S. HRG. 118–316

PENDING LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
PUBLIC LANDS, FORESTS, AND MINING

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

ON

S. 1281
S. 1742

DECEMBER 12, 2023

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CONTENTS

OPENING STATEMENTS

WITNESSES

ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

The text for each of the bills addressed in this hearing can be found on the Committee's website at: https://www.energy.senate.gov/hearings/2023/12/subcommittee-on-public-lands-forests-and-mining-hearing-to-receive-testimony-on-pending-legislation

PENDING LEGISLATION

TUESDAY, DECEMBER 12, 2023

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS, FORESTS, AND MINING,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:35 p.m. in Room SD–366, Dirksen Senate Office Building, Hon. Catherine Cortez Masto, Chair of the Subcommittee, presiding.

OPENING STATEMENT OF HON. CATHERINE CORTEZ MASTO, U.S. SENATOR FROM NEVADA

Senator CORTEZ MASTO. The hearing will come to order.

This afternoon's agenda includes two bills pertaining to the state of domestic mining on our public lands. The first is S. 1281, which is the Mining Regulatory Clarity Act. It is a bill that I introduced along with my colleague Senator Risch, and we have co-sponsors, Senators Murkowski, Rosen, and Sinema. The other bill is S. 1742, the Clean Energy Minerals Reform Act, which is sponsored by Senator Heinrich. These bills are of great interest to several members of this Committee and to many communities and stakeholders across the country. After Subcommittee members have an opportunity to make an opening statement, the Subcommittee will then hear from representatives of the Department of the Interior and Forest Service, who will provide the Administration's testimony on the bills, and then, representatives from the mining industry and conservation community.

At this time, I would like to comment on one of the two bills, which is the Mining Regulatory Clarity Act, S. 1281. Nevada's critical minerals are the key to our country's clean energy future. They are vital for everything from electric vehicles and solar panels to semiconductors and our military's high-tech weaponry. But right now, the misguided Rosemont decision is threatening to upend mining projects in Nevada and across the country. My bill corrects the situation created by the Rosemont decision, which requires mining companies to prove that all their operations are on mineral-rich land, even for ancillary-use activities that are not planned for mining, such as the placement of waste rock processing, vehicle sheds, and administrative offices. This is a problem for mines in the West, who largely have no other choice but to also utilize public lands near their mines for their accompanying mining support activities. It makes no economic sense for miners to use land that has commercially viable minerals to locate mining support activities. If they are forced to store waste rock or build administrative offices

on mineral-rich land, they can't access the resource. My bill addresses the decision and reaffirms long-held practice and previous legal interpretation that some public land use under a mining claim inherently accompanies exploration and extraction activities for other mining support activities, and it directs mining projects and federal agencies to operate under the pre-existing BLM regulatory framework.

Contrary to what some have alleged, this bill does not open up more land to mining or allow mining in national parks or other protected areas. However, without this bill, mining in the United States would be severely impacted for the foreseeable future, setting back the Biden Administration's efforts to create domestic supply chains for critical minerals, and to meet climate goals. Without mining of critical minerals in our country, these goals cannot be met. The key to our clean energy transition is to invest in the production of clean energy technologies that reduce our carbon emissions, but we cannot create those technologies without critical minerals, and that begins with mining. About 85 percent of my home State of Nevada is comprised of federal public lands. Nevada also has the largest mining program on public land in the country, which BLM estimates supports nearly—it's good-paying jobs, but also 83,000 jobs in the state alone. Mining is at the heart of so many rural communities in my state, and is the key contributor to the economy and social safety net for many rural and remote communities in Nevada. According to the BLM, activity on Nevada's federal lands in 2022 generated an economic output of $29 billion, of which $27 billion is generated from mining activity alone.

Nevada is also a growing nexus for our clean energy and critical mineral future, as it is the only state in the U.S. that encompasses nearly every facet of the critical mineral and advanced battery technology, from the mining of critical mineral deposits, to research and development, to processing and manufacturing, and finally, to recycling operations. We have enough lithium in Nevada to power the world for 85 years, and we are doing this sustainably. I want to note that Nevada has established a robust regulatory framework for managing the mining industry, and we take balancing development and conservation very seriously. Nevada's regulations have been described as one of the most extensive and strict environmental requirements for mining in the world.

As we take the necessary steps to address climate change, we must do so in a fashion that makes America more productive, secure, and self-sufficient. That means we must produce minerals in the United States and not solely rely on foreign sources, some of whom threaten our national security and don't uphold the same environmental and labor standards. All of this means we must address the complications created by the Rosemont decision. I believe we can and must do this in a way that incorporates robust engagement with all stakeholders that minimizes environmental impacts and protects domestic mining operations.

I also want to recognize an area where I know many Committee members agree, including my colleague Senator Heinrich—we have to address issues around abandoned mine cleanup. There is no dispute that we have to do more. For the record, the legacy of abandoned mines that we will discuss today dates almost entirely to the

times before our modern environmental laws and regulations. And although it is not in our Committee's jurisdiction, Senator Heinrich is advocating for his Good Samaritan mining reform legislation to allow interested parties to clean up mine waste that they do not cause. This is a great goal, which I also support.

I hope today's discussion will also help us find common ground on the critical need to enhance domestic production of the minerals that will underpin the decarbonizing of our economy and turn the tide on climate change.

At this time, I would like to recognize Senator Lee for his opening statement.

OPENING STATEMENT OF HON. MIKE LEE,
U.S. SENATOR FROM UTAH

Senator LEE. Thanks so much, Madam Chair, and thanks to all of our witnesses who have agreed to come out today. We appreciate your expertise and all of the insight that you are going to provide today.

We are here to discuss two bills that are at the very heart of our nation's economic security and our energy security. I will be blunt. One of these bills is, in my view, a step in the right direction, and the other one, in my view, is a significant misstep, one that threatens to undermine our prosperity and also our energy independence.

Let's first address S. 1742, the Clean Energy Minerals Reform Act. You know, while the intent of this bill may be to promote responsible mining, the approach, in my view, is misguided. The proposed gross royalty, new fees, and the new more complex permitting process proposed in this bill will, in my view, stifle the very industry that we rely on for critical minerals that are necessary for all sorts of things, including for our energy future. It is ironic and frankly hypocritical that the Biden Administration, which professes to champion mining for critical minerals necessary for clean energy, also supports a bill that would devastate this very same industry. How the Administration can claim to support the mining of critical minerals while simultaneously enacting policies to make those projects economically unviable is beyond my ability to comprehend. This bill is not something I can fairly characterize as just reform. It is a regulatory straightjacket of sorts that will strangle investment and drive our mining industry into the ground.

Contrast this with S. 1281, the Mining Regulatory Clarity Act. This legislation is simple and it is a necessary response to the uncertainty and instability caused by the ruling in *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service* from the Ninth Circuit. This is a ruling that is commonly known as, and referred to as, the Rosemont decision. This bill simply returns the regulatory environment to the pre-Rosemont ruling status quo. And it addresses an issue that was created by the Ninth Circuit in that case and not by Congress. It provides much-needed certainty and stability to mining projects, safeguarding the ability to perform mining activities on federal lands in a responsible, sustainable way.

The Department of the Interior will tell you today that this legislation is not necessary because the issue was addressed in a May 2023 Solicitor's Opinion issued by the Solicitor at Interior. On the contrary, the Solicitor's Opinion creates even more ambiguity, al-

tering decades of BLM regulations, ensuring future litigation and uncertainty for mining on federal lands. S. 1281 provides a durable solution to the issue, the same issue created by the Ninth Circuit and the Rosemont decision, providing for a return to regulatory status quo and clarity for claimholders. Such clarity is vital, not only for the health of our mining sector, but also for the broader economic and strategic interests of our economy.

As members of this Committee and Subcommittee, we can't afford to overlook the immense value that our mining industry brings to our country in so many ways. It's not just about the minerals extracted. It's about jobs and livelihoods, communities and families sustained, and the broader economic security that results from a strong domestic mining sector. So in conclusion, while I appreciate the efforts at reform, we must be cautious not to undermine an industry as integral as this one is to our nation's prosperity and security. And I urge my colleagues to consider the real-world impacts of these legislative proposals and to prioritize pragmatic solutions that support sustainable growth and innovation in our mining sector.

Thanks again to our witnesses. I look forward to your testimony and to a productive discussion on these issues.

Senator CORTEZ MASTO. Thank you.

Senator Manchin.

OPENING STATEMENT OF HON. JOE MANCHIN III, U.S. SENATOR FROM WEST VIRGINIA

The CHAIRMAN. I want to thank all of you for being here today, and I want to thank my friend Senator Cortez Masto for convening this hearing and helping to bring everyone to the table to see if we can find some common ground on two pieces of legislation modifying the operation of the Mining Law of 1872.

In October 2021, I chaired the Committee's first hearing in 13 years on mining law and opportunities for reform. At that hearing, it was clear that there is a significant opportunity before us to find some compromise, to get a fair return for the American people, and to increase the regulatory certainty for mining companies to pursue investments in the United States. Today, we are building on the progress by looking at Senator Cortez Masto's vitally important Mining Regulatory Clarity Act and holding the first legislative hearing on a comprehensive mining reform bill since 2009—Senator Heinrich's Clean Energy Minerals Reform Act. Debate surrounding our public lands and natural resources are very complex, so I am very glad to once more have several of the same expert witnesses before us again for this discussion.

I have been clear, the American people should receive fair compensation for mining the federal minerals that we own, but we must strike a balance and make sure the United States also remains an attractive jurisdiction for mining investments. With a national debt right at $34 trillion, the fact that over $5 billion in federal mineral dollars can be mined each year and sold without a single penny in royalties is just absolutely insane. Right now, the Federal Government spends nearly $300 million a year addressing mines that were abandoned before modern environmental laws and bonding regimes. Unlike the coal industry, where every coal com-

pany pays into an abandoned mine land reclamation fund, there is no revenue stream to address the enormous legacies of environmental degradation from hardrock mining in the U.S., especially the western U.S. If we can find a path forward on this issue while maintaining certainty for claims and the open access that are key aspects of the mining law, our nation will be better off for it.

Now, more than ever, developing new sources of critical minerals is vital to our energy independence and national security with all the bills that we just passed in the 117th Congress. As our industry witnesses have said, reduced investment in mining on federal lands would counteract those efforts. I understand that there is a trade-off when instituting new royalties or fees. These costs affect the ability to invest, especially with our drawn-out permitting processes and the inevitable litigation that follows. This means that anything that raises costs must be paired with benefits when it comes to permitting and legal certainty. With that in mind, it makes all the sense in the world to reverse the impacts of the Rosemont court decision, as Senator Cortez Masto's Mining Regulatory Clarity Act attempts to do. The Rosemont court's holding in the Ninth Circuit upends the Forest Service and BLM regulatory frameworks for permitting new mines. These regulations have been in place since 1974 and 1980, respectively, and the Ninth Circuit's new approach will slow mining development until Congress steps in and fixes it. It's no secret that I remain committed to trying to find a broader deal for permitting reform that would address issues across all types of energy and mining projects.

Some of my colleagues and some in the mining industry feel that with all the new demand for critical minerals, that we should avoid changes to the Mining Law. Instead, I believe that now is the time that we must find bipartisan solutions and improve the law for the sake of industry and our entire nation by addressing abandoned mine lands and instituting a royalty. If we do so, one of the most common objections of mining opponents would be taken off the table, and public support for mining projects would be greatly improved. Because a bipartisan compromise will have durability, it will remove the threat of destructive changes that are raised by mining opponents every few years.

Last Congress we saw a partisan push in the House to change the Mining Law through reconciliation. I am confident that our Committee can show that a bipartisan path is possible. Finding a path forward will not be easy. I think you all know that. Meaningful compromise never is. However, we have the right people in this hearing room right now to make some progress toward that path.

I want to thank the Chairwoman.

Senator CORTEZ MASTO. Thank you.

Senator Heinrich, do you have an opening statement?

OPENING STATEMENT OF HON. MARTIN HEINRICH, U.S. SENATOR FROM NEW MEXICO

Senator HEINRICH. I do. Thank you, Chairwoman Cortez Masto. And I want to thank you for your leadership and for holding this hearing on a topic of critical importance to both of our states and really, to communities across the entire western United States.

I would like to start by asking unanimous consent to submit for the record a number of letters from conservation groups, outdoor recreation organizations, and hunting and fishing groups in support of the Clean Energy Minerals Reform Act.

Senator CORTEZ MASTO. Without objection.

[Letters of support for S. 1742 follow:]

December 12, 2023

Dear Senator Padilla,

On behalf of the undersigned 29 California-based organizations, we write to thank you for co-sponsoring S.1742, the Clean Energy Minerals Reform Act (CEMRA) and for your ongoing leadership on mining reform. As you are aware, on December 12, the Public Lands, Forests, and Mining Subcommittee will hold a legislative hearing on S. 1742, the Clean Energy Minerals Reform Act (CEMRA) and S. 1281, the Mining Regulatory Clarity Act (MRCA). We greatly appreciate your support for CEMRA and respectfully ask you to oppose S. 1281, the Mining Regulatory Clarity Act.

Here in California, our communities are negatively impacted by mineral exploration projects that threaten culturally important and biodiverse landscapes. These include Hot Creek and Conglomerate Mesa in the Eastern Sierra, and Indian Pass and the Cargo Muchacho Mountains in Imperial County. Mining in California is still governed by the Mining Law of 1872. Designed to settle the West, this statute gives broad latitude for mining on public lands without payment of royalties or protections for the environment, Indigenous sacred sites, and public health. Over 150 years later, the law still gives the mining industry a sweetheart deal at the expense of California communities and ecosystems.

CEMRA (S. 1742) provides a more sustainable way to transition to a clean energy future while protecting our land, air, and water. This bill will protect California's places that are simply too special or sacred to be mined; and where mining does occur, CEMRA ensures mining projects will meet high standards for accountability and environmental protection while minimizing community impacts. It also requires mining companies to clean up their own messes to prevent dangerous pollution from impacting the environment long after mining operations end.

On the other hand, MRCA (S. 1281) weakens the 1872 Mining Law by removing the simple requirement that miners actually "discover" valuable minerals. Under the bill, anyone—for a nominal fee—gains absolute rights to occupy public lands in perpetuity, construct massive waste dumps, and build roads and pipelines to the detriment of all other values. This undermines the federal government's longstanding authority to safeguard public lands, threatening the protection of irreplaceable cultural, environmental, and economic resources. This bill would be devastating for California, giving the mining industry almost unlimited power to dictate how we use our public lands.

We appreciate your consideration and respectfully urge the Subcommittee to reject S. 1281, the Mining Regulatory Clarity Act, and instead support S. 1742, the Clean Energy Minerals Reform Act.

Sincerely,

Preston J. Arrow-Weed
President
Ahmut Pipa Foundation

Mason Voehl
Executive Director
Amargosa Conservancy

Kevin Emmerich
Co-Founder
Basin and Range Watch

David F. Gassman
Co-Convenor
Bay Area System Change Not Climate Change

Thomas Helme
Coordinator
California Environmental Justice Coalition

Nick Jensen
Conservation Program Director
California Native Plant Society

Maria Jesus
Conservation Chair
California Native Plant Society, Bristlecone Chapter

Michael J. Painter
Coordinator
Californians for Western Wilderness

Linda Castro
Assistant Policy Director
CalWild

Lisa Belenky
Senior Counsel
Center for Biological Diversity

Ralph Silberstein
President
Community Environmental Advocates Foundation

Jared Naimark
California Mining Organizer
Earthworks

Wendy Schneider
Executive Director
Friends of the Inyo

Bradley Angel
Executive Director
Greenaction for Health and Environmental Justice

Daniela Flores
Executive Organizer
Imperial Valley Equity and Justice Coalition

Jolie Varela
Executive Director
Indigenous Women Hike

Emily Gartenberg
California Policy and Legislative Manager
Jobs to Move America

Kelly Herbinson and Cody Hanford
Co-Executive Directors
Mojave Desert Land Trust

T. Robert Przeklasa
Executive Director
Native American Land Conservancy

Emily Markstein
No Hot Creek Mine

Herman Barahona
Lead Community Organizer
The Sacramento Environmental Justice Coalition

Lynn Boulton
Chair
Sierra Club, Range of Light Group

Carrie Monahan
Associate Director
The Sierra Fund

Aaron Zettler-Mann
Executive Director
South Yuba River Citizens League

Lin Griffith
Steering Committee Member
Stop OAK Expansion Coalition

Janice Schroeder
Core Member
West Berkeley Alliance for Clean Air and Safe Jobs

Laura Cunningham
California Director
Western Watersheds Project

Jose Witt
Mojave Desert Landscape Director
The Wilderness Society

Christobal Illingworth
President
Xanapuk Land Water & Culture Conservancy Inc

Dec. 7, 2023

Dear Members of the Senate Energy & Natural Resources Committee,

We, as faith-based organizations, ask Congress to ensure that laws governing the natural resources central to building a renewable energy economy are just, equitable, and reflect our values. We support the Clean Energy Minerals Reform Act (S. 1742) as a means of accomplishing that goal amidst the rush for certain minerals for the transition away from fossil fuels. We fear that the Mining Regulatory Clarity Act (S. 1281) takes us in the wrong direction.

Survival of sacred lands and water, the health of communities, and respect for Indigenous people depend upon mining reform for the 21st century and beyond. It is clear to us that S. 1742 provides some of the needed protections for the energy transition, while S. 1281 gives too much power to mining companies, including the ability to limit other uses for public lands.

The current law, the Mining Law of 1872, was enacted more than 150 years ago. While much in society has changed since then, the law still allows miners to pay no royalties for precious minerals procured from land under federal jurisdiction and requires no restraints for much of their activities. This issue takes on greater importance as the energy transition proceeds; many of the mineral deposits vital to building a clean energy economy are located near or within areas of cultural and environmental significance to Indigenous and land-based communities.

The Clean Energy Minerals Reform Act requires that companies pay royalties for minerals extracted from public lands, sets strong environmental standards for mineral mining and cleanup of abandoned mines, and mandates meaningful tribal consultation before issuing mineral mining permits that would impact those communities. Importantly, the bill also grants federal land managers authority to protect certain public land from mineral mining.

The Mining Regulatory Clarity Act, meanwhile, undermines the federal government's long-standing authority to safeguard public lands. Under this bill, any company, for a nominal fee, gains absolute rights to occupy land in perpetuity. And it removes the simple requirement under current law that miners actually discover valuable minerals. This means that the mining industry – not local communities nor the federal government – could dictate how we use precious public lands since a company could block any alternate use such as a renewable energy project that would cross its "claimed" public lands.

God tells humanity of our sacred obligation to protect the world and issues a prescient warning: "Take care not to spoil or destroy My world, for if you do, there will be no one to repair it after you." (Midrash Ecclesiastes Rabbah 7:13). The Muslim tradition writes extensively of caring for creation and sites the Qur'an 30:41 in addressing damage to creation: "Corruption (pollution) has spread on land and sea as a result of what people's

hands have done, that He may make them taste a part of what they have done so that they might return [to the Right Path]."

Mining has caused immeasurable destruction and is the No. 1 source of toxic pollution for many communities, such as people living in the Navajo Nation suffering from decades of health hazards from uranium mining. Our sacred places, wilderness, recreation access, and public health are under constant and serious threat from mining without long overdue mining reform.

Pope Francis, in a message to the Latin American Churches and Mining network in 2015, said: "Minerals and, in general the wealth of the earth, of the soil and underground, constitute a precious gift from God that humanity has used for thousands of years..... The entire mining sector is undoubtedly required to effect a radical paradigm change to improve the situation in many countries."

Caring for the Earth, offering moral leadership, and weaving a future for younger generations and all species is accomplished in many ways. The Clean Energy Minerals Reform Act is one strand in the sacred garment of life that we must tend to for the Common Good and Earth, Our Common Home. We, therefore, urge you to pass the reforms in S. 1742 and reject the Mining Regulatory Clarity Act.

Sincerely,

Catholic Climate Covenant
Congregation of Sisters of St. Agnes
Daughters of Wisdom (US Delegation)
Dominican Sisters ~ Grand Rapids
Dominican Sisters of Houston
Dominican Sisters of Sparkill
Hospital Sisters of St. Francis, USA
Interfaith Power & Light
Medical Mission Sisters, Justice Office
Mennonite Central Committee U.S.
Presentation Sisters
Religious of the Sacred Heart of Mary, Western American Area
Sisters of Charity of Seton Hill
Sisters of Charity of Seton Hill Generalate
Sisters of Mercy of the Americas Justice Team
U.S. Federation of the Sisters of St. Joseph
Unitarian Universalists for a Just Economic Community

December 8, 2023

Members of the Senate Energy & Natural Resources Committee,

Regarding the legislative hearing concerning hardrock mining on December 12th in the Public Lands, Forests, and Mining Subcommittee, the ten below organizations write to share our strong support for S. 1742, The Clean Energy Minerals Reform Act (CEMRA), and strong opposition to S. 1281, The Mining Regulatory Clarity Act (MRCA). We believe S. 1742 is a more sustainable way to move into a mineral-dependent clean energy future. On the other hand, we believe S. 1281 will threaten our lands, waters, and wildlife, inhibiting our ability to meet our key climate and environmental justice goals. Enclosed are also two letters signed by dozens of groups, companies and communities laying out the details of concerns with S. 1281 and specific reasons for support of S. 1742.

The transition from a fossil-fuel based economy to a clean energy economy is essential for the viability of our planet and relies upon an assortment of minerals to fuel the shift. The clean energy technologies that we rely on today and that need to scale—such as lithium-ion batteries, wind turbines, and solar panels—are currently made from minerals that must be dug or leached out of the ground, or recovered from recycled materials. Demand for some of these key clean energy minerals, such as graphite, lithium and cobalt, is expected to grow by 400-500% by 2050 to meet the additional demand from the clean energy transition.

Despite the need to confront modern challenges, domestic mining operations are still governed by the Mining Law of 1872. This Civil War-era statute was designed to "settle" the West and still gives broad latitude for both individuals and corporations to extract minerals from public lands without payment of royalties to the federal government and contains no protections for the environment, Indigenous sacred sites, or the public health of communities. Over 150 years later, the law still gives the mining industry a sweetheart deal at the expense of Indigenous rights, conservation, clean energy, recreation and tourism, drinking water supplies, and other important land uses.

We support CEMRA (S. 1742) because a clean energy transition does not require more dirty mining. Some places are simply too special or sacred to be mined, and where mining does occur, we need greater accountability to ensure that projects will meet the highest environmental standards with minimal community impacts. Our laws must also require mining companies to clean up their own messes to prevent dangerous pollution impacting the environment and communities long after mining operations end.

MRCA (S. 1281) is a highly problematic, unprecedented giveaway of America's cherished public lands to mining corporations, upending and reversing over a hundred years of public land law precedent. Under the bill, anyone—for a nominal fee—gains absolute rights to occupy land in perpetuity, construct massive waste dumps, and build roads and pipelines across public lands to the detriment of all other values. Despite what proponents contend, this legislation does NOT return the mining law to the status quo. Instead, S. 1281 weakens the mining law by removing a simple requirement that miners actually discover valuable minerals. This undermines the federal government's longstanding authority to safeguard public lands, threatening the protection of

irreplaceable cultural, environmental, and economic resources. If an alternative use—like an electric transmission line or a renewable energy project—needed to cross "claimed" public lands, mining companies could block the project or demand large sums of money in exchange for giving up their claim. This bill would tip the scales away from communities, the environment, and our clean energy future—giving the mining industry the power to dictate how we use our public lands.

We urge the committee to reject S. 1281, the Mining Regulatory Clarity Act, and instead pursue reforms such as those in S. 1742, the Clean Energy Minerals Reform Act, which will ensure our mining laws meet the needs of our clean energy future.

Sincerely,

Center for Biological Diversity
Earthjustice
Earthworks
Friends of the Earth
League of Conservation Voters
Mennonite Central Committee U.S.
Natural Resources Defense Council
Sierra Club
Southern Utah Wilderness Alliance
The Wilderness Society

December 8, 2023

Dear Senators,

On behalf of our millions of members across the country, the undersigned organizations support the immediate passage of the "Clean Energy Minerals Reform Act of 2023", a bill that would update the antiquated hardrock mining law that has governed public lands mining operations in the United States for 151 years. We write to share the below views for the Senate Energy and Natural Resources Subcommittee on Public Lands, Forests and Mining on December 12th 2023.

Our hardrock mining law dates back to 1872, when the United States incentivized colonization and settlement of what is now the Western part of the country. The mining law allows anyone to stake claims on public land and extract the gold, copper, uranium, and other minerals from the ground without paying any royalties to the public. With an increased focus on the raw materials needed for clean energy supply chains to electrify our economy, there has never been a more important and compelling moment for updating the mining law.

The 1872 Mining Law contains no environmental or community protections. It threatens Indigenous and other mining-affected communities and the scarce drinking water upon which they depend. Hardrock mining releases arsenic, mercury, and lead into communities' air and waters. According to the Environmental Protection Agency, 40 percent of Western headwaters are polluted by mining. In fact, the EPA's Toxics Release Inventory has consistently shown that the hardrock industry releases more toxic chemicals than any other industry.

Even when mining operations cease, the destruction they leave behind impacts communities for generations. Hundreds of thousands of hazardous abandoned mines scar the West, polluting water and land and causing serious hazards. Without dedicated funding for reclamation, these old mines cost U.S. taxpayers tens of billions of dollars to clean up. Congress established a hardrock mines reclamation fund in the Infrastructure Investment and Jobs Act, but appropriated only $5 million in FY 23.

Since 1872, hardrock mining companies have taken more than $300 billion worth of minerals from public land, without paying a dime in royalties to taxpayers. The Clean Energy Minerals Reform Act of 2023 provides a fair return to taxpayers for our minerals.

For 151 years, the hardrock mining law has prioritized the interests of mining corporations over the needs of the American people and Indigenous and other mining-affected communities. Today, new mining threatens many sacred and irreplaceable places, including national parks, yet community members and land managers have been unable to reject mine proposals where they do not belong.

This bill would help remedy this long standing injustice and:

• Protect water resources and habitats by establishing strong environmental and cleanup standards specific to mining;

• Provide a fair return to taxpayers by ensuring a reasonable royalty on minerals to fund the Infrastructure law's hardrock abandoned mine lands program;

• Defend Indigenous and other mining-affected communities and special places from irresponsible mining by giving land managers the ability to balance mining with other uses of the public's lands.

The Clean Energy Minerals Reform Act of 2023 acknowledges that growing demand for certain materials may require new hardrock mines, including some on federal public lands. Giving more discretion for land use and putting hardrock minerals on the same level as other uses—including oil, gas, and coal companies–would help provide certainty to the permitting process and result in more timely and socially acceptable decisions.

We are grateful to Sen. Heinrich for this important effort to improve hardrock mining policy and urge broad support within Congress. We look forward to working with Senator Heinrich on these common-sense solutions to modernize our hardrock mining law to fit a 21st century industry, and to begin to fix the toxic legacy left behind by abandoned mines over the last 151 years.

Sincerely,

Adorers of the Blood of Christ US Region JPIC office
Ahmut Pipa Foundation
Alaska Community Action on Toxics
ALASKA LONGLINE FISHERMEN'S ASSOCIATION
Alaska Wilderness League
Amigos Bravos
Arizona Mining Reform Coalition
Arkansas Valley Conservation Coalition (AVCC)
Azul
Black Hills Clean Water Alliance
Brooks Range Council
Californians for Western Wilderness
CALSTART
Cascade Forest Conservancy
Center for Biological Diversity
Citizens to Protect Smith Valley (NV)
Climate + Community Project
Climate Hawks Vote
Coalition to SAVE the Menominee River, Inc.

Community Environmental Advocates Foundation
Conservation Northwest
Cook Inletkeeper
Copper Country Alliance
Cultural Survival
Dakota Rural Action
Deer Tail Scientific
Earthjustice
Earthworks
Endangered Species Coalition
Ethical Metalsmiths
Friends of the Earth US
Friends of the Inyo
Friends of the Sonoran Desert
Georgia Interfaith Power and Light
Gila Resources Information Project
Global Witness
Grand Canyon Trust
Grand Junction Area Broadband- GreatOld Broads for Wilderness
Great Basin Resource Watch
Great Bear Foundation
Great Old Broads for Wilderness, Bozeman Broadband
Greater Yellowstone Coalition
GreenLatinos
Healthy Environment Alliance of Utah (HEAL Utah)
HECHO Hispanics Enjoying Camping Hunting and the Outdoors
High Country Conservation Advocates
Idaho Conservation League
Idaho Rivers United
Information Network for Responsible Mining
Inland Ocean Coalition
Kachemak Bay Conservation Society
Kalmiopsis Audubon Society
Kamloops Moms for Clean Air
League of Conservation Voters
Los Padres ForestWatch
Lynn Canal Conservation
Malach Consulting
Mining Impact Coalition of Wisconsin
Moms Clean Air Force
Mother Kuskokwim Tribal Coalition
Multicultural Alliance for a Safe Environment
Native American Land Conservancy
Native Movement
Native Village of Fort Yukon
Natural Resources Defense Council

New Energy Nexus
New Mexico Environmental Law Center
New Mexico Sportsmen
New Mexico Wild
New Mexico Wildlife Federation
No Hot Creek Mine
Northern Alaska Environmental Center
Nuclear Information and Resource Service
Okanogan Highlands Alliance
Oregon Natural Desert Association
Oregonians For Wild Utah
Oxfam America
Patagonia
Patagonia Area Resource Alliance
Portneuf Resource Council
Powder River Basin Resource Council
Progressive Leadership Alliance of Nevada
Protect the Kobuk
Publish What You Pay - United States
Rio Grande Indivisible, New Mexico
Rivers Without Borders
Rock Creek Alliance
Royal Gorge Preservation Project
San Juan Citizens Alliance
Save Our Cabinets
Save The Scenic Santa Ritas
Save the South Fork Salmon, Inc.
Sierra Club
Silver Valley Community Resource Center
Sisters of Mercy of the Americas Justice Team
Sky Island Alliance
Southeast Alaska Conservation Council
Southeast Alaska Indigenous Transboundary Commission
Southern Alliance for Clean Energy
Southern Utah Wilderness Alliance
The Wilderness Society
Tó Nizhóní Ání
Trustees for Alaska
Tucson Audubon Society
United Women in Faith
Upper Peninsula Environmental Fund
Waterkeeper Alliance
WaterLegacy
Waterway Advocates
Western Organization of Resource Councils
Western Shoshone Defense Project

Western Watersheds Project
Wild Connections
WildEarth Guardians
Wisconsin Mining Impact Coalition

December 11th, 2023

Sen. Catherine Cortez Masto
Chair, Subcommittee on Public Lands, Forests, and Mining
520 Hart Senate Office Building
Washington, DC 20510

Sen. Mike Lee
Ranking Member, Subcommittee on Public Lands, Forests, and Mining
363 Russell Senate Office Building
Washington, D.C. 20510

RE: December 12th Subcommittee Hearing on Hardrock Mining Legislation.

Dear Chair Cortez Masto, Ranking Member Lee, and members of the Subcommittee:

On behalf of the human-powered outdoor recreation community, the outdoor industry, and conservation-minded businesses, we write to express strong support for the Clean Energy Minerals Reform Act of 2023 (S. 1742) and strong opposition to the Mining Regulatory Clarity Act of 2023 (S. 1281).

