as new mines are permitted if the law is enacted in its current form. A net proceeds royalty however would generate much less revenue. As you mentioned, the state of Alaska imposes a 3% net-proceeds royalty on state lands but has collected a royalty of less than one tenth of one percent on mining operations. Although, as Senator Murkowski mentioned in the hearing, the mining industry does provide other revenue to state and local communities in the form of taxes and fees, these are costs all industries incur and do not lessen the need for a fair royalty. The case is much the same in Nevada, where a net proceeds royalty is also collected and generates little revenue.

Overall, a net proceeds royalty would provide far too great an opportunity for gamesmanship and manipulation leading to abuse, and difficulties administering and overseeing its collection. Recognizing this, the Minerals Management Service also recommended the committee enact a gross income rather than a net proceeds royalty. Furthermore, most countries worldwide impose a gross income or net smelter royalty instead of the more complex net proceeds royalty.

For these reasons, it is clear a net proceeds royalty would not create enough funds to even begin to address the current $50 billion abandoned mine liability taxpayers face. We urge the committee to support a gross income royalty similar to the House passed H.R. 2262.

RESPONSES OF MIKE DOMBECK TO QUESTIONS FROM SENATOR DOMENICI

Question 1. You state in your testimony that the 1872 Mining Law allows mining to take precedence over all other public land uses, including hunting and fishing.

Are there not current and existing authorities for the federal government to protect special areas and resources from mining?

Answer. First, federal land managers can withdraw federal lands from mineral development. However, in my experience as the chief of two agencies, this mechanism is far too cumbersome to work well. There are too many administrative hurdles for already strapped agencies to overcome. It is a virtually useless mechanism.

Second, under limited circumstances, the Endangered Species Act (ESA) and the Clean Water Act can stop proposed mines. If the FWS or NOAA Fisheries determine that a proposed mine on federal lands would jeopardize the existence of a listed species, the agencies have the authority to stop the proposal. Under the CWA, the EPA could deny CWA Section 402, regulating point source discharges, and 404 permits, regulating the deposition of dredged and fill material into waters of the United States, if the proposed mine is required to obtain the permits. Use of these permit denial authorities rarely happens for any activity, let alone mine development.

The overwhelming problem is that these and all other laws protect only against a relatively narrow range of impacts. Many other aspects of environmental degradation from mines are not covered, such as destruction of fish and wildlife habitat of non-listed species (including hugely valuable recreational species such as elk, pronghorn antelope, wild brown trout), and groundwater resource depletion or pollution. Even the CWA has huge hole in it regarding mines because it does not regulate nonpoint source pollution, and much of mining pollution is nonpoint pollution.

That is why I so strongly believe, as I stated in my testimony, that special places with important fish and wildlife and water values such as wilderness areas, National Parks, Fish and Wildlife Refuges, and inventoried roadless areas ought to be placed off-limits to mining entirely, and that there should be at least one new mechanism in the Senate Bill to allow federal land managers to deny mine proposals in other situations where the benefits of conserving fish, wildlife and water resources clearly outweigh the benefits of the proposed mine.

Lastly, I would observe that all other federal land resource users face up to such a mechanism on a regular basis, including, forestry, mining, and grazing, Mining should too.

Question 2. You state in your testimony that mining reform legislation should prohibit the patenting or sale of public lands.

If patenting is eliminated, how would you propose providing the security of tenure necessary to attract the large investments needed to make domestic mining projects a reality?

Answer. I believe that a long term permitting system should be adopted to allow for security of tenure, while giving land managers leeway to determine the parameters of the mine on a particular piece of land. Again, land managers already do permitting on a range of activities, from firewood cutting to grazing to recreational use, such as float trips on rivers on federal lands. The same kind of mechanism could be used, while allowing for the longer term use.

RESPONSES OF MIKE DOMBECK TO QUESTIONS FROM SENATOR CANTWELL

Question 1a. As you know, our nation's public lands provide enormous economic and conservation resources benefits that add to the quality of life for all citizens and future generations. Many of our public lands are still pristine and undeveloped, providing clean water, clean air, wildlife habitat, and proximity to mountains and rivers. Roadless areas, for example, provide clean drinking water, essential fish and wildlife habitat and world-class recreational opportunities. An analysis of Bureau of Land Management data by Environmental Working Group shows that mining claims in Forest Service Roadless Areas in 12 Western states increased almost 50 percent from 9,000 claims in January 2003 to more than 13,000 as of July 2007. In Washington state, there are over 400 mining claims in Roadless areas.

The 1872 Mining Law has long been interpreted as mandating hardrock mining as the "highest and best" use of public lands. Federal land managers have argued that the 1872 Mining Law forces them to approve any mining project proposed on public lands regardless of competing resources values.

What is the effect of mining on these important wilderness lands such as Roadless areas and Wild and Scenic River systems?

Answer. National Park, Wilderness and Wild and Scenic designations have fairly strong statutory protections against activities such as mines, and generally I have seen few direct threats of mines proposed directly in these areas. The law is not clear, though, on whether a mine or a protected area would win out of if pitted against each other. I believe the Senate bill should include a clear prohibition on mines in these areas.

Question 1b. A greater threat from mining is to inventoried roadless areas and from projects that are close by to, or even under, these protected areas. Examples include the following: I know of a coal mining operation on and under a roadless area in Utah; and a proposed silver mine under the Cabinet Mountain wilderness in western Montana which threatens that special place. So while the highest levels of land protection, such as wilderness designation, have helped prevent development of mines in those areas, real threats remain and should be addressed in this legislation.

Under current law, what can land managers do to balance mineral activities with other uses of public land when considering whether to approve a mining application?

Answer. That is exactly the problem; there is no such balancing now. The Senate bill must give federal land managers authority to balance the benefits of fish, wildlife, and water values against mine values, and in at least limited cases where the

latter values are superior to the former, the bill should allow the federal managers to deny the proposal.

Question 1c. Given the significant increase in mining claims within Roadless Areas and given that Roadless Areas were designated to be protected areas, shouldn't we withdraw Roadless Areas from further mining activity?

Answer. I doubt you can find a person more committed to protecting inventoried roadless areas than me. I strongly agree.

Question 2. In a recent L.A. Times article, Death Valley National Park Superintendent James T. Reynolds expressed concern about mining activity on the border of the Park's boundaries. He stated: "I hope the public understands the destruction that will occur. Development will have far-reaching impacts that our grandchildren will have to address. Unfortunately, we don't have the authority to stop [the mining activity]." Under the current law, our land managers appear to be in a bind. Mining pollution can—and does—travel vast distances. For example, beneath the Bingham Canyon Mine in Utah there is a plume of contaminated groundwater that covers 72 square miles. In 1996, the federal government paid $65 million to buy out patented claims to a gold mine just three miles from Yellowstone National Park. The mine would have been located at the headwaters of three streams that flow into Yellowstone. While land managers can challenge the validity of claims near National Parks and Monuments, but this process is time consuming and expensive.

Given that thousands of mining claims have recently been staked within five miles of many National Parks and Monuments including the Grand Canyon and Mount St. Helens, shouldn't federal officials have the capacity to protect these treasured lands from mining impacts?

Answer. Please see my answers above to your questions. I strongly agree.

Question 3a. While many environmental statutes like the Clean Water Act are applicable to hardrock mining operations, a key issue for us to consider is whether the coverage of these environmental laws is sufficient. In September, University of California Hastings Environmental Law Professor John D. Leshy told this committee that these other laws do not comprehensively address the myriad of environmental threats posed by hardrock mining, such as groundwater depletion and pollution and disruption of wildlife habitat. Professor Leshy testified that existing environmental statutes do not require the government, in making decisions about whether to approve proposed mines, to weigh the value of mining against other values and uses of the public lands.

Why isn't the Clean Water Act sufficient to protect water resources from mining development in Washington or elsewhere in the West?

Answer. Please note my detailed answer to Senator Domenici's similar question above. In short, I strongly agree with Mr. Leshy's assessment. In the CWA in particular, neither nonpoint pollution nor groundwater pollution is regulated, which are precisely some of the biggest threats posed by hardrock mines.

Question 3b. What environmental safeguards would sufficiently protect water resources from mining development in Washington or elsewhere in the West?

Answer. As I stated above, prohibiting hardrock mines in special places, such as wilderness areas, National Parks, Fish and Wildlife Refuges, and inventoried roadless areas would be a critically important step. Further, as I said above, there should be at least one new mechanism in the Senate Bill to allow federal land managers to deny mine proposals in other situations where the benefits of conserving fish, wildlife and water resources clearly outweigh the benefits of the proposed mine.

Question 4. My state of Washington has experienced significant damage from mining and is, in fact, home to some of the nation's largest Superfund sites. When it comes to combating the damage inflicted by mining, I understand that the Superfund program is good for addressing high contaminant concentrations but that it still neglects the majority of mined areas.

Can you tell us whether you believe Superfund is sufficient to address the impacts of mining in Washington and elsewhere?

Answer. I am not an expert on Superfund policy, but my years of experience tell me that that Superfund is most certainly not sufficient to address the impacts of mining in Washington or elsewhere. First, Superfund generally is designed to clean up large messes that have already occurred, not prevent new ones from occurring. Second, only a small fraction of old, polluted mines qualify for Superfund clean up, so there are literally thousands of polluted abandoned mine sites in Washington and the West which do not qualify. To be clear, Superfund is helping clean up mining pollution on the ground, and we are thankful for that, but it is occurring in a limited fashion.

Therefore, as I said in my testimony, a new abandoned mine restoration funding and program, similar to the eastern coal abandoned mine restoration program, should be a key part of the Senate bill.

Question 5. A growing number of mine sites in this country now require water treatment in perpetuity to prevent further contamination of important water resources. Due to the severity of water quality impacts from acid mine drainage, many hardrock mines across the West require water treatment in perpetuity. For example, acid drainage into the Columbia River in Washington state from a Canadian mine will continue for thousands of years.

Shouldn't mines be required to prevent this type of damage?

Answer. Mines absolutely should be required to use all means available to prevent this type of costly long term damage, and if a mine proponent cannot guarantee that it will not occur, the mine should not be developed.

RESPONSES OF JAMES F. CRESS TO QUESTIONS FROM SENATOR DOMENICI

Question 1. A gross royalty is typically portrayed as easier to calculate and collect than a net, profits-based royalty. Both, however, tend to require that some level of deductions be incorporated. Is the extent to which a gross is simpler than a net overstated in some respects?

Answer. The differences between "gross" and "net" royalties are sometimes overstated, and there is considerable misunderstanding about hardrock royalties when the focus is purely on whether they are "gross" or "net." The two components to a royalty based on the value of mineral production are the royalty rate (percentage) and the "royalty base," or the value of the mineral or mineral product to which the royalty rate is applied. The royalty base is what differentiates a "gross" royalty from a "net," but it is not a choice between two alternatives. Rather, it is a continuum which can vary from the value of the land prior to exploration on the claim to the value of the final salable product (fabricated copper or gold, for example), as illustrated in my handout at the hearing titled "Gross vs. Net: What is a Fair Royalty Burden".*

As described in my testimony, coal and oil and gas often have a readily identifiable royalty base at the point they are extracted from the ground, so the federal royalty on those minerals is essentially the value of the minerals on the lease in their crude state. Crude oil is sold in local and international markets and the price of the product that comes out of the ground is generally readily ascertainable at the well. Gas is also often sold at the well head, in some cases without any processing. It is simple and straightforward to calculate and pay a royalty where the minerals have a value without processing, at the point they are removed from the ground. The royalty base is the raw mineral value and you just apply the royalty rate to that value.

These simple "gross royalties" for federal oil and gas and coal become immediately complex, however, where processing and transportation is required. For example, the federal royalty regulations for gas permit the deduction of the processing costs (see 30 C.F.R. Part 206, Subpart D) and the costs of transporting gas from the lease to the processing plant, which may be many miles away (see 30 C.F.R. §§ 206.156, 206.157). These regulations are quite detailed, reflecting the fact that the processed gas and the other salable products are sold far from the lease, and the value of the unprocessed federal minerals has to be determined by netting back to the lease for royalty purposes by deducting the processing and transportation costs. To complicate matters, the contractual arrangements by which gas is processed and transported often involve pipelines and gas processing plants owned by the same company, or an affiliate of the company, that holds the oil and gas lease, so the value of the gas processing and transportation may need to be determined without an arms-length contract. Coal washing and transportation allowances can introduce similar complexity (see 30 C.F.R. Part 206, Subpart F). Ms. Gibbs Tschudy testified that while these deductions are the most complex part of the federal oil and gas and coal royalty system to administer, the MMS is capable of auditing and administering them.

The value of the minerals in place on the claim is the fairest place to determine the royalty base, because it reflects the actual contribution of the government to the mining operation. The government contributes unexplored land, and does not contribute exploration dollars, development costs, construction financing and operational expenses, all of which must be contributed by the mining company before any minerals are removed from the ground and eventually processed into a salable metal or other mineral product. Unfortunately, unlike coal and oil and gas, there is rarely a market for raw hardrock minerals at the point they are removed from the government's land—they are generally still trapped in rock, requiring crushing,

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* Graphic has been retained in committee files.

transporting, milling, smelting, refining and other processing to free the contained metals and other minerals and fabricate a metal or other product that can be sold in a market and serve as the basis to determine royalty value. As discussed below in response to question 3, the states have often recognized that fairness requires the use of a severance tax or royalty base that is calculated on a net profits or net proceeds basis, or on the gross value of the raw minerals such as unprocessed ore, which is equivalent to the federal royalty basis for coal and oil and gas.

Question 2. Mining companies annually submit Corporate Income Tax forms to the Internal Revenue Service. Could the information contained in those documents simplify the administration of a profits-based royalty?

Most information from corporate income tax returns will not be directly relevant, because the royalty will be calculated on the minerals produced from only certain federal mining claims and tax returns are based on company-wide income and cost figures. Many companies mine from a combination of private, state and federal lands (sometimes at the same operation), and their income tax returns will aggregate all of the costs and expenses from the private, state and federal lands. Mining companies in calculating the royalty, and the government in collecting and auditing the royalty payments, will need to allocate the costs of production and the value of the minerals produced to only the federal mining claims that bear the royalty. This is true regardless of whether the royalty is gross or net. This will limit the usefulness of tax return information for federal royalty administration.

Although income tax returns in general will not be useful to simplify royalty administration, the depletion provisions of the Internal Revenue Code could theoretically be used to design a net royalty that might be calculated based primarily on existing information from tax returns and thus simpler to administer. In calculating depletion under Section 613 of the Code, mining companies must calculate their "taxable income from the property." See I.R.C. § 613(a); Treas. Reg. § 1.613-5. Taxable income from the property is the gross income from mining, less certain defined allowable deductions attributable to mining processes. These tax code provisions are similar enough to a royalty calculation that they could, with certain modifications (such as the addition of deductions for depletion, other royalties and severance taxes, and reclamation), be used to calculate a fair net royalty for mining claims. The depletion provisions of the Code are quite complex, but mining companies have been calculating depletion for almost 100 years, and there already exists a considerable body of administrative interpretation and case law. One of the useful tensions in using the depletion provisions of Section 613 as a basis for a federal royalty is that the higher the depletion deduction claimed by the taxpayer, the higher the federal royalty will be if it is based on the same calculation, thus minimizing any temptation to "game" the royalty calculation.

In order to achieve administrative simplification, however, the mining royalty statute would have to expressly state that the royalty is to be calculated in the same manner as required under the Internal Revenue Code and the Treasury Regulations, including judicial decisions and administrative decisions and interpretations of the Internal Revenue Service. The Department of the Interior should be expressly prohibited in the mining royalty statute from adopting any definition of "taxable income" and should have no separate authority to audit or adjust "taxable income." The royalty value should be based on the Internal Revenue Service's regulations, and the Service should have the exclusive authority to audit or adjust "taxable income" in connection with tax enforcement, with the Department of the Interior limited to using the Service's tax calculations in determining the federal royalty. Any duplicative, independent interpretation by the Department of the Interior of "taxable income" would destroy the administrative efficiency of this approach.

There are a number of other issues that would need to be addressed for a royalty based on Section 613 depletion calculations. For example, there will need to be a separate calculation of "taxable income" under Section 613 for federal mining claims subject to the royalty, excluding any federal mining claims not subject to the royalty and any state or private mineral properties. Also, to achieve the desired administrative simplicity and the tension between depletion and royalty described above, the person paying the royalty will have to be the same as the taxpayer calculating depletion. These issues might make it difficult to write a royalty based on "taxable income" under Section 613.

Note that H.R. 2262 uses the "gross income" portion of Section 613, but ignores the deductions resulting in "taxable income" that are essential for a fair royalty burden. H.R. 2262 also does not require the Department of the Interior to use the taxpayer returns and IRS regulations to calculate "gross income," with the result that the administrative burden on both government and industry may actually be increased by requiring complex calcuations under two different sets of rules. H.R. 2262's approach is thus neither administratively simple nor fair.

Question 3. In the United States, what sort of royalty (or tax) rates and structures have individual states imposed on mining operations?

Do States tend to impose a gross royalty or is a net approach more common?

Answer. Western states, in which most federal lands are located that would be subject to a federal hardrock royalty, tend to impose two types of burdens on hardrock mining: royalties on mineral production from state lands and severance taxes on private, state and federal mineral production. Both are calculated using a percentage of the value of the mineral produced, so both can be useful as comparisons for a federal royalty. One caveat is that state tax and royalty systems tend to have characteristics that are designed for the specific minerals that are produced in the state (copper and beryllium in Utah, for example, or molybdenum in Colorado) that may not be applicable or desirable policy for a nationwide royalty on federal lands.

The approaches of the western states to royalties and severance taxes, including the use of net or gross, vary considerably (with more than one approach sometimes used in the same state), but most states include a net approach or an approach based on the gross value of ore or mine mouth value, which is equivalent to a net. Western states apparently do not perceive that net approaches impose undue burdens on the state in calculating and collecting royalties and severance taxes. No state imposes a flat royalty on gross income without any deductions, such as the royalty under H.R. 2262. In addition to their varied approaches to the royalty or severance tax base, the states all impose significantly lower royalty or severance tax rates than the 8% gross royalty proposed in H.R. 2262, even when severance taxes and state royalty rates are added together in those states that have both. Rates tend to be lower for gold, copper and other metals.

Significantly, almost all of the western states already impose a severance tax on mining from federal lands. Any federal royalty will have to be added on top of these existing burdens, making it crucial that the royalty not be so high that the combined burden makes future mining uneconomic.

It is important to look closely at the statutes and regulations when characterizing the state systems, since what may appear to be a "gross" approach may actually be based on the "gross value of ore," "gross value less processing costs," "gross value at the mine mouth" or another royalty base that is functionally equivalent to a net approach. "[T]he definition of the royalty basis is critical to understanding the rate. When comparing royalty rates in different jurisdictions, care must be taken not to compare rates unless the royalty base is identical." Otto, et al., "Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society" p. 62 (World Bank 2006)("World Bank Study").

The various western state approaches to royalty and severance tax base are discussed below in a continuum from the most "net" to the most "gross" approaches.

NET PROFITS OR NET PROCEEDS

A number of states define the royalty base or severance tax base on a net profits or net proceeds basis. These state burdens are truly "net," in the sense that the royalty base is typically determined after deduction of all mining and processing costs and transportation.

Alaska imposes a royalty of three percent of net income on mining from state lands. Alaska Stat. § 38.05.212 (elec. 2008). Alaska also imposes an additional mining license tax (similar to a severance tax) that is calculated as a percentage (between three and seven percent) of the net income from the property. (This mining license tax was ignored in the numbers cited by Taxpayers for Common Sense, which included only the net income royalty, resulting in an inaccurate estimate of the actual government take on state lands, as corrected by Senator Murkowski.) Producing mines are exempted from the tax for three and a half years, in order to allow them first to recover their capital costs. Alaska Stat. Tit. 43, Ch. 65. (elec. 2008).

Nevada imposes a severance tax of between 2 and 5 percent of net proceeds. Nev. Rev. Stat. Ann. Ch. 362. (elec. 2008). "Net proceeds" is defined as the gross value of the mineral product, less deductions for extraction costs, processing, refining and sale costs, costs of transportation from the mine to the place of processing and sale, marketing costs, maintenance and repair costs for machinery, facilities and equipment used in mining, processing and transportation, depreciation of such facilities and equipment, insurance costs, costs of employee benefits, development costs, royalties, and certain administrative overhead costs. Id. § 362.120; Nev. Admin. Code Ch. 362. This tax is phased in as the percentage of net proceeds to gross proceeds increases, with the lower rate applying to operations generating $4 million or less in annual net proceeds.

California imposes a royalty on state lands on a lease-by-lease basis. One basis used is a percentage of the net profits derived from mineral extraction operations. See Cal. Pub. Resources Code § 6895 (elec. 2008).

Montana taxes the net proceeds of minerals other than coal, bentonite and metal mines (metal mines are taxed on a net smelter returns basis as described below). Mont. Code Ann. § 15-6-131(1), (2). Id. § 15-23-503. The "net proceeds" tax base is defined as gross receipts received from the sale of concentrates or metals, less allowable deductions. Deductions allowed include royalties paid, costs of labor, machinery and supplies used in mining operations and development, costs of improvements, repairs or replacements to the mine, mill or reduction works, and depreciation of the mill and reduction works, transportation from mine to mill or place of sale, marketing costs, insurance, environmental, reclamation and mine safety compliance costs, sampling and assaying charges, engineering and geological service charges.

South Dakota imposes several types of severance taxes. One tax is a 10% net profits tax imposed on gold and other precious metals. S.D. Cod. Laws § 10-39-45.1 (elec. 2008).

"Net profits" are defined as gross receipts from the sale of precious metals, less deductions for the cost of extraction, transportation from mine to mill, the costs of reduction, refining and sale, marketing costs, costs of maintenance and repairs of mining, processing and transportation machinery, equipment and facilities and administrative facilities, interest costs, insurance costs, employee benefits, depreciation of machinery, equipment and facilities, mine exploration and development costs, reclamation costs, royalty payments, state and local taxes, and general administrative expenses incurred within the state. Id. §§ 10-39-44, 10-39-45.2.

Arizona also had a royalty on state land of five percent of the net value of minerals, until a 1989 state supreme court decision overturned this method as being inconsistent with the State's enabling act. Ariz. Rev. Stat. § 27-234 (repealed); see Kadish v. Arizona State Land Department, 155 Ariz. 484; 747 P.2d 1183 (1987). Arizona illustrates an important point about the western state royalty systems. The federal government generally granted lands to the states under federal enabling (statehood) acts, which granted the lands in trust for the benefit of public schools and other specified purposes. The limitations of these state enabling acts are generally incorporated in the state constitutions of the western states, and may impose limits on the type of royalty imposed and minimum requirements for the income that must be generated and collected by the state from these state trust lands for the public school or other beneficiaries of the trust. The federal government is not subject to these trust responsibilities on federal lands, and Congress is free (within the limits of the Constitution) to impose a net royalty, or no royalty at all, on federal lands.

GROSS VALUE OF ORE OR MINE MOUTH VALUE

A number of western states have imposed royalties or severance taxes that are based on the gross value of the unprocessed ore or mine mouth value. This is the functional equivalent of a net proceeds or net profits approach, with deductions for all processing and transportation costs and, in some states, mining costs.

Colorado's severance tax is 2.25% of the gross value of the ore, excluding any value added subsequent to mining, and subject to an exclusion for the first $19 million in income and credits for property taxes and any state land royalties. Colo. Rev. Stat. §§ 39-29-102 to -104 (elec. 2008). Colorado state land royalties are determined on a case by case basis, see Colo. Rev. Stat. §36-1-113 (elec. 2008), but gross value of ore has been used for some minerals, and net smelter returns for others. See "Royalties in the Western States and in Major Mineral-Producing Countries," GAO/RCED-93-109, p.28 (GAO 1993) ("1993 GAO Report").

Idaho imposes a license tax (equivalent to a severance tax) of 1% of the gross value of ore, after deducting all costs of mining and processing the ore. Idaho Code §§ 47-1201, 47-1202 (elec. 2008). Idaho, like Colorado, imposes state land royalties on a case by case basis in each lease, see Idaho Code § 47-710 (elec. 2008), and has in the past also used a royalty of between 2.5% (for certain metals) to 10% (for certain non-metallic minerals) of the value of the unprocessed ore. See 1993 GAO Report, p.30.

Utah has imposed a royalty on minerals extracted from state lands of a specified percentage of the value of the minerals, including a royalty of 4% of the gross value of the ore sold for metals other than uranium. See 1993 GAO Report, p.43.

South Dakota imposes a royalty on leases of state lands of not less than 2% of the gross returns from the sale of ores and mineral products derived therefrom, less smelting and reduction charges and transportation and any other "customary and appropriate charges" determined by the state land commissioner. S.D. Cod. Laws §

5-7-55 (elec. 2008). If the ore is sold, this constitutes a royalty on the "gross value of ore" without a deduction for mining costs.

Wyoming's severance tax is based on the fair market value of the minerals at the mouth of the mine, after extraction. Wyo. Stat. § 39-14-703 (elec. 2008). This royalty base is also equivalent to the value of ore, like the states above, but without a deduction for mining costs.

Montana imposes a royalty on state lands of at least 5% of the market value of the minerals recovered. Mont. Code Ann. § 77-3-116 (elec. 2008). Montana has in the past defined this royalty as a percentage of the value of the raw minerals recovered from the claim, See 1993 GAO Report, p.32, which is similar to the "gross value of ore" used in the states described above.

Oregon imposes a royalty of 5% on most metallic minerals removed from leases of state lands. Or. Admin. R. §§ 141-071-0410, -0610 (elec. 2008). The royalty base is calculated on the gross value of minerals at the mine mouth. Id. § 141-071-0620; See 1993 GAO Report, p.41.

NET SMELTER RETURN AND SIMILAR APPROACHES

Several states employ net smelter return or similar methodologies in their royalties or severance taxes. Net smelter return approaches are more common in state land royalties, which may be in part because of the trust requirements imposed by state enabling statutes on state lands, as discussed above.

Montana imposes a license tax (similar to a severance tax) on metal mines of 1.6% of the net smelter returns for precious and base metals. The tax is 1.8% on mineral concentrates prior to shipment to the smelter. Mont. Code Ann. §§ 15-23-801, 15-37-102, 15-37-103 (elec. 2008). The tax base is the receipts received from the sale of concentrates or metals, less allowable deductions. Deductions allowable in calculating the tax include treatment and refinery charges, costs of transportation from the mine or mill to the smelter, roaster or other processing facility, quantity, price, impurity and penalty charges, and interest. Id. § 15-23-801(5). Treatment and refinery charges include labor cost, utility and fuel costs, costs of maintenance, repairs and supplies, materials, depreciation, rental of equipment, pollution control costs, costs of training, freight, engineering, insurance and licensing attributable to smelting and refining, administrative services and all third party treatment and processing costs. Id. § 15-23-801(2).

New Mexico imposes a royalty on state lands of not less than 2% of the gross returns from the smelter or other processing facility, less the costs of smelting or reduction and transportation. N.M. Stat. Ann. § 19-8-22 (elec. 2008). This is functionally a net smelter returns royalty. The royalty percentage is not less than 5% for uranium and certain other minerals.

South Dakota imposes a royalty on leases of state lands of not less than 2% of the gross returns from the sale of ores and mineral products derived therefrom, less smelting and reduction charges and transportation, and any other "customary and appropriate charges" determined by the state land commissioner. S.D. Cod. Laws § 5-7-55 (elec. 2008). If concentrates or metals are sold and no other deductions are allowed by the commissioner, this is equivalent to a net smelter return.

As an alternative to the net profits royalty base described above, California may impose on a case-by-case basis a royalty on state lands based on 10% of the gross value of the mineral production less processing and transportation charges, which is similar to a net smelter return calculation. See Cal. Pub. Resources Code § 6895 (elec. 2008).

GROSS WITH FLAT COST DEDUCTION

Two states use a "gross with flat cost deduction" severance tax system. This approach attempts to approximate the economic burden of a net profits or net proceeds tax, while minimizing the administrative burden by eliminating the need to audit mine-specific cost deductions, by allowing a flat deduction of a percentage of gross proceeds to approximate the deduction of mining and processing costs. These states apply different tax rates to different minerals, and permit different flat cost deductions for different types of mineral products. This is not a "net" approach, however, because the flat cost deduction treats all mining operations the same regardless of their actual costs; this system is effectively a small gross burden that varies for different minerals. The administrative simplicity of the flat deduction has been somewhat offset by the need to amend the statute more frequently to ensure that the size of the flat cost deduction reflects actual costs to the extent possible, and to address concerns of particular mineral producers with higher processing costs, such as beryllium miners in Utah.

New Mexico imposes a severance tax of between 1/8 and 1/2 of 1% (depending on the metal or mineral) of the "taxable value" Taxable value is the value of a specific mineral product (concentrates for molybdenum, copper, lead and zinc, concentrate or doré for gold) less 50% to 66-2/3% of that value to approximate the costs of mining and processing. The tax rate and cost deductions differ for various minerals.

Utah's severance tax is 2.6% of the "taxable value," which is determined based on the product sold. If the mineral product sold is ore, the taxable value is 80% of the gross proceeds, with the 20% of the value excluded approximating a deduction for mining and transportation costs. If the product sold is metal (other than beryllium), the taxable value is 30% of the gross proceeds, with the remaining 70% of gross proceeds approximating a deduction for mining, processing and transportation costs. Beryllium formerly had a taxable value of 20% of the gross proceeds, with an 80% deduction for costs, but taxable value is now equal to 125% of the mining costs. For intermediate mineral products such as copper concentrate, the taxable value is based on the amount of contained metal in the product if the intermediate product is further processed rather than being sold at the point of taxation.

GROSS RECEIPTS FROM FIRST MARKETABLE PRODUCT

Washington imposes a royalty on minerals extracted from state lands of 5% of the gross receipts. "Gross receipts" are based on the value of the first marketable product, subject to the deduction of transportation costs. Wash. Admin. Code §§ 332-16-035, 332-16-155. This royalty appears to be either a gross or net burden depending on the mineral product sold, whether ore, concentrates or finished metals. Washington has no severance tax, which may help offset the impact of this potentially more gross royalty calculation.

UNIT-BASED SEVERANCE TAXES ON SPECIFIC MINERALS

Several states impose an additional, unit based severance tax on particular minerals. A unit-based tax is not based on a percentage of the value of the mineral, such as the net and gross ad valorum approaches described above, but is a flat dollar amount per unit of mineral produced. These taxes tend to be aimed at large producers or particular minerals in these states, presumably because the states have determined they are able to bear a higher tax burden. Unit-based royalties are not a good basis for designing a federal royalty, which must apply to many commodities and many types of mining operations.

Colorado imposes an additional severance tax of five cents per ton of molybdenum ore for all tons over 625,000 produced in a calendar quarter. The quantity limitation limits the tax primarily to two of the largest molybdenum mines in the world that have operated in Colorado for decades.

South Dakota imposes a severance tax on gold of $4 per ounce, plus an additional $1 to $4 dollars per ounce depending on the gold price. Id. § 10-39-43.

Question 4. Can you discuss the importance of allowing discretion for some form of royalty relief for mining operations?

Under what circumstances might royalty relief be appropriate, and what are the costs and benefits associated with a decision to provide relief?

Answer. The Mineral Leasing Act of 1920 permits the Secretary of the Interior to reduce royalties for oil and gas, coal, potassium and other leasable minerals "whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein". 30 U.S.C. § 209 (elec. 2008). Discretionary royalty relief has provided significant flexibility to the United States to maximize the economic recovery of mineral deposits and to assist mineral industries with difficult operating or economic challenges. Royalty reductions have aided the development of underground coal in Colorado and strategic potash deposits in New Mexico and Utah and have maximized production from marginal "stripper" oil wells and heavy oil recovery throughout the west.

Discretionary royalty relief would be just as important in the imposition of a hardrock royalty system. The proposed federal hardrock royalty will apply to dozens of minerals that are produced by many different mining and processing methods. The desire for administrative simplicity will probably result in a single royalty rate and calculation applying to many different minerals and types of operations, something that has never been attempted in federal royalty laws. A discretionary royalty relief provision will enable the Department of the Interior to address some of the inequities between commodities and operations that may be created by this "one size fits all" approach.

A discretionary royalty relief provision should at a minimum permit royalty reductions under the same circumstances as are currently provided by the Bureau of

Land Management for royalties on other solid minerals. Those five categories are: (1) for expanded recovery, where adverse geological or engineering conditions exist, or where the federal resources are likely to be bypassed because recovery is higher in cost due to the royalty than nearby non-federal resources; (2) for extension of mine life, to encourage the greatest ultimate recovery of mineral resources; (3) a financial test for unsuccessful operations, where operating costs exceed the value of production; (4) a financial test in combination with expanded recovery or extension of mine life, where financial information supports an even lower rate than would otherwise be allowed for either expanded recovery or extension of mine life alone; and (5) geographic area royalty rate differentials, where the federal royalty is higher than surrounding state or private royalties and could cause the federal resources to be bypassed or remain undeveloped. See 55 Fed. Reg. 6841, 6844 (Feb. 27, 1990)(amendment of Solid Mineral Royalty Reduction Guidelines); "New Royalty Rate Reduction Guidelines for All Federal Solid Leasable Minerals," BLM Instruction Memorandum No. 87-552 (June 26, 1987)(notice published at 52 Fed. Reg. 24347 (June 30, 1987)).

There are other examples of royalty relief based on royalty reduction statutes applicable to oil and gas. Royalty relief for marginal production could be provided similar to the "marginal property production incentive program" established under Section 343 of the Energy Policy Act of 2005, 42 USC § 15903 (elec. 2008), with automatic thresholds that would apply until the Department of the Interior adopted rules after study. Discretionary royalty relief could also be provided to encourage the mining of new deposits near existing operations, similar to the royalty relief under the Outer Continental Shelf Deep Water Royalty Relief Act. 43 U.S.C. § 1337; 30 C.F.R. Parts 203 & 260 (elec. 2008).

The benefits of providing royalty relief include maximizing federal mineral production from existing operations, consistent with the principles of sustainable development, and encouraging new production that might not otherwise be developed. Royalty reductions can also assist a mineral sector affected by unfair foreign competition or temporary market forces from going out of business, thus preserving high-paying American jobs.

For example, underground coal mines in Colorado have been developed with royalty reductions. Colorado coal has a high BTU or heating value compared to Wyoming surface-mined coal, and is a low sulfur fuel that meets Clean Air Act requirements. The royalty reductions have helped to offset the difficult geological and engineering challenges that these mines encounter, mining up to 2,000 feet or more below the surface under difficult roof control conditions.

Similarly, federal royalty reductions have assisted the development and continued operation of strategically important potash deposits in southeastern New Mexico. The U.S. imports about 80% of its potash requirements, essential for fertilizer and certain industrial applications requiring potassium. Approximately 75% of U.S. domestic production is in southeastern New Mexico, mostly on federal lands, where production commenced in the 1920s. Since 1964, royalty reductions have been used periodically to permit the New Mexico producers with older, more mature operations, to compete with Canadian and Russian producers, who have much higher potash grades and larger deposits. In times of higher prices, these operators have paid higher royalties. Some of the potash royalty reductions used have been sliding scale royalties based on the grade of the potash ore being mined, an innovative approach that permits operations to continue to process lower grades by automatically adjusting the royalty downward when lower grades are encountered in the variable-grade ore, and automatically increasing the royalty when higher grades are encountered.

The cost to a royalty reduction can be measured by the foregone royalties, but that must be offset by the royalty value of additional mineral production from extended mine life or new deposits, and the federal, state and local taxes paid by operations that remain in business or are able to expand production (and their employees).

There really is little downside to including a discretionary royalty relief provision in a hardrock royalty. There will be some administrative burden for the Bureau of Land Management to consider royalty reduction applications, but it has been doing so successfully for years for coal, potash, and other solid minerals. The cost of not including a royalty reduction provision is potentially great. Without this statutory authority, the Department of the Interior will probably have no implied authority to reduce royalties for individual operations or industry segments, regardless of the policy reasons that may from time to time favor a reduction.

Question 5. What might be the exploration and development implications of having claim maintenance fees vary dependent upon whether or not there is an approved and operational Plan of Operations?

For instance, the amount could be set lower for active and higher for inactive claims, or vice-versa.

Answer. Claim maintenance fees should not be made so high as to discourage exploration and development. Since they are paid whether or not a claim contains an operating mine, they constitute a fixed cost. Generally, claim fees that are lower in the initial years of exploration and increase over time may provide an incentive to either explore claims or relinquish them. Imposing a higher fee on claims that are not included in an application for a plan of operations for exploration or development within a certain number of years would also provide an incentive to explore and develop the claims.

Question 6. Mill-site claims have proven to be a contentious issue in the past. Does the concept of a requirement for payment of a fair market rental on lands required for ancillary use activities make sense?

Answer. A reasonable payment for use of lands included in a mining plan of operations would be acceptable if the payment was in return for the use of the lands for the purposes approved in the plan of operations. The controversies over mill sites and the use of federal surface within a plan of operations boundary engendered by certain solicitors opinions of the Department of the Interior have been detrimental to mineral exploration and development in the United States. A statutory solution that results in a fair payment and also eliminates these uncertainties would be very helpful.

The payment should not be based on "fair market value," however. Congress should provide for a fixed payment, to avoid the administrative complexity of having the Department of the Interior determine "fair market value." For example, "fair market value" determinations for federal land exchanges have made exchanges very time consuming. The payment should be in lieu of any other payment under the Federal Land Policy and Management Act or other statutes such as federal cost recovery laws.

Question 7. Considering the large number of participants in the development of a mine (including the operator, owner, co-owners, royalty owners and others), who should be liable for payment of a federal royalty?

Answer. Because the royalty is a property interest carved out of an unpatented mining claim, the owner or co-owners of the mining claim should be liable for the royalty. The royalty will need to be calculated and paid by the operator, however. An owner or co-owner of the claim is sometimes, but not always, also the mine operator. If the operator is not the owner, the owner or co-owners will need to make arrangements for the operator to pay the royalty on the owner's behalf, since the operator will have access to the mineral production and sales information, and the cost information necessary to calculate the royalty. This can be done by voluntary contractual arrangements between the owners and operators, and the government need not legislate a liability scheme for owners and operators.

Care should be taken not to introduce onerous and unfair burdens on royalty owners and others, such as the joint and several liability imposed by Subsections 102(b)(2) and 102(h) of H.R. 2262 on owners that assign their claims to others, and joint and several liability for the "negligent" loss of minerals by any other owner or co-owner. Such provisions have no parallel in existing royalty enforcement in the United States, and will be unworkable and spawn considerable litigation.

Question 8. To what extent does the imposition of a royalty on operational mines constitute an assertion of a property interest?

Answer. A mining claim supported by a discovery of a "valuable mineral deposit" is a vested interest in real property under long-standing Supreme Court precedent. See Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, 79 L. Ed. 1627, 55 S. Ct. 888 (1935) ; Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 74 L. Ed. 445, 50 S. Ct. 103 (1930) ; Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 48 L. Ed. 944, 24 S. Ct. 632 (1904) ; St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 43 L. Ed. 320, 19 S. Ct. 61 (1898) ; Belk v. Meagher, 104 U.S. (14 Otto.) 279 (1881). A mining claim does not have to be part of an operational mine in order to constitute a property interest, since the concept of "discovery" under the mining law has been interpreted for over a century to extend to claims that are being explored or developed and for which "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. . . ." Castle v. Womble, 19 Pub. Lands Dec. 455, 457 (1894); see generally 2 American Law of Mining 2d Ch. 35 (Rocky Mtn Min. L. Fdn. elec. 2007).

A royalty interest is generally understood to be a property interest, and royalties not limited in term have generally been treated as real property interests, rather than personal property. See 3 American Law of Mining 2d § 85.02 (Rocky Mtn Min. L. Fdn. elec. 2007)(Royalty as property). As a result, Congress risks takings claims

by seeking to impose a royalty on existing mines, since the royalty takes a portion of the property interest and, at high levels such as those proposed in H.R. 2262, could put some operations out of business.

The recent case of United States v. Locke, 471 U.S. 84 (1985), cited by Professor Leshy in response to a similar question by Senator Bingaman, did not overturn more than 100 years of precedent stating that a mining claim supported by a discovery is a property interest. The Locke case involved the imposition of a statutory filing requirement for mining claims which provided that the failure to file the claims within three years after enactment of the law would constitute an abandonment of the claim. The law did not require payment of a royalty or fee or otherwise impose a regulatory burden on mining claimants so severe that it was found to be a taking. Certainly there is no assurance that the Supreme Court would condone under Locke the taking of a portion of the minerals mined from an unpatented mining claim, which is the essence of the property right. Ms. Gibbs Tschudy testified that the Justice Department is concerned enough about the potential for takings claims that it has recommended that any royalty apply only to claims located after the date of enactment.

Question 9. We must account for how a royalty will impact the United States as a global competitor for hard rock mining investment dollars.

Internationally, what is a typical 'government take' from hard rock mining operations? How does that compare to existing taxes, fees and other costs of doing business here in the United States?

Answer. There is probably no typical "government take" from hardrock mining, as government taxation and resource policies range from encouraging of mineral development to ruinous depending on the policy needs and objectives of the country. However, the Committee is absolutely correct to focus not only on the royalty rate and the "net" or "gross" royalty base, but on the entire tax and royalty burden applicable to mining. Mining companies take the same holistic view of the cost of doing business when they are deciding where to invest their exploration and mine development capital.

Professor Otto and others have conducted two studies comparing government take in various countries, which included Arizona and Nevada (two of the highest mineral producing western states). The most recent study was published in 2000. Otto, Batarseh & Cordes, "Global Mining Taxation Comparative Study (Second Edition)" (Institute for Global Resources Policy & Management Mar. 2000) ("Global Mining Taxation"). The study evaluated all of the direct and indirect taxes on mining (including royalties) in 24 countries, including a range of developed and developing countries. The authors then modeled the impact of "government take" in these countries on two hypothetical mineral deposits, a gold mine and a copper mine, to evaluate and compare the burden imposed by these tax and royalty regimes.

Professor Otto testified before this Committee that his studies have shown that many mineral producing countries impose a total effective tax rate (government take) in the range of 40 to 50%. It is extremely significant that, at least as of 2000, the effective tax rate for Nevada in his study was 49.3% for a medium-profitable gold mine, before the imposition of any federal royalty. See Global Mining Taxation, Section 4.5, pp. 95-96 and Table 27. With a 10% drop in the gold price, Nevada's effective tax rate jumped to a confiscatory 63%. Id. p. 101 and Table 28. Similarly, the effective tax rate for the hypothetical copper mine in Arizona was 49.9%, before the imposition of any federal royalty. Id. Section 4.5, pp. 95-96 and Table 27. These studies suggest that even a small federal royalty could take the United States out of the 40-50% effective tax rate range typical for successful mineral producing countries, making the U.S. less competitive for mining investment.

In the absence of an updated study of current "government take" in each of the western states compared to other countries, caution would dictate that a net profits or net proceeds royalty be considered that is more sensitive to profitability and commodity price swings. As described by Professor Otto, this has been a trend in countries with diverse economies and effective tax systems that incorporate income-and profit-based taxes towards the use of such royalties:

> [S]ome nations with competent tax administration structures have been moving toward profit-or income-based mining tax systems. Almost all Canadian provinces have replaced traditional forms of royalty with mining taxes based on adjusted income. Likewise, Nevada, in the United States, and the Northern Territory in Australia use profit-or income-based royalty systems. These jurisdictions enjoy a relatively high level of mineral sector investment and also benefit from significant mineral sector fiscal revenues.

World Bank Study, p. 37. These jurisdictions are probably better models for the United States in fashioning a hardrock mineral royalty than developing countries,

which may lack the government capacity to administer a net royalty and therefore often use a net smelter or other form of gross royalty.

Question 10. What impact does the size of a given 'government take' have on reserves, mine life, and the amounts of saleable minerals that are ultimately produced from mines?

Answer. As discussed in connection with question 4 on royalty relief, a larger government take can result in premature mine closures. A lower government take may result in not only greater recovery from existing deposits, but more discovery of new mines due to the increased exploration activity that is generated by a lower government take.

RESPONSES OF JAMES M. OTTO TO QUESTIONS FROM SENATOR BINGAMAN

Note: in my answers below, in some cases I cite a country example. This refers to the royalty law for the named country as contained in the diskette found in the rear sleeve of my book J. Otto et al, "Mining Royalties," World Bank, 2006.

Question 1. In addition to the "gross proceeds" and "net profit" royalties described in hearing testimony, some jurisdictions have also implemented hybrid royalties—which incorporate characteristics of both models. Could you describe an example, and the pros and cons of instituting a hybrid royalty for hardrock minerals?

Answer. Most nations do not use a hybrid approach, but several do. The policy reason for a hybrid is simple: collect at least a minimum amount of tax (usually based on a gross proceeds basis) and a higher amount if the mine is very profitable or if prices are high. Three examples are:

1) a graduated royalty where the royalty rate applied to gross proceeds goes up or down according to the price of the commodity (premise: as the price of the commodity goes up, a mine will be able to pay more than when the price is low). Example: Bolivia.

2) a graduated royalty where the royalty rate applied to gross proceeds goes up or down based on a simple ratio of the value of the minerals extracted to working profits (premise: mines with higher profits can pay higher royalty) Example: Ghana

3) where the taxpayer pays the higher of a gross proceeds royalty or a net profits tax (guarantees some revenue to the treasury even if no profits are made) Example: Dominican Republic.

Pro: all 3 types capture additional revenue when prices are high and at least some revenues are received even when prices are low

Con: 1 above, this is basically a gross proceeds royalty but the taxpayer or tax administrator needs to look up the rate in each tax period based on the commodity price during that period.

Con: 2 above, this is basically a gross proceeds royalty but the taxpayer must calculate a measure of market value to a measure of profits as defined in the law, during the tax period and then do a table look up to determine the rate. This means that the company may practice tax minimization strategies to increase working profit so as to achieve a lower royalty rate.

Con 3 above, this is more work for the company with no real downside for government.

Question 2. Your testimony suggests that a net profit-based royalty might be more susceptible to "tax minimization strategies" than a gross income-based model. Are there specific examples of these strategies that you can offer? Are there any of which we should be particularly mindful at the outset?

Answer. The complete toolkit of tax minimization strategies that can be used to minimize income tax can be used to manipulate profit-based royalty as well. For example, timing new investment costs so as to reduce royalty when prices are high.

Question 3. Your testimony describes "transfer pricing" as a growing concern in the area of hardrock royalties—particularly given the consolidation that has occurred within the mining industry. Please elaborate on this concern, and perhaps detail some of the measures that can be taken to avoid this result.

Answer. I have seen a dramatic increase in transfer pricing over the past decade, in some cases resulting in very substantial losses to the treasuries of the governments concerned. If there is a profit based royalty, there are two edges to the transfer pricing sword—inflated prices being paid to affiliates who provide finance, goods and services to the mine, and sales of the mineral—a price is paid by the buyer that is lower than the market price. There are a number of protections that I build into mining laws and agreements that I draft ranging beyond simple arms length price

requirements, for example the need to report any transactions to an affiliate (where there is 5% equity cross-holding or other criteria).

RESPONSES OF JAMES M. OTTO TO QUESTIONS FROM SENATOR DOMENICI

Question 1. Mining companies annually submit Corporate Income Tax forms to the Internal Revenue Service. Could the information contained in those documents simplify the administration of a profits-based royalty?

Answer. Probably not. Income tax is based on all income earned by a corporation not just income earned from mineral sales. Royalty is almost always based on a measure linked in some way to mineral sales. For this reason, jurisdictions that impose a profits-based royalty specially define how to calculate profits and exclude or limit certain types of income and costs. Example: see Canadian provincial royalty legislation.

Question 2. We must account for how a royalty will impact the United States as a global competitor for hard rock mining investment dollars.

Internationally, what is a typical 'government take' from hard rock mining operations? How does that compare to existing taxes, fees and other costs of doing business here in the United States?

Answer. A typical government take is an effective tax rate of between 40 and 60% percent. The effective tax rate (ETR) is simply the amount of all taxes and fees paid to government divided by the before tax profit. In almost all nations where I have assisted in the design of the mining fiscal system, I have estimated the ETR for several model mines based on that nation's fiscal system. This allows policy makers to see how the fiscal system (and proposed changes to the system) compares to those in other nations and how it would affect the mine's economics. Such studies typically cost from USD15,000 to 45,000. The last "public" study I completed was in 2000, and describes the fiscal systems and calculates ETR for two model mines in over 20 jurisdictions including 2 US states. On January 29, 2008 a team from the GAO visited my office at the request of your Committee and received a copy of that study. The studies I do for governments are usually much more detailed than the global study, for example, showing the ETR for a wide range of prices.

Question 3. What impact does the size of a given 'government take' have on reserves, mine life, and the amounts of saleable minerals that are ultimately produced from mines?

Answer. This is a complex issue which is covered in detail in my book "Mining Royalties." The simple answer is that if a gross proceeds tax is kept low, there will be little impact on most mines but if it is high, it will affect mine design and may result in lower reserves and a shortened mine life.

Question 4. You speak of the importance of taxes in making royalty policy, but single out a single feature of the entire tax code (the depletion allowance) as a justification for higher federal royalties. Can you explain how the depletion allowance works and why you chose to exclude other state & federal fees, taxes, and other costs in your testimony?

Answer. All taxes and fees are important as are tax incentives. In my studies for governments undertaking mining sector fiscal reform I always use a holistic approach where every tax and fee and incentive is evaluated so that interactions and cumulative effect can be understood by policymakers. Most counties have a very similar toolkit of taxes, fees and incentives. The US stands apart from almost all other nations in that it provides a depletion allowance. In most nations minerals belong to the state and one rationale for a royalty is that some sum must be paid to the state as its nonrenewable mineral is mined (depleted). Most nations have rejected the concept that a company should receive a tax incentive to deplete the nation's resources—such an allowance is viewed by many economists as a form of "negative royalty." There are however positive aspects to a depletion allowance, for example, the policy premise is similar to depreciation. As the resource is used up, it will need to be replaced through exploration and the deletion allowance can be used for this purpose. Most taxes and fees levied on the mining industry are similar to those in other nations and I singled out depletion allowance because of its "negative" royalty connotations. Obviously, a five minute presentation can only cover a few issues. My "standard" mining taxation presentation for senior government officials is about 90 minutes long.

Question 5. Considering the large number of participants in the development of a mine (including the operator, owner, co-owners, royalty owners and others), who should be liable for payment of a federal royalty?

Answer. The taxpayer holding title to the mined property or if there is no title, then the holder of the right granted by government to mine the property.

Question 6. To what extent does the imposition of a royalty on operational mines constitute an assertion of a property interest?

Answer. I am not an expert in US property rights. However, this same issue comes up in other nations. In my view, the property rights issue can probably be avoided depending on the language used in the statute. There are several ways that nations approach the concept of a royalty tax. One view is that it is a form of ownership transfer tax where the miner is paying the government for the transfer of the mineral from public to private ownership. If this approach is taken, there is perhaps grounds for a "takings" based legal action for mines where the mineral has already passed hands before the enactment of the new law. However, some nations structure their tax as a usage tax and what is taxed is not the transfer of mineral ownership but instead the right to undertake the activity (to mine). Take for example, a driver's licence. The tax does not involve the automobile, it is levied on the grant of permission to drive.

Question 7. Can you discuss the importance of allowing discretion for some form of royalty relief for mining operations?

Under what circumstances might royalty relief be appropriate, and what are the costs and benefits associated with a decision to provide relief?

Answer. The mineral sector is cyclical and price changes are greater than in most other industries. Most mines will from time to time run at a loss. While some fiscal mechanisms help smooth revenue flows, such as income tax loss carry-forward, costs that must be paid regardless of profitability, such as some forms of royalty, can aggravate a mine's economic situation in a downturn possibly resulting in closure. Some nations, but not most, thus allow a mine to apply for either relief from royalty or for royalty payments to be deferred until a future date. When is exemption or deferral warranted? In some nations the decision is left entirely to the discretion of a government official. In my opinion, if relief power is given to an official, then I suggest that the discretion be bounded. For instance, such discretionary power should not allow individual mines to be exempted on a case by case basis, but where a class of mines is under duress, perhaps allow that class of mines to be exempted but only for up to a defined time period that cannot be extended (perhaps 3 years). The benefits to be gained are that more mines remain open. If closed, there is a negative impact throughout the local economy, costs can be imposed on local government, local government will receive lower taxes such as property tax, and the state and federal government will probably have lower fiscal revenues over the long run (once closed many mines do not reopen). Examples are provided in my book "Mining Royalties."

RESPONSE OF JAMES M. OTTO TO QUESTION FROM SENATOR CANTWELL

Question 1a. In your testimony, you stated that most nations impose some form of royalty on minerals when the nation is the owner of the mineral. There are very few exceptions and over the past few years some countries that previously had no royalty now either have one or are planning to introduce one. In addition, mining companies in the United States receive a multi-million dollar double subsidy in the form of the percentage depletion allowance. The percentage depletion allowance allows mining companies to take tax deductions on mineral deposits they received from public lands for free and costs the taxpayer an estimated $100 million a year.

Shouldn't mining companies be required to pay a royalty similar to what other extractive industries pay in this country, generally 8%—16% of the gross value of the mineral?

Answer. When one considers appropriate rates for royalty there are several considerations to take into account and I will mention three. One is whether or not the mineral being produced is subject to competition from foreign-sourced minerals. Low-valued bulk commodities like sand, gravel, aggregates, coal and iron ore have very substantial transportation costs and thus foreign mined minerals are at a large cost disadvantage. Royalties on these bulk commodities can be relatively high and still allow domestic producers a cost advantage over foreign minerals. In many nations, the royalties on "bulk" minerals are high relative to those on hard-rock minerals. Secondly, miners have many jurisdictions to choose from when deciding where to invest. Most nations tax hard-rock minerals at around a rate of 2 to 5 percent. Rates above 5% are extremely rare. Companies will look outside the US for new investment opportunities. Thirdly, if too high a royalty is assessed, there will be fewer companies willing to explore and discover new tax paying mines. Companies undertake economic feasibility studies to determine whether their minimum rate of return criterion is satisfied. A gross proceeds tax of 8 to 16% (a fixed cost) would result in many potential mines not being built. If an objective of government is to maxi-

mize fiscal revenue from the industry over the long run, too high a royalty rate may result in lower revenues (see below).*

Question 1b. Mining companies are already required to report the value of minerals mined to the IRS to calculate taxes. Why should reporting to the Interior Department to calculate a royalty be different?

Answer. I am not familiar with the income tax reporting requirements for minerals and cannot comment directly on this question. However, almost all nations require separate reporting, and standardized forms can be used. What is important is that whatever agency is responsible for royalty oversight must be familiar with the mining industry and minerals value. At the present time, the Minerals Management Service is best equipped for this function.

RESPONSES OF ALAN BERNHOLTZ TO QUESTIONS FROM SENATOR DOMENICI

Question 1. In discussing Mount Emmons, you have shared your opinion that existing environmental protections are insufficient. The National Academies of Science disagree with that assertion.

Since the Lucky Jack property was patented and is now privately held, is there something other than altering the environmental regulations associated with hard rock mineral activities that you would like this Committee to do, in the context of mining law reform, that would not likely result in a Federal taking for which we would have to compensate the owner?

Answer. As an initial matter, to be clear, although the ore body for the Lucky Jack Project is now on patented private land, the remainder of the proposed project would be located largely on unpatented mining or millsite claims on lands owned by the federal government and managed by the U.S. Forest Service. Attached hereto is the map** that we submitted along with our written testimony on January 17, 2008, reflecting the project proponents' (U.S. Energy/Kobex) mining or millsite claims filings highlighted in red. Again, we obtained the red highlighted portion of the map from U.S. Energy/Kobex's website on that date. The federal courts have uniformly held that government regulation of mining on federal lands is not a "taking."

Regarding the scope of existing federal regulation of mining on public lands, the Forest Service's current position is that the agency cannot deny or significantly restrict mining and can only "minimize adverse impacts" to surface resources. In our situation, according to the Forest Service, the agency is powerless to consider the impacts to the Town, our economy and our quality of life as part of the agency's permitting decision.

As detailed in our written testimony to the Committee, the central focus of Mining Law reform must include provisions allowing the federal land management agencies to balance the needs of mineral development with the needs of the local community, the environment and other uses of public lands. We believe that mining should not be afforded a preference of use on federal land and should be considered along with other equally-important uses of federal land such as watershed protection, wildlife preservation, hunting and fishing and the economic benefits of recreational use of those lands.

Question 2. You contend that mining law reform should include an opportunity for towns to seek withdrawal of certain federal lands from mining.

Three months ago, this Committee held a hearing on the Surface Mining Control and Reclamation Act of 1977. Section 601 of that law permits your Governor, who I assume you could approach about your concerns, to petition for the withdrawal of land from mining for many of the reasons you have shared with us today.

The Federal Land Policy and Management Act of 1976 also contains withdrawal authority, as does the Antiquities Act of 1906. And any member of Congress can introduce withdrawal legislation at any time.

Why are these existing authorities insufficient?

Answer. Although the ability of the federal government to withdraw lands from mineral entry has existed for decades under these authorities, it is entirely at the discretion of the Secretary of the Interior. These authorities offer no direct pathway to achieve a withdrawal to protect water supplies or other resources. As such, there is no recourse available to a community if a withdrawal petition is denied. The current HR 2262 provides, in contrast, that such a withdrawal petition would be approved unless the withdrawal would be against the national interest. We believe that this is the proper approach.

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*Graph has been retained in committee files.

**Map has been retained in committee files.

Regarding SMCRA Section 601, that provision largely deals with split-estate lands and only applies to federal land whose surface use is "of a predominantly urban or suburban character, used primarily for residential or related purposes." That is not the case on the vast majority of western public lands and is not the case for the Forest Service lands proposed for the Lucky Jack Project. Accordingly, we cannot approach our Governor about a petition for withdrawal pursuant to SMCRA as Section 601 does not apply.

RESPONSES OF ALAN BERNHOLTZ TO QUESTIONS FROM SENATOR CANTWELL

Question 1. In 12 western states, mining claims have increased more than 80 percent since January 2003. Over an eight-month period from September 2006 to May 2007, the Bureau of Land Management recorded 50,000 new mining claims. Many of these new claims are near many of our national parks and monuments. In Washington state, there are 204 mining claims within five miles of the Mount St. Helens National Monument, 104 of which were staked just since January 2003 and cover over 1,700 acres of public land. This dramatic surge in claims is especially problematic because once a claim is staked, the federal government interprets mining law as providing virtually no way to stop hard rock mining at that site, short of buying out mining claims or other congressional intervention, even when mining is in plain view of national parks and Monuments such as Mount St. Helens.

What is the effect of developing mining operations in sensitive areas near national parks, monuments, wilderness areas, and in watersheds for municipal water supplies?

Answer. Industrial mineral development in these sensitive areas is incompatible with the natural resources of these areas. Although new mining claims and new mining operations are not allowed within the borders of National Parks, Wilderness Areas and National Monuments, current federal law allows such operations to be conducted immediately adjacent to these areas. The federal land manager may not consider the values of these areas when reviewing the proposed mine and cannot use harm to these areas as grounds to deny proposed operations (except in limited situations of cross-border pollution under environmental laws).

For municipal water supplies, there are even less constraints on mining. Unless one can show that a mining operation will violate water quality standards of the Clean Water Act prior to mine construction (which is very difficult to establish prior to mine operation), the Forest Service's position is that they cannot deny or restrict mining in watersheds and can only "minimize adverse impacts."

Question 2. How much latitude do land managers have to address these claims?

Answer. As noted above, the Forest Service which controls the land surrounding Crested Butte believes that they cannot reject mining operations to protect these areas, absent proof that the proposed operation will violate existing environmental laws such as the Endangered Species Act. Contrary to the beliefs of some members of the Committee and the views espoused by the mining lobby, the National Environmental Protection Act does not allow the Forest Service to reject a plan of operations for a mine where the environment or a watershed will be damaged. It only allows the Forest Service to make an informed approval of the plan of operations.

Question 3. Do you believe that state, local and tribal governments should be able to petition to protect certain areas of local importance from mining?

Answer. Yes. We believe HR 2262 takes the proper, common sense approach. That legislation allows state, local and tribal governments to petition the Secretary of the Interior for a withdrawal. Such a withdrawal petition would be approved in certain circumstances unless the withdrawal would be against the national interest.

Question 4. How has not having this capacity affected our ability to protect our national treasures and local communities?

Answer. Under current law, local communities are in large part powerless to protect their watersheds, economies and quality of life in the face of proposed industrial mineral development. The threat of such industrial development may have negative impacts on critical waters, recreation-based economies and the sales and use taxes derived therefrom, as well as severe impacts to the overall quality of life in rural and recreation-based communities.

[Responses to the following questions were not received at the time the hearing went to press:]

QUESTIONS FOR DEBORAH GIBBS TSCHUDY FROM SENATOR BINGAMAN

Question 1. In his testimony, Professor Otto described "transfer pricing" as a growing concern in the area of hardrock royalties. The central concept is that a mine operator may sell its product to an affiliated company, for less than it would sell the same product to an unaffiliated company. The practical effect is to retain profits under the same corporate umbrella, but minimize royalty payment liability for the mine operator. As a technical matter, what are some of the safeguards that could be instituted to avoid this result?

Question 2. Your testimony discusses MMS' collection of hardrock mining royalties on certain Federal acquired lands (in contrast to original public domain lands). In the specific example you cite of a mine in Missouri, a royalty of five percent of gross value is applied. From about how many of these acquired land/hardrock operations (or leases) does MMS collect a royalty? How customized are the lease terms, as it relates to royalties?

Question 3. Your testimony mentions the need for adequate audit and compliance resources upon institution of a royalty for hardrock minerals. Please describe the kinds of activities that would need to occur, to ensure a successful start to the program.

Question 4. Your testimony mentions the need for an interface with BLM's systems (a topic that has also surfaced within the context of challenges facing the MMS oil and gas royalties program). Could you describe the kinds of information that would need to pass back and forth between MMS and BLM, which could help ensure the timely and accurate collection of hardrock royalties?

QUESTIONS FOR DEBORAH GIBBS TSCHUDY FROM SENATOR DOMENICI

Question 1. It is my understanding that the 8 percent gross royalty contained in H.R. 2262 would generate between $70 and $80 million per year. How much would a 5 percent net proceeds royalty, similar to what exists in Nevada likely generate on an annual basis?

Question 2. Considering the large number of participants in the development of a mine (including the operator, owner, co-owners, royalty owners and others), who should be liable for payment of a federal royalty?

Question 3. To what extent does the imposition of a royalty on operational mines constitute an assertion of a property interest?

Question 4. In your opinion, what considerations might a court make in deciding if a "fee" constitutes a tax versus a royalty?

Question 5. In your testimony, you stated that unlike oil, natural gas, coal, or sedimentary minerals, hardrock mineral deposits must generally undergo physical processing and intensive chemical processing to produce salable products.

Can you elaborate on that statement and its implications for the determining the type and amount of royalty that should be imposed on hard rock minerals?

Question 6. We must account for how a royalty will impact the United States as a global competitor for hard rock mining investment dollars.

Internationally, what is a typical 'government take' from hard rock mining operations? How does that compare to existing taxes, fees and other costs of doing business here in the United States?

Question 7. What impact does the size of a given 'government take' have on reserves, mine life, and the amounts of saleable minerals that are ultimately produced from mines?

QUESTION FOR DEBORAH GIBBS TSCHUDY FROM SENATOR WYDEN

Question 1. Ms. Tschudy, you stated in your testimony that the Administration would prefer a royalty program that resembles the program established under the Energy Policy Act of 2005. This program authorizes the federal government to continue to receive physical quantities of oil and gas royalty-in-kind payments provided the Secretary of Interior determines that receiving royalties in-kind provides benefits to the United States greater than or equal to those that it would have received in-value. Furthermore, in this Act there are various provisions that grant the Department of Interior the authority to reduce royalty payments to maintain or stimulate oil and gas development offshore and for marginal wells (Title III Subtitle E).

Given the serious problems identified by the Department of Interior Inspector General with the royalty-in-kind program for oil and gas, why should the same approach used by this troubled program be used for hardrock minerals? In particular, why should the BLM be given authority to reduce royalties on hardrock minerals given the problems that have arisen with the royalty relief provisions for oil and gas?

QUESTIONS FOR HENRI BISSON FROM SENATOR BINGAMAN

Question 1. How many patent applications are pending that (1) were filed with the Secretary not later than September 30, 1994 and (2) had fully complied with all requirements applicable to the patent application by that date? How many such patent applications have been granted since September 30, 1994? How many applications filed on or before September 30, 1994 are still pending? What is the status of these applications? Please provide a list that includes location, identity of applicant and status of the application.

Question 2. How much was collected in claim maintenance fees over each of the past 10 years? How much was collected in claim location fees over each of the past 10 years? Of these amounts, how much have been dedicated to program administration?

Question 3a. How many claimants qualified for the small miner exemption from the fee requirements (i.e., hold less than 10 claims on public land) during each of the past 5 years?

Question 3b. How many claimants hold less than 25 claims on public land?

Question 4. How many mining claims are there on BLM lands? How many on National Forest System lands? Please provide by state.

Question 5. How many mining claims have been located in each of the past 10 years? Please provide by state and type of mineral, if available.

Question 6. What is the value of hardrock minerals produced on federal lands during each of the past 20 years? Please provide this data by state, if available.

Question 7. How many acres of federal land have been patented since enactment of the Mining Law of 1872? How many acres have been patented in each of the past 30 years?

Question 8. Does BLM currently require a bond for exploration activities? What authorization is required prior to exploration activities on federal lands?

Question 9. Does BLM currently approve plans of operation for hardrock mining on Forest Service lands?

Question 10. What is the average life of a hardrock mine?

Question 11. Can the Secretary require modification of an approved plan of operations for a hardrock mine? What standards must be met in order for the Secretary to require such a modification? How often has the Secretary required such modifications in the past?

Question 12. Would authority to use bonding pools be useful for purposes of posting reclamation bonds? Are bonding pools currently used?

Question 13. Has the Administration taken a position on whether patenting should be eliminated?

Question 14. Does the Administration have a position on whether a royalty should be imposed on the production of hardrock minerals from federal lands? If so, what structure (net vs. gross)? And what rate?

Question 15. Your testimony also references the inclusion of administrative penalty authority in any update of the law. Why is this important?

Question 16. Is there any reason that there should not be a statutory requirement for reclamation bonding, permitting for greater than casual use, and approval of plans of operation?

Question 17a. Your testimony indicates that between 2000 and 2007, BLM inventoried 5500 abandoned sites. Does BLM have an inventory of the universe of abandoned hardrock sites on federal lands (including BLM and Forest Service)? If so, please provide a listing of the sites by state.

Question 17b. How much money does BLM expend annually on abandoned hardrock mine sites?

Question 17c. How much money would be needed to conduct a comprehensive inventory and undertake needed reclamation?

Question 18. Does the Department have data on how many abandoned hardrock mines exist on Indian lands? If so, please provide by tribe. Does the Department have an estimate of the amount needed to reclaim these sites?

Question 19. Does the Department have data on how many abandoned hardrock mines exist on state and private lands? If so, please provide by state. Does the Department have an estimate of the amount needed to reclaim these sites?

Question 20. Under current law, does the Secretary have discretion to prohibit the development of a mine once a valid mining claim is located on federal lands and all environmental laws are complied with? If so, under what circumstances and what standards apply?

Question 21. The NRC Committee in its 1999 Report on Hardrock Mining on Federal Lands indicated that it had been "consistently frustrated by the lack of reliable information on mining on federal lands." The report goes on to state that "without

more and better information, it is difficult to manage federal lands properly and assure the public that its interests are protected."

What has the BLM done to address this problem?

Question 22. How many plans of operation have been approved by BLM? How many plans are pending approval?

Question 23. Is it the Department's legal position that a royalty can be imposed on existing mining claims? On mines with approved plans of operation? Please provide any legal opinion or analysis that you have undertaken that addresses this issue.

QUESTIONS FOR HENRI BISSON FROM SENATOR DOMENICI

Question 1. The problem of abandoned mines and mine shafts, located on old mining claims, has been a long-standing public safety issue. Does the Department have a strategy for addressing this issue? How has this work been funded?

Question 2. BLM currently collects fees for mining claims, part of which offsets the BLM's cost of administering the mining laws. Is it correct that BLM collects far more from these fees than BLM is given to administer the program? If Congress were to ask BLM to use excess mining revenues to address the public safety issue associated with abandoned mines, what progress could we expect to see?

Question 3. Can the Secretary of the Interior modify a Plan of Operations after it has been approved?

Question 4. What is a sufficient amount of money, on an annual basis, to reclaim abandoned mines? How long would it take with that amount of money to clean up our highest priority abandoned hard rock mine sites?

Question 5a. Under what circumstances can an Interior Secretary say "no" to mining? For example, what if an endangered species lives in an area where a Plan of Operations has been submitted, could the Department say "no" to that request for permission to mine?

Question 5b. Has this ever happened?

Question 6. In considering changes to the Mining Law of 1872, it is important to remember that what we are talking about is a land use statute. Can you elaborate upon the legal and practical distinctions between federal property laws and federal environmental laws?

Question 7. How many patent applications are pending after having been grandfathered with the annual moratorium that has been enacted since 1995? What plan does the Department have in place to resolve the fate of these applications?

Question 8. Among existing land designations available, administratively to the Department or legislatively to the Congress, which ones are (by definition) inclusive of a withdrawal from location and entry under the Mining Law of 1872? Are there other designations that tend to result in such a withdrawal, without their definition explicitly requiring it?

Question 9. What might be the exploration and development implications of having claim maintenance fees vary dependent upon whether or not there is an approved and operational Plan of Operations?

For instance, the amount could be set lower for active and higher for inactive claims, or vice-versa.

Question 10. Pursuant to Section 601 of the Surface Mining Control and Reclamation Act, on how many occasions has the Department been contacted by the Governor of a State about the propriety of mining operations near areas of urban character?

Question 11. Through the years, some environmental problems have resulted from mining. How do we reconcile these problems with the 1999 report from the National Academies of Science, which concluded that existing environmental protections are "complicated but generally effective"?