Improving federal mining policy and accelerating our society's transition towards renewable energy are both critically important priorities for our communities. To this end, S. 1742 would make long-overdue updates to U.S. mining policy that would allow hardrock mining projects to proceed in a more responsible way while making mining more responsive to concerns around environmental justice, conservation values, and outdoor recreation. Conversely, S. 1281 would exacerbate some of the most egregious aspects of America's outdated mining laws, making it more difficult for communities to protect themselves from pollution, while harming taxpayers and further degrading important environmental, cultural, and recreational values on public lands.

The outdoor recreation community and the outdoor economy are profoundly affected by hardrock mining. Improperly sited mines have the potential to irreversibly degrade outdoor recreation resources like rivers, trails, and climbing

areas, as well as important cultural sites and conservation lands—often areas that our community considers irreplaceable. Recreationists are also affected by legacy mining pollution, which the EPA estimates has polluted 40% of headwaters in western U.S. watersheds.[1] At least 140,000 abandoned hardrock mine features exist across federal public lands, many of which pose physical hazards to people, as well as environmental hazards that threaten public health, wildlife, and aquatic ecosystems.[2] Together, these mining impacts threaten the outdoor recreation experience on federal public lands and also threaten America's growing $1.1 trillion outdoor recreation economy.

The outsized impacts of mining on outdoor recreation stem in large part from the 1872 Mining Law, a relic of the era of westward expansion that still governs hardrock mining on federal public lands in the west today. The law considers mining to be the highest and best use of public lands and gives mining companies unfettered access to public lands in a way that no other user group enjoys. Under the law, mining companies do not pay royalties to the federal government, and land managers are often hamstrung in their ability to say no to projects that would have unacceptably deleterious effects on other resource values. The 1872 Mining Law also pre-dates the modern environmental movement and modern forms of outdoor recreation and does not provide adequate safeguards for sensitive environmental resources that are important to our community. These concerns collectively create an enormous level of uncertainty with regard to future mining threats to recreation lands, making it more difficult for our community to support mining projects that may be needed to support the renewable energy transition.

Our comments on individual bills are outlined below.

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[1] U.S. Environmental Protection Agency, EPA-840-B-00-001, Liquid Assets 2000: America's Water Resources at a Turning Point (2000).

[2] Abandoned Hardrock Mines: Information on Number of Mines, Expenditures, and Factors that Limit Efforts to Address Hazards. United States Government Accountability Office. March 2020. Report to the Ranking Member, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, U.S. Senate, https://www.gao.gov/products/gao-20-238.

Clean Energy Minerals Reform Act of 2023 (S. 1742)

Our organizations strongly support the Clean Energy Minerals Reform Act of 2023 (CEMRA), which proposes greatly needed reforms to the 1872 Mining Law. For more than 150 years, the law has elevated hardrock mining above other uses of federal public lands, including outdoor recreation, and has encouraged irresponsible mineral development without environmental standards or a meaningful return for taxpayers. CEMRA provides a comprehensive, long overdue update to federal mining policy that, if passed, would provide the planning guidance, environmental safeguards, and taxpayer protections needed to support a necessary responsible increase in federal production of critical minerals. We especially appreciate that CEMRA:

- *Eliminates patenting of federal lands*. § 101 would permanently end the practice of patenting federal lands, whereby individuals and corporations can purchase public lands from the federal government at a nominal price. Although Congress has imposed temporary moratoriums on new patent applications since 1994, a permanent fix is needed for this outdated policy.
- *Establishes royalties for hardrock mining*. Title II would establish royalties to help ensure that taxpayers see more of the financial benefits of hardrock mining on federal lands. Revenues would support the Hardrock Minerals Reclamation Fund established in Title IV.
- *Requires permits for exploration and mining operations*. Sections 302 and 303 would establish a permitting system for hardrock mine exploration and mining operations, respectively. These permit systems would help prevent degradation of public lands and mandate better planning for mining activities.
- *Creates new pathways for protecting special places*. Section 307 creates a process by which local land managers review important conservation areas, including Areas of Critical Environmental Concern, Wilderness-quality lands, and eligible Wild & Scenic Rivers, and make a determination as to whether lands should be withdrawn from mining. This section also allows states, Tribes, and local governments to petition the federal government to withdraw lands from mining.
- *Strengthens tribal consultation.* Tribes deserve consistent, early opportunities to consult with federal agencies about mining proposals before permitting

decisions are made. § 310 would require that tribal consultations be conducted in accordance with the 2022 Presidential Memorandum on Uniform Standards for Tribal Consultation,[3] providing consistency for the consultation process related to mining.

- *Address legacy mining pollution.* Title IV would create a Hardrock Minerals Reclamation Fund that would carry out the abandoned hardrock mine cleanup program established by Section 40704 of the Infrastructure Investment and Jobs Act. Funds for the program would come from a portion of royalties, rents, and fees generated by other provisions of CEMRA. This cleanup program is greatly needed to remediate ongoing issues like soil contamination and acid mine drainage that cause public health and safety issues for outdoor recreationists and others.

These reforms are critically needed to bring hardrock mining policy into the 21st century. Our organizations encourage you to advance this important legislation in the 118th Congress.

Mining Regulatory Clarity Act of 2023 (S. 1281)

Our organizations strongly oppose the Mining Regulatory Clarity Act of 2023 (MRCA), which would grant mining companies a permanent right to use and occupy mining claims on federal lands regardless of whether a valuable mineral deposit has been discovered. This legislation was developed partly in response to the recent *Rosemont* court decision, which blocked the Rosemont copper mine in Arizona.[4] In *Rosemont*, the 9th Circuit affirmed an earlier decision invalidating Hudbay Minerals' proposal to store large amounts of mining waste on claims nearby the actual mine site, where valuable minerals had not been discovered. The court found that, because they lacked a valuable mineral deposit, the mining claims proposed for waste storage were invalid and thus conferred no right to Hudbay Minerals to use and occupy lands.

Rather than taking a targeted approach to addressing mining waste storage, the MRCA instead provides a broad guarantee that miners can "use, occupy, and

[3] Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (December 5, 2022).
[4] *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022).

conduct operations" in perpetuity—a right not granted by the 1872 Mining Law. This amounts to a significant weakening of the already-inadequate 1872 Mining Law and has far-reaching implications for multiple public lands values, as well as for frontline communities.

We are highly concerned that the right to permanently use and occupy federal lands granted by § 2(e)(1)(B) could amount to a *de facto* privatization of public land, whereby mining companies could assert a right to preclude other uses of public land within mining claims, including recreational uses. Because of the chaotic claim staking system facilitated by the 1872 Mining Law, hundreds of thousands of mining claims exist across federal public lands, many of which overlap with popular outdoor recreation destinations. Under the MRCA, claimants could foreseeably prevent access to these sites or charge a fee for visitors. This could create significant new barriers to building and improving recreation infrastructure like trail systems that would bisect a mining claim. A version of this scenario infamously played out in the early 1900s when future Senator Ralph Cameron argued that a series of mining claims along the popular Bright Angel Trail in what is now Grand Canyon National Park allowed him to charge a fee to tourists visiting the trail. In this case, Cameron's claims were found invalid due to a lack of a valuable mineral deposit.[5] By granting claimants a permanent right to occupy federal lands regardless of whether a valuable mineral deposit has been discovered, the MRCA invites similar types of abuses, exacerbating mining's burden on taxpayers and precluding other uses of public lands.

In short, S. 1281 takes mining reform in the wrong direction. We encourage the Subcommittee to instead focus on CEMRA and other mining reform efforts that protect outdoor recreation and other critical public lands values and help develop systems that support orderly and responsible mining.

* * *

Thank you for holding this important hearing. We look forward to working with you to modernize hardrock mining and transition our society towards clean energy.

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[5] *Cameron v. United States*, 252 U.S. 450, 456 (1920).

Best regards,

Louis Geltman
Vice President for Policy and Government Relations
Outdoor Alliance

Shoren Brown
Vice President, Public Affairs
The Conservation Alliance

Rich Harper
Director of Government Affairs
Outdoor Industry Association

Our Organizations

Outdoor Alliance is a coalition of ten member-based organizations representing the human powered outdoor recreation community. The coalition includes Access Fund, American Canoe Association, American Whitewater, International Mountain Bicycling Association, Winter Wildlands Alliance, The Mountaineers, the American Alpine Club, the Mazamas, Colorado Mountain Club, and Surfrider Foundation and represents the interests of the millions of Americans who climb, paddle, mountain bike, backcountry ski and snowshoe, and enjoy coastal recreation on our nation's public lands, waters, and snowscapes.

The Conservation Alliance is an organization of like-minded businesses whose collective contributions support grassroots environmental organizations and their efforts to protect wild places where outdoor enthusiasts recreate. Alliance funds have played a key role in protecting rivers, trails, wildlands and climbing areas. Membership in the Alliance is open to all companies who care about protecting our most threatened wild places for habitat and outdoor recreation. Since its inception in 1989, The Conservation Alliance has contributed more than $21 million, helped to protect more than 51 million acres of wildlands; protect 3,107 miles of rivers; stop or remove 34 dams; designate five marine reserves; and purchase 14 climbing areas. For complete information on The Conservation Alliance, see www.conservationalliance.com.

Based in Boulder, Colorado, with offices in Washington, D.C., Outdoor Industry Association (OIA) is a catalyst for meaningful change. A member-based collective, OIA is a passionate group of business leaders, climate experts, policy makers, and outdoor enthusiasts committed to sustainable economic growth and climate positivity while protecting—and growing access to—the benefits of the outdoors for everyone. For more than 30 years, OIA has catalyzed a thriving outdoor industry by supporting the success of every member company across four critically aligned areas: market research, sustainability, government affairs, and inclusive participation. OIA delivers success for its members through education, events, and business services in the form of solutions and strategies, consultation, collaboration, and opportunities for collective action. For more information, visit outdoorindustry.org.

December 11, 2023

Dear Senator Hickenlooper,

On behalf of the undersigned 5 Colorado-based organizations, we write to urge you to co-sponsor S.1742, the Clean Energy Minerals Reform Act (CEMRA) and respectfully ask you to oppose S. 1281, the Mining Regulatory Clarity Act. As you are aware, on December 12, the Public Lands, Forests, and Mining Subcommittee will hold a legislative hearing on both bills.

Just eight years removed from the devastating Gold King Mine disaster, our Colorado communities remain negatively impacted by mining projects that threaten water, biodiversity, and culturally important landscapes. These include gold exploration in a Wilderness Study Area, speculative drilling inside the proposed Dolores River National Conservation Area, "zombie" uranium mines reviving in four counties after decades on "standby," the return of cyanide leach processing to Leadville, and a significant increase in claimstaking on public lands across the state since 2019. Mining in Colorado is still governed by the Mining Law of 1872. Designed to "settle" the West, this statute gives broad latitude for mining on public lands without payment of royalties or protections for the environment, Indigenous sacred sites, and public health. Over 150 years later, the law still gives the mining industry a sweetheart deal at the expense of Colorado's communities and ecosystems.

CEMRA (S. 1742) provides a more sustainable way to transition to a clean energy future while protecting our land, air, and water. This bill will protect Colorado's places that are simply too special or sacred to be mined; and where mining does occur, CEMRA ensures mining projects will meet high standards for accountability and environmental protection while minimizing community impacts. It also requires mining companies to clean up their own messes to prevent dangerous pollution from impacting the environment long after mining operations end.

On the other hand, MRCA (S. 1281) weakens the 1872 Mining Law by removing the simple requirement that miners actually "discover" valuable minerals. Under the bill, anyone—for a nominal fee—gains absolute rights to occupy public lands in perpetuity, construct massive waste dumps, and build roads and pipelines to the detriment of all other values. This undermines the federal government's longstanding authority to safeguard public lands, threatening the protection of irreplaceable cultural, environmental, and economic resources. This bill would be devastating for Colorado, giving the mining industry almost unlimited power to dictate how we use our public lands.

We appreciate your consideration and respectfully urge the Subcommittee to reject S. 1281, the Mining Regulatory Clarity Act, and instead support S. 1742, the Clean Energy Minerals Reform Act.

Sincerely,

Information Network for Responsible Mining

Western Colorado Alliance

4Corners Broadband/Great Old Broads for Wilderness

Rocky Mountain Wild

Conservation Colorado

Senator HEINRICH. The law that governs metal mining on most public lands in the West was written in 1872, more than 150 years ago. Yellowstone had been a national park for barely two months when the Mining Law was signed and New Mexico would still be a territory for another 40 years. We have learned a lot since 1872. How to manage public land for public benefit. How to conserve habitat for sustainable fish and wildlife populations. How to protect our drinking and irrigation water from toxic pollution. And how to ensure a fair return for the commercial development of resources that belong to the American people. And yet, our hardrock mining law remains stuck in the 19th century right when we need to build the clean energy technologies of the 21st century. The 1872 Mining Law charges no royalties for mining federal hardrock minerals. It provides no mechanism to clean up old mines that pollute our rivers and streams. And it provides no way for communities to identify places that are simply inappropriate places for a mine.

If you mine coal that is owned by the American people, you have to bid on a lease, pay a royalty, and pay into a fund that cleans up old abandoned coal mines. Hardrock mining is not responsible for any of this. Our national forests and BLM lands are multiple-use lands, and we have public planning processes that decide what activities will happen on which parcel of public land. Recreation, grazing, transmission lines, pipelines, wildlife habitat, wilderness, oil and gas development, hunting and fishing, all of these are weighed and balanced in the public planning process. But because our mining laws are still a holdover from the Homestead Era, hardrock mining is exempt from this entire process. Unless there is a specific withdrawal of the land from mineral development, hardrock mining takes priority over all other uses of public land. All public land users deserve to be on equal footing with companies that want to mine on our public lands. We need responsible mineral development in this country, and public lands can play an important role in that development.

But we can't do that with the outdated law that we have on the books. Mining law reform can finally bring public-land mining into the 21st century and provide the minerals that we need for the energy technologies of today. Chairwoman Cortez Masto, I look forward to working both with you and all of our colleagues on this Committee to figure out how we can make our mining laws work for today's needs. And thank you again for holding this hearing.

Senator CORTEZ MASTO. Thank you.

If there are no more opening statements from the members, let's get to the witness panel, and I would like to introduce Dr. Steve Feldgus, the Deputy Assistant Secretary for Land and Minerals Management at the Department of the Interior.

Troy—Heithecker?

Mr. HEITHECKER. Heithecker, yes.

Senator CORTEZ MASTO. Heithecker—the Associate Deputy Chief for the U.S. Forest Service.

Rich Haddock, who is the Senior Advisor to Barrick Gold Corporation.

Chris Wood, President and CEO of Trout Unlimited.

And Katie Sweeney, Executive Vice President and COO for the National Mining Association.

I would ask each of you to limit your remarks to no more than five minutes. After everyone on the panel has given their statement, we will turn to a round of questions from the Committee members.

Dr. Feldgus, we will start with you.

STATEMENT OF DR. STEVE FELDGUS, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR

Dr. FELDGUS. Thank you very much.

Chairwoman Cortez Masto, Ranking Member Lee, members of the Subcommittee, my name is Steve Feldgus, Deputy Assistant Secretary for Land and Minerals Management at the Department of the Interior, and thank you for the opportunity to provide testimony on S. 1281, the Mining Regulatory Clarity Act and S. 1742, the Clean Energy Minerals Reform Act.

The Biden-Harris Administration welcomes the opportunity to work with the Subcommittee to update our mining policies, reform the general Mining Law of 1872, and promote the sustainable and responsible domestic production of minerals. The Administration recognizes the important role that mining plays in the modern economy and the growing need for responsibly sourced minerals to meet our climate, infrastructure, and global competitiveness goals.

Starting with S. 1742, the Clean Energy Mineral Reform Act, the legislation would make significant changes to the way that the administration of mining operations occurs on federal lands. Among other provisions, the bill would establish a royalty for hardrock minerals produced from federal lands, establish a new permitting process for exploration and mining, enact environmental and reclamation reforms to protect special areas from mining, and establish a funding source for the remediation of legacy hardrock mining pollution. The Department supports many of the provisions in S. 1742, which would govern federal hardrock mineral resources similar to the way that other mineral resources are managed on federal lands and align with the recommendations of the Interagency Working Group on Mining Laws, Regulations, and Permitting. The bill would help generate a fair return for the American taxpayer, conserve unique resources in special areas, and enhance tribal consultation. And the tribal consultation requirements, in particular, align with our commitment to strengthening government-to-government relationships with tribal nations, reduce conflicts with local communities, and improve environmental, social, and economic outcomes.

In particular, the Department supports the bill's establishment of a royalty for hardrock minerals, similar to how oil, gas, and coal production is currently managed and as recently recommended by the Interagency Working Group. The Department notes that hardrock mining is the only extractive industry on public lands that does not pay royalties, while nearly every other state and country charges royalties on hardrock mineral production. In addition to providing taxpayers with a fair return, establishing a royalty rate for hardrock production would also help provide funding that could be used to mitigate the potential adverse environmental and social impacts from mineral development. This, in turn, would

help improve economic and public health outcomes for underserved communities. The Department also supports the proposal in the legislation to use claim maintenance fees above what the Bureau of Land Management needs to fund its program to help fund abandoned hardrock mine reclamation, which does not currently have a dedicated source of funding.

We would like the opportunity to work with the sponsor and the Subcommittee on a few amendments to the bill, including the addition of language to provide adequate liability protections for Good Samaritans wishing to undertake cleanup activities.

Turning to S. 1281, the Mining Regulatory Clarity Act, the bill would define the term "operations" with respect to locatable minerals, which would include various mining activities, the reclamation of areas disturbed by those activities, and any actions reasonably incident to those activities, such as the construction and maintenance of any necessary infrastructure, regardless of whether it's carried out on a mining claim. The bill would also grant mining claimants the right to use, occupy, and conduct operations on public land with or without the discovery of a valuable mineral deposit. The claimants would only need to have paid the location fee and the claim maintenance fee, or those claimants who qualify for a small miner waiver may instead comply with the required work assessment. The Department's understanding is that S. 1281 seeks to address a ruling in the Ninth Circuit's Rosemont decision.

While the Department supports the goals of S. 1281, it is important to note that we have already taken action to address this issue administratively by issuing a Solicitor's M-Opinion that identifies options for potentially impacted operators. The Department is also concerned that, as written, the bill could lead to a number of unintended consequences. In particular, granting claimants the right of use and occupancy prior to showing the discovery of a valuable mineral greatly expands the rights conferred under the Mining Law. This could encourage the filing of nuisance claims that attempt to interfere with or prevent other authorized uses and could lead to unauthorized non-mining industrial uses and residential occupancy.

The Department would like to work with the sponsor and the Subcommittee on improvements to the bill that maintain the intent of the legislation while limiting potential unintended consequences.

Thank you again for the opportunity to testify on these bills, and I look forward to your questions.

[The prepared statement of Dr. Feldgus follows:]

Statement of
Steve Feldgus, Ph.D.
Deputy Assistant Secretary
Land and Minerals Management
U.S. Department of the Interior

Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests and Mining

Hearing on
S. 1742, Clean Energy Minerals Reform Act
S. 1281, Mining Regulatory Clarity Act

December 12, 2023

Introduction

Thank you for the opportunity to testify on S. 1742, the Clean Energy Minerals Reform Act, and S. 1281, the Mining Regulatory Clarity Act. These bills address issues related to the Federal mining programs managed by the Bureau of Land Management (BLM). Specifically, S. 1742 would make fundamental reforms to the General Mining Law of 1872 (Mining Law), changing the way that locatable minerals on public lands are developed, and S. 1281 would change claimant rights on Federal mining claims.

At the time of its enactment over 151 years ago, Congress designed the Mining Law to encourage mineral exploration and development on Federal lands and the settlement of the West. The law allowed citizens to freely explore public lands for valuable minerals (such as gold, silver, and copper), to stake a claim if minerals were discovered, and to patent the claim – gaining legal title to the land for a nominal cost – to encourage development of the minerals. In keeping with the era in which the law was enacted, Congress did not include any provisions to account for the environmental degradation that mining would have on its surrounding communities, nor did it provide for royalties or a comprehensive system to evaluate, permit, develop, and reclaim mines to ensure sustainable mining and healthy public lands for future generations. Future land management and environmental laws, such as the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, and others, would subsequently establish the legal and regulatory structure under which U.S. mining now operates.

The Mineral Leasing Act of 1920 and the Materials Act of 1947 established a process to provide the taxpayer with a financial return for those minerals that are disposed of through sale or lease. For minerals subject to disposal under the Mining Law, mining claimants are required to pay some fees, including one-time fees to record mining claims with the BLM, and a yearly maintenance fee unless certain waiver requirements are met. But the Mining Law does not require operators to report the quantity or type of minerals that are produced by their operations to the BLM and, most importantly, they pay no royalties to the U.S. government when they remove valuable mineral resources from public lands. This is in sharp contrast to the royalty

payments required for the extraction of oil, gas, coal, and other leasable minerals from public lands.

Over the years, the management of public lands has evolved to meet the needs of our nation. The Department of the Interior (Department) recognizes both the historic and defining contribution that mining provided in settling the West and the important role that mining will continue to play in meeting the growing need for responsibly sourced critical minerals to achieve our shared climate, infrastructure, and global competitiveness goals. However, we believe that the Mining Law is an inadequate structural framework and ultimately serves as an impediment to a robust and responsible domestic mining industry.

We appreciate the efforts of the Sponsors and the Subcommittee on these pressing issues, and we look forward to continuing to work with Congress in considering potential reforms to the Federal mining program.

S. 1742, Clean Energy Minerals Reform Act

S. 1742 would make significant changes to the way that the administration of mining operations occurs on Federal lands. Among other provisions, the bill would establish a royalty for any minerals produced from Federal lands, establish a new permitting process for exploration and mining, enact environmental and reclamation reforms to protect special areas from mining, and establish a funding source to ensure full remediation of legacy hardrock mining pollution.

Locatable Mineral Deposits (Title I)

Title I of S. 1742 would permanently codify the mining patent moratorium that Congress initially instituted in 1994 and has since included in annual appropriations bills. It would also prohibit the processing of any patent application if the land has been subsequently withdrawn from the general mining laws. Title I would increase the claim maintenance fee to $200 per year and the location fee to a minimum of $50, both of which would be adjusted every five years by the Secretary of the Interior (Secretary). Finally, Title I would allow the Secretary to void claims if the claimholder cannot demonstrate that it has been used exclusively for mineral activities.

The Department supports the adjustment of fees associated with mineral development on Federal lands, and strongly supports the use of claim maintenance fees above those needed to fund the BLM Mining Law Administration program for abandoned hardrock mine reclamation, which aligns with one of the recommendations of the Interagency Working Group on Mining Laws, Regulations, and Permitting (IWG). We would like to continue working with the Sponsor and the Subcommittee on some technical amendments, including ensuring that the bill maintains existing protections for withdrawn lands such as National Park System units. We would also like to work with the Sponsor and the Subcommittee on the most appropriate level for fees in the bill, since the Department notes that the next regularly-scheduled inflation adjustment to claim maintenance fees may bring them close to the level the bill currently specifies.

Royalties (Title II)

Title II would require any Federal mineral development to be subject to a minimum royalty of five percent, but not more than eight percent, of gross income. This title also allows the Secretary to set a royalty rate on individual minerals. However, Title II provides that no royalties will be

assessed on any existing mine that is in productive status under an approved mine plan as of the date of enactment.

The Department supports the establishment of a royalty for all minerals extracted from public lands, similar to how oil, gas, and coal production is currently managed, and as recently recommended by the IWG. The Department notes that hardrock mining is the only extractive industry on public lands that does not pay royalties, while nearly all states and other countries charge royalties on hardrock mineral production. In addition to providing taxpayers with a fair return for this important national resource, establishing a royalty rate for hardrock mineral production would also help provide funding that could be used to mitigate potential adverse environmental and social impacts from mineral development. This, in turn, would help improve economic and public health outcomes for underserved communities.

Mineral Activities (Title III)

Title III of S. 1742 requires those seeking to engage in surface-disturbing mineral activities above casual use on Federal land to obtain exploration or mining permits. In order to receive a permit for exploration activities, applicants would need to provide detailed information about their proposed activities, including an exploration plan demonstrating best management practices; a description of potential impacts to groundwater and surface water; evidence of adequate financial assurance; and reclamation, monitoring, and evaluation plans, among other requirements. Applicants for mining permits would be required to submit similar information, including a description of the condition of the land and water resources of the area before mining activities are initiated. Under the bill, mining permits would be for a term of 30 years and would continue thereafter so long as locatable minerals are produced in commercial quantities from the permit area; the bill does not specify a time duration for exploration permits.

In addition, Title III of S. 1742 requires that holders of mining permits pay a land use fee equal to four times the amount of the claim maintenance fee described in Title I for each 20 acres included within the permit area. This land use fee would be in addition to the claim maintenance fee and would be subject to adjustment as necessary to correspond to any adjustment in the claim maintenance fees as outlined in Title I. Furthermore, if mineral activities are discontinued for a period other than a temporary cessation approved by the Secretary or allowed under the specific permit, reclamation would be required to begin immediately.

Excluding the current requirement to establish trusts to fund long-term water treatment, Title III would also support performance-based reclamation standards and specific financial assurance requirements for operations conducted under an exploration or mining permit and require that such financial assurances are sufficient to cover the cost of long-term water treatment, if necessary.

Title III would further require – within 3 years of enactment – a complete review of most of the BLM's National Conservation Lands, National Parks, National Wildlife Refuges, Areas of Critical Environmental Concern, and certain other Federal lands. After the completion of this review, Title III would authorize the Secretary to remove these lands from the operation of the Mining Law, subject to valid existing rights, based on the criteria outlined in section 202(c) of FLPMA. If the Secretary determines that these lands should be removed from the operation of

the Mining Law, they would be segregated until the applicable land use plan was revised or amended to reflect the removal. Such land use plan revisions or amendments would be required to be completed within 1 year.

Additionally, Title III of S. 1742 would require inspections of permitted mineral production activities at least once per quarter. After reclamation activities begin, inspections would be required at least twice per year. Finally, Title III would require the Secretary to conduct active, meaningful, and timely consultation with all applicable Tribes before undertaking any mineral activities that may have a direct, indirect, or cumulative impact to certain Tribal lands and interests.

The Department supports provisions in Title III that would govern Federal hardrock mineral resources similar to the way other mineral resources are managed on Federal lands; incorporate best management practices to avoid, minimize, and remediate potential impacts associated with mineral production activities; generate a fair return for the American taxpayer; and conserve unique resources in special areas. With respect to the review required by the bill, the Department notes that all of the BLM's National Conservation Lands would not be included. We recommend that the bill's definition of "National Conservation System unit" be amended to encompass all units of the BLM's National Conservation Lands. The Department also supports the Tribal consultation requirements in this Title, as they align with our commitment to strengthening the government-to-government relationship with Tribal Nations. Title III would enhance consultation, which will reduce conflicts with local communities and improve environmental, social, and economic outcomes, and thereby improve overall permitting times.

Hardrock Minerals Reclamation Fund (Title IV)

Title IV would establish a Hardrock Minerals Reclamation Fund (Fund). The Fund would be used in part to award grants to States and Tribes that have jurisdiction over abandoned hardrock mine land to reclaim that land, as authorized in the Bipartisan Infrastructure Law (BIL, Public Law 117-58). Additionally, Title IV would establish a new abandoned mine land reclamation fee of not less than one percent and not to exceed three percent of the value of mineral production each year. The revenue collected from the rents, royalties, claim maintenance fees, and other fees and penalties outlined in S. 1742 would also be deposited into the Fund.

There are estimated to be more than 500,000 legacy mining sites in the western U.S. alone, many of which pose public safety hazards or can cause environmental damage. Unlike for coal, where the industry pays a fee for each ton of coal mined to help reclaim unreclaimed legacy coal mines, there is currently no dedicated source of funding to address legacy abandoned hardrock mines. The Department greatly appreciates the efforts of the Sponsor and the Subcommittee to ensure that robust reclamation is a key part of any reforms on Federal mining and supports this Title, which is also consistent with IWG recommendations. The Department would like to continue working with the Sponsor to ensure that changes to reclamation requirements are consistent with the reclamation work authorized under the BIL. The Department notes that it is currently unclear whether the bill provides legal certainty for Good Samaritans working to remediate legacy pollution. We recommend – also in line with recommendations from the IWG – that the Sponsor and the Subcommittee ensure that the bill includes either a permanent or pilot program to

provide adequate liability protections for Good Samaritans wishing to undertake cleanup activities.

Transition Rules, Administrative Provisions, and Miscellaneous Provisions (Title V)
Title V includes various provisions that apply to mineral activities on any mining claim, millsite, or tunnel site occurring before the date of enactment, and it provides for a 10-year transition period to bring operations on those into compliance with the requirements of S. 1742. Title V also includes numerous provisions to enforce the bill's requirements, including sections related to administrative and judicial review. Additionally, Title V makes various clarifying amendments to the Multiple Surface Use Act of 1955 regarding clay and the disposal of mineral materials. Finally, Title V requires a review of uranium development on Federal land by the National Academy of Sciences.

Given the scope of the reforms contained in S. 1742, the Department supports a transition period for mineral production activities ongoing at the time of enactment. The Department also has no objection to the required uranium study.

S. 1281, Mining Regulatory Clarity Act
S. 1281 would amend the Omnibus Budget Reconciliation Act of 1993 to expand the rights of mining claimants, with respect to locatable minerals, by defining the term "operations" to include various mining-related activities. These include any activity or work carried out in connection with prospecting, discovery and assessment, development, extraction, or processing; the reclamation of an area disturbed by any of these activities; and any action reasonably incident to these activities, regardless of whether it is carried out on a mining claim, such as the construction and maintenance of any road, transmission line, pipeline, or any other necessary infrastructure or means of access on public land for a support facility.

This bill would also grant mining claimants the right to use, occupy, and conduct operations on public land with or without the discovery of a valuable mineral deposit, so long as they have paid the location fee and claim maintenance fee. In lieu of paying the claim maintenance fee, claimants who qualify for a small miner waiver may instead comply with the required work assessment under the general mining laws. Under the bill, claimants who have met these requirements would be considered to have satisfied any requirements under FLPMA for the payment of fair market value to the U.S. for the use of public land resources.

The Department is committed to working with the Sponsor and the Subcommittee on reforms that provide certainty and stability for the industry, strengthen domestic mineral supply chains, advance environmental sustainability, while ensuring a fair return to taxpayers. The Department's understanding is that S. 1281 seeks to address the ruling in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022), commonly known as the *Rosemont* decision. While the Department supports the goals of S. 1281, it is important to note that we have already addressed this decision by issuing a Solicitor's M-Opinion that identifies options for operators potentially impacted by *Rosemont*, and we note that legislation to resolve this issue may be unnecessary.