Question 12. Mill-site claims have proven to be a contentious issue in the past. Does the concept of a requirement for payment of a fair market rental on lands required for ancillary use activities make sense?

Question 13. How often does the Interior Department inspect federal lands where mining activities are taking place? What is the nature of these inspections?

Question 14. Please list all fees and financial transactions (including the amount or how the amount is calculated) that are currently paid by those engaging in mineral activities on federal land, from prospecting through reclamation and release of a financial assurance.

Question 15. Does the Interior Department believe that the existing legal and regulatory framework for mining is sufficient to protect units of the National Conservation System from unnecessary or undue degradation of the values for which such units were established in the first place?

Question 16. In implementing the recommendations of the 1999 National Academies of Science report, the Interior Department did not increase civil penalties. Is there a justification, however, for doing so? Would that authority strengthen the Department's ability to ensure that unnecessary or undue degradation of federal lands does not result from mineral activities thereon?

Question 17a. Is there any expectation that bonds, or other financial assurances, posted in the last decade will be insufficient for complete reclamation as a result of unforeseen impacts having resulted from mineral activities?

Question 17b. If so, does the Department have existing administrative authority to adjust the level of required bonding or other financial assurance (up or down), subsequent to a Plan of Operations approval, if the original amount is found insufficient or in excess of what will ultimately be needed?

Question 18. How often does the Department review the sufficiency of bonds and other financial assurances to fully reclaim mined lands?

Question 19. How would you respond to Mayor Bernholtz's assertion at the hearing that existing financial assurance requirements need to be strengthened?

Question 20a. H.R. 2262, which has been referred to this Committee, asserts in its Section 104 that payment of fees and compliance with applicable laws provides authority to use and occupy federal land for the purpose of prospecting and exploration.

Understanding that any decision to place a permanent ban patenting creates a host of problems for investors' security of tenure, is it reasonable or practicable that this approach would be applied to mining activities as well?

Question 20b. Are there any examples of timely fee payment and compliance with applicable law vesting an entity with certain property rights that could serve as a model for how we fill the vacuum left by the absence of patenting?

Question 21a. Combined, how many acres of land are managed by the BLM and Forest Service?

Question 21b. Of that acreage, how may have been designated as Wilderness Study Areas, designated as Areas of Critical Environmental Concern, included in the Wild & Scenic Rivers System, designated for potential addition to that System, or identified as inventoried Roadless in the November 2000 Forest Service Final EIS maps?

Question 21c. What percentage of the total acreage managed by the two agencies do those categories represent?

Question 22. How does the process for designating Wilderness Study Areas, Areas of Critical Environmental Concern, Wild & Scenic Rivers, and Roadless areas differ from the FLPMA process of withdrawal from location and entry under the Mining Law of 1872?

Question 23. For everything from fishing boats to oil rigs, there are examples of the federal government requiring by law that no-one engage in certain activities on federal land without a permit. The process by which hard rock minerals are located on and extracted from federal lands is different, however.

Can you elaborate on why this might be warranted?

QUESTIONS FOR HENRI BISSON FROM SENATOR CANTWELL

Question 1a. Recently, the Bureau of Land Management released a draft Environmental Assessment for issuing a hardrock minerals lease near Mount St. Helens in the headwaters of the Green River. The Green River is a municipal water supply and home to listed species of salmon and steelhead. Mine development activity could significantly harm and potentially eliminate these fish populations. Also, acid rock drainage from the mine's leaching process could contaminate the municipal water supply for nearby communities including Kelso, Castle Rock, and Longview. The land in question was purchased by the government under the authority of the Weeks Act using Land and Water Conservation Funds, which are appropriated by Congress for conservation and recreation purposes to "promote or protect the navigation of streams on whose watersheds they lie."

Can you explain how leasing this land to a mining company is in the public interest or compatible with "promoting or protecting the navigation of streams on whose watersheds they lie?"

Question 1b. Can you explain how leasing this land to a mining company is compatible with the preservation of the integrity of the Green River, or whether it aids in the preservation of the scenic beauty of such an area?

Question 1c. Residents of Kelso, Castle Rock, and Longview in my state of Washington have expressed concern about the proposed mine near Mount St. Helens. Do you believe they should have a right to petition for the withdrawal of these lands from mining?

Question 2a. The 1872 Mining Law has long been interpreted as mandating hardrock mining as the "highest and best" use of public lands. Federal land managers have argued that the 1872 Mining Law forces them to approve any mining project proposed on public lands regardless of competing resources values. Yet, you stated in your testimony that current environmental laws

Can you please provide a detailed list of examples of when the Bureau of Land Management denied a proposed mining operation based on the predicted inability of the proposed mine's ability to comply with the "undue and unnecessary degradation" standard set forth in the Federal Land Policy and Management Act?

Question 2b. Can you please provide a detailed list of examples of when the Bureau of Land Management denied a proposed mining operation based on the predicted inability of the proposed mine's ability to comply with other environmental laws?

Question 3a. In your testimony, you indicated that the Administration believes that the existing statutes and related regulations pertaining to hardrock mining provide sufficient authority to prevent adverse consequences on natural resources and the environment as a result of mining. Some argue that pollution from mines results almost entirely from historic operations and that "modern" mines are governed by numerous statutes and regulations and are environmentally responsible, problem-free operations. It is true that historic mining polluted and continues to pollute rivers, streams and aquifers and that, until 1976, there were no federal regulations written specifically to govern hardrock mining operations on publicly owned land. But, it is also clear that the patchwork of laws that have governed hardrock mining operations since 1976 are not enough to ensure that western watersheds and communities are protected. Mines that began operations in the past three decades have spilled cyanide, killed aquatic life, caused pollution that will require treatment in perpetuity, and burdened the taxpayers with enormous liabilities. For example, soon after mining began at the Grouse Creek Mine in Idaho in 1994, the tailings impoundment began to leak cyanide. As a result of ongoing violations, the Forest Service posted signs which warned: "Caution, do not drink this water." In 2003, the Forest Service declared the mine site an "imminent and substantial endangerment." There are other examples of modern mines that are far from "problem-free," including the Beal Mountain and Kendall mines in Montana, the Formosa mine in Oregon, and the Jerritt Canyon mine in Nevada.

Can you explain how existing statutes and related regulations pertaining to hardrock mining provide sufficient authority to prevent adverse consequences on natural resources and the environment in light of these examples of pollution and contamination?

Question 3b. Do you believe additional legal tools could address these situations?

QUESTION FOR HENRI BISSON FROM SENATOR WYDEN

Question 1a. Mr. Bisson, you stated that existing regulations which are currently in place are already adequate to manage hard rock mining activities and any subsequent environmental damage. However, there are still cases where existing hardrock mining activities and/or abandoned mines continue to negatively impact human health and the environment. For instance, in my own State of Oregon, Formosa Mine in Douglas County is a copper and zinc mine that operated in the early 1900's, then reopened in 1989 and operated until 1993. The primary impact is acid mine drainage and metal contamination that has eliminated about 18-stream miles of prime habitat for the threatened Oregon Coast coho salmon and steelhead. The Oregon Department of Environmental Quality's (DEQ) 2004 evaluation of cleanup options for the site indicated that cleanup could cost more than $10 million dollars. DEQ has spent over $1.2 million since 2000 to investigate and undertake interim cleanup actions to minimize the environmental damage caused by the mine. DEQ has been unable to undertake further cleanup and is instead, working closely with the U.S. Environmental Protection Agency, the U.S. Bureau of Land Management, and the U.S. Department of Interior to find alternative funding to complete the cleanup. It seems to me that BLM and other responsible regulatory agencies are failing to enforce the existing mining and environmental regulations that you referenced in your testimony.

Mr. Bisson, can you explain which environmental statutes apply to mining and how they are applied? Can you also explain to me how the BLM and other responsible agencies will proactively ensure the enforcement of existing regulations to prevent negative human health and environmental impacts instead of reacting to the actual impacts to human health and the environment after they have occurred?

Question 1b. Furthermore, during your testimony, discussions occurred regarding the Bureau of Land Management's ability to limit or deny hardrock mining oper-

ations to prevent the unnecessary or undue degradation of public land resources that would result in substantial irreparable harm to these resources. You mentioned that BLM had within the past few years denied a number of hardrock mining operations and that BLM you would supply to the Committee the names and locations of the mines that were denied operation. Can the Bureau of Land Management also please provide the reasons why (e.g., undue degradation to public lands, environmental regulations) these hardrock mining applications were denied. Additionally, can the Bureau of Land Management also provide the number of hardrock mining operations approved in the same year as those operations that were denied?

QUESTIONS FOR WILLIAM E. COBB FROM SENATOR DOMENICI

Question 1. For everything from fishing boats to oil rigs, there are examples of the federal government requiring by law that no-one engage in certain activities on federal land without a permit. The process by which hard rock minerals are located on and extracted from federal lands is different, however.

Can you elaborate on why this might be warranted?

Question 2. Does Freeport-McMoran wait until closure of a mine to start reclamation? How are inactive mining sites treated?

Question 3. Can you elaborate further on the importance of secure tenure and regulatory certainty to the maintenance and growth of a domestic mining industry?

Question 4. What role could a "Good Samaritan" provision play in the clean-up of AML sites?

Question 5. Is there a risk that eligibility requirements for a "Good Samaritan" could be too stringent to allow those with actual mining and reclamation expertise to qualify?

Question 6. Some mining critics have produced studies, including one by Earthworks, claiming that hardrock mines harm water quality. Do you have any comments on the Earthworks report?

Question 7. In considering changes to the Mining Law of 1872, I believe that it is important to remember that what we are talking about is a land use statute. Can you elaborate upon the legal and practical distinctions between federal property laws and federal environmental laws?

Question 8. What might be the exploration and development implications of having claim maintenance fees vary dependent upon whether or not there is an approved and operational Plan of Operations?

For instance, the amount could be set lower for active and higher for inactive claims, or vice-versa.

Question 9. Through the years, some environmental problems have resulted from mining. How do we reconcile these problems with the 1999 report from the National Academies of Science, which concluded that existing environmental protections are "complicated but generally effective"?

Question 10. Mill-site claims have proven to be a contentious issue in the past. Does the concept of a requirement for payment of a fair market rental on lands required for ancillary use activities make sense?

Question 11a. H.R. 2262, which has been referred to this Committee, asserts in its Section 104 that payment of fees and compliance with applicable laws provides authority to use and occupy federal land for the purpose of prospecting and exploration.

Understanding that any decision to place a permanent ban patenting creates a host of problems for investors' security of tenure, is it reasonable or practicable that this approach would be applied to mining activities as well?

Question 11b. Are there any examples of timely fee payment and compliance with applicable law vesting an entity with certain property rights that could serve as a model for how we fill the vacuum left by the absence of patenting?

QUESTIONS FOR WILLIAM E. COBB FROM SENATOR CANTWELL

Question 1a. Mr. Cobb, residents of Kelso, Castle Rock, and Longview in my state of Washington have expressed concern about mining operations near where they live, and I understand that residents of Boise, Idaho and Crested Butte, Colorado have expressed similar concerns. In your testimony, you expressed opposition to extending to local and tribal governments the right to petition for the withdrawal of certain lands important for clean drinking water, recreation, and endangered species habitat. You argued that the National Environmental Policy Act's public process is sufficient to enable local and tribal governments to work with the federal government to deny a mine. Yet, in a recent Environmental Impact Statement scoping document for a proposed gold mine, the U.S. Forest Service emphasized that it "does

not have the authority to select the no action alternative" under the 1872 Mining Law.[1]

When local communities are struggling to meet their funding needs, why would you oppose streamlined legal tools to address these situations?

Question 1b. Are you saying that local communities should essentially be at the mercy of global demand for minerals because under the current law, because land managers don't feel they have much authority to prevent mines from going forward?

Question 1c. Shouldn't local citizens have a say in the actual decision to open mining operations in their community not just the chance to submit input through the public environmental scoping process?

Question 2a. Mr. Cobb, in your testimony you expressed opposition to protecting special places, including Roadless areas, from mining claims. But when the federal government enacted the Roadless Rule in 2001 to protect our last Roadless areas inside National Forests, the Forest Service found that "maintaining these areas in a relatively undisturbed condition saves downstream communities millions of dollars in water filtration costs. Careful management of these watersheds is crucial in maintaining the flow and affordability of clean water to a growing population." Metal mining, on the other hand, is the leading source of toxic pollution in the United States according to the Environmental Protection Agency's Toxics Release Inventory. And, the western United States is growing more and more littered with mining Superfund sites including a new site designated in Oregon in fall 2007.

Do you agree that maintaining Roadless areas is a more cost effective way to ensure local communities have clean drinking water than spending millions to clean up new Superfund sites?

Question 2b. If no, why not?

Question 3. Water treatment can be a significant economic burden for federal, state, and local government if a mining company files for bankruptcy or refuses to cover water treatment costs. For example, acid runoff from the Summitville Mine in Colorado killed all biological life in a 17-mile stretch of the Alamosa River. The site was designated a federal Superfund site, and the EPA is spending $30,000 a day to capture and treat acid runoff. In South Dakota, Dakota Mining Co. abandoned the Brohm mine in 1998, leaving South Dakota with $40 million in reclamation costs - largely due to acid mine drainage. And, at the Zortman Landusky Mine in Montana, the State of Montana was left with millions in water treatment costs when Pegasus Gold Corp. filed for bankruptcy in 1998.

When perpetual pollution is predicted, as is the case of in the Phoenix Project in Nevada, shouldn't an additional burden be put on the company to provide an independently-guaranteed reclamation bond to cover the full cost of maintaining treatment in perpetuity?

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[1] USDA Forest Service, Boise National Forest, "Atlanta Gold Project Environmental Impact Statement Scoping Document," February 2004, http://atlantagoldeis.com/Documents/AtlantaGoldScoping.pdf.

APPENDIX II

Additional Material Submitted for the Record

DEAR SENATORS BINGAMAN AND DOMENICI: We the undersigned organizations represent millions of hunters and anglers, fish and wildlife professionals and businesses, and others who recreate on and enjoy our public lands. For many years, Congress has considered reform of the General Mining Law of 1872.

On November 1, 2007, the House of Representatives passed HR 2262, the Hardrock Mining Reform and Restoration Act, by a strong bipartisan vote of 244 to 166. Now is the time for the Senate to take up a hardrock mining bill that will provide sensible reform and protect fish and wildlife resources on America's public lands.

We urge you to take action on modernizing the 135-year-old mining law this Congress, and we offer our assistance and support.

Public lands managed by the Bureau of Land Management (BLM) and the Forest Service harbor some of the most important fish and wildlife habitat and provide some of the finest hunting and angling opportunities in the country. For example, public lands contain well more than 50 percent of the nation's blue-ribbon trout streams and are strongholds for imperiled trout and salmon in the western United States. More than 80 percent of the most critical habitat for elk is found on lands managed by the Forest Service and the BLM, alone. Pronghorn antelope, sage grouse, mule deer, salmon and steelhead, and countless other fish and wildlife species are similarly dependent on public lands.

Mining is a legitimate use of public lands, but there are few laws more in need of an overhaul than the 1872 Mining Law. The 1872 Mining Law, signed into existence 135 years ago by President Ulysses Grant, is the most outdated natural resource law in the nation. Under the 1872 law, mining takes precedence over all other public land uses, including hunting and fishing. The Secretary of the Interior must sell public land to mining companies, often foreign-owned, for as little as $2.50 per acre. Furthermore, mining companies pay no royalties for hard rock minerals, gold, copper and zinc that belong to all citizens. It is estimated that since the 1872 Mining Law was enacted, the U.S. government has given away more than $245 billion of minerals through royalty-free mining and patenting.

As you consider legislative reform of the 1872 Mining Law, America's sportsmen urge you to consider the following recommendations:

- Recover a fair royalty from all minerals, present and future, taken from public lands and establish a fund for fish and wildlife habitat improvement projects associated with past mining.
- End mining's priority status on public lands.
- Ensure that resource professionals have full discretion in the planning and permitting processes to protect public lands where high fish, water and wildlife values exist.
- Allow "Good Samaritans" reclamation incentives and common-sense liability relief.
- Prohibit the patenting or sale of public lands under this law; keep public land in public hands.
- Provide for harmonious integration of state and federal wildlife habitat and population objectives in permit operating plans.

Thank you for considering our recommendations, and we look forward to working with you to ensure that mining on public lands is modernized to the benefit of fish, wildlife and water resources.

Sincerely,

Archery Trade Association; American Sportfishing Association; B.A.S.S.; Backcountry Hunters and Anglers; Bowhunting Preservation Alliance; Berkley Conservation Institute; Conservation Force; Catch-A-

Dream Foundation; Federation of Fly Fishers; Dallas Safari Club; Izaak Walton League of America; International Hunter Education Association; National Wildlife Federation; North American Bear Foundation; North American Grouse Partnership; Pope and Young Club; Orion—The Hunters Institute; Quality Deer Management Association; Trout Unlimited; Pure Fishing; Theodore Roosevelt Conservation Partnership; Wildlife Management Institute.

DEAR GINA,

I request that the 1872 mining law and act not be changed in any way from it's original intent. Please let me know you reviewed this e-mail.

Thank You,

JAMES SCHELLER.

ECO STAR ENERGY SYSTEMS™,
Athol, ID, January 24, 2008.

HONORABLE COMMITTEE CHAIRMAN, DISTINGUISHED COMMITTEE MEMBERS: My message truly needs to be heard (get out) and if, it remains buried in a dusty archive for one day, a historian to find, and behold, "this is the way it could have been" not what the sordid historical result actually was: First, there is nothing wrong with our so-called "outdated" 1872 Mining Law. What is wrong is that our law-makers see a new source of revenue and control, and can't stand to leave well enough alone till eventually affecting the demise of our great nation.—I would personally consider it an offense, even an act of treason to change the Mining Law of 1872, or tamper with it. We don't use its power now, our ignorance. The USA is good at: (A) Stimulating investment—trade (B) then killing the goose that laid the golden eggs.

1. We need to know just when "enough is enough" in protecting our environment and the eco-system, and to look at the substance beyond the veil when making policy decisions, or "judicial incursion."
2. We need to recognize that mining concerns are using reclamation as a "toe in the door" to create mischief and we are not fully assured as to whether or not the reclamation issues can be dealt with.
3. We need to know that there is a new breed of mining companies that "mine the people" instead of mining the resource.—Do people really care whether or not any ore is truly processed in the end?
4. We need to know that U.S. Department of the Interior (DOI) Bureau of Land Management (BLM) is not doing its job according to charter, but "just collects your money" when dealing with filing fees for mining claims.—And the BLM has created a "lawyer's dream" as result of faulted due diligence.
5. We need to know that U.S. Fish and Wildlife Service (USFWS) is an advisory agency to the Forest Service (via consultation doc.) and do not enforce protection of so-called "endangered species."
6. We need to know that the U.S. Department of Agriculture (USDA) Forest Service (FS) like the BLM does not get involved in property disputes (mining claims) allegedly, but when issuing permits, or not issuing permits, it becomes apparent that a de facto decision of ownership has been rendered.
7. We need to know that Mining Companies issuing stock put a percentage towards actual mining, and much goes toward "covering your flanks (both of them)"—known as "CYA" in government circles—and raising more money . . . the Security and Exchange Commission (SEC) "pulp mill" respectfully is a great deal of the incumbent cost, and however necessary, it is impossible to deter the "determined."
8. We need to know that federal government agencies, and state environmental protection agencies, do not work seamlessly as would be desired on the mining laws.—Memorandums of Understanding (MOU)s between the agencies such as the USDA FS and the State Department of Lands, or now, the respective state Department of Environmental Quality (DEQ) and mining project MOU's try, but fail.
9. We need to know that the individual State has its unique resources, history, peoples, cultures, and economic drivers, and a state's mining laws are tailored for that reason, including the State's other laws—Constitution, and though agreeable with federal mining law, its law is unique to that State!

My father, my namesake, opened the full Senate with prayer on April 16, 1953. Of a different and more innocent era (when everyone was present—accounted for), he asked: Divine Guidance for leaders of our nation, and that we do the right thing personally and for our constituency. The U.S. Constitution, in my opinion, was more revered then, and laws were believed not tampered with or "legislated from the bench."

The 1872 Mining Law, Title 30 USC, "Mineral Lands and Mining" not unlike the U.S. Constitution was sacred and not "tampered with" for the most part as the general populace then believed. Today, nothing is sacred. Everything under the sun, except the questionable federal tax system, is subject to sunset, abolishment, or revision and modification. The drivers for this are "special interest" motivated, and generally do not uphold or strengthen our system of laws and government. We are not a "nation of law" but a nation of lawyers . . . .

It is heartening to see case law (of the Mining Act) setting precedence dating back early the last Century. Changing the 1872 Mining Law, under color of law, as a reform is nothing more than "clearing the slate" of affirmative law and rewriting "Mineral Law and Mining" subjectively, a "knee jerk" attempt at undermining the mining act to satisfy international pressures, activists' shrill, questionable science, political expedience.

All we need is another legislative reform screw-up. Any changes needs to be suspect. Take the Tax Reform Act of the 1980's. What a joke, and what a mockery on the American public. To quote "As Good As It Gets" All Congress needs to do is "get its hot sweaty hands" on the 1872 Mining Law and its virtue is lost forever. Now Congress wants to assess royalties in their lust for money, for control. They will need to create a new bureaucracy to collect the "windfall" for a time, and then it becomes another albatross on the U.S. taxpayer.

Inherent with our democratic form of government is that overriding mass ignorance and self-serving political expediency prevails instead of true, self-sacrificing, visionary leadership.—What Congress needs to do is get smart and be brave and quit being myopic—effectively stupid, thus being political giants instead of cowards:

A. Enact a tariff or head fee on any "off shore" entity directly-indirectly mining American resources.

B. Due to the volatile nature of mining stocks, movements of ownership's values need to be limited.

C. Have new classes taught at all levels of school as mandatory (like American History, should be):

(1) Geology, in a real sense, focusing on the evidence and not someone's social agenda!

(2) Why is it that "Minerals are the Foundation of Civilization?"—focus on this always:

(3) What happens to society (our civilization, the USA) when we can not harvest minerals?

(4) What happens when adversaries can harvest strategic base metals expediently, cheaply?

(5) What happens to our natural resources when our adversaries have their boot on our neck due to our leaderships' continued foolishness and myopia and avarice . . . what will happen?

(6) Have Capital Hill classes taught on "Mines And Madness" Copyright 2007 by Jim Ebish:

Back Page: "Learn how wealth is created by mining entrepreneurs and how to profit from the coming economic boondoggle brought on by the ignorance of politics where history, science, and logic are trumped by big hair, junk science and fabricated war stories. The folly of our generation is the irrational protection of the environment through the ill-conceived National Environmental Policy Act (NEPA) and other similar laws. Enacted in 1970 as a result of the 1969 Santa Barbara oil spill, NEPA halted virtually all progress in America. Many businesses now have denationalized their operations, sending a high standard of living to foreign shores. The loss of domestic mining and manufacturing will negatively impact all Americans, although the idle rich will feel less pain than the rest of us normal folks. Environmental shills and hucksters, using airhead celebrities to promote their cause, have been empowered by NEPA to deter any development which is not part of their trendy lifestyle . . . ."

What Congress needs to do is get smart . . . brave . . . quit being stupid . . . political giants . . . cowards (continued):

Ultimately, there will be a heavy price to pay. Get ready for higher taxes, more swaggering government goons wielding lively truncheons, increased

regulation, and a lower standard of living. If you think that the zombies and fatties of the Transportation Security Administration who hassle hapless codgers at the airport are ridiculous, you ain't seen nothing yet. Get ready for a turd-world existence. At the dawn of the 21st Century, the sun may set on America unless significant changes are made to NEPA and similar government gobbledygook. Wise up!

—The Author (6), Jim Ebish MSc. (jimmycrackcore@yahoo.com) is a Registered Professional Geologist (RPG) Stratabound Metals Expert consultant in the Pacific Northwest based in Spokane, WA.—Order his book for more specifics.

(7) Knowledge is power! This effort to reform the 1872 Mining Law is flawed, but to reform the associated, probably outdated, environmental process (NEPA) and educate practical care of our environment by emerging populace will prove many-times rewarded in the near term.

D. We need to have a resurgence of mining mill operations and smelter operations and assay offices. Just like in the "old days" when one could make a strike, "prove it" then process the ore for value.

E. Today, what good is it to get the ore out of the ground, prove its worth, and not be allowed to mill and crush the (hard-rock) ore, then "float the ore" to clarify the metallurgical components, yielding a "high-grade" concentrate, and then smelter the ore to produce the final enriched, purified metal.

F. That "off shore" facilities in processing the ore, whether raw ore or concentrated ore, the bottom line is that foreign countries have the U.S. at a distinct advantage: If you as a Senator a/k/a U.S. Congressman do care enough to not screw with the 1872 Mining Law, but rather make sure:

(1) That needed new refineries for oil and gas (liquids and gases) are immediately underway.

(2) Those new smelters for hard-rock refinements (solids) are constructed in critical locations.

(3) That personnel is trained appropriately to man the smelters and refineries, and

(4) That state assay offices exist not unlike a library for training and lab work in proving up metal ore as it is being exposed, working in conjunction with professional assay firms . . .

(5) Rather than tamper with the 1872 Mining Law, we need to have better and more power generation facilities, nuclear, wind, solar, hydro and geothermal, celesta-magnetic, etc.

G. In the next few years or decades, the author will no longer walk this earth, and thank God for that. If what is reasonably presented has not been expediently dealt with, the United States of America will become (as it already is) a sub-standard, second-rate country. In the past, the USA has gone down to its roots and demonstrated new worth and a new future and a new destiny, but no more.

Even since its founding, the United States has had incumbent in its government the seeds of its eventual demise. These seeds were found in secret societies, like cancer throughout all civilization, composed of people who actually believed they were smarter and were privileged characters. The truth is they were advantaged. This has not changed. The so-called "New World Order" is a ruse to bind up the sovereignty of the U.S. citizen into subservience. Those in power do not seem to care and rightfully so, for they are the privileged characters, and want to keep it that way and the nation's future be damned.

I am testifying before this committee not because I expect my recommendations and comments to bear any fruit, but to bear witness that what was stated would happen actually did happen, and the leadership of our nation had the golden opportunity do the right thing and did their usual, the exact opposite of reason, logic. I will rest easy knowing that my integrity is intact and not unlike the hatred of history at purity of thought, expect "all they can do is dig up my bones, if they can find them, and burn them at the stake."

1. Should this legislation provide for new environmental standards for hard-rock mineral activities? If so, what should those standards be and what transition rules would be appropriate for their implementation?

We do not need any more environmental standards for hard-rock mineral activities. The miner is inundated with federal, state and local statutes, rules and regulations even before required authorizations which place strict environmental criteria on mining activities. Federal: The Clean Water Act regulates storm-water and dis-

charges from mines and attendant facilities. The Clean Air Act and Superfund and Resource Conservation and Recovery Act regulate mining and protect the environment. States: each has companion statutes and regulations that correspond with federal requirements. Permits are needed from the property claim holder (especially if a lease), for ingress/egress, for power transmission, mill siting areas, ventilation and material process facilities, etc. requiring soil engineering, civil and survey engineering, building permits, road use permits, and even to snow plow and transportation impact permits on national forests. Also permitted and controlled and (hopefully oversights) are plan of operations (POO), mitigation and exit strategies, monitoring and quality control measures, spill recovery and containment, reclamation of the habitat, etc. and a host of best management plans for timber removal, road development, site development, etc.—Flora and fauna and endangered species and natural habitat eco-systems are consistently at the forefront of any decision.

2. Should the legislation designate categories of land not available for location and entry? If so, what categories should be designated?

NO! What we need is less government and more freedom! Wilderness Acts, Wild and Scenic Rivers, Parks and National Monuments, National Wildlife Refuges, and so on are encroaching on rights of our citizens to exploit their legacy. The only entities that benefit are federal employees paid to supervise the closed lands.

3. Should the legislation address situations where mining claims should not be developed due to [alleged] environmental or other concerns? If so, how should [these hosts of perceived concerns] be addressed?

This question is covered in part in No. 1. (supra) From Mines and Madness, "The folly of our generation is the irrational protection of the environment through the ill-conceived National Environmental Policy Act (NEPA) and other similar laws. . . . NEPA halted virtually all progress in America. Many businesses now have denationalized their operations, sending a high standard of living to foreign shores. . . . loss of domestic mining and manufacturing will negatively impact all Americans . . . Environmental shills and hucksters . . . have been empowered by NEPA to deter any development . . . American business, under a relentless siege by the big guns of the environmental cult for nearly four decades, is all but defeated."—The NEPA requires that mining claims located on federal lands must be evaluated for environmental and socio-economic impacts of developing that land prior to authorization of use by the administering agency. NEPA evaluations are thorough, exhaustive, and even questionable: They address adverse—beneficial impacts, and cumulative effects on wetlands, streamside areas, historic sites and archaeological sites. NEPA studies cost in the tens of millions and require over 20 years of investigation and analysis, and have utilized highly qualified and even world renowned scientists and engineers, and also involved separate risk analyses prepared by third-party (outside) experts. These NEPA-required evaluations further require that the applicant avoid, minimize and/or mitigate environmental impacts especially alleged as so-called sensitive areas, and are generally cost-prohibitive, "killing the mining venture in its infancy."

4. What additional financial assurances, if any, should be required for mining operations?

NONE, except to assure dollars reside in the U.S. as opposed to "off-shore." Federal agencies like Bureau of Land Management (BLM) and U.S. Forest Service already require "full cost" bonding, and memorandums of understanding (MOU) such as between the FS and Montana DEQ are created to ensure agency coordination: if only they would (due diligent) do their jobs. These costs are typically prepared by qualified third-party consultants. Consultants address associated costs of reclamation, plus administration, plus regular updating, plus escalation factors. The agencies presume that a third-party will also conduct the reclamation activities. Any additional financial assurances would be duplicative and unnecessary, as per MOU, states also require full-cost bonding, which already duplicates federal requirements for state, private and Native-owned land. States: Alaska (ADNR), Montana (MT DEQ), Nevada (NDEP) and Idaho (IDL, IDWR and IDEQ).

5. What type of additional enforcement and compliance provisions, if any are needed?—Term Limits for Congress would be a great start: holding Congress members to the same rules as the rest of the nation!

NONE! As restated, the prevailing DC mindset is: "change is needed for change sake" and has no bearing in fact or law as to reality, "if it works, don't fix it."—What we need is less government and more freedom!—

No additional enforcement and compliance provisions are needed in any present Mining Law, or in the much touted Mining Law Reform, as if it already exists. What is seriously needed is fundamental tax reform, not mining reform! Current enforcement is by the alphabet soup of entities: USFS, BLM, USFWS, EPA and Corps of Engineers, and the myriad counterparts of local and states' regulatory and en-

forcement agencies.—State enforcement in Alaska, as an example, is also provided by Alaska Department of Natural Resources, Alaska Department of Environmental Conservation and Alaska Department of Fish & Game.—Further, most other states have similar oversight roles of enforcement. MSHA also administers the Mine Safety and Health Act.

There needs to be a moratorium on 11th hour litigation brought by environmental groups, or legislating from the bench by activist judges without a stake in the issues or the outcome. It should be obvious by now that activist groups with a "green" agenda have a true purpose to prevent mining, at any cost, not protect the environment.

The only meaningful mining reform would be to place a moratorium on just how much a group can interfere with progress of hardrock mineral mining, so vital to our nation. If slated to be put up for a local or state-wide vote, and the initiative passes, then the environmental guys are "out 'a here" for good on that project and its location.

The 1872 Mining Law, signed by President Ulysses Grant, is a model natural resource law, and has roots not unlike the United States Constitution. Under the 1872 law, mining takes precedence over many other public land uses, including hunting and fishing, and rightfully so... Mining is a legitimate use of public lands, and there are few laws that have fueled the wheels of progress more than the 1872 Mining Law. That the Secretary of the Interior "must" sell public land to mining companies, often foreign-owned, for as little as $2.50 per acre escapes me, or I would be "standing in line" to buy this land. Mining companies pay royalties by virtue of their high-risk venture that in this day and age is fraught with pitfalls such as activist judges and militant environmentalists or wildlife groupies.

To say, "hard rock minerals including; gold, copper and zinc that belong to all citizens" is a little like communism. The opportunity for harvesting these minerals is available to all, not necessarily the mineral itself, or it would never make it out of the ground. The legacy of the 1872 Mining Law has been two-fold, and though the damage from early mining activities is alleged to be still ongoing today, policy-makers need to offset the benefits to the nation over its tenure. Are EPA estimates valid that 40 percent of western headwater streams are degraded by abandoned mines? This could be an incredible exaggeration of fact—an unscientific collation of empirical data.

I represent a mining consortium of pioneer miners and loggers who have done nothing detrimental to the land. We are in one of five known grizzly bear populations in the contiguous states.—A Canadian mining firm in the 1990's, according to the Forest Service, imperiled the bull trout population in the Libby Creek drainage basin due to toxic discharges. This was/is after an alleged temporary hiatus when that mining was shut down, a proposed vital copper-silver mine adjacent to (and under) the Cabinet Mountains' Wilderness in remote northwest Montana.

Professional resource managers at the Forest Service and BLM need oversight to ensure science-based decisions in lieu of political-based decisions, not about where and when mining on public land should occur. With this oversight professional land managers will appropriately maintain their commitments as fair stewards serving our public trust.

The BLM and the Forest Service manage public land with some of the most important fish and wildlife habitats that provide some of the finest hunting and fishing in the nation. Revett Minerals, in Troy, Montana, also in the Cabinet Mountains, Rock Creek Mine is one good example of mining stewardship where they recently provided the Kootenai National Forest Service with a safe harbor for endangered wildlife. It has been noted that more than 80 percent of the most critical habitat for elk is found on lands managed by the Forest Service and the BLM. Pronghorn antelope, sage grouse, mule deer, salmon and steelhead, and other species of fish and wildlife species are on public lands . . . . Mining companies, not unlike true wildlife supporters (hunters and fishers), can and will enhance the ecosystem.

The national forests are a major source of water and of particular importance in the West integral with overall headwaters, streams, lakes and rivers. It is alleged that the Forest Service and EPA scientists have determined that the national forests alone provide drinking water to more than 60 million people in 33 states. Truly domestic mining companies, under existing law, are fully capable and willing to enhance water sources, aquifers and natural reservoirs, and under contract and reclamation bond will leave our waterways and drainage basins in a much better state in the future. All that is needed is delegating the existing oversight to the appropriate government agencies.

Existing—new mining companies and hard-rock mining ventures should not be burdened with so-called "fair royalties" from any minerals taken from public lands.

The general public that has benefited from abandoned mines, or the dynamics of exploration, should fund the cleanup. Congress might as well fund the cleanup with their retirements and so on and live like the rest of the nation. Since 1977, royalties associated with coal mining have generated $7.4 billion to help clean up abandoned mines and recover lands and waters and communities affected by coal mining. That is coal mining, not hard-rock mining.—We do not need a fund for hard rock mining.—What is alleged to be a sensible reform to include all mining operations, present and future will chase away investment dollars, and break the backs of exploration. Commodities developed off public lands such as coal, wood fiber, oil, gas, etc. need to be reassessed as to mitigation of impacts and restoration measures. Hard-rock mining, the foundation of our civilization as we know it, needs to be left alone and not tampered with.