Furthermore, the Department is concerned that, as written, this bill could lead to a number of serious unintended consequences. In particular, granting the right of use and occupancy to claimants prior to showing the discovery of a valuable mineral greatly expands the rights conferred under the Mining Law, and could encourage the filing of nuisance claims that attempt to interfere with or prevent other authorized uses of public lands such as grazing, hunting, off-highway vehicle use, energy development, and more. It could also lead to unauthorized non-mining industrial uses and residential occupancy – often referred to as "squatting" – which previously necessitated the development of regulations to address the issue. It is also important to note that discovery of a valuable mineral deposit should always be required on lands that have been withdrawn from mineral entry, such as units of the National Park System. The Department would like to work with the Sponsor and the Subcommittee on improvements to the bill that maintain the intent of the legislation while limiting potential unintended consequences.

Conclusion

Thank you for the opportunity to testify on these mining bills. The Department is committed to reforming Federal mineral production, and we look forward to working with the Sponsors and the Subcommittee to provide for responsible mineral development while advancing the Administration's climate and clean energy goals.

Senator CORTEZ MASTO. Thank you, Doctor.
Mr. Heithecker.

STATEMENT OF MR. TROY HEITHECKER, ASSOCIATE DEPUTY CHIEF, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Mr. HEITHECKER. Thank you. Good afternoon, Chair Cortez Masto, Ranking Member Lee, and members of the Subcommittee. Thank you for the opportunity to present the views of the U.S. Department of Agriculture on two bills under the jurisdiction of the U.S. Forest Service. It is a pleasure and an honor to be here today. My name is Troy Heithecker and I currently serve as the Associate Deputy Chief for the National Forest System. I have been a career employee with the Forest Service for over 25 years, and in my current position, I am responsible for policy management and oversight of the 154 national forests and 20 national grasslands spanning 193 million acres from Puerto Rico to Alaska.

The Forest Service administers mineral and geologic resources, including mineral exploration, development, and reclamation activities on National Forest System lands. In 2022, the agency administered more than 5,000 federal mineral leases across four million acres for oil, natural gas, coal, phosphate, and other mineral commodities. In 2022, the agency also managed around 75,000 mining claims on National Forest System lands and completed over 1,800 mineral material sale contracts and permits. These mineral activities result in an estimated $5.6 billion annual contribution to the nation's economy and support nearly 40,000 jobs. The Forest Service administers surface uses of National Forest System lands in connection with mining activities under the 1872 Mining Law. This work is complex, it is important, and we take it very seriously.

The Forest Service understands that the intent of S. 1281, the Mining Regulatory Clarity Act of 2023, is to address the Rosemont decision and change how agencies treat activities ancillary to mining operations located on federal lands. The bill sets forth a process to allow mining operators to use, occupy, and conduct operations on public land regardless of whether a valuable mineral deposit has been discovered. While the Forest Service supports the goals of this Act, we believe that the bill, as currently written, would change the scope of rights under the Mining Law in ways that could have unintended consequences. We are therefore committed to working with the sponsor and the Subcommittee on reforms that advance Administration priorities to provide certainty and stability for the industry, strengthen domestic mineral supply chains, protect local and tribal communities, and advance environmental standards, all while ensuring a fair return to taxpayers.

The Clean Energy Mineral Reforms Act of 2023, S. 1742, aims to amend the 1872 Mining Law to eliminate patenting on federal lands, collect royalties on hardrock minerals, establish a hardrock minerals reclamation fund, implement a permitting process, and revise the mineral withdrawal process. Effective October 1, 1994, Congress imposed a moratorium on spending appropriated funds for the acceptance or processing of mineral patent applications that had not reached a defined point in the patent review process. Since then, the rider has prevented the Department of the Interior from

accepting new patent applications, including those for National Forest System lands. The Department of Agriculture supports the proposal, since it will simply codify current practices.

The Forest Service is not able to comment on royalty relief, as this is a Department of the Interior-directed proposal. The Forest Service does support a dedicated funding mechanism to address abandoned mine cleanup. The proposed legislation would also require exploration permits and mining operations permits on federal lands. The Forest Service currently requires an approved mine plan of operations for proposed activities that may cause significant surface resource disturbance, including exploration, development, production, and reclamation operations. We therefore support the intent of the provision to help balance conservation and mining on public lands, and would like to discuss this provision further with the Committee and the bill sponsor.

Section 307 of the proposed bill requires the Forest Service, within three years of enactment, to conduct a review of National Forest System lands that are suitable for wilderness, roadless areas, areas included in the Wild and Scenic River System, and where mineral activities pose a reasonable likelihood of substantial impacts on National Conservation Area lands. Based on that review, the proposed bill would allow the Secretary of Agriculture to recommend and the Secretary of the Interior to withdraw those lands from availability under the Mining Law of 1872. The proposed legislation also removes the two-year segregation period from the date of the Secretary's determination and the 20-year limit to administrative withdrawals. The Forest Service advocates for a balance between the need for domestic critical mineral production to support a renewable energy economy and protecting the environment, and believes the existing process is sufficient to do both. However, the Forest Service is committed to working with the sponsor to ensure that the review includes consideration of mineral potential reports and reasonably foreseeable development scenarios, as recommended in the Interagency Working Group's Final Report on Recommendations to Improve Mining on Public Lands. We support the bill's requirement to consult with tribes, as the Forest Service manages millions of acres of land and waters that are of significant cultural and historical importance to our tribal partners, as is evidenced in our 2023 Tribal Action Plan. The Forest Service is committed to strengthening tribal consultation and nation-to-nation relationships, and the proposed legislation parallels that commitment.

Chair Cortez Masto, Ranking Member Lee, and members of the Subcommittee, this concludes my remarks, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Heithecker follows:]

TESTIMONY of
TROY HEITHECKER
ASSOCIATE DEPUTY CHIEF, NATIONAL FOREST SYSTEMS
UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
Before the
UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
Dec. 12, 2023

Concerning
S. 1281, Mining Regulatory Clarity Act of 2023
S. 1742, Clean Energy Minerals Reform Act of 2023

Chair Cortez Masto, Ranking Member Lee, and Members of the Subcommittee, thank you for the opportunity to present the views of the U.S. Department of Agriculture (USDA) on two bills under the jurisdiction of the U.S. Forest Service (Forest Service).

S. 1281 – Mining Regulatory Clarity Act of 2023

The Forest Service's responsibility to administer surface uses of National Forest System lands in connection with mining activities under the 1872 Mining Law is complex and important work, and we take that work seriously. The Mining Regulatory Clarity Act of 2023 would amend the Omnibus Budget Reconciliation Act of 1993 by changing how agencies treat activities ancillary to mining operations that are located on federal lands. The bill sets forth a process to allow mining operators to use, occupy, and conduct operations on public land regardless of whether a valuable mineral deposit has been discovered on the land. This bill addresses the decision in *Center for Biological Diversity, et al v. United States Fish & Wildlife*, 33 F.4th 1202 (9th Cir. 2022) ("*Rosemont Decision*"), which interpreted the requirements for use of the surface of National Forest System lands for mineral development under the 1872 Mining Law.

The Ninth Circuit's decision in *Rosemont* represented a significant change in the way agency practice typically authorized use of National Forest System lands in connection with mining activities under the 1872 Mining Law, including for ancillary activities that are reasonably incidental to logical and sequential mining operations.

The Forest Service understands that the intent of the sponsor of S. 1281, the Mining Regulatory Clarity Act of 2023, is to clarify the agency's administration of operations on mining claims under the Mining Law. While the Forest Service supports the goals of S. 1281, we believe that the bill, as currently written, would change the scope of rights under the Mining Law in ways that could have unintended consequences. We are therefore committed to working with the Sponsor and the Subcommittee on reforms that advance Administration priorities by providing certainty and stability for the industry, strengthening domestic mineral supply chains, protecting local and tribal communities, and advancing environmental standards that protect our air, water, land and citizens, all while ensuring a fair return to taxpayers. The Forest Service also notes that the Department of the Interior has issued a Solicitor's M-Opinion that identifies options for operators potentially impacted by the *Rosemont* decision, and that the Forest Service has been working to address the impacts of the *Rosemont* decision administratively under

different authorities than the authorities that govern the Department of the Interior. The Forest Service would like to work with the Sponsor, the Subcommittee, and the Department of the Interior on improvements to the bill that address those impacts while limiting any potential unintended consequences.

S.1742 – Clean Energy Minerals Reform Act of 2023

The Clean Energy Minerals Reform Act of 2023 aims to amend the 1872 Mining Law to eliminate patenting of federal lands, collect royalties on hardrock minerals, establish a hardrock minerals reclamation fund, implement a permitting process, and encourage mineral withdrawals.

Eliminating Patenting:

Effective on October 1, 1994, Congress imposed a moratorium on spending appropriated funds for the acceptance or processing of mineral patent applications that had not yet reached a defined point in the patent review process. Since then, the rider has prevented the Department of the Interior from accepting new patent applications, including for National Forest System lands. The Department of Agriculture supports the proposal since it will simply codify current practices.

Royalties and Royalty Relief:

The proposed legislation would require royalty payments for production of locatable minerals from mining claims on public lands and set a royalty rate of not less than 5 percent and not greater than 8 percent based on gross income of production. The bill would allow the Secretary of the Interior to grant royalty relief to mining operations based on economic factors.

Generally, the proposal is outside the purview of the Forest Service because the agency administers the surface estate, and the Department of the Interior administers mining claims, rental, and royalty payments. However, the Forest Service recognizes the bill implements recommendations contained in the Interagency Working Group's Final Report on Recommendations to Improve Mining on Public Lands (IWG Report) aimed to ensure that the public receives fair compensation for mineral development on public lands – including National Forest System lands. To the extent these royalties generate revenue for the Forest Service to tackle abandoned mines on national forest system lands, support Tribes and communities impacted by mining operations, and ensure appropriate staffing and resources to administer its mining program, the Forest Service supports this provision of the proposed bill.

The Forest Service is not able to comment on royalty relief as this is a Department of the Interior-directed proposal.

Hardrock Minerals Reclamation Fund:

The bill identifies that revenues generated by mining on federal public lands would be deposited into a Hardrock Minerals Reclamation Fund for abandoned mine cleanup. Additionally, the fund would be bolstered by an abandoned mine reclamation fee of 1 to 3 percent.

The Forest Service supports a dedicated funding mechanism to address abandoned mine cleanup. Currently, the Forest Service's abandoned mine lands program relies on an annual allocation of funds used for both physical hazards removal and hazardous materials site remediation, to address close to 40,000 abandoned mine sites on NFS lands. Unlike coal mining operations administered by the Office of Surface Mining and Reclamation Enforcement, there is no dedicated fund set aside to address reclamation

of legacy mining features on NFS lands. The direct funding mechanism proposed in this bill would improve the Forest Service's ability to mitigate abandoned mine lands features.

Permits:

The proposed legislation would require exploration permits and mining operations permits on federal lands. Exploration permits would require the proponent to provide information, including, among other materials, an exploration plan, an assessment of potential impacts to ground and surface water, financial assurances, and a reclamation plan for any exploration operations. The proposed bill also would require mining permits, which would necessitate an initial description of the land and water resources in the area, an operations plan, financial assurances, and a reclamation plan. Permits issued under the proposed bill would be valid for 30 years and continue as long as production occurs.

The Forest Service regulations require that if proposed operations might cause a significant disturbance to surface resources, the proponent must provide a Notice of Intent (NOI) to operate. Based on the NOI, the Forest Service can determine if a Plan of Operations and NEPA analysis is needed. These proposed activities also include an expiration date. If mine operations continue beyond that expiration date, a revised plan is required. We support the intent of the provision to help balance conservation and mining on public lands, but would like to discuss this provision further with the committee and bill sponsor given the Forest Service already requires an approved mine plan of operations for proposed activities which might cause significant disturbance of surface resources, including exploration, development, production, and reclamation operations on mining claims.

Mineral Withdrawals:

Section 307 of the proposed bill requires the Forest Service to conduct a review, within three years of enactment, of National Forest System lands that are: suitable for Wilderness, Roadless Areas, areas included in the Wild and Scenic River System, and where mineral activities pose a reasonable likelihood of substantial impacts on National Conservation Area lands. Based on that review, the proposed bill would allow the Secretary of Agriculture to recommend, and the Secretary of the Interior to withdraw, those lands from availability under the Mining Law of 1872. The proposed legislation also removes the two-year segregation period from the date of the Secretary's determination and the twenty-year limit to administrative withdrawals.

The Forest Service advocates for a balance between the need for domestic critical mineral production to support a renewable energy economy and protecting the environment, and believes the existing process is sufficient to do both. To strike that balance, the Forest Service addresses surface resource protections in the NEPA analysis the agency conducts to evaluate any proposed mining operation. Through current land management processes, the Forest Service also evaluates and uses mitigation to minimize significant disturbance to resources—those mitigation measures become part of a mine plan of operations if the plan is approved. For NEPA analyses, the Forest Service takes a hard look at the environmental impacts of proposed operations, including any mitigations which would minimize impacts to surface resources associated with mining activities. The Forest Service also has allowances to limit land use in areas not withdrawn from mineral entry, such as in research natural areas.

The Forest Service is committed to working with the Sponsor to ensure that the review includes consideration of mineral potential reports and reasonably foreseeable development scenarios, as recommended in the IWG Report.

Tribal Consultation

The Forest Service is also implementing numerous Executive Orders, Presidential Memorandums, and Memorandums of Understanding that seek to strengthen relationships; better honor the role of sovereign Tribal nations; and further the Biden Administration's ambitious environmental justice goals. We support the requirement to consult with Tribes. The Forest Service manages millions of acres of land and waters that are significant to our Tribal partners. The Forest Service is committed to strengthening Tribal consultation and nation-to-nation relationships and the proposed legislation parallels that commitment.

Senator CORTEZ MASTO. Thank you.
Mr. Haddock.

STATEMENT OF RICH HADDOCK, SENIOR ADVISOR, BARRICK GOLD CORPORATION

Mr. HADDOCK. Chair Cortez Masto, Ranking Member Lee, and members of the Subcommittee, thank you for meeting today to discuss these important bills. My name is Rich Haddock, I am a Senior Advisor to Barrick Gold, having recently retired as the company's general counsel. I am here today to support the Mining Regulatory Clarity Act of 2023 and to discuss the Clean Energy Minerals Reform Act of 2023. In the full Committee on September 28th this year, you heard a lot of discussion about the uncertainty and long timeframes associated with mine permitting in the U.S. The Ninth Circuit decision on Rosemont and its progeny just add to the uncertainty. S. 1281 eliminates that uncertainty and restores the BLM and Forest Service regulation of mining plans of operations to its pre-Rosemont status quo, nothing more.

There is some history you need to know about the anti-mining advocacy that led us here today. This is not a criticism of the advocates. I respect them. I just disagree with them. The approach was first reflected in the writings of Professor John Leshy in the 1980s. He wrote that to force Congress's hand to revamp the Mining Law, "It might even be appropriate for the Interior Department and courts to consciously reach results that make the Mining Law unworkable." One way to make the Mining Law unworkable is to take away the places where a mine operator can put the overburden, or what we call waste rock, or other necessary components for the surface of a mining operation. There are two ways to do this in the Mining Law. Ancillary use is shorthand that refers to the use of a surface of a 20-acre load claim near your mine for workings that are essential to the operation of the mine. The mill sites are five-acre claims that can also be used for ancillary activities, but will usually be further from the mine mouth because the land has to be "non-mineral in character." If you eliminate ancillary use and make the use of mill sites impracticable, the Mining Law becomes unworkable for almost all open pits and perhaps many underground operations. Prior to 1997, neither ancillary use nor use of as many mill sites as necessary had been seriously questioned and was reflected in the regulations going back to the 1980 FLPMA regulations.

Then, during the Clinton administration, then-Solicitor John Leshy issued an opinion that concluded a miner can only use one five-acre mill site for each 20-acre load claim and he followed up with an opinion that ancillary use was unavailable unless a claim was valid against the United States as opposed to valid against rival claimants. By happenstance, neither opinion was used to stop a mine during the waning years of the Administration, and in fact, Congress stepped in to stop the application of the mill site opinion to a specific project. To clear any confusion, BLM rescinded the Leshy opinions, and in 2005 and 2008 promulgated regulations that re-iterated longstanding interpretations regarding mill sites and ancillary use, and these regulations are still in force. The Rosemont decision and its Ninth Circuit progeny are based on the argu-

ments in the Leshy ancillary-use opinion. Currently on appeal from the D.C. District, some of the Rosemont advocates are challenging the mill site regulation, arguing to the D.C. Circuit that the one-to-one ratio for mill sites should be imposed. Against this backdrop, the current Interior Solicitor has issued an opinion directing Interior to implement Rosemont nationwide. But the effects of Rosemont need to be reversed immediately, and the opinion leaves many issues unanswered, offers mostly impracticable alternatives, and will only foster further litigation.

Now, with respect to S. 1742, while Barrick believes the Mining Law works, by and large, we acknowledge that it's not perfect and we would happily work to achieve appropriate targeted refinements. Barrick applauds some aspects of S. 1742. It recognizes and retains two core principles of the Mining Law—specifically self-initiation and security of title. But we cannot support other aspects of the bill. One big concern is a royalty and fee structure that would result in the U.S. Government total take of about two-thirds of the mine's production. That would make the U.S. a developed-world outlier, and would create an insurmountable disincentive to mining in the United States. As I testified to the full Committee back in 2021, Barrick supports a reasonable net royalty and reasonable increases in claim fees, but we do not support gross royalties for all the reasons we discussed in detail then. We would support dedicating funds from royalties and from claims fees for abandoned mine reclamation.

Thank you, and I am happy to answer questions and submit additional information as needed.

[The prepared statement of Mr. Haddock follows:]

United States Senate
Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining

Hearing to Receive Testimony on Pending Legislation
S. 1281 and S. 1742

December 12, 2023

Statement of Rich Haddock
Senior Advisor
Barrick Gold Corporation

Chairwoman Cortez Masto, Ranking Member Lee, Chairman Manchin, and Members of the Subcommittee, thank you for inviting me to appear before you to offer the views of Barrick Gold Corporation on S. 1281, the Mining Regulatory Clarity Act of 2023, and S. 1742, the Clean Energy Minerals Reform Act of 2023. S. 1281 is an important piece of legislation. I appreciate Chairwoman Cortez Masto's hard work to get the bill to this hearing and I am pleased to be here to support it.

Barrick is the second largest gold producing company in the world and biggest gold producer in the United States. Barrick has gold and copper mining operations and projects in 13 countries in North and South America, Africa, Papua New Guinea, and Saudi Arabia. Barrick has also owned and operated mines in Australia during my tenure with the company. Accordingly, although I am primarily a U.S. Mining Lawyer, I am familiar with the mining legal and fiscal regimes in other mining jurisdictions around the world.

Most of our U.S. gold production comes from Nevada where we operate Nevada Gold Mines LLC, a joint venture of Barrick and the Newmont Mining Corporation. Nevada Gold Mines is the largest gold-mining complex in the world, with more than 7,000 employees and 4,000 contractors, who employ thousands more people, in Nevada and around the country. These jobs pay average annual wages of $94,000 – higher than any other industry in Nevada.

Most of Nevada Gold Mines' operations take place on unpatented mining claims on public lands managed by the Bureau of Land Management. About 85% of the land in Nevada is owned and managed by the Federal Government, more than any other state. Not all of this federal land in Nevada is open to mining exploration and development. About 22 percent of the State is withdrawn from mineral entry and another 10 percent has been proposed for withdrawal for Greater Sage Grouse management. The dominance of federal lands in Nevada means that the Mining Law is more important in Nevada than in any other state.

Before retiring as Barrick's General Counsel in 2022, I worked for Barrick for 25 years and was an in-house lawyer in the gold mining industry for 30 of the 38 years I have been practicing law. I also served as Barrick's global Vice-President of Environment for three years. I am familiar with almost every aspect of this company's U.S. operations, including the Nevada Gold Mines joint venture. I continue to serve as a Senior Advisor to the company.

The Mining Law

In my career I have participated in many administrative and Congressional debates and far too much litigation concerning the Mining Law. I reject the often-repeated criticism that the Mining Law should be changed because it is old. It was signed into law in 1872, the same year as the act that created Yellowstone National Park.

The Mining Law has survived so long for a simple reason: because it does what it was designed to do very effectively. The Mining Law is a land tenure law. It incentivizes the discovery and production of American mineral resources on federally owned lands. It also governs the relationships between claimholders and the U.S. government as paramount title holder, and between competing private claimants. The Mining Law can continue to function effectively if Congress passes the Mining Regulatory Clarity Act of 2023 to restore the longstanding interpretation and application of the law.

We have recently passed through an era in American history when not everybody thought it was a good idea to incentivize mining. During the last 40 years of unprecedented globalization, American businesses could obtain metals and metal products from any number of countries around the world. Mining exploration dollars and capital investment went to countries where it was easier or more attractive to mine for various reasons, including lower costs, especially labor, faster permitting timelines, and even in some cases government subsidies. It was cheaper to import minerals than to find and mine them in the United States. Some began to believe that in a global economy, a domestic mining industry was unnecessary. Congress closed the Bureau of Mines, and policymakers paid scant attention to the health of the domestic mining industry. At the same time, those who opposed mining, particularly on public lands, took the opportunity to attack the Mining Law as a problem to be resolved and sought to minimize domestic mining.

I hope we can agree that those days are over. Today, many of the minerals we need for energy, our economy and defense are produced in countries that cannot be trusted to remain good trading partners, or that don't adhere to American labor, environmental, and other standards. The President and a bipartisan majority in Congress agree that America once again needs to incentivize the production of domestic mineral resources. It is in the economic and security interest of the United States to do so. There is no dispute that we need reliable domestic supplies of minerals for economic development, electric vehicles, wind turbines, solar panels, semiconductors, medical technologies and treatments, mobile phones, computers, and satellites. We also cannot ignore the increasing need for minerals in national defense, including for vehicles, traditional weaponry, high-tech weaponry and munitions. Congress has appropriated billions of dollars to finance development of domestic mineral supplies for these uses.

We should not be drawn into a debate about which minerals matter the most or somehow think that different economic or regulatory schemes for different minerals would make sense. One broad lesson from the emerging energy economy of the last ten years and the overnight recognition of the importance of lithium (as an example) is that we do not know which minerals will become vitally important to our nation's economy and security in the future. For example, gold is widely used in space exploration because of its extremely advantageous properties of heat and corrosion resistance and high reflectivity. With China's view that the U.S. is militarily and economically vulnerable to China's space-directed initiatives, we cannot afford to create unneeded obstacles to domestic production.[1]

The Mining Law should continue to provide the land tenure framework for this renewal of domestic mineral exploration and production. I recognize the Mining Law is not perfect, and parts of it can be updated, but that is not unusual. Congress has amended the Mining Law many times in the past one hundred and fifty years, and as recently as the 1990s, when it ended patenting and added claim maintenance fees.

Barrick has supported updates to the Mining Law – including the imposition of a reasonable net royalty – since the early 1990s and continues to support needed changes. But we don't endorse change for the sake of change. We support a reasonable ***net*** royalty – this is long overdue – and other changes that will streamline the Mining Law, encourage exploration and bring more American mines into production. But here is the most important thing: changes to the Mining Law cannot make it more difficult to find and mine minerals or lessen or remove the incentives that draw mining capital to the United States. The Mining Law must unleash American brainpower and entrepreneurial spirit again to solve the riddles of mineral discovery and with speed and agility meeting future production needs for whatever minerals are necessary at the time for economic or national security. This is exactly what the incentives and self-initiation principle of the Mining Law do best—encouraging exploration and enabling production of whatever American minerals are needed at any given time.

Those are the standards by which any proposed Mining Law amendments should be measured. The purpose and effect of any changes to Mining Law must be to increase supplies of domestic minerals. If Congress makes it harder to find minerals and get mines into production, there will be less mining in the United States and we will not produce the minerals necessary for a successful carbon neutral transition and for our national security and to sustain the high quality jobs and taxes that mining provides, often in communities with little other economic opportunity. If royalties and fees are excessive, and permitting is prolonged by uncertainty and litigation, mining will happen in other countries, not here. It cannot be stated more simply than that.

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[1] "China's goal to establish a leading position in the economic and military use of outer space, or what Beijing calls its 'space dream,' is a core component of its aim to realize the 'great rejuvenation of the Chinese nation.' In pursuit of this goal, China has dedicated high-level attention and ample funding to catch up to and eventually surpass other spacefaring countries in terms of space-related industry, technology, diplomacy, and military power. … China views space as a critical U.S. military and economic vulnerability, and has fielded an array of direct-ascent, cyber, electromagnetic, and co-orbital counterspace weapons capable of targeting nearly every class of U.S. space asset." U.S.-China Economic and Security Review Commission, Chapter 4, Section 3, "*China's Ambitions in Space: Contesting the Final Frontier,*" 2019 Annual Report to Congress, November 2019, 359-60, https://www.uscc.gov/annual-reports.

Efforts to Make the Mining Law Unworkable, Department of Interior Response, and Litigation

In the past, ***some*** opponents of mining attacked the Mining Law because they didn't want mining to happen, particularly on public lands. There is no sugarcoating that reality. Some Mining Law reform efforts were (and still are) ***intended*** to reduce the amount of mining that happens in the United States. The Subcommittee should beware of reform proposals that make it more difficult and more expensive to mine, reduce lands available for exploration and mining, or that increase litigation and delay.

Part of the long-term strategy for mining opponents has been to reduce the public land available to support mining—lands for uses such as construction and operation of processing facilities, storage of waste rock or tailings, ore and soil stockpiles, truck shops, powerlines, pipelines, storage ponds, roads—all of the infrastructure that is necessary to get the ore out of the ground and turn it into a useful product. In the legal debate, these land uses have come to be called "ancillary" uses or activities, but they are absolutely essential for mineral production.

Two notable critics of the Mining Law— Interior Secretary Bruce Babbitt and his Solicitor, John Leshy – made legislative reform of the Mining Law a priority in the early 1990s. Ultimately their efforts failed. My view was that mining opponents were unsatisfied with the final proposed legislation. Though it offered a royalty, it did not include enough restrictions on mining on federal lands or create a completely separate set of environmental restrictions for mining. In short, they wanted more.

Following that legislative failure, Secretary Babbitt and Solicitor Leshy announced that they would seek to accomplish as much of the reform package as possible through administrative action.[2] Key components of that administrative package were two Solicitor's Opinion that restricted the lands available for ancillary uses. These opinions put into action a mining law strategy advocated by Solicitor Leshy before he became Solicitor, when he said that "it might even be appropriate for the Interior Department and the courts to **consciously reach results that make [the Mining Law] unworkable"**[3] in order to force reform. In other words, it might be necessary to break the Mining Law so that Congress would be forced to act. Those opinions planted the legal seeds that bring us all to this hearing room today.

The first prong of the effort to make the Mining Law unworkable involves the use of mill sites. In 1997, when Solicitor Leshy issued an opinion concerning the patenting and use of mill sites.[4] The Mining Law allows location and patenting of mill site claims of up to five acres, provided that they are 1) nonmineral, and 2) used for mining and milling purposes. The Millsite Opinion announced that the Department of the Interior should not approve patents or plans of operations that included a greater number of mill sites than associated lode claims. In other words, the

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[2] See Patrick Garver and Mark Squillace, Mining Law Reform—Administrative Style, 45 *Rocky Mtn. Min. L. Inst.* 14-1 (1999).
[3] John D. Leshy, Reforming the Mining Law: Problems and Prospects, 9 *Pub. L. L. Review*, 1, 11 (1988) and John D. Leshy, The Mining Law: A Study in Perpetual Motion, 282 (1987).
[4] Department of Interior, Opinion M-36988, "Limitations on Patenting Millsites Under the Mining Law of 1872," (1997).

Millsite Opinion claimed that the law only allowed a claimant to locate one five-acre mill site for each mining claim. The Millsite Opinion was never implemented. When the Department relied on the opinion to deny approval of the Crown Jewel Mine in Washington, Congress acted to block application of the limitation in the Millsite Opinion to that project or any other plan of operation that had been submitted prior to the opinion.[5]

In 1999, the Bureau of Land Management proposed a rule that would have limited claimants to five acres of mill site land "for each 20-acre parcel or patented or unpatented placer or lode mining claims . . . regardless of the number of lode or place claims located in the 20-acre parcel."[6] Similar to the Mill Site Opinion, this mill site rule was never adopted. Instead, after public comment, BLM adopted a rule allowing operators to locate as many mill sites as are "are reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations."[7] The rule was challenged by environmental plaintiffs who urged the court to adopt the mill site acreage ratio as the only permissible interpretation of the mining law. The rule was upheld by a Federal District Court decision in 2020, [8] but an appeal is pending. Oral argument on the appeal is scheduled before the D.C. District Court of Appeals in January 2024. Thus, the long-term viability of the use of mill sites to support ancillary facilities remains uncertain.

The second prong of the effort to make the Mining Law unworkable involves restricting the ability of miners to site the ancillary uses mentioned above. In January, 2001, just days before a new a President was to be sworn in, Solicitor Leshy issued a second opinion addressing the use of mining claims for ancillary uses.[9] When approving a proposed plan of operations, the Ancillary Use Opinion directed BLM to inquire into the validity of the mining claims used for ancillary uses, and if there were "grounds" for questioning the validity, then BLM should not approve the plan until the operator either moves the facility, properly stakes mill site claims, obtains a discretionary permit from the BLM, or acquires the land through exchange or sale. The Ancillary Use Opinion was never implemented. It was contrary to BLM mining regulations adopted in 2001, and it was eventually formally withdrawn.

In the years since, environmental plaintiffs repeatedly attempted to revive the reasoning of the Ancillary Use Opinion in litigation challenging BLM's mining rules. Indeed, that effort and litigation led to the *Rosemont* and *Thacker Pass* decisions. In one of the early rounds of litigation over the ancillary use question BLM's mining regulations (including the definition of "operations") were upheld by a Federal District Court in 2003, apart from one question that was remanded to the BLM.[10] The question was whether FLPMA's preference that the government acquire "fair market value" for use of federal lands had been considered in the 3809 Regulations.

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[5] Consolidated Appropriations Act, 2000, Pub. L. No. 106-31, § 3006, 113 Stat. 57.
[6] 64 Fed. Reg. 47,023, 47,037 (proposed Aug. 27, 1999). Mining lawyers had quickly figured out that the one to one claim ratio in the Millsite Opinion could be manipulated by dividing lode and placer claims, which have a **maximum** size of 20 acres, into smaller claims.
[7] 43 C.F.R. § 3832.32.
[8] Earthworks v. U.S. Dept of the Interior, 496 F. Supp. 3d 472, 485 (D.D.C. 2020), *appeal docketed*, No. 20-05382 (D. D.C. Cir. Dec. 30, 2020).
[9] Department of Interior, Solicitor's Opinion M-37004, *Use of Mining Claims for Purposes Ancillary to Mineral Extraction* (Jan. 18, 2001.
[10] Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003).

BLM was directed to consider whether FLPMA required the agency to charge "fair market value" for operations conducted on "unclaimed or inadequately claimed land." This was essentially the same argument as the Ancillary Use Opinion, because plaintiffs argued that BLM had to assess the validity of every claim within a plan of operations and address "invalid" claims under other FLPMA authority. On remand, BLM conducted a rulemaking and determined that there were no such on operations on unclaimed or inadequately claimed lands, but acknowledging there were many claims that were properly located by of unknown validity. BLM determined that evaluating those claims place an unbearable financial burden on the agency and disrupt mining regulations because the Mining Law and the 3809 regulations "create a 'cradle to grave' framework" based on a "long-established . . . practice of permitting mining operations on mining claims without requiring formal claim validity exams."