Mining should be the dominant use of our federal lands for the preservation of our economy.—We do need to reassess values of fish and wildlife habitat, water resources, and hunting and fishing, on public lands aside from activists' shrill, and legal and political manipulation. The Forest Service and BLM believe the 1872 Mining Law makes hard rock mining a dominant use of public lands which is the correct course to follow. Mining reform legislation will compromise the balance of shared use in our volatile time of questionable eminent domain and questionable "road closures." There is inherent value in public lands for family sabbaticals, hunting and fishing opportunities and fish and wildlife, flora and fauna eco-systems and habitats. Our utmost priority as a hopefully to remain a sovereign nation is to preserve our heritage, and ensure our economic and national security by the proper use, management and care of natural resources while exploiting the benefits of our bountiful land.

Under the 1872 Mining Law, mining companies and ventures can have "round-table" discussions with agency managers and jointly make visionary and logical decisions based on protecting our land and/or natural resources. Being told when or where to (not) mine is an incursion of Constitutional freedom. Well-meaning but misguided activists would like to dictate by court order or law to influence what they allege is important for fish and wildlife and fresh water. We are not dealing with band-aide policies. Our Congressionally designated wilderness areas, the sanctuaries and estuaries of Fish and Wildlife Refuges, our National Parks are our heritage as are our hard-rock mineral deposits, and not the emotional or political agenda of misguided souls. The encroaching areas designated "road-less" ought to be placed off-limits, not to mining, but to recreation such as snow-mobiles and "busting through the woods" use of all-terrain-vehicles (ATV) entirely, to restate, not to mining. So-called professional land managers have too much discretion. Round-table discussions with all truly responsible will afford to managers with guidelines on all incumbent lands to allow for balanced and reasoned decisions about ecological, social, and economic values. On highly mineralized lands with low fish and wildlife values, and high levels of mining company investment, mining companies ought to have a higher degree of certainty that mining projects can proceed in accordance with existing federal/state policies—laws, statutes, codes and regulations.

Funding and practical reclamation provisions can be made available to those who want to "clean up the forests" including systematically un-polluting abandoned mines and watersheds.—Abandoned mines are or have been one of the paramount issues facing the nation. Those who quote questionable EPA estimates, "That abandoned hard rock mines degrade nearly 40 percent of all western headwater streams" might take a proactive stance and better utilize monies wasted on frivolous litigation and use their funding to promote "pristine cleanups!" The scope and magnitude of reclamation alleged gives environmental activists opportunity to prove their sincerity.

Mining legislation should be reinstated, not "reformed," again allowing patenting/sale of public lands. The U.S. Government has, like homesteading, opened up million acres of our public lands to mining companies and individual, small miners through the practice of patenting. Those without a "stake" in the sacrifices of exploratory mining, whine about resourceful people who claim on public lands and then allegedly "buy the land" for as little as $2.50 an acre. True, there have been abuses without jurisdictional oversight. It should be heartening that with the increase in the price of metals, so have the number of claims being staked.—Mining is risky and expensive!—Congress should abolish the edict of former Secretary of Interior and re-open public lands to mineral patenting.

This Committee on Energy and Natural Resources has a high calling, and with the full United States Senate, have the timely opportunity to reinstate the 1872 Mining Law in its full measure, with comprehensive, complete revisions for agency oversights, reviewed by Congress as needed. The House reform bill needs to be "set back" to justify its cause and effect ramifications over the next Century.—Our great

nation's posterity will not prevail in national and economic security if influenced by unfound diatribes of "a long stalemate calling for reforming:" 1872 Mining Law.

It is broadcast that watershed protection must take precedence over industrial mining development which is true for all types of development, including the sprawl of cities in arid or coastal regions or where water resources are a premium. Mining concerns have a unique situation to classify, nurture and protect our precious water for permits.

Our pre-eminent economic and military security is past vulnerable with a growing reliance on foreign sources for important minerals and processing or our own ore. As stated, "Despite reserves of 78 strategic mined minerals, the United States currently attracts only eight percent of worldwide exploration dollars . . . " "As a result, our nation [has and] is becoming more dependent upon foreign sources to meet our country's strategic and critical metals and minerals requirements, even for minerals with adequate domestic resources.—The 2007 U.S. Geological Survey Minerals Commodity Summaries reported that America now depends on imports from other countries for 100 percent of 17 mineral commodities and for more than 50 percent of 45 mineral commodities." This is unconscionable and needs to be changed. Reforming the 1872 Mining Law, with increased burdens on mining ventures is the absolute wrong course. "This increased import dependency is not in our national interest particularly for commodities critical to pending strategic programs such as reducing greenhouse gas emissions or undertaking energy efficiency efforts. Increased import dependency causes a multitude of negative consequences, including aggravation of the U.S. balance of payments, unpredictable price fluctuations, and vulnerability [as] to possible supply disruptions due to political or military instability. [Over the last several decades,] our over-reliance on foreign supplies is exacerbated by competition from the surging economies of [aggressive] countries such as China and India. As these countries continue to evolve and emerge into the global economy, their consumption rates for mineral resources are ever-increasing; they are growing their economies by employing the same mineral resources that we used to build and maintain our economy. As a result, there exists a much more competitive market for global mineral resources. Even now, some mineral resources that we need in our daily lives are no longer as readily available to the United States." This has been well stated and portends our eventual demise.

Conclusive reports: "The U.S. mining industry has fully embraced the responsibility to conduct its operations in an environmentally and fiscally sound manner . . . ." Reuters, on January 28, 2008, reported "Zambia will introduce a windfall tax on base metals at a minimum rate of 25 percent and increase mineral royalties to 3 percent from 0.6 percent . . . " New increased royalties and reintroduction of withholding taxes in the base metals sector "will make the country less attractive for future mining investment." New taxes in copper-rich Zambia are effective April 1, 2008. Killing the goose that laid the golden eggs (copper and cobalt), the country's economic lifeblood, is foolish at best. That the U.S. Senate has taken the "high road" in deliberating a "rewrite" (reform) of the 1872 Mining Law, as has been "corrupted" by ancillary legislation, is commendable! When "making sausage," let us not forget our heritage.

National Security issues of domestic mining production "built on competitiveness, certainty and common sense." The Bush Administration, in the latest round of talks on possible changes to the US Mining Law intimated a possible imposition of royalties on hardrock minerals on public lands, according to Mineweb, Jan. 25, 2008. (1) Replacing the current system of mine and mill patenting with a more modern form of "secure tenure" is open to question; (2) Imposing prospective and profits-based royalties is inadvisable at best; (3) Establishing abandoned locatable mine reclamation funding to clean up sites that allegedly threaten the environment and public safety can come out of the General Fund, just like Social Security. A "clean sheet" approach would encompass the 1872 Mining Law as mote. Environmental—other laws have all but smothered the climate of investment and development in mineral mining. We need "to also recognize the economic performance of mines and the security of tenure issues vital to mining investment. My mining concerns are best documented "where the rubber meets the road" in the attached letters.

Attached are two (2) letters of note, and import, to the deliberations concerning the 1872 Mining Law: Simplicity can not happen in our government with imposition of a "royalty program" for hardrock mining. As evident by a Mining Lease apparently ignored by a U.S. mining company, with foreign and "domestic" handlers, litigation will be the norm instead of the exception: "It's all about money, and 'follow the money.'" Providing a "fair return" to taxpayers is translated to "putting another albatross around taxpayers' neck, along with the boots of our adversaries." The federal bureaucracy to manage adequate audit and compliance, above and beyond the present, will go asymptotic and "break the backs" of new and existing mining enter-

prises.—An efficient and automated reporting system can be managed by the individual states that have a stake in the production of mineral mining.

1. Letter to PAUL BRADFORD, Forest Supervisor USDA Forest Service—Kootenai National Forest of 1/31/08
2. Letter to Bradford and MARK WILSON, Montana State Supervisor—U.S. Fish & Wildlife Service of 1/31/08

State and federal environmental agencies and public lands regulatory agencies already have an efficient, effective automated reporting system that is becoming more automated. For example is the BLM LR2000 database, and the county and state Bureau of Land Management location/date, owner, type and recordation of mineral mining claims. The audit and investigative authorities are already in place. All that is needed, as evidenced by attached letters is Congressional, Department of Interior, Inspector Generals' simplified oversight of Forest Service, et al decisions. What is seriously lacking, not a fault of the 1872 Mining Law, is enforcement of ownership, policy and permitting.

That some Senators rightfully—strongly oppose the 8% gross royalty shows some gravity in Congress. Even considering a "modest" 2% to 5% gross royalty is fearful as to its import and implications. William E. Cobb rightfully stated, "the existing comprehensive framework of federal and state environmental and cultural resources already regulates all aspects of mining... Additional federal regulation is unnecessary, duplicative . . . unreasonable." He opposes giving the Secretary of Interior the right "to stop a mining project when all environmental and other legal requirements are met." His astute observation could not be stated any better. The doctrine of "multiple use" needs to recognize the demerits of so-called "recreation" vs. our meritorious capability for "national survival."

There is absolutely nothing wrong with the current demand of commodities driving companies and individuals to "stake their claims" for strategic metals and as the price of uranium, gold and other heavy metals continues to drive companies to stake claims across the West.—Mining claims dot millions of acres of public land across the West.—Righteously, once a mineral stake is claimed, it is nearly impossible to prohibit mining under the current framework of the 1872 Mining Law, no matter how [alleged to be] serious the impacts might be!—Enough Said . . . .

Respectfully Submitted,

FRANK WALL,
National Resource Specialist, Forensic Engineer & Mining Consultant.

ATTACHMENT.—LETTER #1

31 January 2008.

PAUL BRADFORD,
KNF Forest Supervisor, USDA Forest Service, Kootenai National Forest, 1101 Highway 2 West / Libby, MT.
Regional Forester, Policy Oversights, USDA FS Northern Regional Office, P.O. Box 7669 / Missoula, MT.

DEAR MR. BRADFORD:

Re: Trespass by Mines Management—Montanore Minerals on FS lands—LCV claims . . .

Per FOIA request, I possess a copy of a letter you wrote to Eric Klepfer, V.P. Operations of Montanore Minerals Corporation dated August 7, 2007, that has been grossly ignored.

Your letter is "very specific" on MMC's "proposed mining activities associated with the Libby Creek adit within [and adjacent to] the Cabinet Mountains' Wilderness on the Kootenai National Forest (KNF). Based on [your] review of this information [submitted by MMC June 5 & July 3, 2007] and analyses by Forest Service experts, I have [you] determined that MMC must [first] obtain Forest Service approval of a plan of operations [(POO)] as required by Forest Service Locatable Mineral Regulations at 36 CFR 228 Subpart A prior to dewatering and continuing excavation, drilling, and development work at the Libby Creek adit. Previously, we issued a temporary snowplowing permit for the road to the Libby Creek adit which has now expired. In lieu of a new permit for future snowplowing and annual road use, we are requesting that you include this request in a proposed plan of operations. Please file a plan of operations which includes all of the proposed Libby Creek adit activities including future snowplowing and annual road use authorizations for our review and approval."—The following flies in the face of reason:

Mines Management Inc. announcement on third quarter earnings states, "Advanced Exploration and Delineation Drilling Program"—"During the third quarter

of 2007, the Company [(MMI as MMC)] continued preparations for the exploration and delineation drilling activities at the Libby adit site. The water treatment plant components were delivered during the quarter [July—Sept. 2007] and installation of the plant was completed October 31, 2007, with testing and startup activities beginning on November 1, 2007. Other activities included the delivery of major mine equipment, pump stations, power load centers and other key equipment necessary for the delineation drilling program. Installation of the ventilation duct work was completed for the first several hundred feet of the adit. [That is: on Libby Creek Ventures™ mining claims on Forest Service lands.]

On January 25, 2008, your executive assistant Barbara Edgmond confirmed via email, "Mr. Bradford has been advised of your phone call today and the concerns you have that MMI's third quarter report stated they have moved equipment to the adit and are working on the ventilation system." This, combined with receipt of your response to my FOIA request dated November 29, 2007, for documents dated from November 2, 2007 to January 16, 2008 is rather inconsistent. Please note the: (a.) Letter from MMC dated 12/19/07 requesting temporary FS approval to plow the Libby Creek Road; (b.) FS letter to MMC dated 12/27/07 approving this request as of the date of this letter . . . mitigation measures (as outlined last year) will apply, including the gate management locations; (c.) Email from MMC dated 12/27/07 stating, "Thank you for your timely . . . approval."

Mr. Bradford, you further stated in your reply to my FOIA request noted above, that my wanting to know the disposition (of MMC within the adit) was not within the purview of the FOIA. Fair enough, but two months later? Let me restate, "Not within the context of an FOIA request."—Let's cut to the chase. Please affirm or deny whether or not MMC is in the Libby Creek adit on national forest lands. And if so, where is their approved plan of operations, plan of action, or permit of authority (POO, POA, POA_2)? I believe the answer is MMI a/k/a MMC does not have one, did not have, and will not have one . . . .

My reasoning is that for Libby Creek Ventures™ to demonstrate under the doctrine of pedis possessio in the 1872 Mining Law, occupancy of its rightful mining claims, and to continue to demonstrate "boots on the ground," that Mines Management Inc., under any alias or operational subsidiary/entity, needs to "get off LCV property" which is also on the national forest lands. And the USDA Kootenai National Forest needs to enforce the law and quit playing "footsie" with alleged outlaws as is evident as shown and noted above.

Dating back to on or before September 11th, 2006, when MMI first interfered with LCV's rightful exercise of exploration drilling on its mining claims, the Montana DEQ and the USDA Forest Service have enjoined with each other to support MMI and undermine the rightful exercise of LCV's mining heritage, even to the point of quitting. Why is this so? Today, MMI had the audacity to file a civil action against LCV and its components, to include the undersigned, and one claim is that LCV did not exercise pedis possessio.

USDA KNF FS and Montana DEQ have been/are denying LCV its rightful exercise of its small miner initiatives to explore and to hold under the doctrine of pedis possessio; full unequivocal use of its senior mining claims duly registered with DOI BLM; that's why! MMC is allegedly operating under color of law with permissiveness of the FS and DEQ.

Note: http://www.fs.fed.us/r1/kootenai/projects/projects/adit-plan/index.shtml (pdf l 20mb)

Getting back to basics, last year I sent you an email January 15, 2007, which states in its beginning, "As we discussed on Wednesday, January 10th, 2007 at Noon (MST), please accept the following: All of the Libby adit is on FS and FS Wilderness lands . . . I allege was a long-range dispossessory plan . . . the fact MMI is encroaching on LCV permitting or permitted rights . . . a USDA KNF 'fairness' review covering all permits issued and all permits [was] required for the Montanore Project. 'IT IS ONLY FAIR!'"—did this happen?

LCV, et al (claim holders and Wall) are being sued by MMI, MMC and Newhi: stating in their lawsuit that there is a controversy as to who owns the mining claims and the adit, which according to the suit needs to be adjudicated. Shouldn't the Forest Service hold off on permits? Meanwhile, MMI needs to stay out of the Libby Creek adit and all of the mining claims in contention until this is resolved in court and the FS and DEQ needs to quit interfering with LCV's mandatory exercise of its ownership under pedis possessio.

Thank you for attending to this matter.

FRANK REGINALD WALL.

ATTACHMENT.—LETTER #2

31 January 2008.

PAUL BRADFORD,
KNF Forest Supervisor, USDA Forest Service, Kootenai National Forest, 1101 Highway 2 West / Libby, MT.

R. MARK WILSON,
Field Supervisor (via email), U.S. Fish and Wildlife Service (USFWS), Division of Ecological Services, 585 Shepard Way / Helena, MT.

DEAR MR. BRADFORD AND MR. WILSON:

Re: Trespass by Mines Management—Montanore Minerals on FS lands—LCV claims . . .

On Wednesday, December 19, 2007, I sent an email to Mark Wilson that reads—

> Re: Grizzly Bear and Bull Trout concerns on Cabinet Mountains' drainage basins...
>
> I was talking to people at Revett Minerals about the grizzly bear (Usus arctos horribilis) habitat issue. In the discussion, I was alerted that (our—LCV) having an approved POO in the grizzly (and/or bull trout) habitat is a significant issue! However, in that you did not know of our being in the same habitat/environ eco-system as Mines Management, possibly the Kalispell office USFWS, we at Libby Creek Ventures were wondering just how many other mining concerns have, or would/could have, an approved POO in our specific area of operations.
>
> Libby Creek Ventures holds 58 lode mining claims, one being a placer claim, along with three tunnel sites, as overlaid, on Libby and Ramsey Creek drainage basins up to the CMW east boundary and on the forest roads.—§ It is felt that you could get a more prompt, qualified response from the Forest Service than if we [meaning Libby Creek Ventures™] asked them.
>
> Would you please tell us how many mining concerns can operate in this region, meaning adjacent or under the Cabinet Mountains' Wilderness? You asking and collaborating with the Forest Service on this and giving us an official "reading".per same would be most helpful. Our concern is that approved POO's might be viewed by the federal government kind of like water rights with the state: First in place, is first right to limited or vulnerable resource(s). For example, let's say that ten or more mining firms applied for a plan of operations in this area.
>
> Is there an ascendancy of "first come"—"first-in-line, or first right" as far as impacting the Grizzly Bear? If you wrote a letter on this to Paul Bradford, KNF FS supervisor, and qualified this critical situation it would be of great help. This would alleviate our concerns in that: If Mines Management a/k/a Montanore Minerals (Newhi) received an approved POO from the USDA KNF Forest Service, then we might find ourselves "out on a limb" literally, and having spent a lot of time, resource—money, to no avail, in pursuing our long-term mining venture.
>
> As I discussed with you today, we received an approved POO (which is currently valid—to be expanded) from the FS and DEQ early this year, but have been held up in executing our Phase I and Phase II POO due to a noted lack of cooperation by USDA FS, and Mines Management. As mentioned, this involves our concerns of safety issues and our potential liability of harming personnel or equipment in the adit (that shouldn't be in the adit) while we are commencing our initial "hammer in-the-hole" drilling efforts: of our targets in close proximity! [last year]
>
> The scenario that could play out, is like having "too many cooks" in the kitchen. What's the limit? Who's first?—§ The bottom line: is there a "pecking order" of ascendancy in "rights" of POO, and is there a "saturation element" or point of "diminishing returns" with respect to having an approved POO in the grizzly bear habitat—environ? And, if this is the case, what is, or will be, the federal government's position or policy with respect to the same?—§ Mark, any feedback or help with respect to this, in writing, would be most appreciated. Thank you . . . .

On 12/20/07—Re: FS & DEQ Approved Plan of Operations Concerns . . . (subject of email): Mark Wilson replied via email, "We understand your question(s) and my staff and I will be discussing it in the near future, and will get back with you shortly after the first of the year."

On or around January 24, 2008, the undersigned had a conference call with Mark Wilson and Ann Vandehey, USFWS Section 7 Coordinator of the Endangered Species Act. We discussed a "consultation document" as being the means by which the USFWS interacted with the USDA FS on decision-making criterion. We also discussed "nexus" being a buzzword for ingress and egress to private or patented property using federal roads for access and using federal lands for infrastructure impact such as power lines, tailings, mill sites, tunnel/adit portals, etc. For example, "displacement" by creating new roads, etc. is undesirable in Grizzly Bear habitats. Excessive (any) ground water disturbances are extreme concerns in Bull Trout watersheds.

As subsequent follow up to the conference call, there was no USFWS (Kalispell, MT) notation available which contradicts the FS record of an August 2006 Decision Memo to LCV signed by KNF FS Ranger Malcolm Edwards on 9/12/06, and specifies all categories of review/analysis:

IN PART—"Water, Riparian areas and Fish: The proposed action would not occur within the riparian habitat conservation area (RHCS) of Libby Creek. . . . § Wildlife and Threatened and Endangered Species: § Effects to threatened and endangered wildlife species were analyzed for this project. No effect is expected to any TE wildlife species within the project area. Effects to sensitive species were also analyzed for this project. The project is not likely to impact individuals [?] or their habitat and would not contribute to a trend toward federal listing or loss of species viability. § The wildlife analysis is available in the project file."—Please make copies of the wildlife analysis, and species list so noted, to all affected parties.

ALSO IN PART—"V. JUSTIFICATION FOR CATEGORICAL EXCLUSION—§ This project is being categorically excluded from documentation in an EA [(Environmental Assessment)] or EIS under category 32.1 (3). . . . § Federally listed species proposed for Federal listing, or proposed critical habitat, or Forest Service sensitive species: There will be no effect to threatened and endangered species within the projected area. Consultation with the U.S. Fish and Wildlife service was not necessary. § The project is not likely to impact individuals or their habitat and would not contribute to a trend toward federal listing or loss of species viability. § Species list and analysis is available in the project file at the district.—[Excerpts of page 2 & 3]

IN PART—"VI. PUBLIC INVOLVEMENT—§ . . . Comments were solicited from the District Wildlife Biologist, Archaeologist, Botanist, Weed Specialist, Hydrologist, Fisheries Biologist . . . " "VII. FINDINGS REQUIRED BY OTHER LAWS—§ . . . The Endangered Species Act . . . § Under provisions of this Act, federal agencies are directed to seek to conserve endangered and threatened species and to ensure that actions are not likely to jeopardize the continued existence of these species. Since affects to threatened and endangered species have all been determined to be "no effect", consultation with the U.S. Fish and Wildlife Service was not necessary. The biological assessments for the Libby Creek Ventures Drilling Project are located in the Project Record. I have determined that my decision is in compliance with the Endangered Species Act.—[Excerpts from page 4 & 6 of 8 pages—Comprehensive vetting process]

"APPENDIX A—Response to Comments [alleged public comments one of two received]—Comment: Concern was expressed regarding the location of the drillholes with respect to the Montanore Minerals Corporation Libby Creek Evaluation Adit. Interception of the adit by a drillhole could potentially cause impacts to water quality or quantity in the Montanore adit. Response: A letter from the Libby District Ranger specifying these concerns will be submitted to Arnold Bakie of Libby Creek Ventures."—[Excerpt from page 8 of 8—This is not their property!]

It should be evident, as events before and since 9/11/2006, questionable choices were made.

On 01/10/07—One year ago, LCV and the KNF FS entered into an agreement entitled RPOOA (Revised Plan Of Operations Addendum), the purpose of which was to—"resolve appeal issues as outlined in Libby Creek Ventures (LCV) appeal of October 26, 2006 per 36 CFR 251.93 ." A review of the content of the RPOOA with respect to the Decision Memo is: this is an addendum to the plan which was submitted on May 26, 2006: an extension (FS) for cause was granted.

Quid pro quo: Provision "10. Claim Ownership § Approval of this Plan of Operations does not constitute certification or recognition of ownership to any person named herein. If another party [such as MMI a/k/a MMC] proposes a conflicting plan that would prevent the FS from administering the mining regulations (6 CFR 228 Subpart A) it would be the sole responsibility of the concerned parties to resolve such conflict. In some situations the FS may require resolution prior to authorizing surface disturbing activities." And provision "11. Claim Validity § Approval of the

Plan of Operations does not constitute recognition of the validity of any mining claim named herein, or of any mining claims now hereafter covered by this plan."

On December 18, 2007, Arnold Bakie and I received your Libby Creek Ventures Drilling Project Appeal Decision which in effect (if not appealed to a second level of review) reverts to RPOOA and any effort to perform expert hydrology—structural evaluation studies are thereby stymied. Access to the Libby Creek Ventures Adit™ is also effectively denied even though on FS lands.

Under any reasonable observation, by a prudent man, a jury of peers or a judicial review, will conclude, "beyond a reasonable doubt" that USDA KNF Forest Service and Montana DEQ have effectively and consistently "taken sides" and denied Libby Creek Ventures™ their rights under the 1872 Mining Law of occupancy—exploration—mining under the doctrine of pedis possessio.

There is only one solution at the present, and that is for the USDA Forest Service and Montana DEQ under their Memorandum of Understanding to deny all permits and licenses to Montanore Minerals and Mines Management until such time as "claim ownership" and "claim validity" has been adjudicated. Furthermore, LCV has an approved even a tour de force RPOOA of its POO.

The LCV POO (as revised and amended) was approved by FS and DEQ jointly before Revett's Rock Creek approval and before Mines Management's Montanore project which has yet to be approved even though MMI allegedly acts as if it has all the needed permits and licenses. The approvals give LCV "first come, first right" with respect to its present—expanded POO for exploration mining under the Small Miner Excursion Statement (SMES) and need for buffers for environmental air quality, water quality and impacts under the Endangered Species Act. Any consideration for any permits or licenses to MMI, MMC, et al would have to consider that LCV has first right in pursuing its long-range objectives in SMES hard-rock exploration and mining in the Libby Creek and Ramsey Creek watersheds and attendant forest service lands.

Any speculation or comments as to LCV minimal exposure to mining has to take into account that LCV first submitted a plan almost two years ago for four (4) simple drillholes on the side of the national forest road and in front of any gates (before MMI's interference). Notice: One hole will be drilled in situ of the three (3) approved, and the other three (of the four original holes that were bonded) will be moved closer to the Cabinet Mountains' Wilderness eastern boundary line and in similar close proximity to FS trails, with minimal or no disturbances!

Under the 1872 Mining Law and federal and Montana mining codes, regulations and statutes, LCV is required to perform annual assessment work, maintenance work and diligently work its mining claims: lode and placer, and tunnel sites! To not perform with due diligence is to lose, by abandonment, as Noranda has done, all rights in perpetuity to any undiscovered minerals. The FS and MT DEQ have a fiduciary obligation to not interfere with LCV exercising its rights. Under the doctrine of pedis possessio, LCV demands that the FS rescind any/all MMI permits. If MMI (or the Montana DEQ for MMI) wants to do mining, then they need to speak with LCV.

After seeing a bundle of bailing wire on the south shoulder of FS #2316 at the entrance to the Johnstone Placer Patent, that could injure life or limb, human or animals, and after seeing steel rebar on the top of a stump sticking sideways in the forest, that could injure life or limb, human or animals, and after seeing the shoddy snow-plowing job performed by MMI last year, and after seeing all the dust generated by MMI and MMC along the forest service roads, it is my contention (photos) that MMI has or had good intentions, but does not necessarily deliver.

Libby Creek Ventures™ demands that its sign be posted on the seasonal gate closure and that Montanore Minerals Corp. (MMC) sign be removed. It is an affront to LCV that MMC not only has keys to those gates, but has a common sign with the USDA Forest Service and FS logos This is unquestionably illegal at worst and poor judgment at best. LCV was castigated in its "48 Hour Notice" for safety reasons September, 2006, being alleged to be using FS stationery.

It is and has been from day one, and as can be proven empirically, that LCV has performed using "best management practices" in the forests and on the forest roads and trails and forest watersheds. LCV, in studying how to best explore for minerals, has determined to access ore targets from existing forest roads and trails, and take every effort to minimize or eliminate all-together any discharge of water. LCV will create and maintain very clean and functional man and mining operations' facilities and tunnel sites, and will not impact the feeding and nocturnal habits of animal species including endangered fish, fowl and mammals. LCV intends to leave the forest in a more natural and desirable condition than when first encountered! This is the Code of the West, and that is to leave minimal or no traces of occupation or

habitation. It is true that these are goals which, in reality, might require minor changes for practical reasons.

This letter and its counterpart "Demand for Quid Pro Quo Under Doctrine of Pedis Possessio" will be entered as exhibits to U.S. Senate testimony pursuant to [not] reforming the 1872 Mining Law as a demonstration that there is nothing wrong with this law, just enforcement thereof being rather deficit when it comes to heading off litigation when such can be avoided.

I am inviting the Senate Committee on Energy and Natural Resources to review the de facto background from a Forest Service perspective which leads one to believe that all is legitimate:

1. "Vested interest?" http://www.fs.fed.us/r1/kootenai/projects/projects/montanore/index.shtml
2. Adit LCV's Property: http://www.fs.fed.us/r1/kootenai/projects/projects/adit-plan/index.shtml
3. Stale data: http://www.fs.fed.us/r1/kootenai/projects/projects/montanore/involvement.shtml
4. 6/05? http://www.fs.fed.us/r1/kootenai/projects/projects/montanore/final—scoping—letter.pdf
5. ??? http://www.fs.fed.us/r1/kootenai/projects/projects/montanore/permits—lic—app—table.pdf

All is not legitimate as the Forest Service has ignored Libby Creek Ventures™ senior position and ownership of its mining claims. The FS acts as if there is not a breach between Noranda's termination of a valid lease and Noranda's junior partner Mines Management Inc.'s attempts at "acquiring possession" of LCV's property by trespassing on it with Montana DEQ and USDA FS "looking the other way" over LCV's oral, official and written protests. LCV is not even afforded "equal time" or consideration: (1) Where does LCV show up on "seasonal road closure" signs accessing LCV's mining claims? (2) Where does LCV show up on the "permits, licenses, etc." website noted above, as being the first and foremost permission (the owner) required, and (3) Where does LCV show up on the adit plan or the project website noted above? It DOES NOT!

The adit-plan (see link) states "Notification to resume suspended . . . " and should be "Notification to resume terminated . . . " as Noranda terminated its operations thus voiding Permit #00150 as to " . . . resume suspended" implies that there was intent to defraud the Mining Lease holder LCV.

And as any prudent person can observe, a 20 MB pdf document hardly qualifies as a "minor revision" to the "Hard Rock Operating Permit #00150" regardless of how this is glossed over! To say, "Minor Revision" is akin to saying, "minor surgery" about a heart transplant operation: Who is kidding who? Two-hundred and twenty-four pages (224 of revision 2) October, 2006, has obviously been in work for some time, and with the Forest Service's cooperation all along.

Now, since May of 2006, when "called on board" to sort out this mess of valid ownership and prior possession by LCV as successor-in-interest to the Mining Lease holder of a thirteen-year lease and "Grant of Easement" which should not have been in question, I have very diligently reviewed the record for any shortfalls; and there were and are none!—I have worked with the USDA Forest Service (FS) and the Montana Department of Environmental Quality (DEQ), the two "governing agencies" and have gotten virtually nowhere with respect to appropriately and reasonably and systematically exploring LCV mineral targets. The FS and DEQ have supported the trespassers at virtually every critical occasion, taking the side of Mines Management, Inc.

If the Forest Service refuses to "step up to the plate" and suspend Mines Management, Inc. a/k/a Montanore Minerals Corp. operations within the adit on national forest lands, which are also valid mineral mining claims of LCV and thus maintain a neutral posture until ownership is adjudicated within the Lincoln County District Court, Cause No. DV-07-248, then a prompt and comprehensive Congressional Investigation is called for.—A USDA Inspector General Oversight review is also warranted, and also, right soon!—The FS and DEQ need to do their jobs of fairly enforcing their respective federal and state mining law, codes and regulations!

I have had to do Internet searches using search engines to get to the bottom of this as the Forest Service has not timely notified the LCV mining claim holders, who the FS "should have known, and would have had to have known" were principally affected by Mines Managements' exploits and efforts. I have noted that "after the fact" public notices and public meetings on the decision-making process were evident to LCV principals, and no notification was properly given except what was published in local news and/or discretely posted on FS project website.

It's hard for me to believe otherwise that there was not a policy to keep LCV "in the dark" on this and not let LCV know "what was happening" until such time that inertial forces were in place to make it virtually impossible to correct-the-record and assert occupancy under the doctrine of pedis possessio. Mines Management was using the Johnstone Placer Patent as a means of "toe in the door" and allegedly subverting any means of LCV to protect its rights.

My accompanying letter to you, Mr. Bradford and the Regional Forester pertaining to oversights is an unequivocal—"DEMAND FOR QUID PRO QUO UNDER DOCTRINE OF PEDIS POSSESSIO"—It should be unquestionable in its message and mission . . . As you are fully aware, I have made it a point to establish a "chain of evidence" on this alleged illicit activity and alleged conspiracy if none other than History.—Being a defendant in a lawsuit of which I have NO mineral interest shows the extent Mines Management is stretching to suppress my message and silence my voice of injustice.

As I'm sure you are aware, sooner or later, the Good Lord willing, justice will prevail!

As noted on this letter to you, Mr. Bradford and also to Mr. Wilson, this DEMAND FOR "FIRST COME—FIRST RIGHT" UNDER DOCTRINE OF PEDIS POSSESSIO—As of the date of RPOOA approval by the FS, now a year ago, is asking the two of you to come to a "meeting of the minds" with respect to Libby Creek Ventures'™ posture in the Cabinet Mountains' Wilderness. Please expedite, officiate—clarify your position and bring this controversy to a conclusive end result.—Anything less is a miscarriage . . . .

Why is it that when policy making comes about, the small miner gets excluded? Small miners are where many discoveries of valuable ore have been brought to the "light of day." Note the following excluded LCV holding "first position" in: http://www.missoula.com/news/node/925 ... "Mining companies at odds over Cabinet Mountains drilling" (meaning Revett and MMI).

Please act on my request so that LCV does not "have the rug jerked out from under it" more than has already occurred. And as you know, this has been due to "not knowing" of adversity stalking its property, while at the same time LCV was complying with the mining regulations.

Libby Creek Ventures™ is required by the 1872 Mining Law to fully demonstrate, under the doctrine of pedis possessio, diligent occupancy of its rightful mining claims, and to consistently demonstrate "boots on the ground!"—Mines Management Inc., under any alias or operational subsidiary/entity, needs to "get off LCV property" which is also on national forest lands.—The USDA Kootenai National Forest needs to enforce the laws involving LCV!

To Recap my assertions: Dating back to on or before September 11th, 2006, when MMI first interfered with LCV's rightful exercise of exploration drilling on its mining claims, the Montana DEQ and the USDA Forest Service have enjoined with each other to support MMI and undermine the rightful exercise of LCV's mining heritage, even to the point of forcing LCV to give up: Today, MMI had the audacity to file a civil action against LCV and its components, to include the undersigned, and one claim is that LCV did not exercise pedis possessio.

LCV, et al (claim holders and Wall) are being sued by MMI, MMC and Newhi: stating in their lawsuit that there is a controversy as to who owns the mining claims and the adit, which according to the suit needs to be adjudicated. Shouldn't the Forest Service hold off on permits? Meanwhile, MMI needs to stay out of the Libby Creek adit and all of the mining claims in contention until this is resolved in court and the FS and DEQ needs to quit interfering with LCV's mandatory exercise of its ownership and diligent occupancy under pedis possessio.

USDA KNF FS and Montana DEQ have been/are denying LCV its rightful exercise of its small miner initiatives to explore and to hold under the doctrine of pedis possessio; full unequivocal use of its senior mining claims duly registered with Lincoln County Office of Recorder, Libby, Montana and the U.S. Department of Interior (DOI) Montana BLM. LCV is the rightful claim holder and expects a written ruling of "first come—first right" respecting its POO and select endangered species.

Respectfully submitted for your prompt execution,

FRANK R. WALL.

WALDO MINING DISTRICT,
Cave Junction, OR, January 23, 2008.

Hon. JEFF BINGAMAN,
Chairman.
Hon. PETE V. DOMENICI,
Ranking Minority Member.