Environmental plaintiffs challenged BLM's response to the remand, urging the Federal District Court to adopt the reasoning of the Ancillary Use Opinion and require BLM to conduct claim validity examinations before approving mining plans of operations. In 2020, the District Court upheld BLM's rule.[11] The court stated that plaintiffs' interpretation of the law would "quietly upend the current claim system under the Mining Law" and it declined to read FLPMA "as silently working such a fundamental change to longstanding practice under the Mining Law."

Subsequently, in Federal District Court in Arizona, some of these same environmental plaintiffs who are litigating in the DC Circuit revived the reasoning of the Ancillary Use Opinion to challenge the Forest Service's approval of the plan of operations for the Rosemont Mine and found a more sympathetic judge. The District Court reversed approval of the Rosemont plan because the Forest Service did not confirm that the mining claims underlying proposed waste rock and tailings storage facilities were valid before approving the plan.[12] In May, 2022, in a 2-1 opinion, a Ninth Circuit panel affirmed the District Court's decision (though on different legal reasoning) and that brings us to S. 1281 and this hearing today.

S. 1281 - The Mining Regulatory Clarity Act

In September of this year, the full Committee held a hearing on issues affecting the domestic mineral supply chain. Dr. Daniel Yergin, Vice President of S&P Global predicted that U.S. demand for copper will double over the next twelve years, and demand for nickel, cobalt and lithium will increase over twenty-three times during the same period. Dr. Yergin identified permitting delays, uncertainty and litigation risk as the primary obstacles to meeting domestic mineral needs. At the same hearing, Deputy Interior Secretary Tommy Beaudreau, identified conflict and litigation as the biggest impediments to domestic mineral production.

In a report issued a few weeks ago, the Fraser Institute looked at just one slice of expanded mineral demand: electric vehicles. Based on existing goals for electric vehicle production and

[11] Earthworks v. U.S. Dept of the Interior, 496 F.Supp. 3d 472 (D.D.C. 2020). Plaintiffs initially appealed both parts of the District Court decision but withdrew their appeal of the Fair Market Value rule after the Ninth Circuit issued the *Rosemont* decision.

[12] Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738 (D. Ariz. 2019), *aff'd*, 33 F.3d 1202 (9th Cir. 2022).

sales in the U.S. and Canada, the world will need 50 new lithium mines by 2030, along with 60 new nickel mines, and 17 new cobalt mines. The materials needed for cathode production will require 50 more new mines, and anode materials another 40. The battery cells will require 90 new mines, and EVs themselves another 81. In total, this adds up to 388 new mines. For context, as of 2021, there were only 270 metals mines operating across the U.S. and only 70 in Canada.[13]

These same themes have been identified by multiple witnesses in multiple hearings before multiple Senate and House committees and subcommittees. In response, Congress has appropriated billions and has begun to address significant permitting reform, with important NEPA reforms in the Fiscal Responsibility Act and permitting bills authored by the Chairman and Ranking Member of this Committee and others. But these efforts are doomed to fail unless Congress acts to resolve the uncertainty and litigation risk caused by *Rosemont.*

S. 1281 addresses the single most important source of legal uncertainty and litigation to the U.S. mining industry today. In May of 2022, the second prong of the effort to make the Mining Law unworkable finally bore fruit. After more than twenty years and many court and IBLA rejections of the rationale of the 2001 Ancillary Use Opinion, a panel of the Ninth Circuit Court of Appeals vacated Forest Service approval of a mining plan of operations for the Rosemont Copper Mine in Arizona. Two judges found that the Mining Law required that the Forest Service confirm that validity of mining claims that were proposed to be used for storing waste rock and tailings and remanded the decision back to the agency for further work. The dissenting judge would have found that the agency acted properly and in accordance with the intent and text of its longstanding mining regulations. The dissent pointed out correctly that the majority's reasoning in fact, made the mining law "self-defeating."

As we have had the time to analyze the impacts of the *Rosemont* decision, see it applied by two federal district courts in Nevada and interpreted by the Department of Interior's Solicitor, and evaluate the arguments that the anti-mining litigants still want to press, it is clear that leaving *Rosemont* unaddressed creates major uncertainty in mine permitting on federal lands and will lead to further litigation to resolve questions about the scope of the decision.

Before *Rosemont*, the scope of mining regulation on federal lands had been well settled in regulation and practice for over 40 years. The regulators and the operators both have had certainty concerning which lands are available for locating ancillary facilities. The Forest Service adopted regulations in 1974 and the BLM in 1980. Both required operators to submit plans of operations for review by the agencies before mining could begin on federal lands. Both sets of regulations have been revised and fleshed out with detailed agency guidance. The Forest Service regulations are published at 36 C.F.R. Part 228A and referred to as the "228 Regulations." The BLM regulations are published at 43 C.F.R. Subpart 3809 and referred to as the "3809 Regulations." Both sets of regulations cover mineral activities from initial exploration through production and reclamation, mine closure and post-closure maintenance, applying environmental performance standards and requiring financial assurance at each and every stage of the process to all facilities.

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[13] Kenneth P. Green, Fraser Institute, *Can Metal Mining Match the Speed of the Planned Electric Vehicle Transition?* (2023).

Both sets of regulations broadly define the "operations" that are subject to the regulations without regard to mining claim status. The Forest Service defines "operations" to mean:

> [a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, **regardless of whether said operations take place on or off mining claims.**[14]

BLM's regulations are similar, defining "operations" as:

> [a]ll functions, work, facilities and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction and processing of mineral deposits locatable under the mining laws; reclamation, or disturbed areas; and all other reasonably incident uses, **whether on a mining claim or not**, including the construction of roads, transmission lines, pipelines and other means of access across public lands for support facilities.[15]

BLM explained that it adopted the broad definition of operations so that it could manage mining on federal lands from "cradle to grave."[16] Since their adoption, BLM and the Forest Service have applied these regulations to hundreds of mining and exploration plans of operations. In no case, until the *Rosemont* decision, has the BLM or Forest Service investigated as part of mine permitting the mining claim status of lands proposed for mining operations on lands that were open to location under the mining laws.

The Rosemont Decision in Detail

The Rosemont copper mine was a typical large, open pit copper mine proposed to be located on National Forest lands in Arizona. The open pit was on a mix of private land and unpatented mining claims. The Forest Service reviewed the proposed plan under its 228 regulations and prepared an environmental impact statement. The EIS evaluated five different configurations for the storage of waste rock and tailings. In the decision approving the plan, the Forest Service selected a particular alternative that had the smallest disturbance footprint and avoided an important cultural site. The Forest Service also approved a reclamation plan that would require that the waste rock and tailings storage areas be reclaimed and returned to the prior land uses, wildlife habitat and grazing, after mining was concluded. Consistent with practice since the inception of the Mining Law, the Forest Service did not consider the status of any of the mining claims included in the plan of operations and did not constrain its selection of the preferred alternative based on mining claim status.

The Center for Biological Diversity and other groups challenged the Forest Service decision in federal court. The District Court reversed the agency's decision and held that the Forest Service applied the wrong regulations to the proposed waste rock and tailings storage facilities. According to the court, the Forest Service should have applied its special use regulations, rather than the 228 mining regulations because the mining claims were not valid. The court reasoned that the mining regulations only governed mining

[14] 36 C.F.R. § 228.3(a) (emphasis added).
[15] 43 C.F.R. § 3809.5 (emphasis added).
[16] 65 Fed. Reg. at 70,013 (Nov. 21, 2000).

activities on valid mining claims and because the Forest Service failed to confirm that the operator's mining claims were valid, it could not approve the mining plan under its mining regulations.[17]

But the Forest Service special use regulations contain no provision for the review or management of any mining or mining-related facilities. In fact, those regulations explicitly disavow any application to mining plans of operations. The special use regulations also prohibit the approval of facilities that include disposal of solid waste on Forest lands. Paradoxically, the district court mandated application of a legal framework that would not allow the Forest Service to approve the mine as proposed.

The Forest Service and the operator appealed to the Ninth Circuit Court of Appeals. Two judges in the three-judge panel affirmed the lower court's decision, but on different reasoning. A third judge dissented, finding that the Forest Service properly reviewed the mining plan of operations under its 228 regulations.

The majority opinion ignored the district court's conclusion that the agency had used the wrong regulations. It found that concern, as well as the dissent, "premature." Instead, the majority found that the Forest Service had erred when it "assumed that Rosemont's mining claims on [the land proposed to be used for waste storage] were valid." Of course, the Forest Service made no such assumption—the agency determined, in accordance with the long-standing definition of mining "operations," that all activities in the proposed plan of operations were to be reviewed under its mining regulations without regard to the status of the claims. The majority opinion dismissed that inconvenient fact in a parenthetical: "In the FEIS, the Service either assumed that Rosemont's mining claims on that land were valid or **(what amounted to the same thing)** did not inquire into the validity of claims."[18]

The majority opinion then determined that the record before the Forest Service included "no evidence" that the claims were valid and the agency's reliance on the 228 regulations was in error. The court remanded the decision back to the Forest Service to determine if its 228 regulations "are applicable to Rosemont's proposed occupancy of invalid mining claims with its waste rock, . . ."[19]

Application of the Rosemont Decision Today

The majority opinion's holding is quite narrow and based on an incorrect reading of the agency record, but the opinion also includes a long discourse on the Mining Law that as subsequently applied by lower courts and interpreted by the Department of Interior, leaves mining regulation on federal lands incredibly muddled. Further litigation is certain. Indeed, in a decision earlier this year, the United States District Court for the District of Nevada directed BLM to inquire into the validity of certain mining claims associated with the Thacker Pass lithium mine project, but did not vacate the approval of the mine plan of operations. Opponents of the mine appealed the decision not to vacate approval of the mine plan of operations, but that appeal was denied on procedural grounds. Appellants raised issues regarding the scope and application of the Rosemont

[17] Center for Biological Diversity v. U.S. Forest Service, 409 F. Supp. 738 (D. Ariz. 2019), *aff'd* 33 F. 4th 1202 (9th Cir. 2022).
[18] Center for Biological Diversity v. U.S. Forest Service, 33 F.4th, 1202, 1212 (9th Cir. 2022) (emphasis added).
[19] 33 F.4th at 1224.

decision, including specifically that the BLM was required to perform a claim validity determination akin to the examination required to support a patent application, but those were found to be untimely and were not considered by the Ninth Circuit panel, which ruled that the plaintiffs must first raise those arguments before the district court.

Shortly after the district court's decision on the Thacker Pass project, another Federal District Court in Nevada relied on the *Rosemont* decision to vacate BLM's approval of the proposed Mount Hope molybdenum mine. The Mount Hope deposit is considered one of the largest and highest-grade molybdenum deposits in the world. Molybdenum of course is used to make all manner of alloys, including steel alloys to increase strength, hardness, electrical conductivity, and to increase resistance to corrosion and wear—all uses that make it important for the future of this country. Unfortunately, the permitting history of the Mount Hope project is but another example of how appeals and litigation can unreasonably delay mining projects.

The proposed plan of operations for the Mount Hope molybdenum mine was originally submitted to BLM in June, 2006. The notice of intent to prepare an environmental impact statement was published in the Federal Register in March, 2007. The Draft EIS was made available for public comment in December, 2011, the final EIS was published in October, 2012 and the Record of Decision approving the project was issued the next month. BLM's decision was challenged by Great Basin Resource Watch and the Western Shoshone Defense Project. The Federal District Court for the District of Nevada upheld BLM's decision in July, 2014. Notably, in that appeal, these plaintiffs argued that BLM erred when it did not confirm validity of the Mount Hope mining claims before approving the plan of operations—the *Rosemont* argument. Consistent with every other decision on mining opponents' ancillary use attacks up to that time, the Nevada court applied established precedent and rejected that argument finding that the Mining Law did not require that BLM inquire into claim validity.

Plaintiffs appealed the 2014 decision to the Ninth Circuit Court of Appeals raising several environmental claims, but they did not pursue their ancillary use argument. In December, 2016, the Ninth Circuit affirmed most of BLM's decision, but remanded the project back to the agency for additional environmental analysis on two air quality issues and asked BLM to clarify the legal status of certain springs. BLM completed that work and published a Draft Supplemental EIS for public review in February, 2019, and a final Supplemental EIS in July, 2019. The Record of Decision approving the project was reinstated the next month. The same plaintiffs again challenged BLM's decision. In April, 2023, following briefing on the impact of the *Rosemont* decision, the same federal judge who approved the project nine years earlier, vacated the decision and sent the project back to BLM to evaluate the project's mining claims in light of the *Rosemont* decision.

The Department of Interior Recent Solicitor's Opinion

In May, 2023, the Solicitor of the Department of Interior issued an opinion,[20] binding on the agency, that extended the *Rosemont* court's strained reading of the Mining Law beyond the Ninth Circuit and ignored the text of the 3809 regulations and BLM's application of those regulations over the past 40 years. The Department offers the Solicitor's Opinion, and perhaps some subsequent guidance that has not yet been made public, as a solution to the practical

[20] Department of the Interior, Office of the Solicitor, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057, May 16, 2023.

problems created by the *Rosemont* decision. Respectfully, I do not agree. Instead, the Solicitor's Opinion creates more uncertainty, guarantees further legal challenges to mining projects, and undermines the stated policy of this administration and a bipartisan majority of this Congress to encourage domestic mineral exploration and production.

The Solicitor's Opinion directs that BLM shall not approve "plans of operations where the operator proposes to place significant waste or tailings facilities on mining claims where BLM's record lacks evidence of the discovery of valuable mineral deposits underlying those facilities." The agency is given no guidance but to reject the proposed plan of operations. In those circumstances, the burden shifts back on to the operators to 1) submit additional evidence, 2) "re-site the ancillary uses on mill sites (as appropriate)," 3) seek a land use authorization under other BLM regulations ,or 4) seek to acquire title to the land through a land exchange or sale.

The Opinion effectively rewrites the 3809 regulations without any public notice or comment. The current regulations and 40 years of practice are dismissed in a footnote where the Solicitor "acknowledges that the Department's reading of the Mining Law has not remained static in the last several decades, and that BLM may have approved mining plans that, at least in part, are not strictly consistent with this memorandum."[21]

Congress should move forward and enact S. 1281 in the face of the Solicitor's Opinion for two important reasons: First, the Opinion does not settle the matter. Further litigation is certain. As I noted above, anti-mining plaintiffs continue to argue in the DC Circuit that the Mining Law only allows one five-acre mill site for each 20-acre lode claim. Second, and more to the point of the Committee's work, application of the Opinion is bad mining policy and will discourage and delay mining investment, exploration and production.

This Subcommittee should not assume that this Solicitor's Opinion will survive legal challenge any better than prior opinions. The majority opinion in the *Rosemont* case swept aside a 2020 Solicitor's Opinion that comprehensively evaluated the Mining Law and BLM practice and interpretation in two sentences, according the Opinion no deference because "the Solicitor has taken inconsistent positions" on the issue. The new Opinion is simply another inconsistent position.

The *Rosemont* decision left many questions unanswered targets for further legal challenges. The Solicitor's Opinion attempts to limit the *Rosemont* decision to its facts: an inquiry into claim validity is necessary only where an operator proposed to permanently occupy land with significant waste rock or tailings facilities. But mining opponents have already challenged that limitation and litigate both the scope of the decision—to which ancillary facilities does the claim validity requirement apply—and the process for determining claim validity, insisting on complete claim validity examinations on each and every claim.

In litigation over the Thacker Pass project, some plaintiffs argued that the *Rosemont* decision applied to every facility in the plan of operations, not just "permanent" features as argued by the Solicitor's Opinion, attempting to capture pipelines, transmission lines, roads, stockpiles, processing facilities, and all other uses. The court, however, found that argument untimely, so it was not resolved. Those plaintiffs argued that BLM cannot approve <u>any</u> mining facility on public land until it has determined that the underlying claims are valid. Thus, despite the Department of Interior's protestations to the contrary, the Solicitor's Opinion has resolved

[21] Solicitor's Opinion at p. 9, n.7.

nothing. Those same opponents argue that BLM must conduct a full claim validity examination for each claim included in the plan of operations—that the suggestion in the Solicitor's Opinion that BLM need only "some evidence" of claim validity is far too little. As they have already done, it is inevitable that mining opponents will continue to seek opportunities to raise these legal challenges.

The alternatives suggested by the Solicitor's Opinion will also result in further uncertainties and delays. Since the 3809 regulations were adopted in 1980, all major mine facilities have been reviewed under those regulations. After decades of pre-*Rosemont* consistency, switching to new systems and processes now will only cause further uncertainty and harm. The learning curve on putting a square peg in a round regulatory hole will add years of delay to every mining project forced to obtain new permits. The regulatory program was designed to review mining operations holistically. Requiring different permits for individual mine features will unduly complicate the permitting process, resulting in additional delays. Indeed, given the arguments that plaintiffs are making regarding ancillary uses in current litigation and permitting, mine proponents must necessarily engage in a guessing game to determine which facilities should be permitted under which regulations. Issuing special use permits or rights-of-way for mining facilities, rather than permitting them through plans of operations (as intended under FLPMA and done for decades) will also add more opportunities for litigation. Under BLM's 3809 regulations, mine plans are approved if the BLM finds that those plans include adequate measures to prevent "unnecessary or undue degradation," the standard imposed by FLPMA and defined in the regulations. Rights-of-way and other permits have different standards and afford BLM more discretion in making decisions. The exercise of that discretion is subject to legal challenge.

The Solicitor has also failed to consider important practical problems imposed by the opinion in mine permitting. For example, BLM's 3809 regulations require that every plan of operations with an open pit include an analysis of the feasibility of backfilling the open pit with waste rock. Waste rock is nothing more than naturally occurring material that must be moved from one place to another so miners can access ore. But miners need somewhere to place the waste rock. Backfilling is a preferred method of reclamation where a pit is mined out and the backfill rock will not create the risk of water quality problems. Nevada Gold Mines has placed billions of tons of waste rock as open pit backfill, essentially putting the rock back where it came from. Backfilling can work where the operator is mining in one portion of a pit, an adjacent pit, or a nearby underground mine but then places the backfill rock in the mined-out portion of a completed pit or the mine-out portion of an underground mine. But under *Rosemont* and the Solicitor's Opinion, the status of mining claims in a mined out open pit or underground mine creates a vexing legal question. Applying the *Rosemont* analysis, an operator must either show that the claims remain valid or that the lands are nonmineral in character and the operator must then stop and relocate the area as mill sites. Both create complex geologic questions of fact that are ripe for litigation. The necessary showings will be almost impossible to make. For surface mines, the pit has been designed to **the economic limits of mining at that date**, and the value has been removed but the rock just outside of pit wall is still mineralized, so it may not be available for location as either a mining claim or mill sites. For underground mines, the mining areas (stopes) have also been designed to the economic limits of mining at that date, but the adjacent rock will be mineralized and there may be mineralization stratigraphically above or below the mining areas that make location with a mining claim or mill site a vexing question. Further, after mining is completed, *Rosemont* (and the Solicitor's Opinion) require that miners must reevaluate their claim locations and decide which type of claim is appropriate, which as

noted above is anything but clear, and then go through the process of locating those claims on already located and mined ground. Again this complexity and uncertainty created by *Rosemont* and adopted by the Solicitor's Opinion, litigation is certain in either case.

Further experience with the *Rosemont* decision will lead to additional absurd results. We have underground mines where we are using the surface above the underground mine for ancillary uses, including rock crushers, roads, pipelines and even waste rock storage. While the valuable minerals remain in the ground, those claims are "valid," but when the underground mining is completed, those same claims would lose their validity under the *Rosemont* paradigm, even under a narrow reading of the decision, yet they certainly remain mineralized, again bringing into question whether the operator can relocate the claims as mill sites.

The suggestion of a land exchange or land sale is even more unrealistic. Experience, and litigation, has made land exchanges essentially unavailable for mining projects.

In 1994, ASARCO proposed a land exchange with the BLM to acquire land adjacent to its Ray Mine in Arizona for waste rock storage and other ancillary facilities. Asarco had mining claims on all of the lands that it sought to acquire. BLM completed an EIS in 1999 and issued a record of decision approving the land exchange in 2000. Then the litigation began.

First, the Center for Biological Diversity, the plaintiff in the *Rosemont* case, together with two other environmental groups filed a protest of exchange with the BLM. That protest was denied in May, 2001. The same parties filed an administrative appeal with the Interior Board of Land Appeals. In August, 2004, the IBLA denied the appeal and affirmed the BLM. The same parties then filed a complaint in United States District Court in Arizona. In June, 2007, the court upheld BLM's decision. The plaintiffs then appealed to the Ninth Circuit. In 2010, in a 2-1 opinion written by Judge Fletcher, the same judge who wrote the majority opinion in the *Rosemont* case, the court reversed BLM's decision approving the exchange because BLM did not require and evaluate a detailed mining plan for the lands that would be transferred to BLM.[22] In other words, the court required that BLM essentially evaluate a mining plan of operations for the lands that would be exchanged.

In a dissenting opinion, Judge Richard Tallman said that "the majority's holding is shortsighted and unreasonably impairs the BLM's ability to effectively manage the public lands in a manner that we all desire. In practice, the new minted quasi-[Mining Plan of Operations] requirement will unquestionably stifle, if not altogether stymie, land exchanges, especially whenever mining companies are involved or mining-related activities are contemplated. Indeed, this judicially created obstacle would be, in application, an impenetrable wall."[23]

But Asarco and BLM continued to pursue the exchange. **Nine years later**, a supplemental environmental impact statement was published and in October, 2019, BLM issued a record of decision approving the exchange. Another BLM protest followed, filed by the Center for Biological Diversity and the Arizona Mining Reform Coalition (also plaintiffs in the *Rosemont* case). That protest was denied, and in May, 2020, **twenty-six years after the exchange application was filed, the land was transferred**.

Another land exchange, proposed in 1994 by the J.R. Simplot company in Idaho and seeking only 719 acres of public land, still has not been completed. BLM initially approved the

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[22] Center for Biological Diversity v. U.S. Department of Interior, 623 F.2d 633 (9th Cir. 2010).
[23] Id. at 665.

exchange under an Environmental Assessment and Finding of No Significant Impact in 2007. That was followed by a protest and appeal to the IBLA. The protest and appeal were denied, but the plaintiffs challenged the BLM's decision in Federal District Court in Idaho. In May, 2011, the Federal District Court reversed BLM's approval of the exchange and required preparation of an EIS.

If ancillary uses cannot be effectively and efficiently reviewed and approved by the federal land managers, those uses and the mines they support will not happen. That is the inescapable reality. In the bills under consideration today, Senator Cortez Masto's Mining Regulatory Clarity Act would reestablish the understanding of the Mining Law that has been settled law for 100+ years, until the *Rosemont* court upset it, and Senator Heinrich's Clean Energy Minerals Reform Act also makes efforts to address the problems created by the *Rosemont* decision. Legislation is absolutely necessary. If *Rosemont* is not addressed effectively by Congress, you will be leaving in place a problem that will ensure years of litigation and delay, a result that is contrary to the goal of using domestic minerals to address climate, economic and defense needs.

Rosemont and its progeny leave the federal land managers and the mining industry with a permitting system that is unworkable for most mines in most circumstances. The prior interpretation and the existing regulations provide the cradle-to-grave framework necessary for rational regulation and operation. If Congress fails to clarify the regulatory requirements and return the federal land permitting regulations to the status quo before the *Rosemont* decision, domestic exploration and mineral production will not increase, they will decline.

S. 1742 - The Clean Energy Minerals Reform Act

Barrick applauds some aspects of S. 1742 but cannot support other provisions of the bill. To Barrick, the most important feature of S. 1742 is that it recognizes and retains the core principles of the Mining Law: self-initiation and security of tenure. Barrick appreciates that Senator Heinrich seeks to build on those two important Mining Law features instead of replacing them.

S. 1742 also retains most of the existing claim maintenance and location fee system, while putting into place a mechanism for both fees to be adjusted to keep up with inflation. This system has worked well since the 1990s. However, Barrick does not believe this system needs to be included into this new legislation, particularly in the manner proposed. S. 1742 incorporates some parts of the existing regulatory language but not others, which would cause problematic confusion in an otherwise well-understood program.

Barrick also appreciates that, unlike other Mining Law reform proposals, S. 1742 does not attempt to insert separate environmental protection standards into the Law. Barrick applauds and supports the bill's recognition that – like every other industry in the U.S. – the mining industry must already comply with all of the federal, state, (and sometimes tribal and local) environmental and historic/cultural protection requirements. An obvious mark of anti-mining sentiment in Mining Law advocacy is the contention that the Mining Law is outdated because it contains no environmental standards. By that logic, legislation governing other American industry also must be deficient. The mining industry – like every other industry in the U.S. – is subject to the many

environmental laws and rules that have been adopted at the federal and state levels since the 1960's. S. 1742 acknowledges this reality.[24]

- **Royalty and Fees.**

As I already noted, Barrick supports a reasonable net royalty, but is opposed to the imposition of a gross royalty as proposed by S. 1742. Initially, it is important that this royalty discussion not be muddled by nomenclature. Rather, it is important to actually examine how the royalties are applied. Coal and oil and gas royalties are commonly described as "gross" because they nominally attach at the mine mouth or wellhead, but in application are "net" of any downstream processing costs because those costs are deducted before the royalty is calculated. In fact, the DOI's rules have always allowed deductions for "processing" when calculating the royalty on gas, and transportation costs for both oil and gas. *See* 30 C.F.R. §§1206.109, 110, .111 (transportation deductions for oil); §1206.156 (transportation deductions for gas); §§ 1206.158., 159 (processing deductions for gas). Similarly, DOI allows deductions for transportation and washing of coal. 30 C.F.R. §§ 1206.262, -.263, -.264 (transportation deductions for coal); §§ 1206.267, -.268, -269 (washing deductions for coal). Of course, coal washing is an expense incurred to make the coal saleable, akin in the hardrock world of processing that the raw ore must undergo to become a saleable product.

The proposed gross royalty also ignores that different ores are of different qualities and require different kinds of extraction techniques and, more importantly, bespoke processing facilities to make them into the end metal product. Hardock geologic deposits are incredibly metallurgically complex, and often different ore bodies carrying the same commodity (such as copper or gold for example) require completely different processing facilities (i.e., "mills") to convert the raw ore into a commodity product that can be sold. Creating such bespoke processing facilities is an enormously expensive and complex undertaking, requiring hundreds of millions of dollars and sometimes billions of dollars in engineering, pilot mill design and construction, full-scale mill design and construction, and commissioning. A gross royalty is a tax burden on all that massive capital investment. Rather than assessing the royalty on the value of what the miner separates from the ground, the proposed royalty is assessed at the end of the refinery. It is akin to assessing the oil & gas royalty on gasoline instead of on crude oil.

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[24] Among others, mining operations must comply with the following federal laws, which belies the oft-repeated argument that the mining law is "old" or has not been "updated:" Federal Land Policy and Management Act 43 U.S.C. § 1703(b); Forest Service Organic Act 16 U.S.C. § 478; National Environmental Policy Act 42 U.S.C. § 4321 et seq.; Clean Air Act 42 U.S.C. § 7401 et seq.; Clean Water Act 33 U.S.C. § 1251 et seq.; Safe Drinking Water Act 42 U.S.C. § 300f et seq.; Resource Conservation and Recovery Act 42 U.S.C. § 6901 et seq.; Emergency Planning and Community Right to Know Act 42 U.S.C. § 11001 et seq.; Toxic Substances Control Act 15 U.S.C. § 2601 et seq.; Mercury Export Ban Act; 15 U.S.C. §§ 2607, 2611; 42 U.S.C. § 6939f; Endangered Species Act 16 U.S.C. § 1531 et seq.; Wilderness Act; 16 U.S.C. § 1131 et seq.; Wild and Scenic Rivers Act, 16 U.S.C. § 1271; National Historic Preservation Act, 54 U.S.C. §§ 300101.

By asking that any royalty be "net" the mining industry is simply asking that we be treated fairly and that the investment we make in converting the rock into saleable product be recognized, just as Nevada's Net Proceeds of Minerals Tax does. One positive aspect of S. 1742's royalty provisions is that they would be imposed prospectively, and not on operating mines with commercial production existing on the date of enactment. These are mining operations whose economics were determined without counting a federal royalty as a cost; imposing a royalty on existing producing mines would be especially disruptive and could be viewed as a taking of large capital investments.

To be clear, the foregoing are not arguments against imposing a royalty; Barrick believes the federal government should receive compensation for its minerals. Barrick and other miners supported a net royalty that was included in a 1995 budget reconciliation package passed by Congress, but which was vetoed (on other grounds) by President Clinton. But Barrick believes firmly that is short-sighted and bad policy to focus on just the royalty, which is only one aspect of the government's "take." Governments around the world choose the manner in which they take a share of mineral production for the nationally owned resource. In doing so there are three basic levers: equity, taxes (including fees and duties) and royalties. In deciding what is an appropriate share for the government to receive, Congress should be looking at "total government take", the sum of all three levers. Also, in our federal system, Congress cannot ignore taxation at the state level.

Barrick appeared before the full Committee in a hearing on October 5, 2021, and submitted testimony and responses to written questions that explained in detail the policy and economic underpinnings of our position on royalties. Rather than repeating those arguments in this limited space, we recommend those materials and incorporate them here by reference. *See* Responses of Rich Haddock, General Counsel of Barrick Gold Corporation, Questions for the Record of the October 5, 2021 Hearing of the Senate Energy and Natural Resources Committee to Examine and Consider Updates to the Mining Law of 1872 (October 29, 2021).[25]

In addition to the gross royalty discussed above, S. 1742 would require a land use fee of four times the amount of the claim maintenance fee (in addition to the claim maintenance fee), and a reclamation fee of between 1% and 3% of the gross value of mine production. This reclamation fee as proposed is just additional gross royalty. Combined with the primary gross royalty, location fees, and claim maintenance fees, these additional fees will impose a significant and

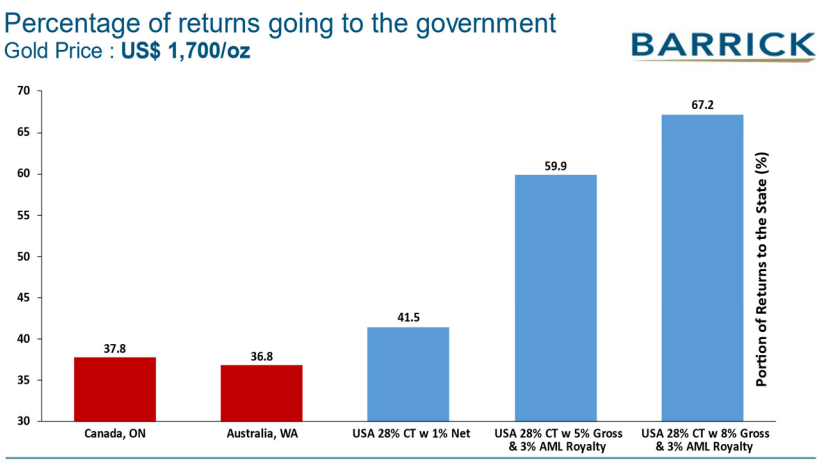
[25] S. 1742 authorizes the Secretary to set royalty rates (within a range), and to offer royalty relief. Both provisions suggest an understanding that hardrock minerals are diverse, and that royalty relief is sometimes necessary in an industry characterized by price cycles. A net royalty addresses both of these problems, and in a way that involves significantly fewer administrative burdens than those caused by the gross royalty in S. 1742. First, a net royalty "normalizes" for ore grade, differences in mineral processing costs, global market prices, and other variables. In that way, a net royalty makes it unnecessary to conduct and periodically updated complicated rulemaking processes to determine appropriate royalty rates for different hardrock minerals. Second, a net royalty accounts for price cycles, ensuring that royalties are not the cause of mine closures in down cycles, and making it unnecessary for the Secretary to engage in the factfinding necessary to determine if royalty relief is warranted.

unworkable cost burden on U.S. hardrock mines. As Congress considers Mining Law amendments and the imposition of royalties and fees, it must remember that the overall goal is to incentivize and grow the domestic mining industry, which creates jobs and tax revenue, and the minerals the country will need in the coming decades.

The amounts of royalties and fees matter a great deal. These are policy choices as much as revenue choices for the United States. If government taxes, royalties, and fees are excessive or punitive, they will raise the cost of investing in the United States too much and discourage, not ensure, future domestic mining, at a time when the U.S. government has recognized that it needs a domestic supply chain.

As mentioned above, Congress should not ignore that miners, like any other businesses, evaluate the "total government take" in deciding where to invest their capital. Mineral economists have developed an approach that allows the total tax burden (all forms of taxes, fees, royalties, duties, etc.) in one jurisdiction to be compared to that in others. This provides a standardized way in which to compare the government tax burden in different countries. When considering changes to the Mining Law, and especially the appropriate level of royalties and fees, Congress must understand how the U.S.'s total government takes compares to other favorable mining jurisdictions, and how that figure may result in more- or less- future mining investment in the United States.

To evaluate the impacts of the proposed royalties and fees in S. 1742 we created a hypothetical mine in order make an apples-to-apples comparison between jurisdictions. We compared what the total government economic take would be if the mine were in Australia or Canada and what it would be in the U.S. (Nevada) under the type of royalty proposed by Barrick and the royalty and fees proposed by S. 1742. The hypothetical mine is a "tier one" gold mine, which means it has more than 10 year of mine life with at least 500,000 oz. of annual production. This mine would be a very robust mine. A less robust mine would see even a greater percentage of government take. The percentage of Government take would increase at lower metal prices if royalties are gross. Note we assumed a corporate income tax rate of 28%, well below even the 40 year average rate. The graph speaks for itself.



In short, the royalties and fees proposed by S.1742 would be hugely more than governments receive in the developed world, leaving the miner little incentive to invest or develop here and forcing Americans to leave home if they want to work in mining, or worse stifling the development of American know-how. In the west, where public lands dominate, this reduces the ability of U.S. citizens to access good-paying mining jobs and acts as a socioeconomic penalty.

- **Exploration Permits**

S. 1742 would require an exploration permit for all mineral exploration on federal lands. BLM currently allows exploration to proceed under a notice (i.e., does not require a plan of operations) if the total surface disturbance is five acres or less and the operator has an approved reclamation plan with financial assurance. S. 1742 would eliminate notice-level exploration. This provision would create a severe disincentive to the most necessary and basic form of grassroots exploration in the U.S., reducing the opportunity for, and the value of, the Mining Law's self-initiation principle. Notice-level activity is the geologic equivalent of a litmus test, the most basic exploration activity, that gives a geologist some real information, but nowhere near full information, to begin to develop a geologic understanding and plot the next (expensive) geologic investigations. Finding valuable ore deposits takes a huge amount of exploration activity, and a lot (perhaps most) of that exploration is performed by smaller companies or even individuals that prospect and locate deposits and then sell them or enter into joint ventures with larger operators (like Barrick). Ultimately, less than 1 in 10,000 exploration projects become mines.[26] Requiring each one of these exploration activities to obtain a permit will burden the exploration process and

[26] "Mining 101," Ontario Mining Association, at https://oma.on.ca/en/ontario-mining/Mining101.aspx (accessed Dec. 4, 2023).

delay, not enhance, the discovery of promising mineral deposits. Even on the very conservative assumption that the Ontario Mining Association was off by a factor of 10 it would still take 1,000 notice-level exploration projects to lead to a mine, and with an added cost of $100,000 to each to obtain the permit, which is also a conservative cost figure for the development and processing of an exploration permit application with NEPA compliance, you have added at least $100 million dollars to the capital cost of the next mine project (10^3 x 10^5). That added cost alone would kill many projects. Eliminating notice-level activity would also create a severe administrative burden for the BLM, which already struggles to keep up with its Mining Law and NEPA responsibilities. Indeed, it would impose the same magnitude of costs on the BLM.

Further, eliminating the notice system is unnecessary. The existing system already requires miners to notify BLM of its activities, to avoid cultural resources and sensitive species, to reclaim completely at the conclusion of the notice-level work, and to provide financial assurances. If the notice-level activity is proposed in a sensitive area or would otherwise pose unusual risks or raise significant environmental issues, BLM already has the authority to require that a full plan of operations be submitted.

Some critics complain that the existing notice system does not keep tribes, communities, and other stakeholders informed, leaving them in the dark about mineral activities that may affect them. S. 1742 may be trying to address that concern by requiring public notice before an exploration permit is issued. However, such a statutory requirement is simply not necessary to inform the public. The information is already public; BLM just needs to make it more accessible. Notices are public documents and could be shared by BLM creating a publicly accessible database, such as a web-based register of notice-level operations. BLM already has the information necessary about notice-level activities to inform the public, and Barrick supports prompt delivery of that information to stakeholders and the public.

- **Status of the General Mining Laws.**

Barrick is concerned about the potential for confusion, delay, and litigation arising from Section 506(c)(2) of the bill, which provides that the Act "supersedes the general mining laws, except for the provisions of the general mining laws relating to the location of mining claims that are not expressly modified by this Act." The provision is so ambiguous and vague that the reader is left to figure out what it is intended to eliminate and what it is intended to preserve. In any event, this language ensures disagreement and litigation about its meaning. Barrick believes that changes to the Mining Law should be specific and surgical, and that the parts of the Law that are working well should be left in place, along with the decades of administrative and judicial precedent that surround and support them. An example (also noted above) are the claim maintenance provisions in Section 102, which appear to restate existing law but also exclude some provisions. The significance of the inclusions and exclusions here and elsewhere in the bill will translate into administrative confusion, delay, and litigation.

- **"Undue Degradation".**

Another most troubling concern is the bill's definition of "undue degradation," which is a *sub rosa* amendment of the Federal Land Policy and Management Act Section 302(b)'s "unnecessary

or undue degradation" standard. The definition would displace decades of administrative and judicial interpretation of FLPMA by grafting into it the "substantial irreparable harm" standard that mining opponents have sought for decades. Section 306(c) of the bill then finishes the job by declaring that the Secretaries must withhold permission for any mineral activity that will result in undue degradation – the "mine veto."

Barrick cannot support this radical and unwarranted change to FLPMA and the Mining Law. It is fundamentally inconsistent with the other provisions of S. 1742 that purport to keep the existing mining claim system in place. The new standard will be a cudgel for opponents of any and all mine projects on federal lands; it will result in project delays and litigation that will make today's permitting problems seem modest by comparison. And that assumes that major mining investments will continue to happen. It is more likely that mining companies simply will not invest the capital necessary to bring a mine into production when the project can be stopped apparently at any time, even after hundreds of millions of dollars have been spent and all standards and requirements of state and federal environmental laws are met.

- **Withdrawals**

The appropriate way to identify lands unsuitable for mining is via the land use planning process and withdrawal of such lands, before significant capital is invested. FLPMA provides for administrative withdrawals and millions of acres have been withdrawn from mining under that authority. Section 307 of the bill proposes to build on that process, but it does so in an expansive way.

Rather than taking a measured approach, the withdrawal portion of the bill will vastly expand the lands considered and eligible for withdrawal. For example, the bill specifically calls out "National Conservation Areas" for withdrawal. But National Conservation Areas are designated for a completely different purpose—to make federal funds available for the U.S. Fish & Wildlife Service to purchase conservation easements on private land. Those designations are often outsized because they are meant to make as much private land as possible eligible for the federally funded easements. As such, they should not be used for land management planning for *public* land, which is of course addressed in a robust way under the land management statues, such as FLPMA for BLM managed lands. The recently proposed Missouri Headwaters Conservation Area in Montana is a perfect example—the U.S. Fish & Wildlife Service has designated almost 6 million acres to enable conservation easement purchases of only 125,000 acres of private land. But under this bill, that full 6 million acres is specifically called out for withdrawal because it would be a National Conservation Area.[27] But now is not the time to withdraw massive tracts of land from mineral exploration. Indeed, the United States Geological Survey announced in July 2023 a plan to conduct geological surveys for critical mineral resources in a portion of this very same area in Southwest Montana.[28]

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[27] Another example is the Dakota Grassland Conservation Area, which covers approximately 30 million acres of North and South Dakota—vast portions of each state—to enable conservation easements on 2 million acres of private land. Land Protection Plan, Dakota Grassland Conservation Area, North Dakota and South Dakota, https://www.govinfo.gov/content/pkg/GOVPUB-I49-PURL-gpo38042/pdf/GOVPUB-I49-PURL-gpo38042.pdf.

[28] Press Release, U.S. Geological Survey, Bipartisan Infrastructure Law Funding Helps Map Critical Mineral Resources in Montana (July 13, 2023), https://www.usgs.gov/news/national-news-release/bipartisan-infrastructurelaw-funding-helps-map-critical-mineral.

- **Mine Veto**

Section 306 of S. 1742 appears to contain a new mine veto mechanism whereby BLM can veto a mine plan of operations after all of the investment has been made and the permitting completed. This language is closely related to the definition of "unnecessary or undue degradation." This language requires significant clarification before we can provide meaningful comments. At best, the vague and ambiguous nature of this language would lead to uncertainty, risk, and litigation, and as a result diminish and discourage mineral investment.

Conclusion

Barrick welcomes the opportunity to work with Senator Heinrich and other members of the Committee to refine the suggested approach of screening and protecting sensitive lands via land use planning. The "mine veto" is not the answer nor is expansive but vague withdrawal power outside the land management statutes; both will discourage mining investments and undermine the goal of establishing domestic sources of minerals.

Senator CORTEZ MASTO. Thank you, Mr. Haddock.
Mr. Wood.

STATEMENT OF CHRIS WOOD,
PRESIDENT AND CEO, TROUT UNLIMITED

Mr. WOOD. Chair Cortez Masto, Ranking Member Lee, and Subcommittee members, my name is Chris Wood, and I am the President and CEO of Trout Unlimited.

TU's mission is to bring together diverse interests to care for and recover rivers and streams so that our children can experience the joy of wild and native trout and salmon. In pursuit of this mission, TU has long been involved in mining issues, from protecting special landscapes, such as Bristol Bay in Alaska, to working with the mining industry to collaboratively clean up legacy abandoned mines. Domestic mineral production helped to build our nation. It helped to fuel our western expansion. It helped us to win two world wars. And it provides the raw materials for modern society. Unfortunately, mining that often occurred before the era of modern environmental laws left hundreds of thousands of abandoned mines. These mines dot the landscape like ticking time bombs releasing their deadly brew of lead, zinc, cadmium, and arsenic into our rivers and streams. There is no constituency for acid mine drainage and orange rivers. They do not have lobbyists for working for them in DC.

There are two central challenges to cleaning up abandoned mines. The first is potential legal liability to those would-be Good Samaritans that want to clean them up. The second is the lack of dedicated restoration funding. Two members of this Committee, Senators Heinrich and Risch, and seven other Committee members, are working hard to solve that first problem, and we appreciate that. Just about every commodity produced off our public lands has an associated royalty or fee that is used to clean up legacy development. I appreciate the fact that mining companies must make years and often millions of dollars in investments before they can mine, but there should be a common-sense royalty to help pay for the cleanup of legacy mines. We urge Congress to enact a royalty for minerals extracted from public lands. We do it for oil. We do it for gas. We do it for coal. We should do it for hardrock minerals. S. 1742 would achieve these objectives by establishing an adjustable royalty for new mines. I don't claim to be an expert in royalties, but certainly, reasonable people should be able to come together and determine a fair royalty that would allow the industry to plan with certainty while helping to finance the cleanup of abandoned mines.

The overall need for critical minerals could increase by as much as six times by 2040. Critical minerals such as lithium and cobalt are important in electric vehicles, solar panels, and wind turbines. A critical minerals mining rush will create new environmental and social challenges, and the Subcommittee is smart to take a hard look at the Mining Law of 1872, as well as the implications of the Rosemont decision. Rosemont has created uncertainty, as we have heard, for mining on public lands. The solution should not create additional uncertainty. S. 1281 ties the validity of a mining claim to the payment of claim maintenance and location fees. So long as

these fees are paid, mining claims would be valid with or without the discovery of a valuable mineral deposit. While this approach would resolve Rosemont, it does not distinguish between lands that are open for mining and those that have been withdrawn, such as wilderness areas and national monuments. Under existing regulations, mining can only be allowed in protected areas if pre-existing claims have been determined to be valid, meaning that there has been the discovery of a valuable mineral deposit. However, if the provisions of S. 1281 were to become law, the valuable discovery standard would be eliminated in protected areas, and it could become unlawful to deny prospecting, mining, and exploration activities.

We have fought, bickered, and disagreed over mining on public land for decades. Certainly, there is a common-sense compromise within our reach that would fund and make it easier to clean up abandoned mines and allow that certain landscapes are inappropriate for mining while addressing the legal and regulatory certainty needed by the mining industry to help us transition to a clean energy future.

I look forward to answering any questions.

[The prepared statement of Mr. Wood follows:]

Testimony of Chris Wood
President and CEO of Trout Unlimited
United States Senate Committee on Energy and Natural Resources
Public Lands, Forests, and Mining Subcommittee Hearing
December 12, 2023

Chair Cortez Masto, Ranking Member Lee, and Subcommittee Members:

My name is Chris Wood. I am the President and CEO of Trout Unlimited (TU). Thank you for inviting me to testify on the Clean Energy Minerals Reform Act of 2023 (S.1742) and the Mining Regulatory Clarity Act of 2023 (S.1281).

TU's mission is to bring together diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. In pursuit of this mission, TU has long been involved in mining issues, from advancing policies to foster responsible mining, to protecting special places such as Bristol Bay in Alaska, to working with the mining industry to clean up legacy pollution from abandoned mine lands (AML).

Domestic mineral production helped to build our nation, won two world wars, fueled westward expansion, and provides the raw materials for modern society. Domestic mining of critical minerals, for example, is an important part of transitioning to a clean energy economy. At the same time, mining that often occurred before the era of modern environmental laws left hundreds of thousands of abandoned mines that dot the landscape like ticking time bombs waiting to release their toxic brew of lead, zinc, cadmium, arsenic, and other toxins. How we proceed from this point forward is one of the most important policy questions before Congress and we thank the subcommittee for its focus on these critical issues.

There is an obvious path forward if we are creative and work together, and TU is committed to helping, however we can.

There is no constituency for acid mine waste and orange rivers. They do not have a lobby shop working for them here in the nation's capital. There is, however, a bipartisan commitment to clean up abandoned mines, encourage responsible mining, and propel the needs of a clean energy future, while making our rivers and streams cleaner.

Trout Unlimited stands ready to help the bill sponsors and Congress achieve these objectives and I offer the following testimony on behalf of TU and its more than 350,000 members and supporters nationwide.

Historic mining left widespread pollution that must be addressed

In 1872, the General Mining Law was a progressive law designed to spur settlement of the West. Anyone with a claim was able to mine with little if any oversight – polluting waterways, stripping mountainsides and changing the landscape of the West with little regard to, nor knowledge of, health, safety or environmental impacts. The impacts of those legacy mines pollute our lands and waters today.

In fact, the EPA has estimated that 40 percent of western headwater streams are deleteriously affected by abandoned hard rock mines. To be certain, improvements in environmental regulations have helped stem many of the worst effects of mining, but reforms remain important for funding abandoned mine clean up and the protection of fish and wildlife, sacred sites, and water supplies.

A 2020 Government Accountability Office report[1] estimates there are more than 533,000 abandoned hardrock mines on lands managed by the Forest Service, Bureau of Land Management, Park Service, and Environmental Protection Agency (EPA). On average, these agencies spend approximately $287 million annually identifying, cleaning up, and monitoring abandoned hardrock mines—adding up to approximately $2.9 billion in spending between 2008 and 2017. An analysis conducted by TU found that approximately 110,000 miles of streams – enough to circle the Earth four times – are listed as impaired for heavy metals or acidity, and abandoned mines are a major source of these impairments. Of these impaired stream miles, 20 percent are in areas that contain native trout and salmon while 52 percent are in areas that are important drinking water sources.

We must do better. The vast majority of these sites are not Superfund type problems. They are easily correctible, relatively small scale engineering projects. The problem is that certain provisions of two of the most important environmental laws, CERCLA and the Clean Water Act provide a profound disincentive for organizations such as mine that had nothing to do with the creation of the waste but want to make things better. The saying is trite, but true: we have allowed the perfect to be the enemy of the good.

While not the focus of this legislative hearing, the *Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2023* (S. 2781) is proof that the mining industry and conservation interests can not only find common ground on mining issues, but that we can come together to build bipartisan coalitions and advance important policies. With 26 Senators supporting this legislation—13 Democratic and 13 Republican – several of whom are members of the Subcommittee, it shows that there can be a path forward on mining policy that is grounded in trust and compromise. We thank Senators Heinrich and Risch for their determined leadership on Good Samaritan legislation and showing us all what is possible when we apply common sense to common problems for the common good.

In 2004, I established TU's abandoned mine reclamation program. My thinking at the time was, "this is such a commonsense fix. How hard can this be?" The intervening 19 years have answered that question. Over the years, we have completed dozens of abandoned mine reclamation projects across the western states in cooperation with state and federal agencies and private sector partners. TU recently expanded our efforts into Alaska, and we aspire to do even more in the coming years. To date, these projects have restored more than 200 stream miles across the West.

Our technical, partner-based approach has enabled us to become a non-profit leader in abandoned mine restoration. Many of those projects would not be possible without the financial and technical support from our private industry partners. Foundations such as the Tiffany & Company Foundation and companies such as Freeport McMoRan, Kinross Gold Corporation, Newmont Mining, Integra Resources and Ouray Silver Mines Incorporated, provide valuable financial support and expertise that allows TU to leverage matching funds to accomplish meaningful reclamation that benefit rivers and local communities, alike.

We and our partners have shown that by working together we can make a difference cleaning up the scourge of abandoned mines. However, to address this pervasive problem on the scale it demands, we need Good Samaritan legislation and a dramatic increase in funding.

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[1] GAO-20-238, *Information on Number of Mines, Expenditures, and Factors That Limit Efforts to Address Hazards* https://www.gao.gov/products/GAO-20-238

Funding barriers to progress that Congress must address

Tens of thousands of abandoned legacy mines negatively affect our nation's waters every single day. This is a completely fixable problem.

Just about every commodity produced off of our public lands has an associated royalty or fee that helps to address remediation from legacy development. We respect and appreciate that mining companies must make years, and often millions of dollars, in investments before they can mine, but there should be a common-sense royalty to help pay for the clean-up of legacy mines. We urge Congress to enact a royalty and/or fee structure for minerals extracted from public lands. We do it with oil and natural gas. We do it with coal. We do it with timber. And there is no reason we should not do it with hardrock minerals.

As noted previously, federal agencies have spent roughly $287 million per year to address abandoned mines, and estimates put the total future cost of cleaning up abandoned mines at as much as $54 billion. To be certain, not all abandoned mines are created equal. Some pollution is more harmful to people (and fish!) than others, but it is important that any new royalty and/or fees are both fair for the mining industry and generate enough revenue to make substantial progress cleaning up abandoned mines.

The *Clean Energy Minerals Reform Act* would achieve these objectives by establishing an adjustable royalty between 5% and 8% of the gross income from mining locatable minerals on public lands. TU nor I are expert on royalties associated with hard rock mining, but certainly reasonable people can come together and determine a fair royalty that would allow the industry to plan with certainty while providing relief from the abandoned mine crisis. Revenues generated from these royalties would then be dedicated for the purposes of the Abandoned Hardrock Mine Reclamation Program established by Section 40704 of the Infrastructure Investment and Jobs Act, including inventorying, reclaiming and remediating abandoned hardrock mine lands.

Importantly, this royalty would only apply to new mining operations. Additionally, royalty relief should be provided if production would not occur without a reduction in royalty. Taken together, this would ensure a fair return on the production of locatable minerals on federal lands, create flexibility necessary for a sustainable domestic mining industry, and generate much needed funding to finally begin tackling the abandoned mine crisis. We urge your support for these provisions.

A clean energy transition relies on critical mineral supply chains

The Biden Administration has established the lofty and laudable goal of the United States reaching 100 percent carbon pollution-free electricity by 2035. This does not come without cost. According to the International Energy Agency, the energy sector's overall need for critical minerals could increase by as much as six times by 2040. Critical minerals such as lithium, cobalt, tellurium and rare earth elements are important in electric vehicles, solar panels and wind turbines, and non-critical base metals such as nickel and copper will likewise see increased demand.

As I said earlier, supplying this demand and securing supply chains for these minerals is important to meet clean energy goals. Before seeking new sources of raw materials, we should prioritize and fully utilize alternatives, such as recycling, substitutes to critical minerals, reprocessing old mine waste piles (while cleaning up the remaining abandoned mines) and ash material, and engineering advancements to reduce use and the need for new mines.

Abandoned mine cleanups have the potential to remediate sites while also recovering minerals from mining waste that help to meet the need for critical minerals. At the same time, mining for both critical and non-critical minerals is likely to increase, and it is crucial that extracting and processing critical minerals be done responsibly with an emphasis on avoiding, minimizing, and mitigating impacts to fish, wildlife, and drinking water supplies.

However, even with advancements in recycling to help meet demand, domestic mining is and will continue to be an important part of the solution to meet the clean energy and critical minerals challenge before the nation.

Increased domestic mining creates challenges but also opportunities—Federal land management agencies must have the proper authorities to manage and embrace risk

A critical minerals mining "rush" that is driven by clean energy will create new environmental and social challenges, and the subcommittee is right to take a hard look at the Mining Law of 1872 as well as the implications of the Rosemont judicial decision. We are encouraged that S.1742 and S. 1281 are being considered together at this hearing and we urge Congress to continue to approach the issue in an integrated manner.

An integrated and balanced path forward means both reasonable updates to the 1872 Mining Law and reasonable fixes to legal uncertainties to the mining industry stemming from the Rosemont decision.

Importantly, public land management agencies need better tools and resources to manage mining. Much progress has been made in the field of mining to minimize impacts from operations, including greater consideration of fish and wildlife habitat. But the fact is that there needs to be some measure of discretion given to agencies to decide whether to allow mining in critical habitats, community drinking water supplies, or sacred sites, for example.

Some places such as Bristol Bay or the Upper Yellowstone are not appropriate for mining. But it should not take an act of Congress or for the EPA to intervene in dramatic fashion to stop ill-advised mining proposals.

As they do with every other multiple use on public lands, public land managers should have the discretion to determine lands that are suitable for mining. Ensuring equal consideration for all public land uses – including conservation – will allow for sound, science-based decisions. The *Clean Energy Minerals Reform Act* would do this by allowing for mineral withdrawals utilizing criteria enumerated in the Federal Land Policy and Management Act for the development and revision of land use plans, including weighing long-term benefits to the public against short-term benefits; coordination with state and local governments; observing the principles of multiple use and sustained yield; and assuring consideration of state, local, and Tribal plans.

In addition to advancing these provisions, we also encourage Congress to consider opportunities at the local land use planning level (i.e., Forest Plans and Resource Management Plans) for local Forest Service and BLM officials to make "suitability decisions" for lands open to claim staking. This would be similar to how the Forest Service and BLM make lands available for oil and gas leasing, grazing and timber harvest. These decisions are in effect for the duration of the plan (intended to be 10-15 years) but may be adjusted sooner through a land use plan amendment. For lands that a forest plan or resource management plan identify as open for claim staking, self-initiation for mining claims, exploration and mining would continue as it does today and has for 151 years.

Rosemont court decision

Lastly, I want to address the so-called Rosemont court decision and the *Mining Regulatory Clarity Act*. In the Rosemont case, the proponent had a valid mining claim. Its plan of operations, however, proposed to dispose of nearly two billion tons of waste rock on nearby national forest land where the project proponent had not discovered valuable mineral deposits. The District Court and the Ninth Circuit Court of Appeals found that Rosemont needed to establish that they had a valid and existing right prior to allowing disposal of the waste.

The Rosemont decision has created a great deal of uncertainty for mining on public lands, and resolving this uncertainty is something that Congress should address. The solution, however, should not create additional uncertainty, and we encourage amendments that will ensure the legislation is narrowly targeted to address specific challenges resulting from the Rosemont decision.

The *Mining Regulatory Clarity Act* tethers claim validity and security of tenure to the payment of location fees and claim maintenance fees. So long as these fees are paid, mining claims would be valid, with or without the discovery of a valuable mineral deposit. While this approach would resolve the Rosemont decision, it does not distinguish between lands that are open for mining and those that have been withdrawn from mining laws, such as wilderness areas and national monuments. This is problematic because numerous mining claims preexist designations for many of these protected areas, including approximately 1,100 mining claims in National Park units according to the National Park Service.

For instance, in 2018 Secretary of the Interior Ryan Zinke approved, and Congress later enacted into law, the withdrawal of 30,000 acres of national forest lands in Montana on the doorstep of Yellowstone National Park. Across the political spectrum there was agreement that this was a place where mining is not appropriate.

Under existing regulations[1], mining can only be allowed in these types of protected areas if preexisting claims are valid, meaning that there has been the discovery of a valuable mineral deposit. This requirement establishes a high bar to meet before a valid right is established on mining claims within protected areas. However, if provisions of the *Mining Regulatory Clarity* Act were to become law, it would eliminate "the valuable discovery standard," even in "protected" areas, and it could be unlawful to deny prospecting, mining and exploration activities on all such mining claims.

Moreover, under the proposed legislation these rights could also be construed to apply to incidental activities that are not located on mining claims, such as road construction across public land to access a mining claim. Importantly, these rights do not just apply to plans of operations for commercial mining operations; these provisions would extend to all phases of mining, including prospecting and exploration. The effect is that a claim holder in good standing would now have a right explicitly codified in law to not only mine on any claim upon which required fees have been paid, but also for reasonably incident activities, including constructing ancillary roads and other infrastructure across public lands – even just for the purposes of prospecting on a mining claim.

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[1] See 43 CFR § 3809.100, "after the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid."

To prevent these unintended consequences, we encourage amendments that would narrowly focus the legislation Rights for ancillary uses, for example, should not extend to prospecting and exploration activities. Additionally, exploration, mining or related activities should not be allowed in protected areas withdrawn from mining laws unless a valid right was established prior to the protective designation.

Conclusion

We have fought, bickered, and disagreed over mining on public lands for over 100 years. Certainly, there is a commonsense compromise within our reach that would fund and make it easier to clean up abandoned mines; and allow that certain landscapes are inappropriate for mining while addressing the legal and regulatory certainty needed by the mining industry to help us transition to a clean energy future.

You have TU's commitment to work in good faith to strike a balance we can all support.

Thank you for the opportunity to testify today. Trout Unlimited appreciates the leadership of the subcommittee to explore these complex issues and seek solutions that bring stakeholders together and make a difference for the environment and communities around the country.

Senator CORTEZ MASTO. Thank you.
Ms. Sweeney.

STATEMENT OF KATIE SWEENEY, EXECUTIVE VICE PRESIDENT AND COO, NATIONAL MINING ASSOCIATION

Ms. SWEENEY. Chair Cortez Masto, Ranking Member Lee, and Subcommittee members, I appreciate being here on behalf of the National Mining Association's hardrock mining companies in support of S. 1281, the bipartisan Mining Regulatory Clarity Act. I also thank the Committee for their efforts to pursue much-needed minerals policies that support, rather than harm, domestic mining.

America's mining industry supplies the essential materials necessary for nearly every sector of our economy, and we do so in accordance with world-leading environmental, safety, and labor standards. No country mines more responsibly than we do here in the United States. The most mineral-intensive moment in human history is upon us, and the U.S. is woefully unprepared. Looking solely at demand coming from the electric vehicle market, the Energy Transitions Commission estimates we need up to 250 new mines by 2030, Benchmark Minerals says 384 by 2035, and the Frasier Institute says 388 by 2030. It is clearly not a question of if we must mine, but where. With the right policies, the U.S. could ramp up domestic mining, reduce reliance on China, and create high-paying, American jobs. The mining industry needs lasting certainty that is not tied to any political agenda. The stakes are higher than ever, not just for mining companies that can spend hundreds of millions or even billions of dollars before seeing any return on investment, but for society, if we don't get this right.

Regulatory certainty is at the core of our discussion today. S. 1281 reinstates much-needed clarity in the face of a fundamentally flawed court decision that conflicted with more than a century of legal precedent, including Supreme Court decisions. It returns us to the longstanding framework that existed prior to the Rosemont decision, nothing more, nothing less. Regulatory certainty is essential for mine permitting that can take an average of seven to ten years or longer. Opening a mine in the United States typically involves multiple agencies and between a dozen and a hundred of local, state, and federal approvals. Valid environmental concerns should be fully addressed, but permitting processes should not be an excuse to trap mining projects in limbo. Lengthy mine development time frames were highlighted by Dr. Daniel Yergin in testimony before this Committee this fall. His global data on 127 mines demonstrated that a major new resource discovery today would not become a productive mine until 2040, at the earliest. He also cautioned against overzealous attempts to source minerals primarily from allied countries while blocking domestic projects, noting that such availability is not guaranteed.

Regulatory certainty is equally important to investors. Our cumbersome permitting process already negatively impacts investment attractiveness. Consulting firm McKinsey Metals and Mining recently cautioned that regulatory uncertainty could put the energy transition at risk, as such ambiguities impair potential investors' ability to accurately forecast cash flows and result in investment decision delays. That conclusion is particularly alarming, as the

International Energy Agency estimates that the energy transition requires $360 to $450 billion worth of new mineral investment by 2030.

Regarding S. 1742, its fundamental upending of the Mining Law is the antithesis of regulatory certainty. The Mining Law works as intended as a land tenure statute to promote mineral exploration and development on federal lands. It is complemented by exhaustive local, state, and federal environmental laws and regulations to ensure responsible operations. Remaking the Mining Law will further slow mine permitting and force the doubling down of our outside reliance on countries with questionable labor, safety, and environmental practices. S. 1742's worthy goal of promoting cleanup of abandoned legacy mines that predate the modern regulatory era is undermined by its failure to recognize the effectiveness of existing regulations and modern mining practices. Under the Federal Land Policy and Management Act, activities must be conducted to prevent "unnecessary or undue degradation," which requires compliance with applicable federal and state environmental and cultural resource laws. Furthermore, the standard is inherently self-updating to allow for continual improvement. As federal and state laws are strengthened, so is this standard. Promoting regulatory certainty does not mean that laws and regulations should never change or that we are not always seeking improvements. In my 33 years with the industry, I can assure you that NMA's members are committed to continuous environmental improvement.