DEAR ENERGY & NATURAL RESOURCES COMMITTEE MEMBERS; I am writing you today as President of the Waldo Mining District, which was established in May of 1851 (in what is now SW Oregon); and as an individual Miner & Prospector for the last 28 years. I, and thousands of other individual citizens like me, beg you to hear our plea, and remember us in your important deliberations; the outcome of which could destroy the living American Heritage of the "Individual Miner/Prospector".

One hundred thirty-six years ago a Bill was passed by Congress unique to all the world and history. This Bill, the U.S. Mining Law of 1872, was promulgated from a blend of earlier mining laws, traditions, and most importantly from the methods and customs practiced by the miners themselves throughout the American west. For the first (and only) time in human history, individual citizens, without any prior approval from a government, and acting solely on their own initiative and at their own expense; were granted the right to enter the Public Lands to search for, locate, and extract the valuable minerals needed to supply this country's needs and build a sound economy.

Was the 1872 Mining Law a success? For the answer to that question, all one has to do is look to history. At virtually no cost to the Nation and for well over one hundred years, most or nearly all of this country's mineral requirements have been met by domestic mining. All the iron for all the steel to build the railroads, bridges, buildings, all the weaponry and ships to fight two World Wars (and then some), the automobile industry, etc.; all the copper needed to light the world; etc.; and enough gold to pay for it all came from mining under the 1872 Mining Law . . . and along the way, the United States became the richest and most powerful nation on Earth.

Last year, the House of Representatives passed H.R. 2262, the "Hardrock Mining and Reclamation Act of 2007", which if enacted, would utterly destroy what little remains of this Nations once great mineral industry. This Committee now contemplates its own possible revision of the 1872 Mining Law. Because of the seriousness of these matters, and for the sake of this Nations continued wealth, security, and for the protection of a truly unique American heritage, I urge you to consider the following Testimony in your deliberations.

PART I: IN RESPONSE TO THOSE PROPOSING REVISION

Although the 1872 Mining Law has been attacked and amended many times since enactment, a more recent series of attacks in the last twenty or so years has brought us to today, where over-whelming and complete revision is being proposed. Those proposing the revision of the 1872 Mining Law seem to be driven by the extremist environmental community, and a handful of Congressional members that ought to know better. In response to at least some of the "propaganda", I submit the following:

A. CLAIM: Mining in the United States is destroying the environment.

RESPONSE: 99+% of all serious environmental harm from mining occurred before the 1960's & 1970's. Since the passage of tough federal and state environmental protection laws (e.g.; ESA, CWA, NEPA, etc.), no legally operating mine in this country poses a serious risk to the environment. Long gone are the days of unregulated environmental destruction. Amending the 1872 Mining Law will not undue the environmental damage of the past . . . and the laws are already in place to keep any such damage from occurring in the future.

The Committee is urged to keep in mind that "some" level of environmental disturbance will occur from mining (i.e.; you can't dig a hole without moving some dirt). Due to the site-specific nature of mineral operations, the best way to minimize the effects from mining is to control it at the local level. Bureau of Land Management and National Forest Service mining regulations already require NEPA analysis approved Plans of Operation for all mining operations likely to cause a significant surface disturbance. This approval process can take anywhere from a year or two to well over ten years. If anything, this process is already too burdensome and prohibitive for all but a simple pick & shovel operation (which even then may require permitting at the state level).

Amending the 1872 Mining Law to place even tighter environmental protection restrictions and control on mining will bring nearly all mining to a screeching halt,

destroying the industry along with hundreds of communities and thousands of families and individuals dependent on the mining industry.

B. CLAIM: All mining operations should be bonded to guarantee reclamation.

RESPONSE: Current Bureau of Land Management and National Forest Service mining regulations already require 100% reclamation bonding for all mineral operations that create a significant surface disturbance. This generally includes all but the smallest levels of mining, from 1-man with a bulldozer or backhoe to the largest of mines. Amending the 1872 Mining Law with tighter bonding requirements will only work to make a bad situation worse, as especially for the smaller operations, no one will issue a bond on mining operations forcing the operator to post a 100% cash bond, bankrupting many operations before they even stick a shovel in the ground.

C. CLAIM: Mining operations are getting the minerals for "free"; there should be a royalty.

RESPONSE: Mining, as with almost all other business, is all about spending money in the hope of making even more money. The big difference with mining is that small fortunes can be spent just to determine if a deposit is worth developing. For every successful mine there are dozens of unsuccessful prospects. To place a further economic burden on the successful mining operation by imposing a royalty (i.e.; "tax") will do nothing but put that many more mines in the "unsuccessful" list.

No mining operation is getting something for nothing . . . larger operations expend millions of dollars in exploration and development work before any mineral comes out of the ground. That's millions of dollars of investment money spent into local communities as wages, supplies, lodging, etc. and to equipment supplies worldwide . . . plus all the continued expenses if the mine is successful. Even the smallest of operations, such as the 1-man with a small underwater vacuum ("suction dredge") may invest $3-10,000 in equipment.

No miner is getting anything for free . . .

Another problem with the royalty issue is the potential "takings" issues, in that the owners of existing mining claims already own the minerals as granted and guaranteed by the existing law.

D. CLAIM: Miners are patenting land for $2.50—$5.00 per acre.

RESPONSE: No one is patenting land for $2.50—$5.00 per acre. The proof is that if land could be patented for that amount, there would be no land left to patent! In reality, since the early 1990's, Congress has placed a moratorium on the patenting of mining claims. Furthermore, even when patents were still being issued, most claimants expended $20-30,000 (in 1980's dollars) per acre before and during the patenting process.

Considering the incentive value of the patenting of mining claims, it would seem wiser to find a way to continue the practice rather than totally abolish it. I respectfully suggest that the problem with patenting is the fault of Congress, who in over 100 years never revised the payment amounts of $2.50—$5.00 per acre. At the time of enactment, even $2.50 was a lot of money to pay for an acre of land, let alone mountainous wilderness. If based on the value of an ounce of gold in the late 1800's (i.e.; $20/oz), $2.50 was equal to 1/8th of an ounce. At today's price (nearly $900/oz), that same 1/8th of an ounce is now worth $112.50.

E. CLAIM: The Mining Law needs revision because it's "antiquated".

RESPONSE: One of the more popular battle cries, opponents to the Mining Law argue that the Law needs massive revision just because it's an old law. If that were the case, then maybe Congress should consider the creation of the Natl. Park Service and Yellowstone Natl. Park . . . as they too were enacted in 1872. Or how about the U.S. Constitution and the Bill or Rights . . . they are even older than the Mining Law and following this logic (old must be bad) suggests the oldest needs to be revised first. Maybe we should revise the Declaration of Independence . . . as it's oldest of all.

Revising the Mining Law just because its 136 years old is nothing but bad news for this nation. "If it ain't broke, don't fix it" seems to aptly apply . . . and it ain't broke, at least not in the sense proclaimed by those seeking reform. (It is broke in the sense that the environmental protection pendulum has swung way too far into the realm of needlessly restrictive to the point of prohibitive, causing untold economic hardship throughout the West.

PART II: PROTECTING THE INDIVIDUAL MINER/PROSPECTOR

I beg the Committee's indulgence to bring up a special issue in regards to any reform of the 1872 Mining Law, which is the plight of the Individual Miner/ Prospector. Yes, we are still out there, searching for our own version of the American Dream. Every summer the gold regions of the West are visited by thousands of individuals and families usually in pursuit of placer gold using methods used 150 years ago. The most popular form of this "small-scale" mining is with a "surface suction dredge".

Contrary to what the extremist environmentalist community claims, suction dredge mining is the most environmentally friendly method yet devised for the recovery of heavy minerals, such as gold, from active streambed gravels. For the most part, all signs of the operations are reclaimed naturally with one winter flow; and, as numerous studies have shown, suction dredge mining, as currently regulated by the individual states, has a net beneficial affect on the environment.

The largest of the common suction dredges is the 8" dredge. It might have a floating barge 8 ft. wide X 16 ft. long, and be powered by a 40 hp Volkswagon engine. These dredges are used in larger rivers, and might move 1-3 cu/yrds/hr. For the most part, suction dredge and lessor mining/prospecting operations do not require an approved Plan of Operations under current BLM or FS regulations, but do require state permits which regulate for the protection of fish and fish habitat, etc..

By far, this level of small-scale mining is the most popular . . . and the most like the gold rush days 150 years ago. By the thousands, individuals spend their summer vacations or retirement out in the great outdoors, practicing the methods developed over 5,000 years ago. And just like during the gold rush days, some go away empty-handed, most find at least something, many pay their expenses, and a certain few actually do pretty good. For the most part, nobody is getting rich. All however are continuously pumping their own money into the operation, on average of $2-3,000 per person per year.

Next up the scale of operations involves mechanized earthmoving, typically a small 1-2 man (or husband & wife) seasonal bulldozer-backhoe trommel & sluice operation. Even the smallest of these operations usually requires an approved Plan of Operations and reclamation bond. This level of operations is not as popular as the smaller levels of operations due to the considerably higher costs involved (a medium sized dozer or backhoe along with pumps, and some type of wash plant will cost $50,000 on up), the tremendous burden of getting an approved Plan of Operations and posting a bond, along with the plethora of state permits that may be required. Currently, this level of mining is nearly impossible due to the complexity of the regulations and the undue delays in the approval process. There are literally thousands of small-scale mineral deposits throughout the West well worth working at this level (but are far too small to work at the large scale) . . . but aren't being developed due to the burden of obtaining approval. Any more restriction placed on this level of mining will stop the few hundred operations still in existence.

PART III: REQUESTS TO THE COMMITTEE

In order to preserve and protect the small-scale miners and prospectors, and along with them the hundreds of small communities and businesses dependent on the economic boost brought by mining, I respectfully urge the Committee to incorporate the following items in any proposed revision to the 1872 Mining Law:

A. GRANDFATHERED RIGHTS: All existing claims at the time of any revision must have grandfathered rights back to the rights granted on the date of location.

B. RETAIN THE 10-CLAIM SMALL-SCALE MINERS EXEMPTION: In order to maintain the small-scale mining industry (which pumps well over $20-30,000,000 into the economy annually), the exemption on the $125 per claim per year maintenance fee and the performing of assessment work must be retained.

C. OCCUPANCY: Small-scale miners & prospectors must be able to occupy the areas they are working for several reasons:

1. Remoteness of the area, lack of or poor roads makes daily commute expensive and time consuming.
2. Many travel hundreds of miles in pursuit of a prospect, and must be able to freely come and go (and stay) to have any chance of success.
3. Valuable equipment must be guarded at all times from threats of all sorts, natural and human. This usually requires occupancy on or near the claim. In sight of the equipment.
4. Valuable minerals must be guarded from theft. An open deposit is a tempting target when the claim owner is not around.

D. NO APPROVAL NEEDED FOR INSIGNIFICANT DISTURBANCE: Current BLM and FS regulations are sufficient to protect the Public Lands from any unnecessary disturbances. Any revision to the Mining Law should not contain any preset arbitrary conditions, as each mining operation is site-specific and needs the management of local authorities to be affective. Operations deemed not likely to cause a significant surface disturbance, at least up to an including most suction dredge mining operations, should not require an approved Plan of Operations. Simple exploration with a dozer or backhoe should also not necessarily require Plan approval. It really needs the local man on the ground to determine the possible extent of the disturbance, and the possible protection measures reasonably needed.

Low thresholds for needing an approved Plan of Operations will cause the extinction of the smaller levels of mining, and will bury the BLM and FS in endless and needless tons of paperwork. It is currently estimated that the average "simple" FS Plan of Operations takes over $20,000 to approve, and most Natl. Forests are budgeted to approve 1-2 Plans per year. Simply requiring all suction dredge miners to obtain an approved Plan would cause the submittal of thousands of Plans to the FS, which would destroy the suction dredge industry (due to delays), and take all the efforts of the whole FS staff to even make a dent in the pile of Plans to be approved. And all for no good reason.

E. NO ROYALTY ON SMALL-SCALE MINING: Even if the Committee proposes a royalty, all small-scale operations producing less than $100,000 annual net profit should be exempted to avoid placing undue economic hardship on the small miner, and to save the collection agency thousands of hours of paperwork attempting to collect trivial amounts of money (i.e.; the govt. would probably spend way more in the collection and any amount collected).

And although I believe a royalty is wrong, and harmful to the industry on the whole, if there must be a royalty, then it should be on "net" returns, not on the "gross" as proposed by the House. A royalty on the "gross" will work to make way too many mining prospects uneconomical.

F. NO SPECIAL STATUS FOR THIRD PARTY APPEALS & SUITS: Already one of the main reasons for lengthy undue delays in obtaining approval on Plans of Operation is the constant harassing interference usually by non-profit tax-exempt environmental organizations (NGOs) out to save the planet. The laws, rules and regulations already give all interested parties ample opportunity to raise issues of concern and object to any proposed mining operation requiring an approved Plan.

Just by following the FS appeal process (and without going to court), NGOs can and do tie up and delay approval of almost any Plan for proposed mining for easily a year or more based on the flimsiest excuse or slightest technicality in preparation of the required NEPA analysis and document. What's worse, even after forcing the FS into spending on average over $30,000 preparing the required NEPA documents, and after causing the total waste of years of the miners life waiting for approval (and as many individual small-scale miners get involved in mining in their later years, many fall into ill health or even die while waiting 2, 3, 4, all the way up to 10 or more years for approval; even when the NGOs that caused all this are found to be wrong, they loose nothing.

Even if they loose the appeals (of which there are at least two levels available), there is always the option of suing in court to stop or just delay the proposed mining operation. (Sometimes the window of opportunity for the miner is less than the time it takes to fight his way to approval, and he either goes broke from legal fees, or grows too old or dies. The NGOs know that with the right arguments and a determined effort, they can easily delay the approval of any Plan of Operations for at least ten years. Even though they can cost the FS and the miner thousands of dollars in defense, even when they are found wrong and loose in court, in many instances, they (the NGOs) somehow receive legal fees paid by the taxpayers. (NOTE: The whole environmental protection industry has grown by leaps and bounds beyond the realm of simply over-protective. A whole "environmental law" industry has formed milking the taxpayers of hundreds of millions of dollars. They actually get paid for destroying this Nation's natural resource industries . . . in part by the very taxes paid by those same industries.

Please do not give the future of the United States Mineral Industry over to the hands of the NGOs by giving them or other third parties special status, they already have far too much influence and is costing this Nation dearly.

PART IV: CLOSING STATEMENT

The basic premise of our whole system of government is that the least amount of government governs best, and the closer we get to individual freedom and capitalism the better off we all are. Mining of minerals is a prerequisite for all civiliza-

tion. So is a clean and healthy environment. The two are not necessarily incompatible, but rather can go hand-in-hand so that they both thrive.

Under the current levels of regulation (and contrary to what some might say), no legally operating mining operation is seriously harming the environment. On the other-hand, many overly and unnecessarily restrictive regulations and policies are unnecessarily harming the mineral industry.

Considering that everything humankind needs ultimately comes from one of two sources (i.e.; agriculture or mining), there can be no doubt that a strong nation requires a strong domestic mineral industry. I respectfully submit to this Committee that due to the over-whelming success of the 1872 Mining Law, any reform of the 1872 Mining Law should work to strengthen the mineral industry, not act to further destroy it.

REPUBLICAN DEMOCRACY & THE AMERICN DREAM IN ACTION

I can think of no other law still on the books today that practices the tenants of pure republican democracy and the "American Dream" like the 1872 Mining Law. In the tradition of a Horatio Alger "rags to riches" story (whereby the poor hero achieves success and wealth solely through honest hard work), the rights granted in the 1872 Mining Law alone allow nearly anyone to pursue the American Dream of Self-Sufficiency and Happiness. Without the 1872 Mining Law, none of the tremendous benefits to the Nation (e.g.; national economic wealth, mineral self-sufficiency, the taming and settling of the West, technology, millions of jobs, etc.), would have occurred, and this Nations history would be quite different.

I, Tom Kitchar, do herby swear that the above is true and correct to the best of my knowledge and understanding, and I humbly thank the Committee for considering my Testimony.

Respectfully submitted by,

TOM KITCHAR,
President.

ORION MINING,
Richland, OR.

Hon. JEFF BINGAMAN,
Chairman, Senate Energy and Natural Resources Committee.

Hon. PETE V. DOMENICI,
Ranking Minority Member, Senate Energy and Natural Resources Committee.

DEAR COMMITTEE MEMBERS: There are great concerns here in the West if the 1872 mining law were materially changed in any way. Ever since the Sierra Clubs "Mine Free by '93" campaign failed to end mining in this country, a tremendous campaign of misinformation has been waged about the Mining Law of 1872 in general and small scale mining in particular. Yet contrary to activist's propaganda, The Mining Law is as current as any law on the books, and is as important to our sustainable economic and National security as our founding principles of the US Constitution.

Environmental mythology holds that Congress passed the Mining Law to accelerate development of the west. Simply not true. The nation's first mining laws followed the first discovery of gold in North Carolina in 1803. When California was admitted to the Union in 1850, they already had 250,000 people. The diverse mining laws of 1849, 1865, and 1870 were consolidated into one Mining Law, in 1872. And almost every major community in the west was already a settlement. Even Yellowstone Park was created in 1872.

It is hard to understand this ongoing dispute about the area of the 1872 Mining law without reference to history. The California gold rush in 1849 took place without much law to guide it so the miners developed their own rules and customs. They evolved in the miners' meetings, which were used to govern mining camps before any official government existed at these remote locations. Among the earliest successful prospectors in the 1849 California gold rush were experienced miners from Cornwall, England, Chile, participants in the Dahlonega, Georgia gold rush of 1829, and other experienced prospectors and miners, who already knew something about what practical rules were needed. That the rules were so successful may reflect this combination of practical experience with considerable learning, for in 1849 hardly a camp existed on the great Sierra slope that did not contain miners who were graduates of colleges and law-schools or were lawyers of considerable experience. The miners' meetings operated as might be expected of a highly democratic process. They favored the interests of those who were there—mostly individuals and small

firms without much capital. A much more centralized governmental process in Washington might have favored those with influence in the national government—perhaps those who might want to protect large firms from having to pay huge amounts to buy claims from small scale Miners or prospectors who discovered minerals but lacked the capital to extract them or preserve the true wealth for the political elite at the expense of the working man. It has never relay been a fight over protecting the environment but who is in control of local economic and social resources.

The Law defined who could claim mineral rights and how they were to be administered. That's all. Other approaches were possible, and might have commended themselves to people with different interests. Justice Field took the position, to the great displeasure of the miners; that under the common law after Alta California became American, minerals passed to the owner of the land, so that the miner could not invade land privately held. Another alternative might have been the Mexican, based on the Spanish custom, whereby the sovereign was entitled to a royal share, or royalty, of one fifth of the gold. Yet another approach might be the English, where unlike the Spanish quinto, if any gold or silver was found in a mine the king was entitled to the whole, at least if the precious metals were worth more than the base metals (though by two statutes of William and Mary, the king allowed the owner to keep the mine provided that the gold and silver must be sold to the king for the value of the tin in the ore). In the American gold rushes in the West, as in our revolution from the crown the miners made the rules, so the miners made the money, not the king, sovereign or their politically elite governmental equivalent but the common man, the one doing the hard highly risky laborious work. This stimulated a great deal of successful mining, both large and small scale.

The nations' tax, environmental, and corporate laws cover governance of all these raised issues. Today, activists ridiculously proclaim that mining is exempt from these laws because of the 1872 Mining Law. Since 1872 though, the Mining Law has been continuously updated, most recently in 1993. The Mining Law has been severely narrowed through amendments, and restricted through hundreds of court cases and a plethora of environmental laws. In actuality, the only portion of the Mining Law that remains as originally written, is the title.

Mining played an integral role in America's development and growth, especially in the West. In fact, the history of the American West is tied directly to mining and the mines that gave birth to small, rural communities. Cities such as Park City, UT and Denver, CO got their start as mining towns and prosper today. Even though most of the gold in the California and other western gold rushes was found on federal land, the federal government adopted a mining law scheme late, long after the customs of ownership by discovery and extraction had been established. The California gold rush of 1849, Colorado in 1859, the Comstock Lode and other strikes in Nevada in 1859-60, Idaho in 1862-63, Montana in 1863, and quite a few others, all preceded the federal mining laws. As in the software industry in the 1990s, the industry developed, many vast individual fortunes were made, and the national wealth was greatly increased, all by a new kind of property, before much of the legal framework for the industry developed.

However, some communities have turned into ghost towns when mines closed their doors, jobs disappeared and no economic center remained. This is still a threat to thousands of American families and communities throughout the rural West. Though it is not due to the threat of closing of mines but of over regulation of the Western rural landscape.

The present 1872 mining law solves this crisis by allowing small and artisanal miners as well as mining companies to work collaboratively with communities to provide a continued source of economic development after the mineral resource has been depleted. When it came, in skeletal form in 1866, and in substantially its current form in the Mining Law of 1872, the federal statutory law of mining "received" customary law in much the same way that the states had received the common law. The statute, still in force, says "all valuable mineral deposits" in federal lands "shall be free and open to exploration and purchase" under prescribed regulations "and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Thus, instead of following any of the alternative schemes, which might have preserved more government authority or revenue, Congress expressly adopted the "local customs or rules of the miners." The most important of those customs created the property right based on discovery and extraction of valuable minerals, in the absence of any title. Thus, the history of mining customs has unusual relevance because in this area, as Faulkner said, "the past isn't dead—it isn't even past." Despite much contemporary hostility to the Mining Law of 1872 and high level political pressure by influential individuals and organizations for its repeal, all repeal

efforts have so far failed, and it remains the guiding law. The miners' custom, that the finder of valuable minerals on government land is entitled to exclusive possession of the land for purposes of mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals, the very foundation of our economy, and has been the law of the United States since 1872. The provision specifically allows miners and companies to purchase, or "patent," their mining lands and work with other businesses to provide sustainable private income to rural communities. Without making these lands private, reclamation laws require companies to remove everything as they leave, including roads, buildings, power plants and power lines, water and sewer lines, and more to the determent of the local communities.

Unfortunately, several special interest groups have dishonestly portrayed the 1872 Mining Law as a giant land sale and giveaway to developers. Not only is this rhetorically false, it is an affront to the rural American families and communities whose livelihoods depend on sustained economic development. A mineral claim is a parcel of land containing precious metal in its soil or rock." Under the Mining Law of 1872, there are three stages in patenting a mining claim.

The first stage is "location" of a claim. "A location is the act of appropriating such a parcel," generally by posting notice on the ground. "The locators of all mining locations . . . so long as they comply with the laws . . . shall have the exclusive right of possession and enjoyment of all the surface located within the lines of their locations, and of all veins, [and] lodes.

At the second stage, the prospector is required to perform improvements or assessment work. Until a patent has been issued therefore, not less than $100 worth of labor shall be performed or improvements made during each year. However the prospector spends many times this amount today in trying to comply with multitude of governmental agency rules.

The third stage, the prospector may apply for a patent (though at present this is temperately suspended). A person who has "located" a mining or millsite claim can apply for a patent (the term for a government conveyance of title to an individual of public land) with the Bureau of Land Management, show compliance with the laws regarding location, post notice of application, and file proof of notice. After further publication of notice, the applicant files papers showing that the requisite labor has been expended on the claim and that the description is correct, and further proof of the requisite publication of notice.

At This point, if no adverse claim has been filed, "it shall be assumed that the applicant is entitled to a patent" upon payment of a nominal fee, unless it is shown that the applicant has failed to comply with the mining laws.

I find it appalling that the Washington DC establishment has allowed the Mining Law to be so misrepresented. We as a nation cannot allow the scare tactics of a few anti-energy, anti-development, anti-private property, and anti-people special interests to threaten American families, our national security and the vary foundation for our form of self governess.

We've heard a great deal about the outsourcing of American industry in recent years. One aspect of this problem that doesn't get the attention it deserves is the outsourcing of strategic mineral mining to foreign countries to the determent of the US manufacturing, balance of trade, economy and national security.

For more than a decade, a moratorium has been in place on patenting any mining claims in the United States under the 1872 Mining Law. That has resulted in the loss of investments in mining and our nation is forced to look overseas for some desperately needed minerals.

To bring some of these mining jobs back home it's time to lift the moratorium on patenting in the 1872 law.

Contrary to activist's mythology, tax laws require mining companies to pay royalties. Royalties are paid directly to the states, and not the black-hole of the federal government. All mining states have royalties paid under different scenarios. Two royalties are paid on metals in Montana, the Metals Mine License Tax and the Resource Indemnity Tax. Montanans irresponsibly banned gold mining in 1998, and the royalty lost to Montana schools alone, is $200 million dollars!

Environmentalists claim mining is allowed to operate without regard to other public land interests. This is so untrue; the reality is that 65% of our lands are closed to mineral entry. Wilderness consumes 35% of the public lands and supports only 10% of total recreation use. The 0.5% of our lands employed by mining though, has benefited mankind by a 40:1 multiple, that tourism will never equal, and the industry continues to strongly support the multiple-use concept and reclamation after the minerals are depleted.

Consider that our roads, bridges, railroads, transmission, and energy facilities are in shambles in this country. Hybrid electric vehicles consume 30% more copper and new CAFE standards will require new metal alloys.

Considering existing royalties, and the highest corporate and property taxes in the industrialized world, the question begs; where are the metals going to come from when mining is banned by our tort-driven, "taxaholic", NIMBLY attitudes towards our land?

The GAO and independent studies have demonstrated that the Mining Law allows the maximum benefit to the public in terms of taxation, production, and revenue; so leave it alone. The nation's environmental laws continue to fail because they are court-driven and are obstructionist, not protectionist. Environmental NGO's continue to lobby for single-use designation for our public lands. The public beware. The threat to our land is not from the Mining Law of 1872!

To alter or change the 1872 Mining Law in the present political climate would really be a violation of the public trust, since the citizens in each State have elected to Congress members of the Senate, in part, to protect the sovereignty and the property of not only the States but to protect the rights of the individual as stated in the constitution and the US Codes of law.

I expect Congress to protect these rights of the people as well as our National Security both economic and social.

Thank you for taking this testimony.

ARTHUR SAPPINGTON,
Owner/Operator.

SOUTHEAST ALASKA CONSERVATION COUNCIL,
Juneau, AK, February 5, 2008.

Hon. JEFF BINGAMAN,
Chair, Senate Committee on Energy and Natural Resources, Washington DC.

Re: Comments for the Hearing Record on Reform of the Mining Law of 1872

DEAR SENATOR BINGAMAN: Like most Americans, the Southeast Alaska Conservation Council (SEACC) supports strong and healthy communities and appreciates the jobs associated with mining. Mining must be done in a way that protects our clean water and way of life. SEACC works to ensure that mining in Southeast Alaska is done responsibly. We support reforming the Mining Law of 1872 to hold the mining industry fully accountable for protecting our public resources and providing a fair return to U.S. taxpayers for the use of public lands.

Mr. Randy Wanamaker, with the Berners Bay Consortium Human Resource Development Corporation, testified on January 24, 2008, before the Senate Committee on Energy and Natural Resources. Mr. Wannamaker used examples from the Kensington Mine project, near Juneau Alaska, as the basis for his opposition to reform of the Mining Law of 1872. With our testimony, SEACC hopes to provide the Committee with a balanced perspective of mining law reform and the Kensington Mine project. We respectfully request that this letter and accompanying attachments be included in the official record for the January 24, 2008 hearing.

Founded in 1970, SEACC is a grassroots coalition of 15 volunteer, non-profit conservation groups made up of local citizens in 13 Southeast Alaska communities and is dedicated to preserving the integrity of Southeast Alaska's unsurpassed natural environment while providing for balanced, sustainable uses of our region's resources.

PROTECTING RESOURCES, WATER AND COMMUNITIES IS GOOD FOR BUSINESS

The Mining Law of 1872 was enacted over 135 years ago, and the federal government interprets it as a mandate that mining is the highest and best use for public lands. This approach fails to address issues that are critical for today, such as mining royalties, abandoned mine cleanup, and protecting special places and clean water. Mining law reform, such as the provisions outlined in H.R. 2262, would help ensure that mining stays a part of our economic future in a responsible way.

Mining proponents claim that reform to the Mining Law of 1872 would damage the industry. The truth is that responsible development that protects clean water, wildlife and special places is good for business. That is especially true in Southeast Alaska, where some of our strongest industries, such as commercial fishing and tourism, rely on these resources.

BETTER WATER QUALITY PROTECTIONS ARE NEEDED

Unfortunately, federal law does not sufficiently protect surface and groundwater quality from the impacts of hardrock mining. The Mining Law of 1872 contains no environmental provisions. The Clean Water Act does not address impacts to groundwater. And, the Resource Conservation and Recovery Act (RCRA) provides exemptions for mining waste. A 2006 scientific, peer-reviewed study found that more than 75% of the major hardrock mines surveyed exceeded water quality standards.[1] Of the mines surveyed, 84% were modern mines that began operating after the advent of modern environmental laws. Coeur d'Alene Mines Corporation's Rochester Mine in Nevada illustrates this very issue. Despite the company's assertions that existing laws would protect water resources, the mine has resulted in numerous groundwater quality exceedances for pollutants such as cyanide.[2]

MINING LAW REFORM SHOULD ENSURE THAT MINING IS BALANCED WITH OTHER LAND USES

Mr. Wannamaker asserts that the National Environmental Policy Act (NEPA) provides sufficient protection for special places, and provides federal land managers sufficient authority to balance mining with other important land uses. This is not true. NEPA requires only that the environmental impacts of a mining proposal be considered by federal decisionmakers; it does not require federal agencies to choose the most protective option. Furthermore, the 1872 Mining Law prioritizes mining over all other land uses, precluding federal land managers from effectively protecting areas of special value (e.g., spawning habitat, municipal water supplies, or important cultural resources) even if identified through the NEPA process.

MINING LAW REFORM SHOULD REQUIRE FULL COST, INDEPENDENTLY GUARANTEED, RECLAMATION BONDING

Mining law reform should ensure that there is sufficient, independently guaranteed, financial assurance to cover the full cost of reclamation and closure. Too often, taxpayers are left bearing the burden when reclamation bonds are inadequate.[3] To date, the EPA estimates the full cost of abandoned mine cleanup at $50 billion.[4]

The State of Alaska's reclamation bonding does not adequately protect the taxpayer or ensure reclamation because it authorizes corporate guarantees. As a form of financial assurance, corporate guarantees provide no guarantee at all. A corporate guarantee is simply a written promise, or "IOU," by the corporation that it will fulfill its reclamation obligation. There are no hard assets, cash, or cash-equivalents behind it.

Circumstances such as mergers, hostile takeovers or dramatic fluctuations in metal prices often occur very rapidly, leaving what might appear to be a healthy corporation in difficult financial circumstances. Many companies using corporate guarantees have failed or declared bankruptcy.[5]

EXISTING LAWS DID NOT CAUSE UNNECESSARY DELAYS AT THE KENSINGTON MINE

Mr. Wannamaker asserts that existing federal environmental laws and conservation groups caused unnecessary delay in permitting the Kensington Mine, In truth, it was Coeur d'Alene Mine Corporation's push to permit a mine using an illegal waste disposal method that delayed the process. The Kensington Mine had received the necessary permits for dry-land mine waste disposal in 1998. But the company chose not to proceed with mine operations and instead, it redesigned the mine to ensure a maximum profit. This new plan called for dumping chemically processed waste (tailings) into a lake. These toxic tailings would have killed all fish and most other aquatic life. If it had proceeded, the Kensington Mine would have been the first mine in over 30 years to be permitted to dump chemically processed tailings into a lake. Not surprisingly, the 9th Circuit Court of Appeals ruled that this lake dumping plan violated the Clean Water Act.[6] The Kensington Mine could have been

[1] Kuipers and Maest, "Comparisons of Predicated and Actual Water Quality at Hardrock Mines," 2006.

[2] Ibid.

[3] Government Accountability Office, "Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs," June 2005, GAO-05-377.

[4] US EPA, Office of Solid Waste and Emergency Response, "Cleaning Up the Nation's Waste Sites: Markets and Technology Trends," September 2004.

[5] Government Accountability Office, "Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations," August 2005, GAO-05-658.

[6] United States Court of Appeals for the Ninth Circuit, "SEACC v. Corps," May 22, 2007, No. 06-35679.

in operation now for a number of years, if Coeur d'Alene Mine Corporation had not abandoned its initial design in favor of a legally risky one—one that ultimately proved illegal.

Before passage of the Clean Water Act in 1972, mining companies frequently dumped their tailings in the nearest lake or river, often with catastrophic consequences for those water bodies, for fish, and for human health. What the Kensington Mine proposed to do with their tailings has been illegal for decades. In fact, in 1982 the Environmental Protection Agency (EPA) adopted regulations specifically prohibiting this practice for all new gold mines. The EPA studied the mining industry nationwide and concluded that the discharge of mine tailings into navigable waters was unnecessary because feasible alternatives existed and were already in use at most mines. More recently, and for the Kensington Mine specifically, the EPA determined that disposal of tailings on dry land would be the environmentally preferable alternative.

Mr. Wanamaker was correct in stating that most people in Southeast Alaska want the Kensington Mine to go forward, but many Alaskans also want development at the Kensington to be done right and to have Alaska's clean water protected. Most recently, SEACC worked one-on-one with Coeur d'Alene Mines, to develop a mining plan that would dispose of the mine's waste in a way that protects water quality and moves the project forward. SEACC and other conservation groups have described this new plan as promising.[7]

SEACC has long encouraged the approach to responsible development that is embodied in the House's mining reform bill. We encourage the Senate to use this bill as the basis for Mining Law reform and to include these important principles in any reform bill that is introduced in the Senate:

ALLOW MINING TO BE BALANCED WITH OTHER LAND USES

The federal government currently interprets the 1872 Mining Law to mandate that mining is the highest and best use for public lands. Federal land managers give preference to mining over all other land uses—from recreation to clean water to hunting. Land managers should have the authority to deny mine proposals and balance mining with other valuable land uses.

ESTABLISH ENVIRONMENTAL AND RECLAMATION STANDARDS

Strong standards are needed to make sure damage to land and water is prevented. Perpetual pollution should be banned and mines should be required to reclaim public lands to sustain post-mining uses.

GIVES LOCAL COMMUNITIES A VOICE IN LAND USE DECISIONS

State, local, and tribal governments should be able to put lands important to their community off-limits to mining.

IMPLEMENT FISCAL REFORMS

The sale of public lands to corporate interest should be permanently ended, and mining companies should be required to pay for the minerals they extract from taxpayer's lands. Mining companies should pay a gross royalty similar to what other extractive industries pay for what they extract from public lands.

CREATE FUNDS TO CLEAN UP ABANDONED MINES

Money generated by this new royalty should go to clean-up the more than 500,000 abandoned mines that litter western landscapes.

PROTECT SPECIAL PLACES FROM MINING

Treasured areas like Wild and Scenic Rivers, Roadless Areas, Areas of Critical Environmental Concern and Wilderness Study Areas are not appropriate places for a mine. These areas should be put off limits to new claims.

I would be pleased to answer any additional questions you may have on mining reform or the Kensington Mine.

Sincerely,

ROB CADMUS,
Water Quality and Mining Organizer.

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[7] Alan Suderman and Kate Golden, Juneau Empire, "Coeur submits Kensington proposal," January 27, 2008.