Thank you for the opportunity to be here today.

[The prepared statement of Ms. Sweeney follows:]

Testimony of
Katie Sweeney
Executive Vice President and Chief Operating Officer
National Mining Association

U.S. Senate Subcommittee on Public Lands, Forests, and Mining

"Hearing to Receive Testimony on the Mining Regulatory Clarity Act of 2023 (S. 1281) and the Clean Energy Minerals Reform Act of 2023 (S. 1742)"

December 12, 2023

Table of Contents

Good morning Chair Cortez Masto and Ranking Member Lee. I am Katie Sweeney, Executive Vice President and Chief Operating Officer of the National Mining Association (NMA). I appreciate the opportunity to testify today on behalf of the hardrock mining industry on the Mining Regulatory Clarity Act of 2023 (S. 1281) and the Clean Energy Minerals Reform Act of 2023 (S. 1742). America's mining industry supplies the essential materials necessary for every sector of our economy – from technology and healthcare to energy, transportation, infrastructure and national security. The NMA is the only national trade organization that serves as the voice of the U.S. mining industry and the hundreds of thousands of American workers it employs before Congress, the federal agencies, the judiciary and the media, advocating for public policies that will help America fully and responsibly utilize its vast mineral resources.

We work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security and economic security, all delivered under world-leading environmental, safety and labor standards. The NMA has a membership of more than 280 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers.

Introduction

Despite being home to vast mineral reserves, the U.S. is facing unprecedented and dangerous mineral supply chain challenges. Our import reliance has been a well-documented and increasingly problematic issue for decades and has now become a crisis, exacerbated by pandemic and war-related supply chain challenges, and exponentially increasing mineral demands due to the rapid electrification of our economy. As documented by the U.S. Geological Survey (USGS), the U.S. reached record mineral import reliance in 2022 as imports made up more than one-half of the U.S. apparent consumption for 51 nonfuel mineral commodities – up from 2021, when only 47 commodities met that metric.[1]

There is recognition by some within the Biden-Harris administration of the immense challenge we now face and the importance of domestic mining to nearly every piece of the President's agenda. Several of the administration's early executive actions, including its comprehensive supply chain review, made clear the inherent vulnerabilities of our overreliance on mineral imports, the need for domestic mining support and lack of domestic processing capabilities. Despite the rhetoric from the administration about the need to address the minerals challenge, actions have not lived up to the words.[2] There can be no mineral and supply chain security — no

[1] U.S. Geological Survey, 2023 Commodity Summary, available at https://pubs.er.usgs.gov/publication/mcs2023.

[2] The administration recently memorialized its policy recommendations with the Sept. 12, 2023, release of the White House Interagency Working Group (IWG) on Mining Regulations, Laws, and Permitting released its report, "Recommendations to Improve Mining on Public Lands." The NMA strongly disagrees with the report's overarching conclusion that fundamental reform of the Mining Law is necessary to achieve the best outcomes. The NMA's comments to

meeting the enormous mineral demand at our doorstep — without fundamental recognition that we need more domestic mining and the policies to achieve it.

Solutions to meet anticipated mineral demand, while simultaneously rebuilding our domestic supply chains, must be comprehensive. Friend-shoring of our minerals supply, however, cannot come in place of the essential work of standing up production and these supply chains at home. Regulatory certainty must be the cornerstone of minerals policies to enable the ramping up of domestic production and processing under our rigorous environmental and safety standards.

The NMA appreciates the opportunity to discuss the importance of regulatory certainty in the context of the legislation that is the subject of this hearing. The NMA strongly supports the bipartisan Mining Regulatory Clarity Act of 2023 (S. 1281) to restore long-standing interpretations of the Mining Law upended by the U.S. Court of Appeals for the Ninth Circuit's fundamentally flawed decision in *Center for Biological Diversity v. U.S. Fish & Wildlife Service (Rosemont Decision)*. We have significant concerns, however, about the partisan Clean Energy Minerals Reform Act of 2023's (S. 1742) wholesale changes to the Mining Law including its punitive fees and a radical change to the established standard governing approval of mining projects on federal lands. These provisions will erode investor confidence in the U.S. and jeopardize the viability of a strong domestic mining industry.

Ever-increasing Demand for Minerals

The most mineral intensive moment in human history is upon us and the U.S. is woefully unprepared. Looking solely at demand coming from the electric vehicle market: the Energy Transitions Commission estimates up to 250 new mines may be required by 2030.[3] Benchmark Minerals says we will need 384 new mines by 2035. [4] And last month, the Fraser Institute said 388 new mines must be built by 2030.[5] It's clearly not a question of if we must mine, but where. The "where" matters as producing minerals here at home, as opposed to countries such as Congo and Zambia being pushed by the administration, ensures mining will be conducted in accordance with the world's most stringent environmental, labor and safety regulations, while simultaneously creating high-paying American jobs.

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the IWG are available at https://www.regulations.gov/comment/DOI-2022-0003-26954. A recent NMA op-ed, the Biden mining policy train wreck, outlines concerns regarding many of the key policy recommendations is available at https://elkodaily.com/opinion/column/commentary-the-biden-mining-policy-train-wreck/article_3036f00e-80c5-11ee-bc20-1bade970ae33.html. These NMA concerns apply equally to provisions of S. 1742 that are similar to the IWG policy recommendations.

[3] Energy Transitions Commission, "Material and Resource Requirements for the Energy Transition," July 2023; https://www.energy-transitions.org/wp-content/uploads/2023/07/ETC-Material-and-Resource-Requirements-ExecSummary_vF.pdf

[4] https://source.benchmarkminerals.com/article/more-than-300-new-mines-required-to-meet-battery-demand-by-2035.

[5] Fraser Institute, "Failure to Charge: A Critical Look at Canada's EV Policy," Nov. 2023; https://www.fraserinstitute.org/sites/default/files/can-metal-mining-match-the-speed-of-planned-electric-vehicle-transition.pdf.

The Biden administration has also prioritized scaling back U.S. reliance on Chinese minerals. Earlier this year, President Biden's national security adviser, Jake Sullivan, warned that "clean-energy supply chains are at risk of being weaponized in the same way as oil in the 1970s, or natural gas in Europe in 2022."[6] In his remarks, he specifically mentioned concerns about minerals that form "the backbone of the clean-energy future."[7] His concerns were prescient. In July, China announced restrictions on the export of gallium and germanium, minerals integral to semiconductors, solar panels and missile systems. The U.S. is currently 100 percent reliant on China for these critical commodities. As accurately described by the Wall Street Journal, the action was "more than a trade salvo. It was a reminder of China's dominant hold over the world's mineral resources—and a warning of its willingness to use them in its escalating rivalry with the U.S."[8] The July restrictions were followed by an October announcement by China setting export restrictions on graphite, a move Geoffrey Pyatt, Assistant Secretary of State for Energy Resources, called a "wake-up call' that reflects both the dangers and urgency the U.S. faces in ramping up critical mineral supply chains to meet its climate goals."[9]

China's willingness to employ such tactics for decades, has led to skyrocketing prices for many minerals and has required a drawdown of limited stockpiles that will last two to three months at most.[10] As articulated by a former U.S. Trade Representative for China, China's past retaliation patterns are the best clues for predicting what to expect next, and their most effective passive option would be an export suspension of key inputs that would "inflict direct, reciprocal pain." [11]

China's dominance in mineral production and processing will take focused and durable policies to overcome. As the primary producer and/or supplier of mineral commodities listed as essential to U.S. economic and national security,[12] China

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[6] Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution, April 27, 2023. Available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/.

[7] Id.

[8] Jon Emont, Wall Street Journal, China Controls Minerals That Run the World—and It Just Fired a Warning Shot at U.S., July 11, 2023. Available at https://www.wsj.com/articles/china-controls-minerals-that-run-the-worldand-just-fired-a-warning-shot-at-u-s-5961d77b.

[9] E&E Greenwire, "State Dept. official: China's graphite restriction a 'wake-up call'." November 2, 2023. Available at https://subscriber.politicopro.com/article/eenews/2023/11/02/state-dept-official-chinas-graphite-restriction-a-wake-up-call-00125003.

[10] Reuters, "China gallium, germanium export curbs kick in; wait for permits starts." August 1, 2023. Available at https://www.reuters.com/markets/commodities/chinas-controls-take-effect-wait-gallium-germanium-export-permits-begins-2023-08-01/.

[11] The Hill, "China's retaliation playbook can't meet the US export control challenge," October 20, 2022; https://thehill.com/opinion/international/3697077-chinas-retaliation-playbook-cant-meet-the-us-export-control-challenge/

[12] Notably this reliance comes despite existing U.S. resources. In the 2022 Mineral Commodity Summaries, the USGS indicated the U.S. had an estimated 48 million metric tons (mt) of copper that can be mined and processed economically, 69 million mt of cobalt, 340 million mt

controls more than 80-90 percent of global rare earth element production, nearly 90 percent of global mineral processing capabilities, as well as the market prices for rare earth elements at each step of the process. China also refines 68 percent of the world's cobalt, 65 percent of nickel, and 60 percent of battery grade lithium needed for electric vehicle batteries and energy technologies. Goldman Sachs Research also estimates the extent of the vertically integrated nature of China's dominance, with 65 percent of battery components, 71 percent of battery cells, and 57 percent of the world's electric vehicles being made in China.[13]

Notably, China's strong supply chain position does not result from an inherent advantage in reserves for most materials, but rather from heavy non-market activities and government subsidization of mining, processing and manufacturing industries and excesses capacity. With its much longer planning horizon, China has pursued its "Going Global" strategy since the late 1990s, which involves deployment of significant direct investments across the globe to secure mineral supply chains.[14, 15]

The administration's electrification and national security objectives cannot be achieved through outsourcing our mineral supply chains to countries like China and Russia and the Democratic Republic of Congo that have far less environmental, safety and labor oversight, or in some cases none. Unfortunately, we only increase our dependence on these and other sources for our minerals needs when we stand in the way of opportunities to enact meaningful enabling policies, instead choosing policies that limit or completely block responsible domestic mineral development.

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of nickel and 750 million mt of lithium. Regardless, in 2021, the U.S. imported 48 percent of U.S. consumption of nickel, 76 percent of cobalt, 45 percent of copper, and more than 25 percent of lithium.

[13] Goldman Sachs, "Resource realism: The geopolitics of critical mineral supply chains," Sept. 2023. https://www.goldmansachs.com/intelligence/pages/resource-realism-the-geopolitics-of-critical-mineral-supply-chains.html

[14] Humphries, Marc. Congressional Research Service, "China's Mineral Industry and U.S. Access to Strategic and Critical Minerals: Issues for Congress," March 20, 2015. http://fas.org/sgp/crs/row/R43864.pdf).

[15] *See also,* USGS 2020 Investigation of U.S. Foreign Reliance on Critical Minerals (There are instances where the mineral deposit or mining and mineral processing operation of a commodity is partially or completely owned and (or) controlled by foreign companies with strong ties to their governments. For example, Chinese firms have purchased equity stake in lithium deposits and operations in Australia and Chile, niobium operations in Brazil, a rare earth deposit in Greenland, and cobalt operations in the D.R. Congo, Papua New Guinea, and Zambia (S&P Global Market Intelligence, 2020). Investigating China's investment in cobalt assets worldwide, Gulley and others (2019) found that when taking into account Chinese companies' ownership in foreign assets on an equity-share basis, China's share of global cobalt production increases from 2 to 14 percent for cobalt mine materials and from 11 to 33 percent for cobalt intermediate materials (figure 6). Furthermore, if the Chinese companies' equity shares of the production from these assets are assumed to be as secure as its domestic production, then these acquisitions have the effect of reducing China's NIR from 97 percent to an adjusted 68 percent, thereby reducing China's exposure to supply disruptions (Gulley and others, 2019).) p. 8.

The U.S. effectively has all the ingredients necessary to counter China's global mineral dominance. However, the wrong policies are creating substantial setbacks to attaining such dominance. Today's legislation, the Mining Regulatory Clarity Act, is a necessary step to help ensure U.S. minerals policy provides the necessary regulatory certainty to enable responsible domestic mining.

Destabilizing The Mining Law

Backdrop: Rosemont Project and Subsequent Litigation

The decade-long Rosemont permitting process began in 2008 when it submitted a mining plan of operations and was subsequently followed by a draft environmental impact statement (EIS) in 2011 and a final EIS in late 2013. The Forest Service issued a final record of decision in 2017, but final approval was delayed until Rosemont received a Clean Water Act section 404 permit in 2019. The approved plan of operations included authorization to place waste rock on more than 2,000 acres of unpatented claims as a "use reasonably incident" to its operations.

Years of Litigation

Several environmental groups challenged the approval of the Rosemont project, including the placement of waste rock on the unpatented claims. The Rosemont litigation was a strategic assault on the Mining Law in an attempt to make it wholly unworkable, knowing that the economic viability of a mine depends upon the ability to use surrounding lands for activities incidental to mining, known as ancillary use activities. In 2019, the United States District Court for the District of Arizona issued a fundamentally flawed decision vacating the Forest Service's record of decision supporting the agency's approval of Rosemont plan of operations.[16] The decision conflicted with more than a century of legal precedent, including numerous U.S. Supreme Court decisions, related to the Mining Law. The District Court's reversal focused on the failure of the Forest Service to confirm that the mining claims underlying proposed waste rock and tailings storage facilities were valid before approving the plan.[17] In doing so, the court misconstrued existing legal precedent regarding rights conveyed by the Mining Law to owners of unpatented claims and the ability to use surface resources to further the development of those claims.

The district court decision was appealed and in May 2022, the United States Court of Appeals for the Ninth Circuit (9th Circuit) affirmed the underlying decision on slightly different grounds. The narrow and unprecedented reading of the Mining Law and U.S. Forest Service 36 C.F.R. §228 Subpart A regulations, severely restricts the Forest Service's ability to approve ancillary use activities incidental to mining operations.

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[16] *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 409 F. Supp. 3d 738 (D. Ariz. 2019).
[17] *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.3d 1202 (9th Cir. 2022).

The environmental groups involved in the Rosemont litigation have tried to further leverage the Rosemont decision to prevent other mining projects from moving forward nationwide. For example, they challenged the Lithium America's Thacker Pass project arguing the Rosemont decision rationale applied to Bureau of Land Management (BLM) authorizations as well as Forest Service. The U.S. District Court for the District of Nevada agreed but remanded the Thacker Pass permit back to the agency instead of invalidating it.[18] The Mount Hope molybdenum mine suffered a similar fate later in 2023. These same groups have submitted comments on numerous other projects arguing they are unlawful under the Rosemont decision.

The Mining Regulatory Clarity Act (S. 1281)

The bipartisan legislation introduced in April 2023 by Senators Catherine Cortez Masto (D-Nev.) and Jim Risch (R-Idaho) reinstates much needed clarity in the face of the Rosemont decision. The legislation returns us to the workable framework that existed prior to the fundamentally flawed Rosemont ruling, ensuring the fundamental ability to conduct responsible mining activities on federal lands.[19] The legislation is a durable solution, vastly superior to what can be achieved through the May 2023 Solicitor's Opinion[20] issued by the Department of the Interior, especially considering courts' increasingly reluctance to provide the appropriate deference to such opinions.

What S. 1281 Does Not Affect

Contrary to allegations by the bill's detractors, the legislation simply codifies the prior framework that existed before the Rosemont ruling – nothing more, nothing less. It provides no additional rights or allowable actions for a claim holder than what has existed, and worked, for decades before. It ensures a claim holder shall have the right to use, occupy, and conduct operations with or without discovery of a valuable mineral deposit, which is the longstanding method utilized by BLM to evaluate proposed operations.

- **The legislation does not lock up federal lands:** The legislation does not change the requirements that a mining claim actually be used for mining purposes. A claim holder cannot simply ground a stake to mark a claim, pay a fee, and file paperwork to lock up lands for purposes unrelated to mining as this would result in immediate suspension pursuant to BLM regulations. [21] All existing standards for conducting mining operations under existing BLM regulations remain in effect as does the Mining Law's "good faith" doctrine.

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[18] *Bartell Ranch LLC v. McCullough,* No. 321CV00080MMDCLB, 2023 WL 1782343, (D. Nev. Feb. 6, 2023)

[19] See, definition of operations at 36 CFR 228.3 which is mirrored in the legislation.

[20] Department of the Interior, Office of the Solicitor, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057, May 16, 2023. The NMA believes the opinion undermines regulatory certainty by raising more questions than it answers, offering unworkable solutions and undercutting well-understood and lawful interpretations of the Mining Law.

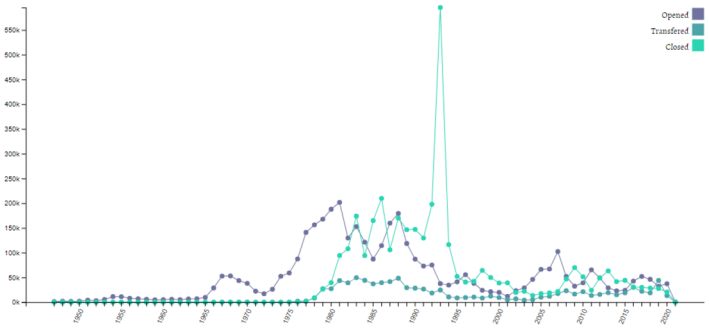
[21] See, use and occupancy regulations under the Mining Law at 43 CFR § 3715.0-1, 43 CFR § 3715.2, and 43 CFR § 3715.7-1

Pursuant to the doctrine, any claim located in "bad faith," or with no intention to extract minerals is void.[22] Activities must be reasonably incident, constitute substantially regular work, be reasonably calculated to lead to the extraction and beneficiation of minerals, as verified by BLM official.

Further, BLM data listing the amount of mining claims opened, closed or transferred demonstrates that since 1947 a steady and proportionate number of new claims are opened and closed each year.[23]

Annual The United States Mining Claim Trends

Annual breakdown of The United States mining claim records between 2021 and 1947.



- **The legislation is complemented by exhaustive local, state, and federal environmental, cultural resource, reclamation, and financial assurance laws and regulations to ensure responsible operations:** Activities on BLM and Forest Service lands must meet all applicable laws and regulations. Under the Federal Land Policy and Management Act (FLPMA) section 302(b), activities must be conducted to prevent "unnecessary or undue degradation," which requires compliance with applicable federal and state laws related to environmental protection and protection of cultural resources.[24] Furthermore, the standard is self-updating: the inherent nature of the standard allows for continual improvement. As federal and state laws are strengthened, so is the standard. Importantly, state environmental regulations of general applicability

[22] *See, generally, U.S. v. Bagwell, 961 F.2d 1450* (9th Cir. 1992) (The department can move forward to eject a claimant acting in bad faith without first contesting the claims) and *U.S. v. Nogueira*, 403 F.2d 816 (9th Cir. 1968)(A claim made in bad faith is void even if it is supported by a discovery).
[23] Bureau of Land Management claim listings data. Available at https://thediggings.com/usa/trends#table-annual-actions. Note: a data outlier occurred in 1993 after the claims maintenance fee was implemented.
[24] Bureau of Land Management, "The Federal Land Policy and Management Act of 1976, as amended." Available at https://www.blm.gov/sites/default/files/AboutUs_LawsandRegs_FLPMA.pdf

apply on federal lands and are not preempted by the General Mining Law or other federal laws.[25]

- **The Mining Regulatory Clarity Act would not change access to public lands for recreation or conservation:** Under existing law, the public has "the conditional right to cross mining claims or sites for recreational and other purposes and to access federal lands beyond these boundaries." Nor does the legislation reopen lands already placed off-limits to mining through congressional or administrative action, including wilderness, national parks, wildlife refuges, recreation areas and wild and scenic rivers.

- **Renewable energy projects on public lands will not be impacted:** In April 2013, the BLM published a final rule, "Segregation of Lands—Renewable Energy," that allows the BLM to segregate public lands within a solar or wind application area from the operation of the public land laws, including the Mining Law, by publication of a Federal Register notice. The BLM uses this temporary segregation authority to preserve its ability to approve, with modifications, or deny proposed energy generation right-of-way (ROW), and to facilitate the orderly administration of the public lands, subject to valid existing rights.[26] Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature which would not impact lands identified in this notice of intent may be allowed with the approval of an authorized officer of the BLM during the segregation period. The BLM has exercised this authority at least 10 times in the last year.

- **The legislation does not undermine the rights of tribes:** The legislation does not speak to the rights of tribes, communities, or any stakeholders so it does not lessen any obligations under existing local, state, and federal regulations.

The Clean Energy Minerals Reform Act (S. 1742)

International competition for minerals is becoming fierce and nearly every other Western ally – aside from the U.S. – is prioritizing ramping up domestic mining operations. In the last two years, Canada released its strategy to position itself as the "global supplier of choice for clean energy minerals:" [27] the United Kingdom released its critical minerals strategy;[28] and the European Union unveiled a

[25] *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).
[26] Federal Register, "Segregation of Lands—Renewable Energy," (78 Fed. Reg. 25204, Apr. 13, 2013). Available at https://www.federalregister.gov/documents/2013/04/30/2013-10087/segregation-of-lands-renewable-energy
[27] Natural Resources Canada News Release, "Countries Commit to the Sustainable Development and Sourcing of Critical Minerals," Dec. 12, 2022. Available at https://www.canada.ca/en/natural-resources-canada/news/2022/12/countries-commit-to-the-sustainable-development-and-sourcing-of-critical-minerals.html
[28] Department for Business, Energy and Industrial Strategy, "Resilience for the future: The UK's critical minerals strategy, 22 July 2022. Available at

comprehensive proposal including various permitting efficiency actions to ensure the EU's access to a secure, diversified, affordable and sustainable supply of critical raw materials.[29]

Despite significant efforts by individual agencies to secure our supply chains, the U.S.-China Economic and Security Review Commission found that:

> The current ability of the U.S. to overcome the scale and scope of China's harmful policies is undermined by the lack of a coherent strategy and fragmented authorities to mobilize resources, coupled with a deficiency in new tools to address economic injury. The U.S. is also impeded by its self-imposed barriers to employing and underutilization of available tools and its difficulties in data sharing and analysis.[30]

Over the past three decades, legislation to amend the Mining Law has been introduced every Congress. The legislation generally is punitive in nature, containing gross retrospective royalties, taxes on the movement of materials, prescriptive, duplicative and potentially conflicting environmental standards, and greater restrictions on land access. The partisan Clean Energy Minerals Reform Act, despite the name, is no exception. Upending the Mining Law as contemplated by S. 1742 at this critical moment is counterproductive to reshoring essential supply chains, reducing our mineral import dependance on geopolitical adversaries, and building the materials industrial base needed to underpin the renewable energy and climate reduction objectives.

The perennial legislative proposal relies on an outdated view of the mining industry to legislate us into indefinite import reliance. While it is a worthy goal we all share of promoting cleanup of abandoned legacy mines that predate the modern regulatory era, it is undermined by its failure to recognize the effectiveness of existing regulations and modern mining practices. Remaking the way we conduct mining on federal lands, as is contemplated in S. 1742 undermines the regulatory certainty needed to incentivize domestic investment and development.

Proposed provisions in the Act that create the greatest uncertainty include:

- A 5-8 percent royalty on the gross income from mining for production of all locatable minerals (includes a grandfathering provision to only protect mines that have an approved plan of operations and are in production as of the date of enactment);
- A prospective annual land use fee equal to four times the claims maintenance fee on each 20 acres of federal lands;

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https://www.gov.uk/government/publications/uk-critical-mineral-strategy/resilience-for-the-future-the-uks-critical-minerals-strategy

[29] European Union's Critical Raw Materials Act, March 16, 2023. Available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/green-deal-industrial-plan/european-critical-raw-materials-act_en

[30] U.S.-China Economic and Security Review Commission, 2022, Executive Summary; p. 16. Available at https://www.uscc.gov/sites/default/files/2022-11/2022_Executive_Summary.pdf

- A prospective annual abandoned mine land reclamation fee of 1-3 percent of the value of production from hardrock minerals mining operations (the reclamation fee applies to all operations, whether on federal, state or private lands);
- A radical change to the existing unnecessary or undue degradation standard;
- New authority allowing land withdrawals to be effectuated without compliance with the procedures and approvals established under FLPMA.

The existing system works as intended – as a land tenure statute and not an environmental statute – to promote mineral exploration and development on federal lands. It is complemented by exhaustive local, state and federal environmental, cultural resource, reclamation, and financial assurance laws and regulations to ensure responsible operations. Upending this system will not only slow the mine permitting process in the U.S. but will force the U.S. to double-down on our already outsized import reliance from countries with questionable labor, safety and environmental practices.

A Punitive Gross Royalty Disincentivizes Investment

As highlighted by the NMA and mining company representatives in prior congressional hearings, the NMA and the mining industry are not opposed to all royalty proposals, just those that impair our global competitiveness.[31] The mining industry has long worked to engage with Congress in a bipartisan fashion to enact reasonable amendments to the Mining Law, including a royalty. However, all royalty approaches are not equal, and royalties need to be crafted carefully to avoid driving mining further abroad. The NMA supports the allocation of royalties to address physical safety and environmental hazards at abandoned hardrock mines. These monies could be supplemented with allocation of excess claims maintenance fees (fees collected by the BLM in excess of the funds needed for the Mining Law Administration Program). The NMA supports a portion of the monies collected being distributed directly to affected states where these abandoned mine lands (AMLs) are located though we do not currently have an official position on allocation percentages.

The NMA believes that the best way to address competitiveness concerns is to institute a net prospective royalty. Generally, a royalty assessed on gross income increases the economic risk of a given mining investment and acts as a disincentive to investment. A net prospective royalty is the only type of royalty that maintains incentives for private parties to invest enormous up-front capital to develop mining projects on federal lands. 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. 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

[31] Comments for 2009 testimony from Phil Baker and 2021 testimony from Katie Sweeney, illustrating the NMA's consistent positions on potential amendments to the Mining Law.

gross royalty takes a bigger bite out of the shrinking income pie as prices decrease. This can have a dramatic impact on whether existing mines stay open or new mines are built.

Change to the FLPMA Unnecessary or Undue Standard

S. 1742 would subvert the FLPMA unnecessary or undue standard by redefining the term to eliminate the word "unnecessary" and provide a mine veto for mines that cannot meet the new standard. As such, the definition displaces decades of administrative and judicial interpretation of FLPMA by grafting into it the "substantial irreparable harm" standard that mining opponents have sought for decades. The new standard will lead to project delays and litigation and undermine investment.

The BLM engaged in rulemaking activities to adopt a similar change in 1999 and 2000 but ultimately concluded the harms of such an approach outweighed any benefits. The final 2000 Environmental Impact Statement associated with the rulemaking effort projected that the value of mine production originating from public lands would decrease by 10-30 percent ($169-$484 million) across the study area. Decreased production would cause ripple effects including losses of: 2,100 to 6,050 jobs; $305 million to $877 million in total industry output; $138 million to $396 million in total personal income (of which $76 million to $218 million is employee compensation); $157 million to $453 million in value-added. The negative impacts to Nevada alone were estimated at $117 to $351 million.[32]

Changing the Rules of the Road Impairs Investment

S. 1742's vast changes to the Mining Law will undermine the U.S.' investment attractiveness. With so many variables at play within a mining project, the importance of regulatory certainty in attracting investment in mining projects cannot be overstated. Mining is a capital-intensive process that takes years of exploration, engineering, design and development before minerals can be produced. Unlike coal, and oil or gas exploration, concentrations of useful minerals that are rich enough to form ore deposits are rare with approximately 1 out of 1,000 deposits having the qualities that allow them the chance of being transformed into an operating mine. Coupled with the complex state and federal permitting process, significant time may pass – the NMA has member companies whose projects have been more than 20 years in the making and billions of dollars invested before bringing in a single dollar in return – impacting the ability of mining companies to attract investment capital.

A recent article from consulting firm McKinsey Metals & Mining highlights the importance of regulatory certainty, noting that regulatory and policy uncertainty could put the energy transition at risk. The article cautions that any ambiguity could affect domestic supply chains as potential investors lose the ability to accurately

[32] BLM Final EIS, Surface Management Regulations, Vol. 1, at p. 288 (Oct. 2000).

forecast cash flows leading to delays in urgently needed investment decisions.[33] McKinsey's conclusion is particularly alarming in the face of the International Energy Agency's estimates that global investment in mining will need to reach $360–450 billion by 2030 to support the energy transition.[34] McKinsey also found the Inflation Reduction Act's mineral sourcing requirements would fail without simultaneously addressing the existing permitting system that has allowed persistent bottlenecks.

It should come as no surprise that investors favor projects where they are likely to get the earliest return on their investment and where they know they have the necessary security of title and tenure from the time of location through mine reclamation and closure. As a result, investment dollars for mineral exploration and development tend to flow to countries with a stable political environment, a strong economy, an efficient permitting system and predictable regulatory climate. Further, unlike other countries where mining is driven by government investment, U.S. mining is primarily a private enterprise. These unique factors taken together make the existing system, with its requisite security of tenure, the most appropriate for the U.S. to promote mineral exploration and development on federal lands.

Conclusion

What we are seeing is an explosion in mineral demand colliding with a geopolitical arms-race for development and control of integrated mineral supply chains. Matching the speed and scale of this rising demand requires the U.S. to recognize that mineral policy is now energy, climate and national security policy. To compete, we need access to our vast mineral resources and a permitting regime that enables the mining sector to respond to market signals and meet demand. Additional improvements to the permitting process should remain a high priority given the data provided by Dr. Daniel Yergin of S & P Global in testimony before the committee this fall. He shared global data on 127 mines across the world that began production between 2002 and 2023, which demonstrated that a major new resource discovery today would not become a productive mine until 2040 at the earliest. He cautioned against overzealous attempts to source minerals primarily from allied countries while blocking domestic projects, noting that our allies are experiencing similar supply constraints, so availability is not guaranteed.

The right policies to support domestic mineral production and our supply chains must be forward-looking rather than regressive or the U.S. mineral supply chain – from mining through smelting and processing – will remain a shell of our true domestic potential. Promoting regulatory certainty doesn't mean that laws and regulations never change or that we aren't always seeking improvements. In my 33 years in this industry, I can assure you that the NMA's members are committed to

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[33] McKinsey& Co. Regulatory efficiency will be essential for the energy transition, June 16, 2023 Available at https://www.mckinsey.com/industries/metals-and-mining/our-insights/regulatory-efficiency-will-be-essential-for-the-energy-transition.

[34] International Energy Agency, Energy Technology Perspectives 2023, Jan. 2023

continuous environmental improvements, and routinely review developments across the globe for potential incorporation into their own operations.

The NMA applauds the work of this committee, and the legislation pursued both by Mining Subcommittee Chairwoman Catherine Cortez Masto (D-Nev.), Senator Jim Risch (R-Idaho), Chairman Joe Manchin (D-W. Va.), and Ranking Member John Barrasso (R-Wyo.), and Mining Subcommittee Ranking Member Mike Lee (R-Utah), among many others, to reach a thoughtful, bipartisan, and durable solutions to address our nation's disjointed minerals policy and prioritize domestic mineral security. Regulatory certainty provided in the Mining Regulatory Clarity Act, permitting certainty through real time limits on reviews and judicial review of federal agency actions, getting the decisions made by Bureau of Land Management state offices to the Federal Register for public comment and out of endless review in Washington D.C., and responsible access to federal lands are important efforts to ease our nation's bureaucratic paralysis and provide for greater economic competitiveness and growth.

The NMA appreciates the opportunity to provide this testimony to the subcommittee and looks forward to working with Congress and the administration to support a robust domestic mineral supply chain for generations to come.

Senator CORTEZ MASTO. Thank you, Ms. Sweeney.

All right, for the benefit of the panelists and members, we are in the middle of votes this afternoon. So I just talked to Senator Lee, and I think what we are thinking is, the closer we get to the second and third votes, we may recess. We are going to go until we can get to, hopefully—then recess, go vote for the second vote and the third vote and come back if we have to, to finish the hearing. Okay?

So we are now going to start the Q&A period for the members. I will begin. Thank you so much to all of the panelists for being here and your comments already.

We know the Biden Administration has set climate change mitigation goals to drastically decarbonize our economy and has stated that their policy is to do so by securing domestically sourced critical minerals used to manufacture those clean energy technologies. Mr. Haddock, how is our ability to meet the Biden Administration's climate goals impacted by the Rosemont decision, and how is our ability to develop domestic critical minerals impacted by that decision as well?

Mr. HADDOCK. Thank you, Senator.

The Rosemont decision results in really an irrational operation of a mine. The purpose of ancillary use was to be able to effectively and rationally organize and operate a mine. If you aren't able to do that, then you may not be able to develop certain mines. You may not be able to economically develop certain mines. Even if the mill site opinion is upheld in the D.C. Circuit, you have to go further away to dispose of waste rock. That is at a very high cost, and it can make the mine uneconomic. So from my perspective, the other problem is that it results in permitting and litigation delay. From a permitting standpoint, there still is an open question as to what you have to show under the Solicitor's Opinion to meet the "some evidence" test. That certainly is ripe for litigation in every case, and there are additional open issues with respect to the use of roads and pipelines that have always been a part of a unified plan of operations. And so, that will also affect the ability to rationally permit a mine.

Senator CORTEZ MASTO. So Mr. Haddock, can you explain a little bit for those folks that aren't familiar with hardrock mining or haven't been to a hardrock mining site, talk a little bit about the Rosemont decision and how you believe that it's going to extend the already lengthy permitting process? You talked a little bit, but give us examples.

Mr. HADDOCK. Well, I mean, environmental impact statements that are going on right now that I am familiar with, they have been delayed for months while the agency tried to understand exactly what was required, why the mining company went back and tried to gather the information that was required from the permitting agency. And so, it has just created another step and, you know, imposed additional burden on an already busy agency.

Senator CORTEZ MASTO. Can I ask you, because of your expertise and your legal background, particularly with the Mining Clarity Act, there is a lot of misinformation around it, so I want to ask you a couple questions to verify whether this is true or not. There is a myth that somehow the bill locks out other uses of public lands

such as for renewable energy projects or conservation. Does the bill lock out other uses of public lands?

Mr. HADDOCK. It does not. I think there is a misconception that somehow this is a whole new mining law in this section. What this is is an amendment to Section 28f of the Mining Law, and it fits in the entire Mining Law framework, and it is subject to all of the other legal requirements, including the FLPMA requirements for permitting. It doesn't change anything with respect to excluding other activities.

Senator CORTEZ MASTO. So can I ask you very quickly then, because I only have so much time——

Mr. HADDOCK. Yes.

Senator CORTEZ MASTO [continuing]. Does the bill give mining companies unrestricted access to public lands?

Mr. HADDOCK. It does not.

Senator CORTEZ MASTO. Does the bill allow mines to be built within national parks, wilderness areas, and other areas already withdrawn from the Mining Law?

Mr. HADDOCK. It does not.

Senator CORTEZ MASTO. Does the bill automatically grant rights-of-way for roads, pipelines, or transmission lines on public lands?

Mr. HADDOCK. No, it does not.

Senator CORTEZ MASTO. Does the bill give new rights to claimants who have not discovered any valuable minerals?

Mr. HADDOCK. It does not.

Senator CORTEZ MASTO. Does the bill undermine tribal rights? And for the record, if it did, I would not be introducing this bill, but does it undermine tribal rights?

Mr. HADDOCK. It does not. It does not affect the National Historic Preservation Act, the Archeological Protection Act, treaty rights, any of those issues.

Senator CORTEZ MASTO. Thank you.

And then, finally, Dr. Feldgus brought something up at the very end of his testimony, and can you clarify this for me, which you said this bill could lead to a number of serious unintended consequences, in particular, granting the right of use and occupancy to claimants prior to showing the discovery of a valuable mineral, and could encourage the filing of nuisance claims that attempt to interfere with or prevent other authorized uses. And then he also said it could also lead to unauthorized non-mining industrial uses and residential occupancy. Is that true? And by the way, did that occur even prior to the Rosemont mine decision?

Mr. HADDOCK. Abuse of mining claims——

Senator CORTEZ MASTO. Yes.

Mr. HADDOCK [continuing]. Is something that happened prior to the Rosemont decision, but it does not happen much anymore. A mining claim that is located for any purpose other than mining is void ab initio—it doesn't exist. The agency can go ahead and approve rights over the top of such a claim. And you know, it was really more of a problem pre-FLPMA. And since FLPMA came, now the agency knows where all the mining claims are and they know when things are built on public land. You have to have a permit to do so. If somebody tried to use a mining claim for residential

purposes, BLM would look at the plan, they'd go out and inspect, and they would not allow it to happen.

Senator CORTEZ MASTO. And then, finally, why is the Solicitor's Opinion not a fix, or is it?

Mr. HADDOCK. The Solicitor's Opinion isn't a fix because it basically makes Rosemont the law of the land, not just in the Ninth Circuit, it makes it the law everywhere, despite the regulations that are on the books elsewhere in the country. It also does not resolve the issue that the—it is not binding on the mining opponents, but one of the issues that they want to litigate, they wanted to litigate it in the Thacker Pass case, but the Ninth Circuit would not allow them. Sent them back to the District Court. They wanted to litigate whether or not the standard was actually to show by full feasibility—full validity of a claim—rather than the "some evidence" standard that is in the Solicitor's Opinion. They also indicted in the Thacker Pass case, but the court would not let them because they raised it late, that they wanted to challenge use of the surface for roads, pipelines, the distribution lines, and the other surface facilities, other than waste dump trucks and tailings. And they are preserving that issue for another case.

Senator CORTEZ MASTO. Thank you.

Senator Lee.

Senator LEE. Dr. Feldgus, I would like to start with you, and I have a lot to cover with a lot of witnesses, so for these answers, I would love it if you could give me a yes or a no.

Does the Biden Administration support the new gross royalty that is proposed in S. 1742?

Dr. FELDGUS. We support a royalty.

Senator LEE. And again, yes or no. Does the Biden Administration want to see increased investment in domestic mining?

Dr. FELDGUS. Yes, we do.

Senator LEE. Good.

Ms. Sweeney, you are an expert, and your organization, the National Mining Association, has a really good pulse on the industry. Will a new gross royalty lead to more investment or less investment in domestic mining in America?

Ms. SWEENEY. Less investment.

Senator LEE. Okay.

Mr. Haddock, I would like to ask you the same question. Will a new gross royalty lead to more investment or less investment in domestic mining?

Mr. HADDOCK. A royalty is a cash cost and any cash cost is a disincentive to investment.

Senator LEE. Okay. So Dr. Feldgus, we have just heard from two industry experts who have both definitively said that a new gross royalty will have a deleterious effect in this area and will stifle investment in domestic mining projects. Now, given the Biden Administration's stated support for domestic mining of critical minerals, I am really scratching my head here. And I start to wonder how on Earth could one justify endorsing legislation that would, as we have just heard, cripple domestic mining on federal lands by imposing new fees and royalties. I just, I don't get it.

Now, Ms. Sweeney, proponents of new mining fees and royalties will often try to justify these measures by a familiar trope. They

tend to say that these measures are acceptable, in fact, they are necessary as a way to ensure that taxpayers are getting a "fair return" on mining activities that happen to occur on federal lands. But it seems to me that there won't be any fair return at all, as there won't be any return if there isn't any mining. And there won't be any mining if there is not investment. Is that fair to say?

Ms. SWEENEY. Correct.

Senator LEE. Coal, oil, and gas—they all pay a royalty. Why would a similar royalty and framework not work for hardrock minerals?

Ms. SWEENEY. So there are several reasons that a gross royalty approach doesn't work the same way for hardrock minerals, and it's really that the market fundamentals are just vastly different. When you are out there exploring for hardrock minerals, it's very elusive. You are looking for smaller concentrations, so there is so much upfront work to be done that can take a decade. Compare that to oil and gas, or coal, where you have broad areas with often known resources. Another difference is——

Senator LEE. You know where the vein is if it's coal, or you know where the oil or gas is.

Ms. SWEENEY. Yes, you know where the basin is, where the oil might be, or there is a lot of information, government information even, about where the coal resources are. We don't have the same information for hardrock minerals. Another difference is that the period between exploration and extraction is usually much longer. So there is a lot greater risk, right, that the project could be economic before you get to that production stage. And then there is significantly more processing required on the hardrock mining side before you get to a saleable product. And then I think another important distinction is there is no pass-through of cost, including for a royalty for hardrock mining in the same way that there is for oil and gas and coal. So I think those are some of the important distinctions.

Senator LEE. Okay.

Now, Mr. Haddock, under S. 1742, an exploration permit would be required for all mineral exploration on federal land, eliminating the possibility of the current existence of notice-level exploration. Notice-level exploration, of course, requires operators to submit a notice of intent for activities causing more than just a minimal surface disturbance, but not quite extensive enough to necessitate a full plan of operations ensuring environmental considerations are addressed. So notice-level exploration strikes a balance between allowing for reasonable exploration activities on the one hand and protecting the environment on the other. Could you describe the importance of grassroots mineral exploration and how, for example, a new permit requirement might impact the exploration process?

Mr. HADDOCK. That notice-level activity is really the most fundamental kind of testing exercise in exploration. When a geologist develops a concept, he needs to go out and he needs to test it. And notice-level activity, as you say, balances the environmental protections because you have to avoid cultural resources. There are a bunch of rules you have to follow. You have to reclaim. But it allows you to go out and get, for the first time, real data. And it needs to be done over and over and over and over again before you

actually get to a real prospect where you have notice-level, or where you actually have to go and file a plan of operations.

If you can't do that, and you start adding transactional expense in the neighborhood of $100,000 or $200,000, which is what you do for a full-blown exploration plan, it's just going to stifle grassroots exploration.

Senator LEE. And I am reading it correctly—to get rid of notice-level exploration?

Mr. HADDOCK. Yes.

Senator LEE. Thank you.

Senator CORTEZ MASTO. Senator Heinrich.

Senator HEINRICH. Thank you, Chairwoman Cortez Masto.

I do think we need to get some level of certainty on this issue of claims inside protected areas. So Mr. Wood, and I know, frankly, that that is not the sponsor's intent, but Mr. Wood, as you read it, would S. 1281, as drafted, allow mining-related activities on existing claims that are within protected areas like parks and wilderness areas, even if those mining claims are not valid?

Mr. WOOD. We know that that is not the Senator's intent, but I think this demonstrates the challenge of applying a 150-year-old mining law to modern mining. There are 1,100 mining claims in our national parks today. And to mine in a protected area, pre-existing claims have to be determined valid. And you have to prove the discovery of a valuable mineral deposit. Now, there are people here who know a lot more about this than I do, but if you take away the requirement to ascertain whether or not there is a valuable mineral deposit there, the area could be perceived as open.

Senator HEINRICH. But that seems like something we ought to be able to fix in the specific language, right?

Mr. WOOD. Completely.

Senator HEINRICH. Yes. Great.

Mr. WOOD. It sounds like that's no one's intent.

Senator HEINRICH. Perfect.

Mr. WOOD. So it's eminently fixable.

Senator HEINRICH. Thank you.

Mr. Haddock, I wanted to ask you, you know, setting aside what the right number is, is it reasonable to expect mining companies to pay some federal royalty for hardrock minerals?

Mr. HADDOCK. Yes, Senator. As I have said, we support a reasonable net royalty. And the reason we support net, and I think this is really important—a gross royalty would be akin to putting the oil and gas royalty on the product at the pump—that price—because every mine has to have a custom, very expensive process to refine the ore to make the saleable product. And we believe that net actually represents the value of what the government is bringing to the table with their product, with their rock.

Senator HEINRICH. So Nevada has a net royalty, for example, right?

Mr. HADDOCK. It does. And that is exactly how it operates.

Senator HEINRICH. When—what year did that come into being?

Mr. HADDOCK. It's in the Nevada Constitution.

Senator HEINRICH. The royalty?

Mr. HADDOCK. Yes.

Senator HEINRICH. Okay.

And has that prevented investment in Nevada mining?

Mr. HADDOCK. It works because, while any cash cost is a disincentive, and it's a cost, it works because it recognizes the difference in kinds of deposits, it recognizes the cycles. It recognizes the different—it works well across that whole range of different kinds of minerals that have different economics and different processing requirements.

Senator HEINRICH. Dr. Feldgus, estimates to clean up all abandoned hardrock mine sites in the U.S. are in the tens of billions of dollars, is that correct?

Dr. FELDGUS. That is correct.

Senator HEINRICH. How much do we spend in Interior right now on mine cleanup each year?

Dr. FELDGUS. Probably between $20 and $30 million a year.

Senator HEINRICH. Million, with an M?

Dr. FELDGUS. Million with an M, yes.

Senator HEINRICH. So I said billion earlier. How many more zeros are there in a billion than a million?

Dr. FELDGUS. Three more.

Senator HEINRICH. Yeah, so it's a million millions to make a billion, okay. So we aren't getting at that very quickly, is that correct?

Dr. FELDGUS. That is correct, yes.

Senator HEINRICH. Mr. Wood, according to the GAO, officials from 13 western states have identified over a quarter million—three zeros—abandoned hardrock mine features within their states, including about 126,000 features that pose physical safety or environmental hazards, and we suspect those numbers are actually conservative. The scale of the problem of abandoned hardrock mines in the West can be hard to comprehend until you experience what we experienced at the very visible and destructive Gold King Mine disaster in 2015 in Colorado and New Mexico.

Can you talk a little bit about what are some of the consequences for communities where abandoned hardrock mines have not been cleaned up?

Mr. WOOD. Well, first of all, I want to commend you——

Senator HEINRICH. And for sportsmen.

Mr. WOOD. Yes, first of all, Senator, I want to commend you and Senator Risch for your leadership on actively trying to fix this problem by helping to pass Good Samaritan legislation.

The effects on fish and wildlife are profound. You have rivers in the West where kids can't swim in them. We did our first abandoned mine cleanup, Senator Lee, in Utah, outside of Snowbird Ski and Summer Resort. There were tailings piles there that Snowbird wouldn't touch because of the liability concerns. And we ended up working with the Forest Service and the EPA and created a Good Sam agreement. The tailings piles had dirt bike trails over them. Kids were riding their dirt bikes, you know, and doing wheelies and such over these mounds, and EPA measured the lead levels at 1,100 times the safe standard. So I mean, these are profound impacts, and they are often acute and they are often in indigenous communities. And these are totally tractable issues. We know how to clean these things up.

Gold King was almost a Superfund type situation. We are talking about piles of rock that are left and they are leeching acid mine drainage into rivers and streams. It's totally fixable.

Senator HEINRICH. Thank you.

Senator CORTEZ MASTO. Senator Risch.

Senator RISCH. Well, thank you, Madam Chairman.

First of all, Chris, good to see you again. Chris and I worked together when I was Governor doing the Roadless Rule for Idaho. I have always greatly appreciated that and acknowledge it again publicly, notwithstanding the fact that Chris comes to our state occasionally in the fall to try to make the elk extinct. And he hasn't contributed much in that regard.

Well, first of all, thank you for having this hearing. This is a really critical hearing as we really move to a different time, I think, in our country. My home state, aptly named the "Gem State," has a long history in mining. Indeed, we have a miner pictured very clearly on our state seal and we are very proud of our mining history. Historically, Idaho has been one of the most productive silver producing regions in the world. And we also have deposits of many other minerals in high demand today, including antimony, cobalt, and rare earths. Despite having these deposits in places like Idaho, the United States has reached a dangerous and hazardous position for our mineral supply chain. Our supply chain questions came clearly into focus during the COVID times, and now, since the wars have broken out, we have had a chance on all of the committees to deal with national security to look at these things and realize that we are in a very dangerous situation.

Most people—most Americans—don't understand that when they pick up anything, whether it's their watch, their smart phone, or anything else, that material had to come out of the ground, then it had to be processed, and then refined before it could be used. And people take this for granted without really a thought of where it came from and how difficult these things are to come by. And these aren't—we are over 50 percent import-reliant on over 50 minerals. And these are not minerals serving obscure or niche interests, they run our cell phones, cars, support clean energy development, and power defense capabilities. Even worse, we source many of these minerals from Russia and China or from supply chains that they have control over or other supply chains in the world that are notoriously unreliable.

This reliance had already reached a tipping point, and then came the Rosemont decision. This upended 150 years of mining law precedent to make it even less advantageous to develop minerals in this country. The Mining Regulatory Clarity Act, which I introduced with the Chairman, which I appreciate, brings us back to the status quo, but that should be just the start. It's more important now than ever before that our mining laws are workable and regulations do not inhibit the industry. If we cannot produce the minerals needed for manufacturing, energy, and national defense in concert with our allies and partners, we will remain reliant on unsecured supply chains and reliant upon our adversaries. With this in mind, this Committee needs to be extremely careful that any other changes to our mining policy will incentivize growth and investment in domestic mining, not inhibit it.

Enacting a gross royalty structure or other burdensome requirements that would make mining less advantageous would be a grave mistake. To secure our supply chains, support clean energy development, and provide for our national defense, we need domestic mining. We have a great deal of domestic natural resources and we need to take advantage of them. And thank you very much, Madam Chairman.

Senator CORTEZ MASTO. Thank you.

Senator King.

Senator KING. Thank you.

Dr. Feldgus, I wanted to start—I could not help but notice your title, Deputy Assistant Secretary, and tell a quick story. When I worked on the Senate staff some years ago, I was setting up hearings such as this, and I called the Administration one day and asked for a witness on a particular topic and the fellow said we are sending you a Deputy Under Secretary or some long title, and I said, well, I don't really know what those titles mean. Who is this guy? And the fellow gave me an answer, which if I ever write a book about Washington, will probably be the title. He said, the highest level where they still know anything.

[Laughter.]

Senator KING. And I realize that you are at that level and I am now above it. So——

[Laughter.]

Senator KING. Just to be clear: that's an absolutely true story.

Mr. Haddock and Ms. Sweeney, why shouldn't the royalties on gold or lithium or anything else be the same as oil and gas? What is the difference?

Please be brief in your answer.

Mr. HADDOCK. Senator, for example, the royalty on oil and gas goes back to the wellhead. It takes out all processing and transportation costs after the wellhead. Our minerals are like that in the sense that when they come out of the mine, they go through a multi-billion-dollar processing plant in——

Senator KING. But so does oil and gas. It goes through refining and all of that.

Mr. HADDOCK. But the royalty isn't charged on the value of the gasoline, it's charged on the value of the oil at the wellhead.

Senator KING. Would you accept that as a standard?

Mr. HADDOCK. What we are advocating is a net royalty, like the Nevada Net Proceeds of Minerals royalty, which does that, Senator.

Senator KING. Well, my problem with the word net is, I remember learning from Mario Puzo, the author of the Godfather—never take a percentage of the net because you don't have any control over the accounting. Isn't there—is there a way to measure this? I mean, I worry that your companies, with all due respect, will be doing their accounting in such a way that there is never a net, just like there is never a net on a Hollywood movie, as Puzo learned to his regret.

Mr. HADDOCK. Senator, my answer to that is simple, which is, if it actually tracks the Nevada Net Proceeds and Minerals Tax, Nevada has a great track record of being able to audit and confirm it, but even more important than that, those are also elements that go into your federal tax return, your corporate tax return. And a

company like Barrick, we have the IRS in our office every quarter, confirming our tax returns, and when our tax return is filed, it is audited.

Senator KING. So——

Mr. HADDOCK. So they are the same numbers.

Senator KING. Ms. Sweeney, similar, you are okay with a net royalty?

Ms. SWEENEY. Yes, NMA has been on record as supporting a reasonable net royalty, yes.

Senator KING. And I want to be clear. I believe strongly that we have to support, and in fact, move forward with mining in this country. I said a couple of years ago, you can't love EVs and hate lithium mines. To my surprise, that turned into almost a billboard online. Ms. Sweeney, you may have had something to do with that, but in any case. So I understand that. We have to talk about permitting reform. I am surprised that hasn't come up today. Isn't that a part of this discussion, to be sure, because we can't afford 14 years to permit a lithium mine to support the EV industry. Eighty-five percent of the lithium we are now using comes from China. That is downright dangerous.

Mr. HADDOCK. We wholly agree that permitting reform is an important aspect of what we need to do to be able to secure our supply chain.

Senator KING. When a new mine is being permitted, is there any requirement for a cleanup fund to be guaranteed as part of the permitting process? Usually that is often the case in any kind of permitting of a major development.

Mr. HADDOCK. There is, Senator. We have bonding requirements. Dr. Feldgus has said that the bonding in Nevada, the bonding in the United States is the best in the world. We also provide long-term funds for long-term——

Senator KING. So the problem of abandoned mines is really for mines that are in the past, not new mines that are going online in the future?

Mr. HADDOCK. That is correct.

Senator KING. I would appreciate it if you could share with the Committee your thoughts on permitting reform in terms of what changes might be required in federal permitting requirements. Obviously state are all different, but that would be helpful to us if you have suggestions because there are discussions going on, on this Committee, about permitting reform that will go over into next year. So that is a bit of homework for you.

Dr. Feldgus, changing the subject entirely, the last time we talked I asked you about the Administration's position on the RISEE Act, revenues for offshore wind to match revenues for oil and gas. Can you tell me today whether that is something you can support?

Dr. FELDGUS. We are certainly open to the discussion. I think a lot of the question is where would the revenues go, and what would they be used for?

Senator KING. But you would support some revenue scheme that would apply to offshore wind development just as oil and gas does?

Dr. FELDGUS. Well, I can't speak for the Administration at this moment, but certainly, as I said, we welcome additional discussions on that.

Senator KING. We welcome the discussion. That is a pretty clever way to avoid an answer.

Thank you, Dr. Feldgus, I appreciate it.

Thank you all very much.

Senator CORTEZ MASTO. Senator Hickenlooper.

Senator HICKENLOOPER. Senator King, that is what you say to me all the time. You welcome the discussion, and then you tell me why I am wrong. So I know how that works.

[Laughter.]

Senator HICKENLOOPER. Let me start with Mr. Wood, and I certainly don't always, but I do try to glance through people's resumes the night before, and I did not go to Middlebury, but went to Wesleyan University, a similar school, and we had no major in fishing and hunting and political science. A dual major, or tri-major, obviously goes a long way in the right direction.

We heard a little bit there just about permitting reform, litigation risk. Obviously, I think that is a big part of what we, who believe that climate change is accelerating and a grave threat, that we have to have a sense of urgency. And I am sure you saw Bill McKibben's article some months ago entitled "Yes in Our Backyards," as someone who founded those efforts to slow things down. What is your sense of opportunities to reform judicial review of permitting in ways that protect a community's ability to challenge projects for valid reasons, but at the same time, make sure that those developing our future minerals that we need to combat climate change, to make sure that we can get those minerals, and that they can have long-term certainty and be willing to expend those billions of dollars of capital?

Mr. WOOD. Thank you for the question, Senator. As you can imagine, trout are sort of the canaries in the coal mine when it comes to climate change. They depend on cold, clean water every day. I think there is a grand bargain that is right in front of us, and I will speak on behalf of my friends at the agencies, having worked at both Interior and the Forest Service, I know they won't say this, but first of all, they need more people to help process a lot of the permits. They need more staff, which will help accelerate the permit review. I also think there are likely modernizations that need be made to the Mining Law that, while giving the industry the certainty that they need, will also give more discretion for logical places where we should not be mining, and perhaps even accelerating permitting review to allow it in areas where it makes sense to mine.

Senator HICKENLOOPER. Right, good.

Mr. WOOD. And of course, I would be remiss not to say, whether it's net or gross, there needs to be a royalty so we can deal with these legacy issues that are polluting our rivers and streams.

Senator HICKENLOOPER. No, I think—I had never heard what Mr. Haddock described as the causality behind—the difference between minerals like oil and gas that aren't processed until after the royalty is paid. That makes all the sense in the world. I think that is partly why so many recommendations have included it as a net

royalty. I agree that Senator King has a challenge for a lot of people that they do think of net as a way to obfuscating, but clearly in a case like this, the revenues received for selling the mineral products is pretty easy to measure.

Dr. Feldgus, I wanted to ask you, just, do you feel roughly similar to Mr. Wood, in terms of recognizing and having an urgency to make sure that we don't have endless permitting?

Dr. FELDGUS. Certainly. In the Interagency Working Group's report that came out a few months ago, we had a number of recommendations for how to make the permitting process more efficient.

Senator HICKENLOOPER. Good, I appreciate that.

Ms. Sweeney, in terms of the—well, actually, let me talk to Mr. Haddock first, and I am going to ask you the same question, but I want to hear his answer first. Do you think it makes sense—I mean, clearly having more public input earlier, upfront, creates a better project for everyone—is that a useful place to take some of the net royalties and put them into making sure that we have that upfront process in place?

Mr. HADDOCK. We work very hard to have as much upfront engagement with the communities as we can, and if, you know, funding some of the community needs could come from royalties, we would support that.

Senator HICKENLOOPER. Yes, well, that makes sense. And I certainly have heard much about Nevada and how the state approaches trying to make sure you get that certainty and recognizes that we need minerals, but at the same time we have to protect the public interest.

Ms. Sweeney, why don't you take a stab at that as well?

Ms. SWEENEY. Yes, so one of the issues that we have identified for a long time as to why the permitting process sometimes gets hung up is that you are not having those discussions early, and you need everybody involved, including all the federal agencies that might have a role as well.

Senator HICKENLOOPER. Right. And I think as we get further into—I think of it as this great transition into cleaner energy—that we are going to recognize that globally our mining companies are going to have to have more upfront processes, and to make sure that those local communities are fully aware of what is going on and how their water and their health are going to be protected. Just, they will make the same demands that we make here.

I yield back to the—I do want to mention, I said it softly, but not loudly enough, that we hear all the time about how Nevada has such great laws.

Senator CORTEZ MASTO. For the record, thank you.

[Laughter.]

Senator Barrasso.

Senator BARRASSO. Thank you, Madam Chairman.

Ms. Sweeney, we don't control where deposits of minerals exist. Many of the deposits in the United States are on federal land and in the West. Roughly half of all federal land, of course, is off limits to new mineral exploration and production. Would you discuss the importance of keeping federal land open to mineral production?

Ms. SWEENEY. Absolutely. Over 70 percent of our known resources of minerals are in the West. And as you said, a lot of that West belongs to the Federal Government. If we don't have access to those mineral-rich lands, then we are not going to meet our clean energy goals or our goals for infrastructure, manufacturing, economic security, national security.

Senator BARRASSO. So I am thinking about, since the Chairman is here, Senator Cortez Masto, it is my understanding that the Ninth Circuit's Rosemont decision relied on a novel interpretation of our nation's mining laws. Is it fair to say that the Ninth Circuit's decision is a radical departure from how our courts have interpreted our country's mining laws?

Ms. SWEENEY. Absolutely.

Senator BARRASSO. And is it fair to say that the Ninth Circuit Court's decision is a radical departure from how both Democrat and Republican administrations in the past have interpreted our country's mining laws?

Ms. SWEENEY. Absolutely.

Senator BARRASSO. And is it fair to say that the Cortez Masto bill, along with Senator Risch, who is also a member of this Committee, that that simply returns us to where we were before 2019, a status quo that was in place for decades?

Ms. SWEENEY. Yes, we need that return to knowing the rules of the road. This was a huge speed bump.

Senator BARRASSO. So what are the consequences if Congress fails to pass the Cortez Masto-Risch bill and doesn't do it soon enough?

Ms. SWEENEY. It undermines the investment attractiveness of the United States. We are seeing different groups litigating that issue over and over again. They are raising it in comments on mines that are being proposed right now.

Senator BARRASSO. Mr. Haddock, would you like to add anything to that question about the consequences if Congress fails to pass the Cortez Masto-Risch bill?

Mr. HADDOCK. I would just add that as I kind of outlined, there are a lot of open issues. And I am even starting to see the Rosemont argument creep into state permits.

Senator BARRASSO. So Ms. Sweeney, one of the two bills that we are considering today would impose new taxes and new fees on mining on federal lands. It would also make it easier for the Administration to block mineral exploration and production on federal lands. If enacted, what impact would that bill have on investment in mining in the United States?

Ms. SWEENEY. We might as well say goodbye to mining. Allegedly, we need 400—nearly 400 new mines to meet all these energy transition goals. We're not going to be doing it here, for sure.

Senator BARRASSO. So what might that do to the United States in terms of our dependence on China for minerals?

Ms. SWEENEY. We are already highly overreliant on China and all of their different tentacles around the world. That would just increase that reliance.

Senator BARRASSO. Would it make the United States more or less dependent on countries like the Congo?

Ms. SWEENEY. Congo and Russia and other places that are actually also controlled by China.

Senator BARRASSO. So today, we have talked about a bill that would make it harder to mine in the United States. We have also talked about a bill that would fix a bad court decision from 2022. So what can this Committee do to actively encourage mineral production on federal lands?

Ms. SWEENEY. You are making it an easy lay-up. I think we could move forward and pass Senator Cortez Masto's bill.

Senator BARRASSO. And Mr. Haddock, would you like to add anything?

Mr. HADDOCK. I agree that the first step, because it's not Mining Law reform, is to pass Senator Cortez Masto's bill. If we want to talk about actual Mining Law reform issues, we can do that in due course and we are willing to.

Senator BARRASSO. Okay. So Ms. Sweeney, would you explain how a gross royalty would impact mineral production here in the United States?

Ms. SWEENEY. Yes. So a gross royalty would definitely impair investment attractiveness. It would put us out of line with our competitors, like Australia and Canada, because the government take would exceed, you know, where they are. If you look at the legislation that has been introduced, it's not just a 5 to 8 percent gross royalty, it truly is an 8 to 11 percent gross royalty once you add on the so-called fee for reclamation. So that would truly drive investment away from the United States.

Senator BARRASSO. Mr. Haddock, anything you would like to add to that?

Mr. HADDOCK. I would just add also on the leasing front, that bill includes kind of a provision for an oil and gas style leasing program. That does not work for our industry. And the citation for that is, well, Canada and Australia do it. Canada and Australia don't do it. What happens in Canada—self-initiation is preserved. You go and you locate a mining claim, a set of mining claims, and then you explore and when you get to the point where you are going to build your mine, you outline the boundaries of where your mine is going to be and they call that a mining lease. The claims persist. They survive inside the mining lease. That mining lease is basically the legal equivalent of our plan of operations boundary. It is critical that any mining leasing discussion preserve self-initiation.