STATEMENT OF JOHN E. ANTONIO, GOVERNOR OF THE PUEBLO OF LAGUNA, LAGUNA, NM

I. INTRODUCTION

This statement is submitted by the Pueblo of Laguna ("Pueblo" or "Laguna") to apprise the Committee of the Pueblo's concerns over mining and to assist the Committee in developing language to reform the Mining Law of 1872.

The Pueblo of Laguna is a federally recognized Indian tribe located 45 miles west of Albuquerque, New Mexico, and has approximately 8,000 members who are affiliated with six (6) different villages. The Pueblo's lands consist of 560,000 acres in Cibola, Sandoval, Bernalillo and Valencia Counties, and contain the site of what was once the world's largest open pit uranium strip mine: the Jackpile-Paguate Mine. The Jackpile-Paguate Mine, which began operating in 1953, was finally shut down in 1982 but then laid dormant for 7 years before reclamation activities began. During that time, stockpiled waste was blown into surrounding areas, including the Paguate village, located just 30 feet from the mine. In addition, rain caused waste from the mine to flow into surface water tributaries. After years of negotiating with the company who conducted the mining, reclamation began in 1989 and was completed in 1995.

Despite efforts to reclaim the mine after it closed, the mine continues to have a tremendous impact on the long-term health and environmental landscape at the Pueblo. Many Pueblo members who worked in the mine or lived near the mine suffer from cancer-related illnesses and other health conditions. Two surface water tributaries near the mine, the Rio Paguate and the Rio Moquino, and the Rio San Jose have since tested positive for radiation contamination. Groundwater is also at risk for radiation contamination. Because water is scarce in our arid part of New Mexico, the contamination of our water resources is devastating to our people and the entire region. Although no official studies have been conducted to establish a direct correlation between the mining activities and the increase in cancer among individuals who live near or worked at the mine, significant statistical information is being compiled on former mine workers applying for benefits under the Radiation Exposure Compensation Act ("RECA"). Many of these applicants have been diagnosed with cancer-related illnesses. In addition, other studies that are now being conducted may show a direct correlation between uranium mining activities and various respiratory and kidney problems, and may even extend to problems related to diabetes. Testimony on these and related issues was recently presented in Grants, New Mexico, at a New Mexico legislative hearing on the impacts of uranium mining.

As a result of our experiences with mining, the Pueblo is opposed to any mining on or near Pueblo lands. In 2007, our Tribal Council passed a resolution to establish a moratorium on any uranium mining and development. However, in the event that mining is permitted near our lands, the Pueblo seeks to be included in the process and have adequate protections in place.

II. MINING AT LAGUNA

A. Uranium Mining, Generally

Uranium, a silvery-white, radioactive metal similar in appearance to a piece of silver or steel, is never found in its pure form in nature. It is always found combined with other elements into different chemical compounds, which are highly poisonous. Uranium has been used to make material for nuclear weapons and to make fuel for nuclear power plants. Deposits of minerals that include large amounts of uranium, large enough to make mining worthwhile are rare. However, the "Four Corners" area of Arizona, Colorado, New Mexico and Utah contains some of the richest deposits of uranium ores in the world.

Open pit mining is used when the ore is close to the surface and involves removing the "overburden", or top layers of soil and rock that cover the ore. The overburden is hauled off and often stored in huge piles. Underground mining requires drilling, blasting and digging into the earth and the ore is obtained by the use of elevators. Holes are drilled to provide ventilation because the decay of uranium results in a radioactive gas called radon. Radon can build up in underground mines causing serious health problems for miners. In addition, underground water can cause problems.

Once the uranium is obtained, the next process is "milling", or removing the valuable mineral from the mined ore. The ore is crushed and then mixed with water to form slurry. The slurry is mixed with chemicals to separate out the uranium ore from the rest of the rock, referred to as "leaching". The liquid containing the uranium ore, or "leachate", is then filtered from the rest of the slurry and further con-

centrated by a precipitation process. Water is then removed and the precipitate is dried to produce "yellowcake", which is then packaged and shipped to an enrichment plant. Material left over from the milling process is referred to as "tailings", which are still dangerous because of the radioactive elements they contain.

B. Uranium Mining at Laguna

The Grants Mineral Belt, which stretches from east of Gallup, New Mexico to Laguna, New Mexico and includes Laguna Pueblo lands, has especially rich uranium deposits. In May 1952, the Anaconda Mining Company (later Atlantic Richfield or ARCO) entered into a lease with the Pueblo to mine uranium on 4,988 acres of Laguna land near Paguate Village. Additional leases were signed in 1963 and 1976 for 2,560 and 320 acres, respectively, for a total of 8,000 acres. As a result, Anaconda operated one of the world's largest open pit uranium mines at the Pueblo from 1953 until 1982. Before the first lease was signed with the Pueblo, Anaconda had signed an agreement with the U.S. Atomic Energy Commission ("Commission"), which made Anaconda the sole ore-buying agent for the Commission. In fact, a majority of uranium produced on Indian land between 1950 and 1968 went to the Commission.

Anaconda utilized 3 open pit mines and 9 underground mines at Laguna to produce 24 million tons of uranium-bearing ore. More than 400 million tons of earth had to be moved to obtain the ore. Mining conducted from the 9 underground mines primarily began in the 1970s. The Jackpile-Paguate Mine, located in the Village of Paguate, was the deepest open pit mine at 625 feet. It operated 24 hours a day, 7 days a week, 365 days a year for 30 years and employed as many as 800 members. At its peak, the mine employed the majority of the workforce at Laguna and neighboring communities.

ARCO closed the mine on March 31, 1982, after which it laid dormant for 7 years before any efforts to reclaim the mine began. More than 2,000 acres of land and several pits needed to be reclaimed. One pit measured over 600 feet deep, and a few pits were filled with contaminated water that had seeped up over the years. A draft environmental impact statement found ARCO primarily responsible and recommended reclaiming the mine because the site was a public health and safety hazard, noting that more serious hazards would develop if the site was left unreclaimed. Reclamation began in 1989 after ARCO and the Pueblo reached an agreement by which the Pueblo would perform the reclamation. However, the $43 million provided by ARCO was well below the $400 million required to fully reclaim the mine. The Pueblo tried to reclaim the mine as best as possible, despite the lack of funding and the fact that there were standards for reclaiming a uranium mine in place at the time.

In reclaiming the mine, the Laguna Construction Company used the overburden to partially backfill some of the pits. It was specially sloped and terraced to keep it in place and prevent wind and rain from washing it away. Next, a layer of rock, or shale, of up to 12 feet thick was put into the pits to keep radiation from coming up into the air. An additional foot and a half of topsoil was placed over the top and then seeded with grasses and other native plants. High grade ore piles that were still on the surface were covered with layers of top soil and reseeded with native vegetation. The Pueblo's reclamation process, the first attempt in the world to reclaim an open pit uranium mine, was completed in 1995 but the Pueblo continue to monitor the mine and its ongoing impacts. And, because the $43 million provided by ARCO only enabled the Pueblo to conduct minimal reclamation, much work still remains to be done to fully reclaim the mine and reduce the health and environmental impacts.

III. MINING IMPACTS ON LAGUNA

The Village of Paguate, whose outer village boundaries lie only 30 feet from the edge of the largest open pit in the mining area, was significantly affected by the mine. In this village of approximately 1500 residents, blasting caused old stone houses to crack apart, and dust from the mine coated homes, crops and clothes. Paguate residents on the south and eastern sides of the village, closest to the mine, recall dust that seemed to linger for hours after a blast and cracks on the walls of homes.

Despite the reclamation efforts, former mining employees as well as Pueblo members living in Paguate and downwind continue to report growing numbers of cancer-related illnesses. Contaminated surfaces and groundwater sources still exist. Of the 24 million tons of ore mined from the Jackpile-Paguate Mine, approximately 23.7 million tons were left as tailings, which are still dangerous because of radioactive elements they contain. Water contaminated from the milling and precipitation process was pumped into big ponds to evaporate away. In addition, water that flows

through the old mine, including the Rio Moquino and the Rio Paguate, is contaminated from radioactive elements. Many Laguna members have died, and others suffer from high incidences of diabetes, reportedly linked to radiation exposure attributed to uranium mining. In addition, radiation exposure can cause damage that may not show up for 10-40 years.

Currently, little is known about the stability of the radioactive pollutants and additional risks, which may involve migration into local groundwater supplies or into the atmosphere. Meanwhile, the mine continues to have a tremendous impact on the long-term health and environmental landscape at the Pueblo, where many residents and former mine employees continue to experience deleterious health effects. The mine contaminated parts of the reservation with toxic, radioactive materials and miners who worked at the Jackpile Mine were not warned of the exposure to radiation, including radon gas and radioactive dust.

IV. THE PUEBLO URGES THE COMMITTEE TO REFORM THE MINING LAW OF 1872

Based on the Pueblo's experience with the Jackpile Mine, the Pueblo is opposed to any further mining on or near Pueblo lands. The Pueblo fears that the State of New Mexico, the U.S. Department of Agriculture, and the U.S. Forest Service will permit additional uranium exploration and mining because of the current high demand for uranium, fueled by dwindling uranium stockpiles from existing sources and new orders for a large number of nuclear-fueled power plants worldwide.

The Pueblo has spent over 50 years dealing with the impact of uranium mining and knows first-hand the hardships suffered by communities in the proximity of such hardrock mines. It is for this reason that the Pueblo urges the Committee to support legislation reforming the Mining Law of 1872. At a minimum, such legislation should include provisions for funding legislative objectives through royalties paid by hardrock mining operations. In addition, the bill should include four provisions that the Pueblo considers to be particularly prudent, useful, and of great importance, as follows:

A. Establish New Environmental Standards for Hardrock Mining on Federal Lands

Many federal lands adjoin Indian Country and share water resources essential to the health and welfare of tribes. Therefore, it is imperative that any new legislation include adequate environmental standards to protect the health and welfare of the adjoining tribal communities. Although some witnesses who testified at the Committee hearing on January 24 indicated that the statutes currently in place are sufficient to assure that hardrock mining is conducted appropriately, the Pueblo knows first-hand that additional environmental standards are necessary. The Pueblo respectfully requests to Committee to provide input into the development of new environmental standards.

B. Establish a Hardrock Reclamation Account for the Clean-Up of Hardrock Mines

Many hardrock mines leach dangerous pollutants from pits, tunnels, and tailing piles into surface and ground water on tribal lands. New legislation should include a Reclamation Account and authorization for the Secretary to use that account for reclamation and restoration of land and water resources adversely affected by past mining activities on federal and tribal lands. In addition, the funds should be available directly to the tribes to undertake reclamation activities. For example, Anaconda, the original operator of the Jackpile Mine, agreed to pay $43 million for the reclamation of the land at the Pueblo caused as a result of the mining operations at the Jackpile-Paguate Mine. However, an environmental impact statement estimated that it would cost $400 million to successfully reclaim the Jackpile Mine. The Pueblo did its best to reclaim the site of the Jackpile mine, which was the first attempt in the world to reclaim an open pit uranium mine, but additional reclamation work still needs to be done at the mine. Adequate funding is necessary to ensure reclamation successfully remediates environmental damage and addresses other consequences from mining.

C. Establish a Hardrock Community Impact Assistance Account Fund

New legislation should also include the establishment of a Hardrock Community Impact Assistance Account Fund ("Account") to help communities, including tribal communities, that have been adversely impacted by pollution from hardrock mining. The Account should provide assistance for the planning, construction, and maintenance of public facilities and the provision of public services to Indian tribes that are socially or economically impacted by mineral activities conducted under the general mining laws.

D. Enable Tribes to Participate Meaningfully in the Permitting Decision

Tribes should be permitted to take an active role throughout the hardrock mining permitting process. Often, tribes are not included in the process at all or are included at the tail end of the process. The Pueblo encourages the Committee to include language in the bill that would provide tribes a seat at the table from the beginning of the permitting process. In addition, tribes should be permitted to petition for withdrawal of federal land from the general mining laws, including petitions based on value of a watershed to supply drinking water, wildlife habitat value, and cultural, religious, or historic resources that are important to the Indian tribe. For example, Mount Taylor is sacred to the Pueblo of Laguna and other tribes. It is also the site of the world's deepest uranium mine shaft and some of the largest unreclaimed mill tailings piles in the United States. Current mining proposals seek to obtain access to Mount Taylor for mining. However, the Pueblo is strongly opposed to such proposals because of the cultural and religious significance it has for the Pueblo. If the Pueblo is engaged in the permitting process from the beginning, our concerns can be addressed and potential solutions or alternatives may be identified before the interested parties invest in the idea of mining at such an important site.

V. CONCLUSION

In closing, thank you for allowing the Pueblo to present this statement to the Committee. We respectfully request the Committee's favorable consideration of our requests.

LUCKY JACK PROJECT,
Gunnison, CO, February 6, 2008.

Hon. JEFF BINGAMAN,
Chairman, Committee on Energy and Natural Resources, United States Senate, Washington, DC.

Hon. PETE DOMENICI,
Ranking Member, Committee on Energy and Natural Resources, United States Senate, Washington, DC.

RE: Comments for the Record—Senate Energy and Natural Resources Committee January 24, 2008 Oversight Hearing on Reform of the Mining Law of 1872

DEAR CHAIRMAN BINGAMAN AND RANKING MEMBER DOMENICI: The Lucky Jack Project is submitting these comments to supplement the hearing record for the January 24, 2008 Oversight Hearing on Reform of the Mining Law of 1872 to provide the Senate Energy and Natural Resources Committee (the Committee) with accurate information about the proposed Lucky Jack Project in Gunnison County, Colorado. Our comments also discuss several of the Mining Law issues debated during the hearing.

As you will recall, the testimony from the Mayor of Crested Butte, Colorado, the Honorable Alan Bernholtz, focused on the Lucky Jack Project. Unfortunately, many of Mayor Bernholtz's remarks contained inaccurate and misleading information about the project, the regulatory requirements for the project and the applicable federal permitting process. Because we are concerned that Mayor Bernholtz's testimony may have confused the Committee, we respectfully ask that you consider our comments as you deliberate the important issue of how to update the 1872 Mining Law.

We believe that an accurate assessment of the regulatory requirements and permitting process that apply to mineral projects on public lands will clearly reveal that the existing comprehensive environmental regulatory framework and the associated and extensive public involvement process are working well. Therefore, the sweeping Mining Law changes that Mr. Bernholtz recommended in his testimony are unnecessary. These changes are also harmful because they would thwart development of important projects like the Lucky Jack Project (and any similarly situated projects elsewhere in the country) and deprive Colorado and the Nation of the substantial benefits that will result from the responsible development of this world-class, domestic molybdenum deposit.

Because molybdenum is an essential alloying element in many types of steel, including stainless steel, it is indispensable to America's industry, infrastructure and national defense. It is also a crucial environmental metal used as a catalyst to reduce the sulfur content of fuels. Given these important uses for molybdenum, and the ever-increasing competition for molybdenum on world markets, Mayor Bernholtz's position that Congress should amend the Mining Law to give his community veto power to categorically reject this mine proposal without regard to, and

despite, the existing, robust environmental review and permitting process is not in the best interest of the Nation or the State of Colorado.

WE ATTEMPTED TO ALERT THE MAYOR'S TO THE ERRORS IN HIS WRITTEN TESTIMONY

It is indeed regrettable that Mayor Bernholtz's testimony contains so many factual errors because we had provided many months earlier—and had continued to provide in meetings, conversations and on our website accurate information related to the project. Moreover, upon seeing a copy of the Mayor's written testimony, we went to great lengths to try to warn him about the errors it contained. We contacted Crested Butte Town Manager, Ms. Susan Parker, on January 22, 2008, to voice our concerns about the testimony's mistakes and inaccuracies and to offer our help in making corrections. Following up our conversation with Ms. Parker, we provided her and Mayor Bernholtz with the attached letter prior to the hearing.

As you can see, our January 23, 2008 letter to Mayor Bernholtz presents specific and detailed corrections for the inaccuracies in the written testimony he submitted to the Committee. We were hoping that the Mayor would use our letter to correct his remarks and to avoid repeating these errors in his oral testimony.

Unfortunately, the Mayor chose to ignore our letter. At the hearing, he repeated the same misleading and inaccurate statements about the project that he included in his written testimony. He also made a number of incorrect and misleading comments about the regulatory requirements for the project and the permitting process that will evaluate the Lucky Jack Project. We respectfully request that you review our January 23". letter to gain an accurate understanding of the Lucky Jack Project, our commitment to develop an environmentally responsible mine and our ongoing efforts to engage the Mayor and the Town of Crested Butte in a meaningful dialogue about our project. Table 1 summarizes our January 23rd letter.

Table 1
Summary of Kobex's January 23, 2008 Letter to Mayor Bernholtz

False/Misleading Claim in Mayor Bernholtz's Testimony	Correction Supplied in Kobex's Letter to Mayor Bernholtz
Mining is an historic artifact that is no longer important to Crested Butte and Gunnison County.	The West Elk and Elk Creek coal mines are the County's largest individual tax payers, contributing approximately 30% to the County's general fund.
Mining is incompatible with tourism.	Tourism and mining co-exist in many places in Colorado such as Steamboat Springs, Winter Park, Vail, Glenwood Springs, and Cripple Creek, as well as in other places like Salt Lake City, Utah.
The mine will dump hundreds of thousands of tons of mine wastes and mine tailings into Crested Butte's watershed.	Nothing will be dumped into the watershed. Mine tailings will be stored and will undergo ongoing reclamation outside of the watershed. Approximately half of the tailings will be placed back inside the mine using advanced paste-and-fill tailings management technology.
The mine will disturb thousands of acres of prime wildlife habitat.	As currently planned, the Lucky Jack Project will disturb about 350 acres, part of which is land previously disturbed by former mining activities.
The mine will eliminate critical recreational areas from public use.	The 350 acres of planned disturbance will be reclaimed in compliance with stringent state laws.
The mine will turn pristine National Forest lands into a permanent industrial waste dump site.	The 350-acre estimated project footprint will affect previously disturbed land on unpatented and patented mining claims—not pristine National Forest lands. This disturbance will comply will all applicable regulations and will be reclaimed.

Table 1 Summary of Kobex's January 23, 2008 Letter to Mayor Bernholtz	
False/Misleading Claim in Mayor Bernholtz's Testimony	Correction Supplied in Kobex's Letter to Mayor Bernholtz
The mining claims and millsites are slated for U.S. Energy/Kobex's network of waste dumps, pipelines, roads and related facilities.	This will be a modern underground mining project specifically designed to avoid subsidence or other impacts to the overlying surface. The above-ground facilities will be confined to a small area that includes previously disturbed land.
Industrial mineral development of the public lands on Mount Emmons and within the Town's statutorily established municipal watershed would result in significant adverse environmental impacts.	The project must meet many stringent State and federal legal requirements designed to avoid or mitigate any possible significant environmental impacts.
An historic silver/lead/zinc mine discharges contaminated water directly into the Crested Butte watershed. Annual water treatment costs exceed $1 million.	Contaminated water is not discharged into the watershed. U.S. Energy and Kobex operate and pay for a water treatment facility that uses proven and reliable, state-of-the-art water treatment technology. Treated water is discharged into Coal Creek below the Town's water intake. This water treatment facility has operated for over 25 years in compliance with permit regulations which have been in place. The proposed Lucky Jack Project will reduce—if not eliminate—the future need for this water treatment facility.

THE NEPA PROCESS WILL GIVE THE TOWN OF CRESTED BUTTE MANY OPPORTUNITIES TO PARTICIPATE IN THE ENVIRONMENTAL REVIEW FOR THE LUCKY JACK PROJECT

We believe the concerns the Mayor and the Town of Crested Butte have about the Lucky Jack Project can and would be best addressed by participating in the National Environmental Policy Act (NEPA) process that the U.S. Department of Agriculture's Forest Service will conduct to evaluate the Lucky Jack Project. Public participation is at the heart of the NEPA process which is designed to give interested parties—like the Town of Crested Butte—an important and effective opportunity to influence agency decisions about project proposals.

The NEPA process requires federal agencies like the Forest Service to prepare an environmental analysis in the form of an Environmental Assessment (EA) and/or an Environmental Impact Statement (EIS). Although no final decision has been made in the case of the Lucky Jack Project, the Grand Mesa, Uncompahgre and Gunnison National Forests may choose to prepare an EIS.

Federal agencies typically require project proponents to reimburse the agency for the costs of preparing NEPA documents. Because developing NEPA documents is a time consuming and substantial task, it is common for agencies to hire third-party contractors to prepare the documents. These contractors write NEPA documents under the direct supervision of the agency to reflect the agency's findings regarding the proposed project.

During the hearing, Mayor Bernholtz voiced his opinion that NEPA documents are biased because project proponents pay for them. As Senator Craig explained to the Mayor, this simply is not true. Federal agencies carefully review internal drafts of NEPA documents to ensure they properly express the agency's viewpoints and conclusions. In this way, federal agencies exert complete control over the content and findings presented in NEPA documents. Thus, such documents are decision-making tools in which federal agencies are the sole decision makers.

The analysis of project alternatives is the cornerstone of the NEPA process as agencies consider ways to reduce environmental impacts and improve project proposals. NEPA environmental analyses provide a detailed comparison of the impacts associated with the project proponent's proposed action and one or more project alternatives. Agencies select a preferred alternative on the basis of this analysis and disclose the reasons for selecting the preferred alternative. Typically, public comments help shape the alternatives evaluated in NEPA documents. It is very common

for the public involvement and alternatives analysis processes to have a significant effect on projects because agencies often select a preferred alternative that incorporates suggestions and comments from the public.

A recent Northwest Mining Association (NWMA) white paper, attached hereto, documents how public comments gathered during the NEPA process influence agency decisions about project proposals. Section V of this white paper presents case histories for 27 mineral projects and documents the changes made to these projects as a result of the NEPA process and the existing environmental regulations governing milling on public lands:

> The case histories show a consistent pattern of thorough environmental reviews during which both BLM and the USFS identified and imposed environmental controls, project modifications, and mitigation requirements to The Honorable Jeff Bingaman The Honorable Pete Domenici February 6, 2008 Page 6 eliminate or minimize environmental impacts. It is also evident from the case histories that the NEPA process gives the public ample opportunities to participate in these environmental reviews and influence regulators' decisions about project proposals. (NWMA white paper, Page 1.)

Table 3 in this white paper (Pages 17—18) shows the changes that were made to 11 mineral projects on National Forest System lands as a result of public comment and agency requirements to modify the proposed projects in order to avoid, minimize or mitigate environmental impacts. These case histories stand in direct contrast to the following assertion in Mayor Bernholtz's testimony:

> Under the federal government's interpretation of the 1872 Mining Law, the Forest Service is powerless to deny the Lucky Jack Project. At best, under the agency's mining regulations located at 36 CFR Part 228A, the Forest Service can only 'minimize adverse impacts,' but cannot deny the proposed project to protect public resources and local interests. (Testimony, Page 3).

The white paper illustrates how the Mayor's statement is incorrect and misleading. As shown on Table 3, the Grand Mesa, Uncompahgre and Gunnison National Forests recently rejected the Robin Redbreast Plan of Operations as explained in the following excerpt from the Forest Supervisor's May 11, 2007 Record of Decision:

> It is my decision that the 'plan of operations' as submitted cannot be approved, and that changes or additions to the plan of operations are necessary to minimize or eliminate adverse environmental impacts from mineral activities on National Forest System (NFS) lands, as required by Forest Service Regulations (36 CFR 228A). (Record of Decision, Page 3).

The Lucky Jack Project, which is located in the same National Forest as the Robin Redbreast Project, will be subjected to an identical level of scrutiny and will be evaluated with a similarly critical eye. We will bear the burden of proof to demonstrate that the Lucky Jack Project will comply with the Forest Service requirement at 36 CFR § 228.8A to minimize adverse environmental impacts and comply with all other federal laws and regulations.

Mayor Bernholtz's testimony also demands that "...the Forest Service must be given the authority to balance other public uses and values on public lands in determining whether a specific mining proposal can be approved." (Testimony, Page 3). What Mayor Bernholtz fails to recognize is that the NEPA process already requires the Forest Service to achieve this balance by evaluating how mineral activities may impact other land uses and developing project alternatives and mitigation measures to avoid or minimize these impacts.

A 1999 National Research Council report entitled "Hardrock Mining on Federal Lands" characterizes NEPA as the backbone of the environmental and regulatory program for evaluating proposed mining projects:

> The NEPA process is the key to establishing an effective balance between mineral development and environmental protection. (NRC Report, page 6).

The case histories presented in the NWMA white paper clearly demonstrate how the NEPA process and the Forest Service's Section 228A surface management regulations work together to achieve land management objectives—including balancing multiple uses of public lands, protecting the environment, and responding to public comments.

THE CLEAN WATER ACT WILL FULLY PROTECT THE TOWN OF CRESTED BUTTE'S WATERSHED

In his response to questions during the hearing, Mayor Bernholtz also incorrectly described how the Clean Water Act will govern the Lucky Jack Project, arguing that the law would not proactively regulate and protect water quality. To the contrary, that is the primary purpose of this law—not, as the Mayor stated, to respond only after-the-fact if pollution occurs.

We are certain that the Committee is well aware of the scope of the Clean Water Act and how the Section 402 Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit program imposes stringent requirements on discharges to surface water resources. In Colorado, where the Clean Water Act program has been delegated to the State, a Colorado Discharge Permit System (CDPS) permit is required and ensures similar protections. However, the Committee may not be aware that the Forest Service issued a policy in March 2007 that specifically requires project proponents to obtain a Clean Water Act Section 401 Water Quality Certification from either the U.S. Environmental Protection Agency or the state agency with primacy for the NPDES permit program before the Forest Service can approve a Plan of Operations. This new policy, in Section 2817.23a of the Forest Service Manual 2800 on Minerals and Geology, Chapter 2810—Mining Claims, establishes the following requirement:

> 1. CWA § 401—Water Quality Certification: Pursuant to CWA § 401, both the Forest Service and the mining operator have CWA requirements to meet. If the mining activity "may result in any discharge into the navigable waters," (CWA, Title IV, § 401(a) (1), 33 U.S.C. 1341(a), 1972) the mining operator must obtain a 401 certification from the designated CWA federal, state or tribal entity, typically the state. This 401 certification from the designated entity certifies that the operator's mining activities and associated best management practices (BMPs), mitigation and/or reclamation is in compliance with applicable provisions of state, federal and/or tribal water quality requirements of the CWA. The mining operator must give a copy of this 401 certification to the Forest Service prior to the Agency approving the Plan of Operations. *Pursuant to CWA, the Forest Service cannot authorize a Plan of Operations until the 401 certification has been obtained or waived by the designated entity. Finally, the Forest Service may not authorize a Plan of Operations if the designated entity denies the certification.* (Italics emphasis added.)

Therefore, in the case of the Lucky Jack Project, the Grand Mesa, Uncompahgre and Gunnison National Forests cannot approve the Lucky Jack Project Plan of Operation until the Colorado Department of Public Health and Environment issues the Clean Water Act Section 401 Water Quality Certification. This new certification mandate provides the Town of Crested Butte with ample assurance that the Forest Service and the State of Colorado will not approve the Lucky Jack Project until we provide rigorous proof that the project will comply with all applicable federal and state water quality protection requirements.

WHERE SHOULD MINING BE ALLOWED?

Mayor Bernholtz's testimony states that the Mining Law should give local communities the power to place areas off-limits to mining. In response to his remarks, there was considerable discussion during the hearing about where mining should be allowed to occur and the question of whether local communities should be allowed to preclude mining on public lands.

In considering this question, we respectfully ask the Committee to give due consideration to the fundamental geologic fact that mineral deposits only occur in specific and limited places as the result of special geologic conditions. Mineral deposits are therefore rare and hard to find. They cannot be moved and must be developed where they are located. Laws, regulations, and policies governing mining must recognize and accommodate this unique aspect of mining—miners do not get to choose where mines are located.

This geologic constraint makes mineral projects very different from other industrial endeavors in which project developers can pick a location to minimize public concerns about their project. The Lucky Jack Project does not have that option—we cannot develop this project somewhere else—it must be mined where the minerals are located inside of Mount Emmons.

The current Mining Law and extensive regulatory regime governing mining on public lands recognizes this fact about mineral deposits. Any changes to the Mining

Law must continue to acknowledge the geological restrictions that dictate where mineral deposits are located.

Additionally, we wish to point out to the Committee that many communities throughout the West originated as mining towns. This is especially true in Colorado where towns like Aspen, Breckenridge, Durango, Telluride, Cripple Creek, Central City—and Crested Butte—all started out as communities to support adjacent mines. Today, these popular tourist destinations thrive in the midst of some of Colorado's most important and famous historic mining districts, refuting Mayor Bernholtz's claim that mining and tourism are incompatible.

THE LUCKY JACK PROJECT IS COMMITTED TO WORKING CLOSELY WITH THE TOWN OF CRESTED BUTTE

As explained in our January 23rd letter to Mayor Bernholtz, we have reached out to the Town of Crested Butte on numerous occasions to provide information about the Lucky Jack Project, to learn more about their concerns, and to seek their input with the hope of finding common ground. We have made a number of presentations to various community groups and held open houses in Crested Butte and in Gunnison in September 2007. This process will continue, and expand, in 2008 and beyond.

We are currently planning to create the Lucky Jack Community Advisory Board that will include representatives from the Town of Crested Butte, the other nearby communities, the conservation community, area chambers of commerce and several citizens at large. This advisory group will serve as a formalized means of access to company officials. Advisory Group meetings will be open forums designed to foster communication with the objective of disseminating information, developing collaborative solutions to problems, identifying synergies and capitalizing upon opportunities.

We are hopeful that after listening to Mr. Randy Wanamaker's testimony that Mayor Bernholtz and the Town of Crested Butte will resolve to work closely with us. As Mr. Wanamaker stated:

> Everyone wins when government and industry form strategic partnerships.

Mr. Wanamaker described a template for community and company interaction that we believe would be ideal for the Lucky Jack Project, the Town of Crested Butte, and other nearby communities.

We are confident that if the Town of Crested Butte will work with us, together we will find common ground that will lead to a strategic partnership between the Lucky Jack Project and the Town—just like the strategic partnership that Mr. Wanamaker described between Coeur Alaska and the City of Juneau, Alaska.

CONCLUSION

We very much appreciate this opportunity to add these comments to the hearing record. Please do not hesitate to contact us if you have questions about these comments or the Lucky Jack Project. Additionally, we would like to extend an open invitation to you, members of the Committee and to congressional staff to tour the Lucky Jack Project. Please come see for yourselves that the Lucky Jack Project is an exceptional opportunity to develop an environmentally responsible, world-class molybdenum mine that will become an important domestic source of this essential metal.

Sincerely yours,

ROMAN SLIKLANKA,
Chairman, Kobex Resources, LTD.

KEITH G. LARSEN,
Chairman—CEO U.S. Energy Corp.

ATTACHMENT 1.—LETTER TO MAYOR BERNHOLTZ FROM LUCKY JACK PROJECT

January 23, 2008.

Hon. ALAN BERNHOLTZ,
Mayor of the Town of Crested Butte, P.O. Box 39, Crested Butte, CO.

Re: Written testimony of Town of Crested Butte for oversight hearing of U.S. Senate Committee on Energy and Natural Resources concerning 1872 Mining Law

DEAR MAYOR BERNHOLTZ: Kobex Resources Ltd. ("Kobex") has reviewed a copy of the written testimony ("Testimony") prepared by the Town of Crested Butte ("Town") and delivered in a letter dated January 17, 2007, to Senator Jeff Bingaman for an oversight hearing of the U.S. Senate Committee on Energy and Natural Re-

sources concerning proposed changes to the General Mining Act of 1872 (the "Mining Law"). In its Testimony, the Town is urging the Committee to pursue comprehensive changes to the Mining Law that the Town believes are necessary to protect the local economy, environment and public interest. In particular, the Town wants federal legislation to stop the development of a world-class molybdenum mining project by Kobex and U.S. Energy Corp. on nearby Mt. Emmons (the "Lucky Jack Project" or "Project").

In preparing its Testimony, the Town unfortunately has relied on a set of profoundly inaccurate, unsupported and misleading factual claims about the Lucky Jack Project and related matters. In addition, the Town has made a series of wholly inaccurate and misleading statements and conclusions regarding applicable law. We are discouraged by this, because time and again—for example, at a presentation to Town officials and residents on September 25, 2007—we have endeavored to provide accurate and factual information about the Project and the strict legal process it will follow. Yet little to none of that information seems to be represented in what you are offering in Testimony to a Committee of the United States Senate.

We discussed our concerns regarding the Testimony in a conversation with the Town Manager, Susan Parker, on the evening of January 22, 2008, prior to her departure for Washington, D.C., to attend the Senate hearing. Based on this conversation, we understand that Ms. Parker is now in the process of revising portions of the Testimony. This letter is written to assist the Town in that revision process and to correct certain errors and misstatements in the Testimony. We are providing it to you now to give you an opportunity to properly amend the Testimony before the hearing commences.

The inaccurate, unsupported and misleading factual information cited in your Testimony includes the following:

- False/misleading claim: "Times have changed though and our residents and economy no longer depend on mining. In our community, skiing, fishing, hiking and mountain-biking, to name a few, are the life-bloods of our economy." Testimony, p. 1.

  —Correction needed: Times have changed, but it is inaccurate to suggest that mining has been relegated to history. In fact, mining continues to play a very active and important role in the lives of the residents of Gunnison County, of which the Town is a part. For example, the West Elk and Elk Creek coal mines are the County's largest individual tax payers, contributing approximately 30% towards the County's general fund. Along with the rest of Gunnison County, the Town of Crested Butte and its residents benefit significantly from this economic support. In this respect, it is also a mistake to presume and inaccurate to state that the Town relies (or, for that matter, should even attempt to rely) solely on tourism to support itself. To be sure, tourism is an important source of revenue for the Town, but it is hardly the only source of revenue—and that is a good thing. Economic diversification helps ensure that the Town's economy is not hitched to only one engine that, when it stalls, will bring everything behind it to a screeching halt. Indeed, where tourism produces low-wage, service-sector jobs, mining creates opportunities for careers in highly-paid, skilled positions. Finally, mining and tourism are by no means mutually exclusive, and it is highly disingenuous to say otherwise. Consider, for example, the robust tourism industries of Salt Lake City, Utah, and Steamboat Springs, Winter Park, Vail, Glenwood Springs and Cripple Creek, Colorado, all of which have active mining and/or oil and gas operations in their vicinities.

- False/misleading claim: "... the mine will dump hundreds of thousands of tons of mine wastes and mine tailings into Crested Butte's watershed...." Testimony, p. 2.

  —Correction needed: As an initial matter, it must be emphasized that the plan of operations for the Lucky Jack Project is still under development. Therefore, the Town has no basis to say one way or another what any future mine will or will not do. In any event, however, the mine will under no circumstances be "dumping" anything into the Town's watershed. Mine tailings will be temporarily stored outside of the Town's watershed and later placed back into the mine itself utilizing advanced paste and fill technology. Throughout this process, the project site will be reelamated in accordance with State laws.

- False/misleading claim: "... the mine will... disturb thousands of acres of prime wildlife habitat...." Testimony, p. 2.

—Correction needed: The total surface footprint of the Lucky Jack Project is currently estimated to be approximately 350 acres, part of which constitutes land that was previously disturbed from former mining activities. This represents a substantially reduced environmental footprint and is an order of magnitude smaller than what was proposed by Amax previously.

- False/misleading claim: "... the mineeliminate critical recreational areas from public use...." Testimony, p. 2.

—Correction needed: As noted above, the total surface footprint of the Lucky Jack Project is currently estimated to be approximately 350 acres, part of which constitutes land that was previously disturbed from former mining activities. In any event, the small amount of land on which the Project is planned will be reclaimed as required under stringent State laws.

- False/misleading claim: "... the mineessentially turn pristine National Forest lands outside of our Town—all of which are surrounded by federally designated wilderness—into a permanent industrial dump site." Testimony, p. 2.

—Correction needed: Again, the current estimated footprint of the Lucky Jack Project is 350 acres, portions of which include previously disturbed land and patented mining claims which cannot be accurately described as "pristine National Forest lands." In accordance with State and federal law, mine tailings will be processed and disposed of in an environmentally sound manner using modem mining technology and the project site will be reclaimed in accordance with State laws.

- False/misleading claim: "These claims [mining and millsite claims associated with the Lucky Jack Project] are slated for U.S. Energy/Kobex's network of waste dumps, pipelines, roads and related facilities." Testimony, p. 2.

—Correction needed: The mining phase of the Lucky Jack Project is planned to be underground, using modern mining methods designed to avoid subsidence or any other impact to the surface above. Above-ground activities will be limited to a relatively small area comprising in part previously disturbed land.

- False/misleading claim: "... it is clear that industrial mineral development of the public lands on Mt. Emmons and within the Town's statutorily established municipal watershed would result in significant adverse environmental impacts...." Testimony, p. 5

—Correction needed: As noted above, the plan of operations for the Lucky Jack Project is still under development. Therefore, the Town has no rational basis for concluding whether the project will have adverse environmental impacts at all, let alone significant adverse environmental impacts. Moreover, portions of the Project's anticipated footprint fall on previously disturbed land and on patented mining claims. What can be said, even at this early planning stage, is that, in order to proceed at all, the Lucky Jack Project will be required to meet a host of stringent State and federal legal requirements specifically designed to mitigate any possible significant environmental impacts or avoid them altogether.

- False/misleading claim: "... Crested Butte residents live with the threats posed by a defunct silver/lead/zinc mine that continues (and has for the last 30 years) to discharge contaminated water directly into our watershed. ... Yearly treatment costs for the water running out of the defunct mine exceed $1 million with no end in sight." Testimony, p. 6.

—Correction needed: Contaminated water from historic mining operations is not being discharged into the Town's watershed. In fact, water emanating from historic mining operations at the project site is being collected and transported to a water treatment plant operated and paid for by U.S. Energy and Kobex. Only after undergoing state-of-the-art treatment is the water discharged into Coal Creek at a point below the Town's water intake, all of which is done in accordance with federal and State law. Additionally, part of the plan of operations for the Project will involve measures designed to significantly reduce, if not eliminate, the need for a water treatment plant to treat water from mine workings on the Project site.

It is imperative that the Town correct these factual errors in its Testimony to avoid the danger of providing false and misleading information to a Committee of the United States Senate and leaving its members with an inaccurate picture and understanding of the nature of the Lucky Jack Project and related matters.

In addition to factual errors, the Town's Testimony relies on a series of inaccurate and misleading statements and conclusions of law. Most notably, the Testimony mischaractefizes the basic purpose and scope of the Mining Law and suggests that, but for the Mining Law's "antiquated provisions," the mining industry in the United States operates in a legal vacuum, unimpeded by any laws, regulations or other restrictions on its activities. This is evident, for instance, in your assertion that "industrial mineral development of the public lands on Mt. Emmons and within the Town's statutorily established municipal watershed would result in significant adverse environmental impacts that are not addressed under the 1872 Mining Law." Testimony, p. 5 (emphasis added).

The Mining Law establishes a process for acquiring and protecting mining claims on federal lands. It represents an undeniably important part of the regulation of the mining industry in the United States. However, it is only one part of a much larger picture. By focusing only on the Mining Law, the Town's Testimony gives the patently false impression that nothing else exists to regulate mining activities in the United States when, in fact, nothing could be further from the truth.

In reality, any mining operation in the United States, including the Lucky Jack Project, is subject to a comprehensive set of federal laws and regulations involving multiple agencies of government. Without limitation, this includes the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370c; the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Clean Air Act, 42 U.S.C. §§ 7401-7671q; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the Federal Mines Safety and Health Act of 1977, 30 U.S.C. §§ 801-962; and the implementing regulations for each. Colorado adds its own level of oversight and regulation under the Colorado Mined Land Reclamation Act, C.R.S. §§ 34-32-101 et seq., and various statutory and regulatory counterparts to the federal programs described above. In short, the Lucky Jack Project will have to go through a lengthy and thorough review and approval process to demonstrate compliance with a series of strict legal requirements and standards before it can proceed.

Through its Testimony, the Town is demanding that the entire legal process described above should be subverted and made subject to perceived "public interest" of Crested Butte's residents. Obviously, this raises an issue of regulatory takings, where the Town would essentially be depriving Kobex and U.S. Energy of their property rights. Additionally, however, it ignores the fact that, according to a scientific poll conducted in September 2007, two-thirds of Gunnison County residents polled believe that mining in the County "can be done in an environmentally responsible way" and that "the community should work with the partners of the Lucky Jack Project, Kobex Resources and U.S. Energy, instead of working against them." It also ignores the compelling national public interest in pursuing responsible development of strategic minerals (including molybdenum) within the United States. Global demand for these strategic minerals is only going to rise, subjecting the United States to an ever-increasing amount of competition with China, India, Europe and other countries and regions. One only has to look to the Middle East, on which the United States is dependent for energy, to begin to understand the enormous problems that ensue when we fail to achieve a measurable level of self-sufficiency at home.

The molybdenum resource inside Mt. Emmons is one of the richest deposits known anywhere in the world. Using modern mining technologies and methods, the resource can be extracted in an environmentally and socially responsible manner, benefiting the people of the United States, the State of Colorado and the Town of Crested Butte.

We strongly urge the Town to correct both the factual and legal errors and misstatements in its Testimony and provide the Committee with accurate information on which to base its decisions and formulate policy. As always, if you have any questions or need any further clarification or information regarding anything discussed in this letter, we are ready, willing and able to assist.

Respectfully,

PERRY ANDERSON.

ATTACHMENT 2.—NORTHWEST MINING ASSOCIATION (WHITE PAPER)

THE ENVIRONMENTAL PROVISIONS IN THE HOUSE MINING LAW BILL (HR. 2262) ARE SOLUTIONS IN SEARCH OF A PROBLEM

27 MINERAL PROJECT CASE HISTORIES DEMONSTRATE WHY THE SWEEPING CHANGES IN THIS BILL ARE UNNECESSARY TO PROTECT THE ENVIRONMENT

Prepared by: Debra W. Struhsacker, Environmental Permitting & Government Relations Consultant, Reno, NV and Jeffrey W. Todd, Environmental Consultant Boerne, TX

I. EXECUTIVE SUMMARY

The House Mining Law bill, H.R. 2262, contains sweeping changes to the public participation process and environmental standards for hardrock exploration and mining projects on federal lands. Written as if starting with a blank slate, H.R. 2262 ignores the fact that a public participation process and comprehensive and effective environmental standards already exist. As such, H.R. 2262 reinvents the wheel—but adds some corners to that wheel to slow it down and ultimately stop hardrock exploration and mining on federal lands.

This Northwest Mining Association white paper presents environmental permitting case histories for 27 hardrock exploration and mining projects on U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) lands to document how the existing public participation process and the environmental laws and regulations governing hardrock minerals on federal lands effectively protect the environment. These case histories clearly demonstrate that the existing BLM and USFS standards and regulations for mining and the National Environmental Policy Act (NEPA) environmental review process work seamlessly together to provide the agencies with sufficient regulatory authority to regulate mineral projects.

The case histories show a consistent pattern of thorough environmental reviews during which both BLM and the USFS identified and imposed environmental controls, project modifications, and mitigation requirements to eliminate or minimize environmental impacts. It is also evident from the case histories that the NEPA process gives the public ample opportunities to participate in these environmental reviews and influence regulators' decisions about project proposals. The following is a summary of key findings:

- The case histories document that the existing land management regulations governing mineral activities on federal lands satisfy Congressionally-mandated land management objectives to prevent unnecessary or undue degradation of BLM lands and to minimize adverse impacts on National Forest System lands.
  - —BLM and the USFS already have clear and effective authority with which to regulate mineral projects. The case histories show how the agencies use these authorities to require project modifications or to demand specific environmental controls or mitigation measures to eliminate or minimize impacts. Agency-imposed changes span the gamut from adding environmental protection, mitigation, or monitoring measures, to selecting a project alternative that differs from the applicant's project proposal, to denying proposed projects that the agencies believe would violate federal laws and regulations.
  - —The case histories do not reveal any inadequacies or gaps in the current regulations or suggest that the environmental provisions in H.R. 2262 would be useful or desirable.
  - —The case histories show that both BLM and the USFS have verifiable track records of effectively tailoring the on-the-ground application of their environmental performance standards to provide optimal environmental protection and reclamation success at a given site. The case histories provide examples of agency requirements for site-specific measures to protect cultural resources, wildlife and fisheries habitat, scenic values, water quality, air quality, wetlands, public safety, species of concern, special mine waste management measures, and protocols addressing noxious and invasive species controls.
  - —The case histories also demonstrate how the NEPA process and the agencies' surface management regulations work together to achieve the agencies' land management objectives. Agency mandated changes to proposed projects typically respond to public comments received in conjunction with the NEPA process.

- The H.R. 2262 definition, "undue degradation," is unrealistic and unworkable because it changes the current FLPMA standard of "unnecessary or undue degradation," which recognizes that some degradation may be necessary (i.e., unavoidable) in order to mine.
  - —The undue degradation definition in H.R. 2262 singles out hardrock mining compared to all other activities on public lands by imposing a higher, impractical, and unfair standard that precludes unavoidable degradation due to mining.
  - —The case histories do not identify any real-life, on-the-ground problems with the unnecessary or undue degradation standard or suggest any need to change this standard.
- All of the environmental provisions in H.R. 2262 are at odds with the 1999 National Research Council (NRC) report entitled "Hardrock Mining on Federal Lands."
  - —This prestigious and unbiased report found that the then existing regulations provided adequate environmental protection at mines on public lands. BLM's regulations were updated in 2001 to fill the five regulatory gaps identified in the NRC Report. H.R. 2262 treats these same gaps as if they remain unfilled.
  - —The NRC Report places special emphasis on the effectiveness of the NEPA process for gathering public input, evaluating environmental impacts, and identifying any unnecessary or unacceptable impacts associated with proposed mineral projects. The H.R. 2262 parallel public participation process for mining projects will not improve public participation. It will only add redundant bureaucratic hurdles to an already time-consuming mine permitting process and create additional burdens on the agencies, the public, and mining companies.
  - —The NRC Report also stressed the importance of using site-specific, environmental performance standards to achieve optimal environmental and reclamation results at the diverse geographic and ecological settings in which mining occurs. The prescriptive technology-based standards included in H.R. 2262 are inappropriate and will produce second-rate environmental results.
- The environmental provisions in H.R. 2262 are solutions in search of a problem.
  - —The new public participation process is not needed to give the public more opportunities to comment on proposed mining projects.
  - —The new definition of undue degradation and the new environmental standards are not needed to protect the environment.
  - —BLM's October 2000 EIS for the 3809 rulemaking predicted that the alternative containing a Significant Irreparable Harm standard and environmental standards similar to those in H.R. 2262 would result in "significant adverse effect to mining-dependent communities, including declines in social well-being due to potential for up to 75% decrease in some types of mining."
  - —The real purpose of H.R. 2262 is to create intolerable delays in the permitting process, to eliminate all impacts from mining, and ultimately to stop exploration and mining on federal lands.

II. Background

The U.S. House of Representatives passed H.R. 2262, the Hardrock Mining and Reclamation Act of 2007, on November 1, 2007. H.R. 2262 is a disastrously bad bill for the mining industry—and, more importantly, for the country. It eliminates security of land tenure, creates insurmountable regulatory hurdles, empowers third-parties to petition to withdraw lands from mining—even after valuable minerals have been discovered, and creates new unrealistic and impractical standards for mining. Two outcomes are certain if H.R. 2262 becomes law:

1. H.R. 2262 will severely curtail mineral production on America's public lands; and
2. H.R. 2262 will dramatically increase the Nation's already extensive reliance on foreign minerals due to the significant reduction in domestic mineral production.

The unfair and burdensome gross royalty in H.R. 2262 will certainly cause economic hardships and will contribute substantially to the two negative outcomes listed above. However, the environmental components of H.R. 2262 will be equally responsible for reducing domestic mineral production and increasing the country's dependence on foreign minerals.

The environmental and regulatory problems in H.R. 2262 are two fold. First, Title I, Sec. 2(a)(19) of H.R. 2262 creates a new unrealistic and unfair environmental performance standard, "undue degradation," for mineral activities. This undue degradation standard imposes what is essentially a "zero-impact" mandate on hardrock mining—in marked contrast to other sanctioned activities on federal lands. Second, the new and duplicative public participation process and the problematic environmental standards in Title III, "Environmental Considerations of Mineral Exploration and Development," will cause intolerable uncertainties and delays and create insurmountable roadblocks. Taken together, the undue degradation standard and Title III reflect an underlying philosophy that mineral activities must not affect the environment and are clearly intended to thwart exploration and mining on federal lands.

As each of the case histories proves, current regulations and policies are effectively minimizing impacts from mineral activities and mitigating those impacts that cannot be avoided. But H.R. 2262 chooses to ignore this successful track record. Instead, this bill proposes radical changes in an apparent attempt to fix a system that clearly is not broken.

If the goal of H.R. 2262 were to address the well recognized shortcomings in the current Mining Law—the lack of a royalty or a fund to reclaim historic abandoned mined lands (AML)—the bill would not include the undue degradation standard or Title III. Unfortunately, H.R. 2262 has a much different goal. Rather than making the surgical changes needed to require royalty payments and to create an AML fund, H.R. 2262 takes a very different approach that proposes far-reaching changes that are specifically designed to stop hardrock exploration and mining on federal lands.

III. Comparing FLPMA's Unnecessary or Undue Degradation Mandate With the H.R. 2262 Undue Degradation Standard

A. The FLPMA mandate to prevent unnecessary or undue degradation

The term "undue degradation" originates in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S. C. 1701 et seq. Section 302(b) of FLPMA requires the Secretary of the Interior to manage the public lands to prevent "unnecessary or undue degradation." The FLPMA unnecessary or undue degradation standard, often described in shorthand as "U&UD," applies to all activities on BLM-administered public lands. As such, it is not a standard that is unique to mining.

Fundamental to FLPMA's U&UD standard is the plainly-stated concept that human activities cause degradation—and some degradation is necessary to achieve FLPMA's stated public land management goals at 43 C.F.R. §1701. In the case of mineral production, FLPMA establishes the following Congressional declaration of policy at 43 U.S.C. §1701(a)(12):

> Congress declares that it is the policy of the United States that—the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Milling and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands.

The Minerals Policy Act of 1970 states:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs...

Practical, on-the-ground standards to implement the FLPMA U&UD mandate must consider two fundamental geologic realities: 1) mineral deposits can only be found in geologically favorable places; and 2) mines can only be developed where mineral deposits are found. The current BLM and USFS regulations for hardrock minerals reflect this reality by being responsive to the wide range of geographic settings and environments in which hardrock minerals are located and developed. The environmental impacts associated with mining are always site specific and dependent upon site topography, climate, hydrology, mineralogy, mining method, and other factors that may be unique to a particular project.

BLM Regulations to Prevent U&UD

BLM's surface management rules for hardrock minerals at 43 C.F.R. Subpart 3809 (hereinafter called "the 3809 regulations") implement the FLPMA mandate to prevent U&UD. BLM's environmental performance standards at § 3809.420 include a comprehensive list of site-specific, outcome-based performance standards for mineral activities that define how mineral projects must be designed, operated, and reclaimed in order to comply with the FLPMA U&UD requirement. These environmental performance standards also consider the diversity of settings in which hardrock exploration and mining occur.

The case histories discussed in Section V demonstrate BLM's track record of effectively tailoring the on-the-ground application of the § 3809.420 environmental performance standards to provide optimal environmental protection and reclamation success at a given site, and the agency's commitment to prevent U&UD. These case histories provide ample proof that BLM's interpretation and management of the 3809 regulations prevents U&UD and show that the existing regulations are working as intended to protect the environment and achieve BLM's land management objectives. As described in Section V, BLM consistently exercises its authority to require project proponents to modify their project proposals to address site-specific concerns in order to comply with the U&UD mandate. The case histories show absolutely no need for the far-reaching environmental changes in H.R. 2262.

The USFS Regulations Use a Minimize Adverse Impacts Standard

The USFS regulations at 36 C.F. R. Part 228, Subpart A (hereinafter called "the 228A regulations) for locatable minerals take a similarly practical approach that recognizes mining creates some necessary and unavoidable impacts and that miners must avoid and minimize impacts whenever and wherever feasible:

> Sec. 228.8 Requirements for environmental protection: All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources...

The USFS regulations at § 228.8 provide detailed requirements for air quality, water quality, federal solid waste disposal and management, scenic values, fisheries and wildlife habitat, roads, and reclamation. This section of the regulations mandate compliance with federal environmental protection laws and establish the concept that impacts must be minimized "to the extent practicable." For example, the paragraph dealing with solid wastes says:

> All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources. (36 C.F.R. §228.8(c))

Similarly, the paragraph on solid wastes states:

In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations. (36 C.F.R. §228.8(e))

The requirements for protecting scenic values and road building also contain requirements to minimize impacts to the extent "practicable."

The USFS requirement to "minimize adverse impacts" is functionally similar to the FLPMA mandate to prevent U&UD. The USFS's standard requires miners to take appropriate steps to avoid, minimize, or mitigate impacts. Like FLPMA and BLM's 3809 regulations, the USFS regulations for mining recognize that some impacts are unavoidable. The use of the word "practicable" in the USFS regulations adds the concept of economic feasibility based upon a consideration of site-specific factors.

The case histories described in Section V for exploration and mining projects on National Forest System lands demonstrate that the USFS requirement in the 228A regulations to minimize adverse impacts requirement is successfully protecting the environment. These case histories also show that the USFS regularly exercises its regulatory authority to require changes to project proposals in order to comply with the minimize adverse impacts standard. Just like the case histories for projects on BLM-administered lands, the USFS case histories document a consistent agency commitment to enforce all environmental protection standards and requirements.

The case histories include two projects that the USFS approved using a NEPA Categorical Exclusion (CE). Yet in spite of the streamlined NEPA process used for these projects, the USFS placed numerous environmental protection requirements and conditions on both projects, documenting the broad scope of the USFS's 228A regulatory authority. The case histories also include one project where the USFS used the 228A regulations to reject a project proposal.

The Case Histories Show No Need for the H.R. 2262 Undue Degradation Standard

Taken together, the case histories for projects on both ELM and USFS lands present compelling evidence that the existing environmental regulations and performance standards are working well and should not be changed. Even if the undue degradation standard in H.R. 2262 were practical or achievable—which it most certainly is not—there is absolutely no on-the-ground need or justification for this new standard. The only reason to include the undue degradation standard in H.R. 2262 is to eliminate all exploration and mining on federal lands.

B. THE H.R. 2262 UNDUE DEGRADATION STANDARD CREATES A HIGHER STANDARD FOR MINING COMPARED TO OTHER ACTIVITIES ON PUBLIC LAND

Title I, Sec. 2(a)(19) of H. R. 2262 defines undue degradation as "irreparable harm to significant scientific, cultural, or environmental resources on public lands that cannot be mitigated." This "undue degradation" standard is radically different from the FLPMA U&UD standard and the USFS "minimize adverse environmental impacts" standard because it fails to recognize that some degradation is unavoidable in order to mine. The practical meaning of the H.R. 2262 undue degradation standard is that it empowers BLM and the USFS to deny plans of operation for proposed mineral projects even if the project complies with federal environmental laws and regulations and can satisfy all other environmental standards and requirements.

H.R. 2262 singles out hardrock mining by placing a higher standard of environmental performance on mining activities while preserving the U&UD standard for all other activities on public lands. Thus, the world according to H.R. 2262 recognizes and accepts the necessary (i.e., unavoidable) degradation associated with hiking, fishing, camping, hunting, ORV use, developed recreation, logging, extracting coal or oil and gas, film making, livestock grazing, and all other activities that impact public lands. However, it does not acknowledge or accommodate the necessary degradation associated with hardrock mining. In this manner, the definition of undue degradation imposes an impractical, unrealistic, and unfair standard hardrock mining.

Irreparable Harm is Not a New Concept

H.R. 2262 is not the first mining proposal to introduce the concept of irreparable harm or to create an irreparable harm-based standard. In 1997, then Secretary of the Interior Bruce Babbitt announced he intended to use the rulemaking process to change the 3809 regulations as a surrogate for Congressional action to amend the Mining Law. In November 2000, after a four-year long rulemaking process, BLM published new 3809 regulations. This version of the rule, hereinafter referred to as the "2000 § 3809 rule," included a new and controversial standard—Substantial Irreparable Harm (SIH). BLM added SIH to the definition of unnecessary or undue degradation in the final rule, without giving the public an opportunity to comment.

It should be noted that BLM analyzed an alternative (Alternative 4) in the EIS for the 3809 rulemaking that included an SIH concept. However, BLM did not select this as the Agency Preferred Alternative in the EIS due in part to the severe economic hardships associated with this alternative. The following excerpt from the EIS describes the dramatic impact Alternative 4 would have on mining communities:

> Potential for significant adverse effect to mining-dependent communities, including declines in social well-being due to potential for up to 75% decrease in some types of mining. (October 2000 EIS, Surface Management Regulations for Locatable Minerals, page 121.)

The undue degradation standard in H.R. 2262 is clearly modeled after Alternative 4 and the SIH standard in the 2000 § 3809 rule.

In fact, most of the H.R. 2262 Title III environmental provisions are modeled after the prescriptive environmental performance standards included in Alternative 4 in the EIS prepared for the 3809 rulemaking. It should be abundantly clear from the environmental consequences described in the 3809 EIS that this approach—whether in regulations or in statute—will be disastrous for western mining communities. It will also be disastrous for the Nation as we become even more reliant on imported foreign minerals to replace what used to be produced from U.S. mines.

The SIH standard is not currently in the § 3809 rules because in 2001, then Secretary of the Interior Gale Norton reopened the § 3809 rulemaking. Secretary Norton issued a final rule in October 2001 which does not contain the SIH standard. The 2001 final § 3809 rule (hereinafter referred to as the "2001 § 3809 rule") preserved many aspects of the 2000 § 3809 rule, but eliminated SIR from the definition of undue or unnecessary degradation and from § 3809.415. Secretary Norton's decision to remove SIH from the 2001 § 3809 regulations was based in part upon an October 2001 Department of the Interior Solicitor's Opinion (M-37007) which found that the SIH provision is not consistent with FLPMA. Additionally, the way in which SIR was added to the 2000 § 3809 rule violated the Administrative Procedures Act and NEPA.

C. A RECENT NRC STUDY DEMONSTRATES THERE IS NO JUSTIFICATION FOR CHANGING U&UD

In 1998, Congress appropriated $800,000 in the FY 1999 Omnibus Appropriations Bill (Department of the Interior and Related Agencies Appropriations Act, 1999 P.L. 105-277, Division A, Title I, Sec. 120) for a National Research Council (NRC) study of hardrock mining on federal lands. The purpose of this study was to "identify and consider the adequacy of federal and state environmental, reclamation and permitting statutes and regulations applicable in any state or states where mining or exploration of locatable minerals on federal lands is occurring, to prevent unnecessary or undue degradation."

The NRC published its findings in a 1999 report entitled Hardrock Mining on Federal Lands (hereinafter called "the NRC Report.") This carefully researched and impartial study contains significant useful information regarding the scope and effectiveness of the state and federal regulations for hardrock mining. In the context of H.R. 2262, the NRC Report provides an appropriate framework for evaluating the environmental components of the bill including the substitution of undue degradation for U&UD, and the many far-reaching provisions in Title III that are discussed in Section IV.

The NRC Report does not suggest any environmental problems or regulatory deficiencies stemming from the FLPMA mandate to prevent U&UD. Because Congress specifically directed the NRC to examine the adequacy of the environmental regulations to prevent U&UD, it is highly unlikely that this report would overlook any environmental problems due to the U&UD standard itself. Therefore, the NRC report's finding that the existing regulations are protecting the environment strongly supports the conclusion that the U&UD standard is resulting in environmental protection at exploration and mining projects on BLM lands and that the "minimize adverse impacts" standard in the USFS's 228A regulations is providing similarly satisfactory environmental protection on National Forest System lands.

Because the NRC Report was thoroughly researched, unbiased, and independently reviewed, its findings are considered authoritative. Based on the NRC Report, it is clear that there is no justification for changing the environmental performance standard for mining from U&UD to the undue degradation standard in H.R. 2262. The NRC Report demonstrates that the current FLPMA U&UD standard for projects on BLM lands and the USES standard to minimize adverse impacts for projects on National Forest System lands are working well and consistently achieve their stated goals.

IV. THE NEW PROCEDURES AND STANDARDS IN TITLE III SEEK TO SOLVE PROBLEMS AND FILL GAPS THAT DO NOT EXIST

Title III includes a new and duplicative public participation procedure and impractical environmental standards. H.R. 2262 creates both the public participation procedure and the new environmental standards out of whole cloth—as if there are no existing public review processes or environmental standards.

The 1999 NRC Report provides useful information for assessing the need for the new public participation process and the environmental standards in H.R. 2262 Title III. As discussed below, it is clear from the NRC Report that these elements of Title III are both unnecessary and undesirable and seek to fix problems and fill gaps where none exist.

A. TITLE III CREATES A NEW PUBLIC PARTICIPATION PROCESS FOR MINING THAT DUPLICATES NEPA

The new public review requirement in Section 304(i) is one of the most troublesome aspects of Title III. This section requires the Secretary of the Interior and the Secretary of Agriculture to:

> . . . jointly promulgate regulations to ensure transparency and public participation in permit decisions required under this Act, consistent with any requirements that apply to such decisions under section 102 of the National Environmental Policy Act of 1969.

It is clear from Section 302(a) that H.R. 2262 intends to layer the new mining-specific public participation process described in Section 304(i) onto the existing NEPA process. The H.R. 2262 public participation process is not a substitute for NEPA—rather it is a parallel process:

> To the extent practicable, the Secretary and the Secretary of Agriculture shall conduct the permit processes under this Act in coordination with the timing and other requirements under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

The NEPA Process Provides Ample Public Participation Opportunities

There is no demonstrated need whatsoever for creating a new and duplicative public participation process unique to mining projects on federal lands. The NEPA process already affords the public ample opportunities to provide comments on proposed mining projects on federal land. For example, the Battle Mountain Field Office of BLM has received over 6,000 comments on the July 2007 Draft Environmental Impact Statement (EIS) for the Cortez Hills Expansion Project. For the Buckhorn Access Project in Washington, the Okanogan and Wenatchee National Forests received over 100 letters during project scoping, 116 letters on the Draft Environmental Assessment (EA), and 42 letters on the subsequent Draft EIS. The Idaho Falls District Office and the USFS/Caribou-Targhee National Forest received 1,055 original comment letters and a staggering 37,561 identical form letters on the October 2007 Draft EIS the agencies jointly prepared for the Smoky Canyon Mine. (Although Smoky Canyon is a phosphate mine which is governed by the regulations for leasable minerals rather than hardrock minerals, the NEPA statistics dramatically illustrate that the NEPA process already gives the public unfettered ability to comment on proposed mineral projects.)

Given the robust nature of public response to NEPA documents for mining projects, there is simply no evidence that the public is being deprived of an opportunity to provide comments or would benefit from a mining-specific public participation process like that proposed in H.R. 2262. BLM's and the USFS's administration of the NEPA process is clearly complying with the NEPA requirement to seek public comment and the volume of responses being received more than satisfies NEPA's objectives to obtain public comment.

It should be evident from the sheer number of public comments submitted in response to recent draft NEPA documents that BLM and USFS are already burdened with an enormous administrative task of cataloguing and responding to comments. Adding a mining-specific public participation process that would run in parallel to the NEPA process would be an administrative nightmare for all parties—BLM, the USFS, and the interested public. The current NEPA process is more than adequate.

In addition to soliciting public comments on proposed projects through the NEPA process, both the BLM and USFS permitting processes includes administrative appeal procedures that give the public a formal opportunity to challenge the adequacy of the agency's NEPA analysis and its decisions to approve or deny a proposed project. Interest groups frequently use these administrative procedures to try to overturn agency decisions.

Once again, H.R. 2262 is a solution in search of a problem. The proposed mining-specific public participation process in Title III sets out to fill a gap that simply does not exist. There is absolutely no need to duplicate the well-established, highly-structured NEPA public review process that federal agencies have used to make decisions about significant federal actions since 1970.

The NRC Report Concludes that the NEPA Process is Protecting the Environment

The 1999 NRC Report mentioned in Section III characterizes NEPA as the backbone of the environmental and regulatory program for evaluating proposed mining projects: "The NEPA process is the key to establishing an effective balance between mineral development and environmental protection." (NRC Report, page 6). H.R. 2262 destroys this balance.

The NRC Report found the NEPA process to be a meaningful opportunity to evaluate ways to make a proposed mine the best possible project for the community and the environment and confirms that the NEPA process is adequate in scope to accommodate all potential issues. In summary, the NRC Report presents the following findings regarding the efficacy of the NEPA process for hardrock mineral projects (NRC report pages 108—110):

- The NEPA process and its various state equivalents provide the most useful and efficient framework for evaluating proposed mining activities;
- NEPA provides the most comprehensive and integrated framework for undertaking an environmental evaluation that includes the full range of environmental concerns, whether or not they are specifically addressed by some other regulatory program, as well as cultural and other concerns.
- NEPA environmental reviews examine tradeoffs between different and sometimes competing values, and promote a better understanding of the implications of the many decisions involved in the preparation and approval of a mine's operating plan....No other regulatory program provides such a comprehensive, integrated mechanism for decision making.
- The NEPA process ensures that the decisions are based on careful analyses of site-specific conditions. An operating plan for mining activities must adapt and respond to site-specific conditions and sensitivities. The NEPA process allows this responsiveness; regulatory programs relying on inflexible, technically prescriptive standards often do not.
- The NEPA process allows the agencies to be responsive to changes in technology and site-specific conditions. Less flexible regulatory approaches do not allow this flexibility and, as a result, can cause technologies to be "frozen," often with adverse impacts for both the mining operators and the environment.

The inescapable conclusion from these NRC Report findings is there is absolutely no need to create the new public participation process in H.R. 2262. According to the NRC Report, the NEPA process is not only adequate—it is ideal for gathering public input, evaluating environmental impacts, and identifying any unnecessary or unacceptable impacts associated with proposed mining projects.

There is no demonstrated need for the new public participation process mandated in Section 304(i). It is unnecessary and is completely at odds with the findings in the NRC Report.

The Case Histories Also Document That NEPA Is Effective and that Another Public Participation Process is Not Necessary

The case histories presented in Section V for projects on both BLM and USFS lands provide compelling and specific evidence of the pivotal role that NEPA plays in the environmental review and permitting process for mineral projects on federal lands. These case histories consistently document that issues and concerns are raised during public scoping for NEPA documents and in public comments on draft NEPA documents.

More importantly, the case histories provide a verifiable track record of how BLM and the USFS consider public comments when making decisions about proposed projects. It is clear from the case histories that public comments frequently influence agency decisions. Both BLM and the USFS routinely require changes to a proposed project in response to public comments or select one of the alternatives analyzed in the NEPA document rather than the project proponent's Proposed Action. The case histories also show how the NEPA process and the 3809 and 228A regulations work smoothly together to evaluate and refine a project proposal to prevent U&UD on BLM lands or to minimize adverse impacts on National Forest System lands.

B. TITLE HI CONTAINS IMPRACTICAL AND UNATTAINABLE STANDARDS AND DUPLICATIVE REQUIREMENTS

Title III contains impractical and unattainable standards and requirements as well as numerous requirements that duplicate existing BLM and USFS regulations and policies. The problematic standards are designed to make securing permits for new exploration, mining, and ancillary activities very difficult—and in some cases impossible.

The duplicative requirements are another example of the way in which H.R. 2262 provides a solution to an imaginary problem. The regulatory agencies have already developed comprehensive and effective programs that provide environmental protection at mines on federal lands.

Table 1 Examples of Impractical or Unattainable Environmental Standards and Duplicative Requirements in Title III, H.R. 2262	
H.R. 2262 Impractical or Unattainable Standard	Discussion
Limits exploration permits to 10 years §304(e)	It typically takes more than 10 years to discover, explore and define a mineral deposit. The exploration case histories do not demonstrate a need for this limit.
Limits life of mine permits to 20 years—with one possible 20-year renewal §304(d)(1)(A—B)	Some deposit types take longer to mine than 20 years. Some mines have operated for over 100 years. The possibility (but no guarantee) of a 20-year one-time permit renewal creates too much uncertainty to make the necessary investment decisions to develop the mine. The mining case histories do not demonstrate a need for this limit.
	This arbitrary time limit will cause premature mine closures, leaving minerals in the ground, and wasting mineral resources. This will hurt local and state economies that depend on mining.
Restricts Plans of Operations to claims with valid discoveries and requires discretionary permits to use federal lands for processing facilities, roads, mine waste storage areas, etc. §304(a)(1)(A—B)	Most surface mines use more claims without a discovery than valid claims. Limiting Plans to valid claims and the requirement to obtain discretionary approvals to use non-mineralized ground creates too much uncertainty to make the necessary investment decisions to develop the mine. Additionally, this creates a new onerous requirement to establish the validity status of each claim and distinguish it in the permitting process. Inserting claim validity into the permitting process will create an enormous administrative burden for the agencies and further delays for permit applicants. The mining case histories do not demonstrate a need for this limit and requirement.
Limits water treatment to 10 years after mine closure §304(c)(H)	This will make mining of many sites that use water treatment during mining difficult or even impossible. There should be no prohibition against long-term water treatment so long as the applicant provides adequate financial assurance and/or a long-term funding mechanism to operate the treatment facility. From a practical perspective, it is unclear how applicants will be able to demonstrate this during the permitting process before the water treatment system is built.
Only claim holders may apply for an operations permit §304(a)(1)	Mine operators are commonly different entities than the claim owners. It is fairly unusual for a claim owner to operate the mine. This restriction reflects a lack of understanding of typical mining industry business relationships.
Operations must prevent "material damage to the hydrologic balance outside the permit area"§304(c)(E)	This may prohibit the development of both surface and underground mines that require significant dewatering, a common need in many mines
Preserving cultural, paleontological and cave resources	It may be impossible to preserve these resources at sites where the orebody and these features are co-located. (See 3809.420(b)(8)(i)). Current mitigation policies are appropriate.

Table 1
Examples of Impractical or Unattainable Environmental Standards and Duplicative Requirements in Title III, H.R. 2262

H.R. 2262 Duplicative Requirements	Existing BLM and USFS Regulations
Restoring mined land for productive post-mining uses	3809.420(a)(3) 228.8(g)
Contemporaneous reclamation	3809.420(a)(5) and 3809.420(b)(3)(i) 228.8(g)
Salvaging topsoil or growth medium s	3809.420(b)(3)(ii)(A) 228.8(g)
Maintaining stability of the site	3809.420(a)(2) 228.8(g)(1-2)
Controlling sedimentation and erosion	3809.420(b)(3)(ii)(B), 228.8(g)
Minimizing the formation and migration of acidic, alkaline, or metal-bearing leachates	3809.420(b)(3)(ii)(C) and 3809.420(b)(11) 228.8(g)(3)
Reducing visual impacts	3809.420(b)(3) 228.8(d)
Revegetating disturbed areas	3809.401(3)(viii) and 3809.420(b)(3) 228.8(g)(4)
Using standard engineering practices to achieve stability and reclamation	3809.420(b)(12), 228.8(g)
Removing structures and roads and sealing drill holes	3809.401(3)(ix), 3809.401(3)(i), and 3809.420(b)(3) 228.8(f) and 228.8(g)
Restoring or mitigating impacts to fish and wildlife habitat	3809.420(b)(3)(ii)(E) 228.8(e)
Fire suppression and prevention	3809.420(b)(10), 228.11

Title III Proposes Using Inappropriate Technology-Based Standards

Although duplicating requirements that are in existing regulations is not necessarily problematic, the fact that H.R. 2262 Sec. 307(b) gives the Secretaries the discretionary authority to require the use of technology-based design standards versus outcome-based performance standards creates a serious problem. The NRC Report clearly establishes that one-size-fits-all, technology-based standards are inappropriate for mineral projects given the need to accommodate site-specific conditions. For example, Recommendation No. 9 in the NRC Report states:

> BLM and the Forest Service should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. The two land management agencies should continue to use comprehensive performance-based standards rather than using rigid, technically prescriptive standards. (NRC Report, page 108).

The NRC Report explains that technology-based standards are especially unsuitable for mineral projects in light of the rapidly changing nature of mining methods and environmental protection technology. Federal land managers need to have the authority to require the newest and best technology rather than having to adhere to specific technologies that may be outmoded or not optimal for a certain site.

Many of the case histories described in Section V describe how BLM and the USFS have required site-specific environmental controls to respond to unique ecological conditions at project sites. It is clear from these case histories that imposing cookie-cutter-type, technology-based standards would not have been ideal at these sites.

The technology-based standards sanctioned in Sec. 307(b) are likely to result in inferior environmental protection and reclamation compared to the performance-based standards currently in place. Thus, in the case of Sec. 307(b), H.R. 2262 does not solve any identified environmental problem. Instead, it promotes second-rate environmental results.

C. BLM HAS ALREADY TAKEN CARE OF ALL OF THE GAPS IDENTIFIED IN THE NRC STUDY—THE TITLE III MEASURES ARE NOT NECESSARY

Although the NRC Report clearly states that the regulations in place during the 1998—1999 timeframe were adequate to protect the environment, the Report also

identified five regulatory gaps. The NRC Report contains specific recommendations for how BLM should modify its regulations to fill these gaps. The 2001 3809 regulations contain a number of specific changes to eliminate the gaps discussed in the NRC Report. Table 2 lists the gaps identified in the NRC Report and the 2001 gap-filling measures.

A number of the requirements in Title III mimic the gap-filling measures contained in the 2001 § 3809 rules. Because BLM's rules already respond to all of the shortcomings identified in the NRC Report, these Title III provisions are unnecessary, Once again, there are no remaining gaps that need to be filled; Title III seeks to fill gaps that have already been filled.

Table 2
Changes Made in 2001 to the 3809 Rules in Response to the NRC Report

NRC Report Issue or Gap	Changes Made
Require financial assurance for all mining and exploration activities that are not classified as casual use	3809.500, 3809.503
Mandate Plans of Operation for any mining or milling operation regardless of size	3809.5, 3809.11(b)
Develop criteria and procedures for modifying Plans of Operation	3809.430—434
Adopt regulations that define temporary closure and require interim management plan;	3809.401(5)
Plan for and assure long-term, post-closure management of closed and reclaimed mines	3809.401(3)(ix)

V. Case Histories Demonstrate the Environmental Provisions in H.R. 2262 Are Unnecessary to Protect the Environment

A. BLM and USFS Use NEPA and the Surface Management Regulations Effectively to Achieve Environmental Protection and Land Management Objectives

The case histories listed in Table 3 and discussed below demonstrate that BLM and the USFS consistently—in fact on almost all projects—require companies to modify proposed Plans of Operation for exploration and mining projects. The agencies imposed these changes to eliminate, minimize, or mitigate impacts to one or more environmental resource and/or to respond to issues raised during public scoping and in public comments submitted on draft NEPA documents.

All of the examined case histories underscore the effective relationship between the NEPA process and the 3809 and 228A surface management regulations. The NEPA process provides BLM and the USFS with an analysis tool to identify and quantify potential environmental impacts, to analyze project alternatives, and to develop appropriate mitigation and monitoring measures to minimize impacts. Once the NEPA process has identified project alternatives, analyzed impacts (including those associated with the No Action alternative), and specified mitigation measures, BLM and the USFS then use their respective authorities in the 3809 and 228A regulations to require project applicants to modify the project proposal to enhance environmental protection, and to eliminate or minimize impacts whenever and wherever possible. The case histories show that NEPA and the surface management regulations work seamlessly together to achieve the agencies' land management mandates—to prevent unnecessary or undue degradation from mining on BLM lands and to minimize adverse environmental impacts from mining on National Forest System lands.

The changes made to projects as a result of the NEPA process include agency-required mitigation and other measures and stipulations that go beyond those offered by the project proponent. In fact, it is highly unusual for BLM and the USFS to NOT mandate additional requirements for a project. The case histories include many examples of BLM and USFS invoking their respective 3809 and 228A authority to select an "Agency Preferred Alternative" that differs (sometimes substantially) from the project proponent's "Proposed Action." Additionally, even some projects ap-

proved under a NEPA Categorical Exclusion (CE) may have extensive environmental protection requirements attached.

Alternatively, project proponents sometimes chose to modify their project proposals in response to the issues and concerns identified during NEPA public scoping and in public comments submitted on draft NEPA documents. It is not uncommon for companies to take the lead in changing their Proposed Action by adding new mitigation, monitoring, and environmental protection measures, or by changing some aspect of the project proposal based on public input and agency suggestions. This is often preferable to waiting for the agency to impose these changes in the form of agency-required measures or as an Agency-Preferred Alternative that differs from the Proposed Action. Project proponents typically make these changes in close coordination with BLM and the USFS. Either way, whether a company initiates the changes or whether the agencies require the changes, the process results in a project with enhanced environmental protection and mitigation measures that ensure compliance with the mandate to prevent unnecessary or undue degradation on BLM lands and to minimize adverse impacts on National Forest System lands.

It is thus readily apparent from the case histories that the existing regulations for mineral activities on both BLM and National Forest System lands, coupled with the NEPA environmental review process, are working well. There is nothing in the case histories to suggest that an additional public review process or different environmental standards are warranted. The agency track records and the environmental measures described in the case histories provide compelling substantiation that the environmental provisions in H.R. 2262 seek to reinvent the wheel, to solve imaginary problems, and to fill gaps that do not exist.

B. CASE HISTORIES FOR MINERAL PROJECTS ON BLM AND USFS LANDS

The 27 case histories summarized in Table 3 and discussed below were developed from NEPA EIS and EA documents for proposed exploration, mining, and mining-related projects on BLM and National Forest System lands in Nevada, Arizona, California, New Mexico, Idaho, Washington, Oregon, and Colorado. Each project described below presents a clear example of how the agencies' surface management regulations authorize BLM and the USFS to require additional or modified environmental protection, mitigation, and monitoring measures, and other project changes that differ from the applicant's Proposed Action.

Table 3
Mineral Project Case Histories on BLM and National Forest System Lands

Date	State	Type of Mineral Project	Project Name	NEPA Review	BLM Office/ National Forest	Agency -Added Conditions and Changes
BLM Projects						
1996	NV	Mining	Cortez Pipeline Gold Deposit	EIS	Battle Mountain	$1 million contingency fund for water quality issues
1996	NV	Mine Expansion	Lone Tree Expansion	EIS	Winnemucca	BLM added 10. Plus mitigation and monitoring requirements
1997	NV	Mining	Ruby Hill Project	EIS	Battle Mountain	BLM added pit-backfill, development of county advisory group, and others
1998	NV	Mining	Trenton Canyon Project	EIS	Winnemucca	BLM added partial pit-backfill modification
2001	NV	Mine Expansion	Marigold Mine Expansion	EIS	Winnemucca	BLM added partial pit-backfill modification, additional mitigation and monitoring
2001	NV	Mining	Reno Clay Plant Project	EIS	Carson City	Access road change, operations time restrictions, others
2002	NV	Mining	Leeville Project	EIS	Elko	BLM added three alternatives and required a long-term mitigation and monitoring plan
2003	NV	Mine Expansion	Phoenix Project	EIS	Battle Mountain	BLM added 4 major stipulations and 37 requirements
2005	NM	Mine Expansion	Copper Mountain South Pit	EA	Las Cruces	BLM added 5 requirements
2005	NV	Placer Mine	Nick Claims Mining Project	EA	Winnemucca	BLM added 7 stipulations
2006	CA	Mining	Jawbone Canyon Project	EA	Ridgecrest	BLM added 6 mitigation measures and 4 reclamation
2006	AZ	Exploration	Rock Mining Claims	EA	Arizona Strip	11 mitigation measures required
2007	NV	Exploration	Spring Valley Exploration	EA	Winnemucca	Numerous mitigation measures added
2007	NV	Mine Expansion	Cortez Hills Expansion	Draft EIS	Battle Mountain	Clear statement that BLM should

Table 3
Mineral Project Case Histories on BLM and National Forest System Lands

Date	State	Type of Mineral Project	Project Name	NEPA Review	BLM Office/ National Forest	Agency -Added Conditions and Changes
						select BLM preferred alternative
2007	NV	Mine Expansion	Big Ledge Project	EA	Elko	BLM added 4 additional protection measures
2007	NV	Exploration	Tonkin Springs Exploration	EA	Battle Mountain	31 specific conditions included in the draft EA
National Forest System Land Projects						
1988-2003	ID	Exploration	Golden Hand Mine Project	EIS	Payette	USFS selected different, restrictive alternative
2006	NM	Mining	Cerro Del Pino Pumice	EA	Santa Fe	USFS added 19 conditions
2006	NV	Mining	Mount Moriah Stone Quarry	EA	Humboldt-Toiyabe	USFS added 34 conditions
2006	OR	Mine Expansion	Star Rock Pit	EA	Malheur	USFS added 11 conditions. Proponent was state agency
2006	OR	Mine Expansion	Tamarack Quarry	EA	Mt. Hood	USFS added multiple additional conditions. Proponent was state agency
2006	WA	Mine Continuation	Black Diamond Star Claim	CE	Colville	USFS added 16 conditions
2006	WA	Exploration	2007 Exploration Drilling	CE	Colville	USFS added 13 conditions
2007	WA	Mine Access	Buckhorn Access Project	EIS	Okanogan and Wenatchee	USFS selected a different alternative and added 15 terms and conditions plus large bond
2007	ID	Mining	Idaho Cobalt Project	EIS	Salmon-Challis	USFS selected a different alternative with significant additional provisions
2007	CO	Mine Expansion	Red Dirt Pit Expansion	EA	Yampa	USFS added 16 conditions
2007	CO	Mining	Robin Redbreast	EIS	Uncompahgre and Gunnison	Project plan was rejected and denied

BLM CASE HISTORIES

Cortez Gold Mines. Cortez Pipeline Gold Deposit. Final EIS. January 1996. Battle Mountain District Shoshone—Eureka Resource Area, Battle Mountain, Nevada

This EIS demonstrates how the project proponent, Cortez Gold Mines (Cortez), responded to public concerns and potential environmental impacts identified during the NEPA process by amending the Proposed Action to address these issues. Cortez modified its original project proposal by adding a number of "Applicant-Committed Design Measures" to mitigate public concerns and potential impacts. Additionally, BLM stipulated agency-required mitigation measures "to reduce potential significant impacts that may occur despite the applicant-committed design measures." BLM designated Cortez's Proposed Action modified with the "Applicant-Committed Design Measures" and the agency-required mitigation measures as the Agency-Preferred Alternative.

One of the Applicant-Committed Measures added to the proposed project was a long-term $1,000,000 interest-bearing contingency fund to provide for long-term monitoring and corrective action, if required, for pit lake water quality and/or dewatering-related impacts. BLM State Director, Ms. Ann Morgan, describes this fund in a January 12, 1996 "Dear Interested Party" letter as a fund established "in the interest of protecting the environment." Ms. Morgan's letter also describes changes made to the Proposed Action as a result of the NEPA evaluation as follows:

> A number of refinements to the proposed action have resulted from public comments on the Draft Environmental Impact Statement. These refinements have been incorporated into the proposed action and the Pipeline Project Plan of Operations.

Santa Fe Pacific Gold Corporation. Lone Tree Mine Expansion Project. Final EIS. September 1996. Winnemucca District Office, Winnemucca, Nevada

BLM selected Santa Fe Pacific Gold Corporation's (SFPG's) Proposed Action, modified with mitigation and monitoring measures, as the Agency-Preferred Alternative. BLM's Record of Decision (ROD) approves the Lone Tree Mine Expansion Project Plan of Operations subject to ten stipulations and numerous mitigation and monitoring requirements for water resources; soils; avian, terrestrial, and aquatic wildlife; livestock; recreation; air resources; geology; visual resources; vegetation; and cultural resources.

Homestake Mining Company. Ruby Hill Project. Final EIS. January 1997. Battle Mountain District, Battle Mountain, Nevada

As a result of the NEPA analysis conducted for the Ruby Hill Project, BLM selected a Preferred Alternative that consisted of Homestake Mining Company's

(Homestake's) Proposed Action, plus a Partial Backfill Alternative that was one of the alternatives considered in detail in the EIS. This backfilling alternative would result in a slightly larger (approximately 6 acres) area that could be reclaimed. Additionally, BLM stipulated several agency-required mitigation measures to address community concerns about visual impacts, noise and vibration from blasting, and air quality due to dust generated by mining activities. These mitigation measures are described as being developed by BLM in collaboration with Homestake and included the development of an advisory group in Eureka County. The advisory group was established to identify areas where monitoring for dust, noise, or blasting vibration may be needed, and to develop additional mitigation to address impacts that could not be fully identified in the EIS (i.e., before mining started). The BLM also required a visual resources mitigation measure to reduce the height of a waste rock dump visible from town.

Newmont Mining Company. Trenton Canyon Project. Final EIS. August 1998. Winnemucca District Office, Winnemucca, Nevada

For the Trenton Canyon Project, BLM selected an Agency Preferred Alternative comprised of Newmont Mining Company's Proposed Action, modified with the Partial Sequential Backfill Alternative evaluated in the EIS. As described in the EIS, the Agency-Preferred Alternative would reduce the total area of mine disturbance, reduce or eliminate some overburden disposal areas, reduce the reclamation effort for the overburden disposal areas, maximize the total amount of land reclaimed to beneficial use, and reduce potential sedimentation to a nearby creek.

Glamis Marigold Mining Company. Marigold Mine Expansion Project. Final EIS. March 2001. Winnemucca Field Office, Winnemucca, Nevada

BLM selected a partial backfill alternative as the Agency-Preferred Alternative for the Marigold Mine Expansion Project. This alternative requires the project proponent, Glamis Marigold Mining Company (GMMC), to add partial backfilling of the 8-South Pit to the Proposed Action. BLM required this backfilling alternative to eliminate the potential for a pit lake to form in this pit. This alternative also reduces surface disturbance associated with the project, thereby lessening impacts to soils, vegetation resources, wildlife habitat, range resources, and recreation. BLM also required GMMC to perform water resources, air quality, and cultural resource mitigation and monitoring measures in addition to those included in the Proposed Action.

Oil-Dri Corporation. Reno Clay Plant Project. Final EIS. September 2001. Carson City Field Office, Carson City, Nevada

BLM selected an alternative project access route as the Agency-Preferred Alternative. This alternative required the project proponent, Oil-Dri Corporation of Nevada (Oil-Dri), to change the access route to the project in response to public concerns about traffic safety and social concerns related to transporting the clay product from the processing facility. The Proposed Action involved constructing approximately 0.8 mile of new access road on public land. At the Final EIS stage, BLM rejected this aspect of Oil-Dri's Proposed Action. The Agency-Preferred Alternative required Oil-Dri to construct a new access road on private land.

BLM also stipulated the following agency-required mitigation measures beyond those included in the Proposed Actions:

1. Restricting the hours of nighttime operation and prohibiting backfill operations in the North Mine areas on weekends and holidays to address public concerns about noise;
2. Enforcing a 25-miles per hour speed limit on all haul, access, and transport routes to reduce traffic impacts; and
3. Potential temporary changes to Oil-Dri's operating schedule to accommodate planned recreational events on public land.

It is interesting to note that the Draft EIS selected the Proposed Action as the Agency Preferred Alternative. At that time, the private land needed for Alternative C was not available. However, during the interim between the Draft and Final EIS documents, Oil-Dri was able to obtain the private land. BLM responded by changing the agency's Preferred Alternative. This is a good example of how BLM used their authority to prevent unnecessary or undue degradation to public land. The BLM-required changes to this project demonstrate that BLM has ample authority to prevent unnecessary or undue degradation.

Newmont Mining Company. Leeville Project. Final EIS. ROD September 2002. Elko Field Office, Elko, Nevada

In the Draft EIS for the Leeville Project, BLM selected an Agency-Preferred Alternative that added the three alternatives analyzed in detail in the Draft EIS to Newmont Mining Company's (Newmont's) Proposed Action, These alternatives included eliminating the canal portion of the water discharge pipeline system, backfilling the production and ventilation shafts with waste rock rather than with reinforced concrete as proposed by Newmont, and relocating the waste rock disposal facility and refractory ore stockpile to eliminate 118 acres of new surface disturbance. In addition, BLM required Newmont to prepare and add a comprehensive, longterm Mitigation and Monitoring Plan to the Final EIS.

Battle Mountain Gold. Phoenix Project. Final EIS. ROD November 2003. Battle Mountain Field Office, Battle Mountain, Nevada

Battle Mountain Gold (BMG) conducted gold, exploration, mining and recovery operations in the Copper Canyon area (Lander County, Nevada) since the 1980s under various Plans of Operations and EAs. A Plan of Operations submitted in 1994 was updated four times to incorporate additional information developed in the interim. The Phoenix Project, an expansion of open pit gold operations in four pits, Was determined by the BLM to be significant enough in size, scope and impact to warrant preparation of a full EIS. The BLM Battle Mountain Field Office selected BMG's proposed alternative analyzed in the Phoenix Project Final EIS as modified by the BLM with mitigation and monitoring requirements, as the BLM's preferred alternative.

Prior to construction, the BLM required BMG to: 1) Submit an approved long-term funding mechanism to satisfy all costs to implement the Contingent Long-Term Groundwater Management Plan; 2) Submit financial guarantee for reclamation; 3) Implement the monitoring and mitigation measures developed with the BLM and discussed in the ROD; and 4) Secure all required federal, state, and local permits. Approval of the BMG Plan of Operations and the FEIS was contingent upon 37 wide-ranging additional requirements as set forth in the ROD. These very specific requirements again illustrate the latitude and flexibility allowed the BLM under the 3809 rules to alter mining proposals to manage and protect public lands at the site-specific level.

Phelps Dodge Tyrone Inc. Copper Mountain South Pit Expansion. Final EA. January 2005. ROD March 2005. Las Cruces Field Office, Las Cruces, New Mexico

Phelps Dodge Tyrone Inc. proposed to expand the existing Copper Mountain Pit at the Tyrone Mine by 31 acres in order to mine and recover approximately 72 million pounds of copper. The BLM determined that an EIS was not necessary and conducted an EA instead. The BLM's preferred alternative consisted of the Phelps Dodge proposed action and a FONSI was issued with additional BLM requirements relative to noxious weed monitoring and control, special status plant and wildlife species, dust control, and acid producing material monitoring. This project was conducted under existing 3809 rules.

Geodesy Resources, Inc. Nick Claims Mining Project. Final EA. January 2005. ROD September 2007. Winnemucca Field Office, Winnemucca, Nevada

Geodesy Resources, Inc. proposed a gold placer mining operation at the Nick Claims in Pershing County, Nevada. Geodesy's initial proposal was modified during the public comment period. The BLM Winnemucca Field Office preferred alternative consisted of the proponent's alternative as modified with seven stipulations added by the BLM during the Environmental Assessment process. These stipulations pertained to cultural resource protection and data recovery, weedy and invasive species control, wildlife mitigation and monitoring relative to the Migratory bird Treaty Act with provisions relative to nesting birds, development of a detailed reclamation plan, spill response and control, permits and Rights of Way, and a fire prevention plan. This project was conducted under the 3809 rules presently in effect.

Matcon Corporation, Inc. Jawbone Canyon Project. Final EA and ROD. 2006. Ridgecrest Field Office, Ridgecrest, California

Matcon Corporation, Inc. submitted a Plan of Operations under the 3809 rules to excavate and commercially develop a deposit of zeolite on claims administered by the BLM Ridgecrest Field Office in California. The BLM determined that an Environmental Assessment would suffice given the nature of the disturbances described in the Plan of Operations. Following an in-depth review and assessment of the Plan of Operations, the BLM required of the proponent six additional mitigation measures and four additional reclamation requirements in addition to those measures and stipulations discussed in CFR Title 43, Subpart 3809.420.

Quaterra Resources, Inc. Uranium Exploration, Rock Mining Claims. Final EA and ROD. September 2006. Arizona Strip Field Office, St. George, Utah

In 2006, Quaterra Resources submitted a Plan of Operations to the BLM for uranium exploration on BLM administered claims on the Kanab Plateau. The BLM required that an Environmental Assessment (EA) be conducted. The EA detailed 11 mitigation measures required of the proponent by the BLM. These measures involved cultural and archaeological resources, noxious weeds, reclamation, drill-hole abandonment, waste management, wildlife, and water quality and usage.

MGC Resources, Inc. Spring Valley Exploration Project. Final EA April 2007. ROD May 3007. Winnemucca Field Office. Winnemucca Nevada

In September 2005, MGC Resources, Inc. submitted a Plan of Operations (upgraded from the Notice level) to the BLM for mineral exploration activities that would cause disturbances on approximately 76 acres of public and private lands in Pershing County, Nevada with various drill pads, sumps, new roads, and ancillary activities that accompany intensive mineral exploration. The BLM, Winnemucca Field Office determined that an Environmental Assessment would suffice to assess the impact of the proposed project. Following completion of the EA and a 30-day comment period, the BLM selected MGC's proposed alternative, but added significant mitigation and monitoring requirements in approving the project in the ROD. Monitoring and mitigation requirements involved prevention of noxious and invasive weeds, surveys or and monitoring for breeding birds and bird nests and their protection under the Migratory Bird Treaty Act. Compliance monitoring was very specific and detailed. This exploration project was conducted under existing 3809 rules.

Cortez Gold Mines. Cortez Hills Expansion Project. Draft EIS. July 2007. No ROD. Battle Mountain Field Office, Battle Mountain, Nevada

Cortez Gold Mines (CGM) proposed a Plan of Operations for a significant expansion of its gold mining and processing operations in the BLM Battle Mountain Field Office jurisdictional area. The Draft EIS was submitted in July 2007. While the Record of Decision has not been released at the time of this document, the final two paragraphs in the Executive Summary are emblematic of BLM's approach to selecting an alternative that differs from the Proposed Action in order to minimize environmental impacts and enforce the land management directive to prevent unnecessary or undue degradation:

> Chapter V, Section B.2.b. of the BLM's National Environmental Policy Act Handbook directs that "the Manager responsible for preparing the EIS should select the BLM's preferred alternative. ... For externally initiated proposals, ... the BLM selects its preferred alternative unless another law prohibits such an expression. ... The selection of the preferred alternative should be based on the environmental analysis as well as consideration of other factors that influence the decision or are required under another statutory authority.
>
> The BLM has selected a preferred alternative based on the analysis in this EIS. This preferred alternative is the alternative that best fulfills the agency's statutory mission and responsibilities, considering economic, environmental, technical, and other factors. The BLM has determined that the preferred alternative is the Proposed Action as outlined in Chapter 2.0 with mitigation measures specified in Chapter 3.0 of this EIS.

Spirit Minerals LP. Big Ledge Project Mining and Processing. Final EA, November 2007. ROD December 3, 2007. Elko Field Office, Elko, Nevada

Spirit Minerals proposed to incorporate an approved Plan of Operations for the Big Ledge barite mine exploration into a mine plan that would allow the company to expand and renew mining for barite on fee lands and federal lands. The BLM determined that an EIS was not necessary and conducted an EA instead. The BLM's preferred alternative consisted of Spirit Minerals proposed action and a FONSI was Issued with additional BLM requirements relative to protection of cultural resources, establishment of buffer strips, fencing, and monitoring and inspection plan.

Tonkin Springs LLC. Tonkin Springs Exploration Project, Draft EA. December 2007. No ROD. Battle Mountain Field Office, Battle Mountain, Nevada

Tonkin Springs LLC submitted a Plan of Operations to upgrade its long-time mineral exploration project from the Notice level. The BLM, Battle Mountain Field Office, determined that an Environmental Assessment would suffice to assess the impact of the proposed project. While no ROD has been issued at the date of this document, it is worth noting that Tonkin Springs LLC committed to 31 specific conditions regarding environmental protection. These conditions were developed with spe-

cific input from the BLM and included air quality, cultural resources, waste, water quality, wetlands, public safety, fire management, wildlife, invasive and weedy species control, and protection of wild horses and burros.

USFS CASE HISTORIES

American Independence Mines and Minerals, Inc. Golden Hand Mine Project. EIS. 1988, 1996, 2003. Krassel Ranger District, Payette National Forest, Idaho

American Independence Mines and Minerals, Inc. first submitted a Plan of Operations to mine on patented claims within the Frank Church-River of No Return Wilderness as authorized under the 1872 Mining Laws. The USFS did not deny the right of the proponent to mine their claims within the wilderness area. However, through a long and disputed process, the USFS required the proponent to make numerous changes to their plan in order to protect the environment and address the many environmental issues that arose relative to access, water quality, development methods, etc. The proponent's proposed plan, Alternative B was not accepted by the USFS during the EIS process. Rather, the USFS's Agency Preferred Alternative was Alternative C which contained significant agency-directed protective changes as allowed under the USFS rules.

Utility Block Co. Cerro Del Pino Pumice Mine. EA and ROD. 2006. Jemez Ranger District, Santa Fe National Forest. Sandoval County, New Mexico

Utility Block Co. submitted a Plan of Operations to mine pumice from an approximate 6 acre open pit on USFS-administered lands. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 19 specific conditions for approval plus a monitoring stipulation. These conditions included safety, threatened and endangered species, visual aesthetics, erosion control, waste management, and others.

Mt. Moriah Stone Quarry. Mount Moriah Stone Quarry Phase II. EA and ROD. December 2006. Ely Ranger District, Humboldt-Toivabe National Forest. White Pine County, Nevada

Mt. Moriah Stone Quarry submitted a Plan of Operations to the USFS to mine quartzite building stone materials from a 50-acre site on USFS-administered lands. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 34 specific conditions for approval plus a monitoring stipulation. These conditions included safety, waste rock, weeds, wildlife, wildfires, erosion control, and reclamation.

Oregon Department of Transportation. Star Rock Pit Project. EA and ROD. 2006. Blue Mountain Ranger District, Malheur National Forest. Grant County, Oregon

The Oregon Department of Transportation submitted a Plan of Operations to the USFS to expand the existing Star Quarry on USFS administered lands to continue to provide high quality aggregate materials, some of which would be used by the USFS. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added 11 multi-component additional environmental protection and design elements, mitigation measures, best management practices and monitoring for approval. This project is a good example of the interaction of the USFS and its rules when the project proponent is another agency (in this case a state agency), and illustrates that the USFS can and generally does add additional conditions to project approval.

Oregon Department of Transportation. Tamarack QuarryExpansion. EA and ROD. 2006. Zig Zag Ranger District, Mt. Hood National Forest. Clackamas County, Oregon

The Oregon Department of Transportation submitted a Plan of Operations to the USFS to expand the existing Tamarack Quarry on USFS administered lands to continue to provide high quality aggregate materials, some of which would be used by the USFS. The USFS determined that an EA would suffice for NEPA analysis of the project. Following analysis of the EA, the USFS issued a FONSI for the project that selected the proponent's alternative but added a number of multi-component additional environmental protection and design elements, mitigation measures, best management practices and monitoring for approval. This project is another good example of the interaction of the USFS and its rules when the project proponent is another agency (in this case a state agency), and illustrates that the USFS can and generally does add additional conditions to project approval.

Mr. Joe Vines. Black Diamond Star Milling Claim. Categorical Exclusion. 2006. Three Rivers Ranger District, Colville National Forest. Ferry County, Washington

Mr. Joe Vines submitted a Plan of Operations to the USFS seeking approval to continue removal of decorative stone materials from his existing claim. Following USFS review and public scoping and notification, the USFS determined to grant a categorical exclusion to NEPA under its rules. However, as conditions of approval under the CE, the USFS required the proponent to adhere to 16 specific conditions pertaining to access, blasting, threatened and endangered species, invasive weeds, reclamation, cultural resources, safety, and others. Even though this project was approved using a CE, it illustrates the ability of the USFS to apply specific environmental protection conditions under the existing rules to any project on USFS administered lands.

Teck Cominco American Inc. 2007 Exploration Drilling. Categorical Exclusion. 2007. Sullivan Ranger District, Colville National Forest. Pend Oreille County, Washington

Teck Cominco American submitted a Plan of Operations to the USFS seeking approval for mineral exploration and drilling 8 drill holes at different locations on USFS administered lands. Following USFS review and public scoping and notification, the USFS determined to grant a categorical exclusion to NEPA under its rules. However, as conditions of approval under the CE, the USFS required the proponent to adhere to 13 specific conditions pertaining to drilling and abandonment of drill holes, access, threatened and endangered species, invasive weeds, reclamation, cultural resources, safety, waste handling, and others. Even though this project was approved using a CE, it is another excellent example of the ability of the USFS toa 1 specific environmental protection conditions under the existing rules to any project on USFS administered lands.

Crown Resources/Kinross Gold. Bockhorn Access Project. January 2007. FEIS and ROD. Tonasket Ranger District, Okanogan and Wenatchee National Forests. Tonasket, Washington

Crown Resources submitted a Plan of Operations to access their patented claims and fee lands for the purpose of developing an underground mine on private land and hauling the ore to an existing milling facility which also is on private land. The USFS prepared an Environmental Assessment but then determined that an EIS would be required to approve the project. During the EIS process, the USFS developed and ultimately selected an Agency Preferred Alternative, Alternative BI, which made a number of modifications to the Proposed Action. In addition to selecting this alternative, the USFS added 15 terms and conditions including a $967,000 reclamation bond for access area reclamation.

Formation Capital Corporation. Idaho Cobalt Project. EIS. February 2007. Salmon-Cobalt Ranger District. Salmon-Challis National Forest, Lemhi County, Idaho

In 2001, Formation Capital submitted a Plan of Operations to mine and process polymetallic ore on USFS unpatented mining claims in the Salmon-Challis National Forest. Over the intervening years, the USFS and Formation negotiated a series of agency-required and requested changes under the USFS 's land management rules. The proponent's proposal was detailed in the DEIS as Alternative II. However, using its authority to select an Agency Preferred Alternative, the USFS selected Alternative IV. Under this alternative, tailings backfill and any waste rock left underground as backfill will be amended with limestone or equivalent material to limit metals mobility and potential impacts to groundwater. The remainder would be disposed of in the disposal facility using a dry stacking method, and thus, eliminating the need for a tailings dam.

USFS Yampa Ranger District. Red Dirt Pit Expansion. EA and ROD. January 2007. Yampa Ranger District, Yampa, Colorado

The USFS proposed to expand the Red Dirt aggregate pit in order to produce additional rock materials for various projects within the Medicine Bow-Routt National Forest. As with any project proponent, once a Plan of Operations was submitted, the NEPA process was triggered. The USFS determined that an EA would suffice given the size and scope of the project. Through internal review of the project and input from several members of the public, the USFS imposed 16 specific conditions on the project, including stipulations regarding timing of operations, wildlife, dust control, traffic control, and others.

Robert and Marjorie Miller. Robin Redbreast Unpatented Lode Claim Mining Plan of Operations.-id ROD. May 2007. Ouray Ranger District, Grand Mesa, Uncompahgre, and Gunnison National Forests, Hinsdale County Colorado

In this highly contentious case that in a previous variation went before the IBLA, the Millers submitted a Plan of Operations to extract minerals under the 1872 Mining Law on USFS unpatented claims located entirely within the Uncompahgre Wilderness Area. The Plan of Operations included access to the claims, mining plans, and plans for on-site housing. The USFS made this statement in the EIS and in the ROD:

> The Millers have established a statutory right to develop the Robin Redbreast lode claim. This is accepted as a premise on which all analysis in the FEIS, and this Decision, is based.

The ROD denies approval of the Plan of Operations. The USFS stated their denial as follows:

> It is my decision that the "plan of operations" as submitted cannot be approved, and that changes or additions to the plan of operations are necessary to minimize or eliminate adverse environmental impacts from mineral activities on National Forest System (NFS) lands, as required by Forest Service Regulations (36 CFR 228A). (See "Legal Framework" FEIS).

The USFS ROD goes on to say:

> I wish to address potential criticism that environmental protection measures required through this decision are imposed either unfairly, or as a purposeful means to prevent mining. I am fully cognizant of the long history of dispute between the agency and the Millers, culminating in decisions by OHA and then IBLA. I have read these decisions and I fully acknowledge the Millers right to mine and develop the mineral deposits on the Robin Redbreast mining claim. This is made clear in the "Legal Framework" section of this ROD, and is a foundation for the EIS (See Chapter I, FEIS).
>
> At the same time, I have a positive duty to ensure that, considering the environmental effects identified in the FEIS, all reasonable and feasible environmental protection measures are in place and are enforced. The fact that this mining claim lays within the Uncompahgre Wilderness at 11,500 feet in elevation calls for protection measures and requirements appropriate for this setting. With the assistance of my Interdisciplinary (ID) Team, I have exercised every possible diligence to ascertain that those measures or alternatives that are required are necessary and reasonable when considering the location and nature of the proposed mining activity and cost and effectiveness of required measures. I have made these decisions specifically in accordance with the requirements at 36 CFR, Part 228, Subpart A, as cited in the Legal Framework section of the FEIS.

The USFS as stated that the Millers are free to resubmit a modified Plan of Operations. However, this case is an example of the agency exercising its ability under the rules to deny approval of a project as submitted because it did not, in the agency's view, comply with all federal laws and regulations.

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