Senator BARRASSO. Final question, Ms. Sweeney. What is the impact of the Ninth Circuit's decision in Rosemont in terms of on mining on federal lands?

Ms. SWEENEY. So it truly has undermined, I think, some of that regulatory certainty because we are looking at, you know, a century of legal precedent, including Supreme Court cases that lay out how you were supposed to go out and prove up your claims and your ability to use those claims for ancillary purposes. If you can't use those claims for ancillary purposes and you don't have other places to put those uses, then there will be no mining.

Senator BARRASSO. Okay. Thank you.

Thank you, Madam Chairman.

Senator CORTEZ MASTO. Thank you.

I would like to thank our witnesses for their testimony today. Thank you all for being here.

Some members of the Committee may submit additional questions in writing. And if so, we will ask you to submit answers for the record. Committee members will have until 6:00 p.m. tomorrow to submit additional questions for the record.

We will keep the hearing record open for two weeks to receive any additional comments.

And the Subcommittee is adjourned. Thank you.

[Whereupon, at 3:58 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 17 2025

The Honorable Mike Lee
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Lee:

Enclosed are responses prepared by the Bureau of Land Management to written questions submitted following the Subcommittee on Public Lands, Forests, and Mining's December 12, 2023, legislative hearing on S. 1281 and S. 1742.

Thank you for the opportunity to respond to you on these matters.

Sincerely,

Pamela L. Barkin
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Martin Heinrich
Ranking Member

Questions for the Record
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
Legislative Hearing on S. 1281 and S. 1742
December 12, 2023

Questions from Chairman Joe Manchin III

Question 1: Did the Ninth Circuit's *Rosemont* ruling reach FLPMA's "fair market value" requirement?

Response: The ruling in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022) – commonly known as the *Rosemont* decision – addresses National Forest System lands on which FLPMA does not apply. Therefore, the ruling does not address FLPMA's "fair market value" requirement.

Question 2: What is the impact of the "fair market value" clause of S. 1281 (subparagraph "(2) – Fulfillment of Federal Land Policy Management Act of 1976")?

Response: In the Department's view, the "fair market value" clause of S. 1281 is unnecessary, as FLPMA's "fair market value" policy does not apply to the use of public lands pursuant to the Mining Law. Moreover, the Department's regulations already specify that "[o]ther than the processing, location, and maintenance fees, you are not required to pay any other fees to the BLM to use the surface of public lands for mining purposes." 43 C.F.R. § 3800.6.

Question 3: Section 4 of the July 23, 1955, Surface Resources Act says that "any mining claim *hereafter* located ... shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy...with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining?

Response: The BLM notes that approximately 4,880 mining claims pre-date the enactment of the Surface Resources Act, 30 U.S.C. §§ 611-615. Additionally, section 4(a) of the Surface Resources Act was not a change in existing law, but rather a codification of longstanding precedent. *See* H.R. Rep. No. 83-522, at 2 (1953) (comments from the Secretary of the Interior noting that the "limitations on mining claimant's rights which this bill would establish have always been considered by [the Interior Department] to be inherent in the general mining law of 1872" and "confirmed by decisions of the United States courts" (citing *United States v. Rizzinelli*, 182 F. 675 (D. Colo. 1910); *Teller v. United States*, 113 F. 273 (8th Cir. 1901)). Consequently, only uses that are reasonably incident to mining would be allowed regardless of whether the mining claim or site was staked prior to or after enactment of the Surface Resources Act.

Questions for the Record
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
Legislative Hearing on S. 1281 and S. 1742
December 12, 2023

S. 1281 does not appear to include language suggesting that it would repeal any part of the Surface Resources Act and, therefore, would not appear to allow uses on any mining claims for other than prospecting, mining, or processing operations, or uses reasonably incident thereto. However, we anticipate that some stakeholders may argue that S. 1281 retroactively expands the use of pre-Surface Resources Act claims, and that some courts may consider those claims.

Also, because "operations" is defined in the bill to include "prospecting," and because parties may contend that the term "prospecting" reflects a low bar for activity (e.g., sampling by hand), parties could potentially encumber land absent any genuine effort at mineral development. And under certain liberal constructions of the bill, it may also be possible to construct structures on the claim that a claimant argues are meant for prospecting operations (such as a house and/or laboratory), even if the true intent is for the structure to be used for non-mining-related purposes.

Questions for the Record
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
Legislative Hearing on S. 1281 and S. 1742
December 12, 2023

Questions from Senator Martin Heinrich

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Response: The current regulations that implement the Mining Law do not limit the number of mill sites that a claimant may locate in connection with an associated mining claim, as long as the mill site lands are nonmineral in character, not adjacent to the vein or lode (if associated with a lode mining claim), and the amount of land located is only what is reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations. But to the extent that those regulations merely represent one of many permissible constructions of the Mining Law and therefore could be revised in the future, the codification proposed above may help further the goals of S. 1281

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any... reasonably incident... activity, regardless of whether that incidental activity is carried out on a mining claim..." change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Response: As currently written, S. 1281 would provide mining claimants with a right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit," including "any...reasonably incident activity, regardless of whether that incidental activity is carried out on a mining claim." The Department's interpretation of this language is that it is not likely to result in lands subject to mining claims within currently withdrawn areas, including National Parks and designated wilderness areas, being developed without first undergoing mineral validity examinations to verify that valid existing rights exist. A withdrawal withholds an area of federal land from location and entry under some or all of the general land laws, including the mining laws. On lands that have been withdrawn subject to valid existing rights, the Bureau of Land Management, National Park Service, and Forest Service may approve or allow mining operations only if the agencies first determine that the operations will

occur on mining claims or sites that were valid at the time of the withdrawal and also at the time that the operator seeks to use those lands. This determination would include the mining claims' compliance with the requirement for a discovery of a valuable mineral deposit where lode or placer mining claims are involved. The S. 1281 language, in contrast, would appear to apply only to the question of using, occupying, or conducting operations on public lands, rather than to determinations of validity for mining claims and sites located before a withdrawal. Nonetheless, it is possible that some stakeholders will contend that S. 1281 essentially supersedes prior withdrawals.

Question 3: How many mining claims are there within withdrawn areas (wilderness, monument, administrative withdrawals, etc.) on public land?

Response: On BLM-managed lands, there are 2,134 mining claims located in designated wilderness, 960 mining claims located in National Conservations Areas, and 1,906 mining claims located in National Monuments. National Monuments and National Conservation Areas may be open to mineral entry on a case-by-case basis depending on the language in the designating proclamation or legislation. The BLM is not able to track and report the number of mining claims within administratively withdrawn areas because a national administrative withdrawal GIS dataset does not exist. The BLM tracks the withdrawals created by Public Land Orders after the passage of the FLPMA, however it does not have tracking information on many pre-FLPMA withdrawals. Information on pre-FLPMA withdrawals is available at the township level in paper records; however, it has not been digitized and compiled into a national dataset. The BLM plans to collect the pre-FLPMA withdrawal information in the future.

Questions for the Record
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
Legislative Hearing on S. 1281 and S. 1742
December 12, 2023

Questions from Senator John W. Hickenlooper

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Response: The current regulations that implement the Mining Law do not limit the number of mill sites that a claimant may locate in connection with an associated mining claim, as long as the mill site lands are nonmineral in character, not adjacent to the vein or lode (if associated with a lode mining claim), and the amount of land located is only what is reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations. But to the extent that those regulations merely represent one of many permissible constructions of the Mining Law and therefore could be revised in the future, the codification proposed above may help further the goals of S. 1281.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
December 12, 2023 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Troy Heithecker

Questions from Chairman Joe Manchin III

Question 1: Section 4 of the July 23, 1955 Surface Resources Act says that "any mining claim *hereafter* located … shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining on National Forest System lands?

Response:
Any use or occupancy on a pre-1955 mining claim adjudicated under the provisions of Surface Resources Act of 1955 (P.L.167) and formally determined to carry surface rights is still predicated on all functions, work, and activities being directly in connection with prospecting, exploration, development, mining, and processing of locatable mineral resources and uses reasonably incident thereto and subject to regulation under 36 CFR 228A. An important distinction associated with pre-1955 claims that carry surface rights is that the valuable mineral deposit on the claim could be for certain mineral materials such as common varieties of sand, stone, gravel, pumice, pumicite, cinders, and clay because those materials were not removed from operation of the U.S. mining laws until passage of the 1955 Surface Resources Act (30 U.S.C. §611). We welcome further conversation with the committee and bill sponsor regarding the intent of the legislation related to the statutory rights of use and occupation and conducting operations on public lands.

Questions from Senator Martin Heinrich

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Response: The Forest Service would support collaborating with a bill sponsor and the Department of Interior, Bureau of Land Management on appropriate wording for such a bill. These issues have been the subject of extensive litigation and conflicting legal opinions over the years, and updates that take into account the scope and scale of modern mining operations that were not envisioned in 1872 would help to bring clarity to these issues. It would be helpful to find a balance between accommodating the scope and scale of modern mining operations, while requiring operations on mill sites to be reasonably compact and commensurate with the scope of mining operations, and ensuring mineral resources are not wasted or foregone because of indiscriminate siting of large surface facilities like tailings storage facilities or development rock stockpiles over such resources.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
December 12, 2023 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Troy Heithecker

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any… reasonably incident… activity, regardless of whether that incidental activity is carried out on a mining claim…" change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Response: Most lands that are segregated or withdrawn from entry and location under the U.S. mining laws for other programs or purposes are subject to valid existing rights. To constitute a valid existing right that is exempt from segregation or withdrawal from the Mining Law, a mining claim must be valid as of the date of the segregation or withdrawal and must continue to be valid. For a mining claim to be valid, it must contain a discovery of a valuable mineral deposit and have satisfied all applicable statutory and regulatory requirements for location and maintenance. Hence, on segregated or withdrawn lands, use and occupancy of a pre-existing mining claim is predicated on whether that claim is a valid existing right, which requires a discovery of a valuable mineral deposit. The same standard would apply to any mining claim locations on lands subject to a mineral withdrawal in the future. As a result, the Forest Service recommends changes to S. 1281 to specify that the act only applies to public domain lands open to entry and location under the U.S. mining laws. Otherwise, it would leave open the possibility that the statute could be interpreted to allow for use, occupancy, or operations on land for which there is no valid mining claim, potentially including wilderness or other land management designations if the operator satisfies the other requirements in the statute.

Responses of Rich Haddock,
Senior Advisor
Barrick Gold Corporation

Questions for the Record
Of the December 12, 2023 Hearing of the
Public Lands, Forests, and Mining Subcommittee,
Senate Energy and Natural Resources Committee

To Receive Testimony on Pending Legislation

January 12, 2024

The following are responses of Rich Haddock, Senior Advisor, Barrick Gold Corporation, to questions posed for the record by Members of the Subcommittee on Public Lands, Forests, and Mining, Senate Energy and Natural Resources Committee, following the Subcommittee's December 12, 2023 hearing to receive testimony on S. 1281 and S. 1742.

I appreciate the opportunity provided by Chairwoman Cortez Masto and Ranking Member Lee to testify at the Subcommittee hearing and to present Barrick's views on legislative changes to the Mining Law. Addressing the disruption caused by the *Rosemont* case is the most urgent priority, and Barrick is grateful for the leadership of Senator Cortez Masto and Senator Risch in introducing S. 1281, which would restore long-understood Mining Law precedents and curtail unnecessary litigation over the meaning and extent of *Rosemont*.

Barrick continues to support changes to the Mining Law, including a reasonable net royalty to compensate the United States, increased claim maintenance fees, and provisions to address abandoned mine lands. As I testified on December 12, Barrick appreciates Senator Heinrich's recognition in S. 1742 of the two most important aspects of the Mining Law: self-initiation and security of tenure. These must be preserved in any Mining Law legislation. We are encouraged by the productive and constructive exchange that occurred during the Subcommittee hearing.

Finally, Barrick also supports "Good Samaritan" legislation – as part of or separate from Mining Law reform – which addresses existing disincentives for mining companies to assist in the cleanup of abandoned mine lands. Barrick and other mining companies have crucial expertise that could be applied to the abandoned mine lands problem. We support S. 2781 – the Good Samaritan Remediation of Abandoned Hardrock Mines Act – introduced by Senator Heinrich and supported by 25 bipartisan cosponsors. The bill would create a pilot program pursuant to which the Environmental Protection Agency could issue up to 15 permits and grant certain liability relief for project participants. S. 2781 is a thoughtful and sensible first step in promoting abandoned mine land cleanups and addressing stakeholder concerns. The pilot program would create a valuable database of experience with mine cleanups and liability relief that can inform further congressional action.

Note: The responses below refer to the following court cases:

- *Center for Biological Diversity v. United States Fish and Wildlife Service*, 409 F. Supp. 3d 738 (D. Ariz. 2019) (the "*Rosemont*" case).
- *Center for Biological Diversity v. United States Fish and Wildlife Service*, 33 F.4th 1202, 1212 (9th Cir. 2022) (the *Rosemont* appeal to the 9th Circuit. The 9th Circuit affirmed the District Court's ruling).
- *Bartell Ranch v. McCullough*, 2023 U.S. Dist. LEXIS 19280 (D. Nev. 2023) (the "*Thacker Pass*" case).
- *Western Watersheds Project v. McCullough*, 2023 U.S. App. LEXIS 18063 (9th Cir. 2023) (the *Thacker Pass* appeal to the 9th Circuit. The 9th Circuit affirmed the District Court's ruling to remand the Thacker Pass plan of operations without vacating BLM's decision).
- *Earthworks v. United States Department of the Interior*, 496 F. Supp. 3d 472 (D. D.C. 2020) ("*Earthworks"*).
- *Earthworks v. United States Department of the Interior,* No. 20-5382 (D.C. Cir.) (the *Earthworks* appeal to the D.C. Circuit. The appeal concerns the interpretation of the mill site provision of the Mining Law).

Questions from Chairman Joe Manchin III

Question 1: In your view, what is the intended purpose and what is the effect of the "fair market value" clause of S. 1281 (subparagraph "(2) – Fulfillment of Federal Land Policy Management Act of 1976")?

Response: The purpose and effect of this clause are to discourage further litigation over the "Rosemont" issues that are corrected by S. 1281. In *Earthworks v. U.S. Department of the Interior*, the same plaintiffs and plaintiffs' counsel who participated in the Rosemont and other related litigation challenged the Bureau of Land Management's ability to review and approve mining plans under its 3809 regulations without first determining whether claims were valid. Plaintiffs argued that FLPMA required payment of fair market value for the use of any claims that were not determined to be valid. The District Court rejected that idea in a decision directly at odds with the Ninth Circuit's *Rosemont* decision:

> [T]he Mining Law, its implementing regulations and related case law have never required Interior or BLM to verify the validity of a claim by independently confirming discovery. Additionally, as the Supreme Court has recognized, a claim of unknown or undetermined validity is not a legal nullity. An operator on a claim of unknown validity can have rights against rival claimants under the doctrine of *pedis possessio*, and the government cannot find such a claim invalid without a degree of process."

496 F. Supp. 3d at 492 (*citing Cameron v. U.S.* 252 U.S. 450, 460 (1920)) .

The District Court found that plaintiffs' interpretation of the law would "have quietly upended the current claim system under the Mining Law . . . [and] the Court [would] not strain to read . . . FLPMA as silently working such a fundamental change to longstanding practice under the Mining Law." *Id.* at 493 (emphasis added).

Plaintiffs appealed the *Earthworks* decision to the D.C. Circuit Court of Appeals, but dropped their appeal of the "fair market value" theory during appellate briefing. The clause in S. 1281 would prevent plaintiffs from shopping for a different judicial forum that might revive that theory.

Question 2: Section 4 of the July 23, 1955 Surface Resources Act says that "any mining claim *hereafter* located … shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining?

Response: S. 1281 would not allow any claimant to use any claim for uses other than mining. The savings clause of S. 1281 makes it clear that nothing in the act "diminishes any right (including a right of entry, use, or occupancy) of a claimant." Thus, any rights associated with pre-1955 claims would be unaffected. Further, the definition of "operations" in S. 1281 conforms to longstanding interpretation of the appropriate use and

occupancy of mining claims, consistent with the Surface Resources Act and allows for no uses other than mining.

Questions from Senator Martin Heinrich

Question 1 (also posed by Senator John W. Hickenlooper): Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Response: The goals of S. 1281 cannot be achieved by amending 30 U.S.C. § 42(a) (governing mill sites). Changes to the mill site provisions would not address the problems created by the *Rosemont* decision, as explained in more detail below, and in my response above to Senator Manchin's Question 1. Changing the "non-contiguous, 5 acre and 'non-mineral'" limitations of the existing statute would require a rewrite of the entire mill site provision, creating new legislative language that must be implemented and interpreted by BLM. That entirely new language and BLM's efforts to implement it would surely be tested in litigation by anti-mining litigants, resulting in further uncertainty and delay for mine projects. In contrast, S. 1281 is narrowly drafted (1) to restore the long-settled understanding of the Mining Law that existed before the *Rosemont* decision, and (2) to avoid permitting delays caused by unnecessary litigation over *Rosemont* and its progeny. Rather than creating new legal issues to be resolved in litigation, as amending the mill site provision would do, S. 1281 would restore the *status quo ante*, which has been applied by the regulations, guidance, and practice of BLM for decades.

- **Amending the Mill Site Provision Does Not Solve the Problems Created by the *Rosemont* Case**

Amending the mill site provision would not resolve the central problem created by the *Rosemont* decision: the requirement to establish claim validity before using mining claims for an ancillary use such as tailings or waste rock storage. The decision reversed BLM's regulations and settled interpretations of its authority under the Mining Law, and decades of established practice in the hardrock mining industry in complying with those regulations.

Addressing the issue via changes to the mill site provision of the Mining Law would encourage further litigation. The requirement to show claim validity applies with equal force to mill sites and lode claims. As discussed above in response to Senator Manchin's Question 1, the Mining Law and BLM regulations do not routinely require validity determinations for lode claims that are mined. The *Rosemont* case creates a great deal of uncertainty – which inevitably will be litigated – on numerous remaining issues, including whether mill sites under existing or amended law would still require some kind of validity determination.

Other *Rosemont* issues similarly remain unresolved. In the *Rosemont* case, the court ruled for the first time that tailings and waste rock cannot be placed on lode claims unless the miner first demonstrates that the claims are "valid," i.e., that each claim contains a discovery of a valuable mineral. The administrative record in *Rosemont* was clear that the claims in question did not contain valuable minerals. In the *Thacker Pass* litigation, in contrast, the Nevada district court noted that the administrative record contained *some* evidence that claims intended for tailings and waste rock storage were mineralized, and remanded to BLM to conduct an "analysis"

to determine whether the record demonstrated that "Lithium Nevada has discovered valuable minerals." In May 2023, BLM responded, affirming its earlier approval of the Thacker Pass plan of operations and concluding that 99 out of 107 lode claims intended for tailings and waste rock storage contained valuable minerals. *See* Thacker Pass Project, Plan of Operations and Reclamation Permit Record of Decision, NVN098586 (May 16, 2023).

Importantly, BLM clarified that its decision about Thacker Pass claims was not based on a formal mining claim validity determination, and that such a determination was not required by the District Court or by the *Rosemont* court. At the same time, the Interior Solicitor published an opinion concluding that no formal validity determination is required when approving the use of mining claims for ancillary uses; "it is enough for plan approval that there is some evidence of discovery." *See* Solicitor's Opinion M-37077, *Use of Mining Claims for Mine Waste Deposition, and Recission of M-37012 and M-37057* at 2, 5-6 (May 16, 2023).

The plaintiffs in the *Thacker Pass* case made it clear in their 9th Circuit filings that they reject the May 2023 Solicitor's Opinion insofar as it allows a lower quantum of proof than a full claim validity determination for patenting. *See* Attachment A (excerpts of *Thacker Pass* environmental plaintiffs' reply brief in *Western Watersheds Project v. McCullough*). The *Thacker Pass* appeal before the 9th Circuit related only to whether the District Court had erred by refusing to vacate the BLM approval. The Court of Appeals concluded that the remand without vacatur was appropriate. It further ruled that arguments about the sufficiency of BLM's claim analysis were premature and could only be raised after BLM concluded its analysis of Thacker Pass claims. The *Thacker Pass* plaintiffs have not yet appealed BLM's validity determination; whether they will do so remains to be seen – they have six years to decide. However, it is clear that this issue is not resolved, and remains for future litigation.

Accordingly, based on the above discussion, in the case of mill sites, mining opponents are likely to argue that a formal showing is required that mill sites are non-mineral in character before a plan of operations including them can be approved.

The foregoing examples make clear that addressing the *Rosemont* decision by amending the mill site provision will not suffice to resolve uncertainties and limit litigation. The only way to eliminate the uncertainty created by *Rosemont* is to directly reverse the decision, which S. 1281 does.

- **Mill Sites Are Not Practical or Appropriate for Placement of Tailings and Waste Rock**

Using only mill sites for locating waste rock and tailings is impracticable because that would ignore geologic reality. A mill site has to be located on ground that is "nonmineral land." 30 U.S.C. § 42(a). Locatable mineral deposits generally do not exist along bright lines where one side of the line is mineral in character and the other side of the line is non-mineral in character. Rather, they usually exist where there is an "economic" mineral deposit – minerals in form and concentration that can be recovered economically – surrounded by areas that, though mineralized, are non-economic. The distinction between economic and non-economic mineral deposits can change based on mineral prices, the development of more efficient or cheaper recovery technologies, and other factors. Only at a distance from the economic part of the mineralization does the ground finally become definitively "nonmineral land" as required by 30 U.S.C. § 42(a).

For example, porphyry copper deposits such as those in Arizona, New Mexico, and Utah are typically surrounded by a large mineralized area that can extend for miles in every direction from the deposit itself. *See* David A. John, ed., 2010, *Porphyry Copper Deposit Model*, United States Geological Survey, Scientific

Investigations Report 2010-5070-B. The following figure from the USGS report illustrates a porphyry deposit surrounded by a "skarn" of mineralized sedimentary material, and associated mineralized fragments of the porphyry deposit that extend several miles from the deposit itself.

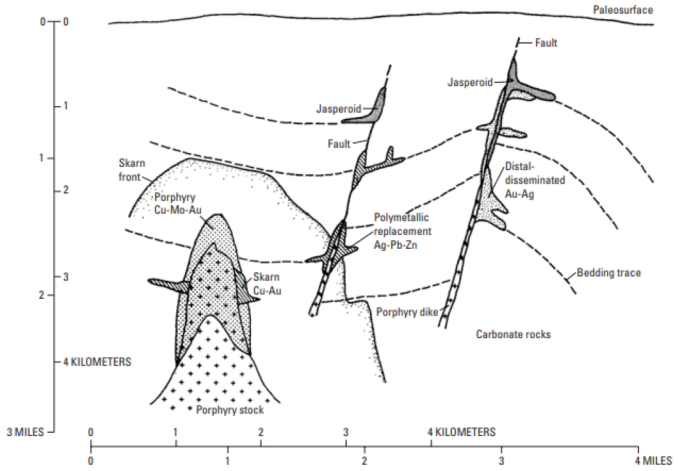

Figure B1. General setting of porphyry copper and associated deposit types (modified from Sillitoe and Bonham, 1990).

Disseminated gold deposits such as those in Nevada are similarly frequently surrounded by a mineralized, though subeconomic halo. Finally, as the *Thacker Pass* litigation has illustrated (addressed in the next section of this response), lithium deposits similarly do not have bright line cut-offs between the target deposit and surrounding mineralized lands.

Relying only on mill sites would mean that tailings and waste rock would need to be deposited at some distance from the actual economic ore body. This would have at least two undesirable outcomes. First, the tailings and mined overburden and waste rock would have to be transported miles from the economic deposit, which adds significant costs to the operation. Added costs have the effect of shrinking or eliminating the economic ore body, a result that is contrary to federal policy promoting domestic mining. Second, use of mill sites in this way would result in significantly greater and more dispersed land disturbance instead of more compact mine operations, with attendant greater environmental impacts and land use conflicts with recreation and other surface uses of the public lands.

- **Other Infrastructure Cannot Be Located Solely on Mill Sites**

Anti-mining litigants have made it clear that they also intend to challenge the use of the surface of lode claims for other mine infrastructure beyond placement of waste rock and tailings. Other mine infrastructure includes such things as roads, power distribution lines, truck shops, crushers, conveyors, and pipelines. Even if it

somehow made sense to site waste rock and tailings facilities far away from the mine itself (and most of the time it does not), roads, conveyers, and other kinds of mine infrastructure by their nature must be at or near the mine and the ore body that is being actively mined. Those facilities could never be located entirely on mill sites.

The *Thacker Pass* plaintiffs attempted to challenge the use of lode claims for mine infrastructure during their appeal of the District Court decision to the 9th Circuit Court of Appeals. *See* Attachment B (excerpts of Bartell plaintiffs' opening brief in *Western Watersheds Project v. McCullough*). The court did not consider the challenge, but only because plaintiffs did not raise it in a timely fashion. This remains an issue that will be used in future litigation brought to oppose mine projects, and amending the mill site provision would not fully resolve it, at least without the specter of more litigation and years of legal uncertainty. S. 1281 resolves the issue, by narrowly restoring the pre-*Rosemont* status of the law allowing ancillary uses to be sited on lode claims without requiring a validity determination. The simplest and most targeted way to address such support infrastructure is to restore "ancillary use" as it has been understood and implemented under the Mining Law for more than a century before the *Rosemont* decision, which is what S. 1281 does.

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any… reasonably incident… activity, regardless of whether that incidental activity is carried out on a mining claim…" change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Response: Current practices and regulations, including 43 C.F.R. 3809.100 (relating to operations on withdrawn or segregated land) would be unaffected by S. 1281. That regulatory provision requires a formal validity determination before approving a plan of operation for mining claims within segregated or withdrawn areas. Other statutes and regulations addressing specific areas withdrawn from location, including 36 C.F.R. Part 6 (mining in the Parks), 36 C.F.R. § 228.15 (mining in Forest Service Wilderness areas); 43 C.F.R. Subpart 3809 (mining on lands in BLM Wilderness review), and 43 C.F.R. 6304 (mining in BLM Wilderness areas), would also be unaffected. No change in management of claims in areas withdrawn from location is intended or expected.

Future withdrawals would be unaffected by S. 1281. S. 1281 does not create new "valid existing rights," but restores the law prior to the *Rosemont* decision.

If appropriate, simple language could be added to the savings clause of S. 1281 to confirm that withdrawn lands are unaffected.

Questions from Senator John W. Hickenlooper

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Response: See response above to Senator Martin Heinrich's Question 1.

ATTACHMENT A to
Barrick Responses to Questions for the Record of December 12, 2023 Hearing

Excerpt, Reply Brief of Appellants Great Basin Resource Watch, Basin and Range Watch, Wildlands Defense, and Western Watersheds Project in *Western Watersheds Project v. McCullough* (9th Cir. 2023), filed May 26, 2023

pp. 50-57

A. BLM's Errors Are Serious and the District Court Abused Its Discretion When it Remanded Without Vacatur.

While this Court reviews the district court's decision to remand without vacatur for abuse of discretion, "[a] misapplication of the correct legal rule constitutes an abuse of discretion." Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California, 813 F.3d 1155, 1163 (9th Cir. 2015). A district court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Inst. of Cetacean

Research v. Sea Shepherd Conservation Soc'y., 725 F.3d 940, 944 (9th Cir. 2013).[15]

The district court misapplied the law here when it treated BLM's responsibility to determine whether LNC had discovered valuable minerals on each mining claim it plans to permanently occupy with waste rock and tailings as a simple procedural error that could be easily "fixed." *See* Order, 1-WWPER-61-62. It is "undisputed" that BLM never determined whether LNC had discovered valuable minerals. Order, 1-WWPER-26. This is a serious error because BLM approved the entire Project based on the erroneous assumption that LNC had valid existing rights under the Mining Law, which eliminated BLM's discretion over the Project. Establishing the existence of valuable minerals is a fact-intensive, substantive inquiry that cannot be done on this record.

A locatable mineral, like lithium, is not "valuable" unless it is shown that it can be "extracted, removed, and marketed at a profit." Rosemont, 33 F.4th at 1209, quoting U.S. v. Coleman, 390 U.S. 599, 602 (1968). "[T]he finding of some mineral, or even of a vein or lode, is not enough to constitute discovery – their extent and value are also to be considered." Converse v. Udall, 399 F.2d 616, 619

[15] LNC erroneously asserts that that case stands for the proposition that a "court abuses discretion *only* if ruling rests on clearly erroneous evidentiary assessment." LNC Resp. 104 (emphasis added). That is a mischaracterization of precedent.

(9th Cir. 1968). "[P]rofit over cost must be realizable from the material itself and it is that profit which must attract the reasonable man." Ideal Basic Indus., Inc. v. Morton, 542 F.2d 1364, 1369 (9th Cir. 1976).

The district court held that "some evidence" of general mineralization in the Project area established a "serious possibility" that BLM will be able to "substantiate" its decision on remand. Order, 1-WWPER-61-62. That is not the test under the Mining Law for BLM to determine whether all the claims contain the requisite "discovery of s valuable mineral deposit."

Valuable minerals must be discovered on each claim and "[a] discovery without the limits of the claim, no matter what its proximity, does not suffice." Waskey v. Hammer, 223 U.S. 85, 91 (1912). Evidence of "general mineralization" thus cannot meet the marketability test. "Each lode claim must be independently supported by the discovery of a valuable mineral within the location as it is marked on the ground." Lombardo Turquoise Mining & Milling v. Hemanes, 430 F.Supp. 429, 443 (D. Nev. 1977) *aff'd* 605 F.2d 562 (9th Cir. 1979). *See also* Henault Min. Co. v. Tysk, 419 F.2d 766, 768 (9th Cir. 1969)(valuable mineral deposit requirement cannot be met on one claim by relying on minerals on other claims).[16]

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[16] LNC continually, and erroneously, argues that WWP "conceded" that LNC has "discovered a valuable mineral deposit" in the mine pit. LNC Resp. 6, 15, 18. This argument highlights LNC's misreading of what constitutes a "valuable mineral deposit" under controlling law, including Rosemont, as mere "mineralization" does not qualify as a "valuable mineral deposit."

LNC argues this this long-established precedent only applies when a claimant is seeking a patent or proposing to mine in a withdrawn area (like a National Monument). LNC Resp. 102. That is not true. As Rosemont held, to have any right to occupy a mining claim post exploration, a claimant must show they have discovered "valuable minerals" on that claim. These cases all define what qualifies as a "valuable" mineral deposit. Rosemont dealt with the same situation here – requiring that the claimant show that all of its claims are valid before having any rights under the Mining Law and federal public land law to use and occupy those claims. Like here, the Rosemont mine was proposed on non-withdrawn lands open to claiming.

LNC also posits various theories that its claims are valid, or that it may file "millsite claims" that might support its assertions of the "valid rights" it needs to avoid most of the RMP provisions. LNC Resp. 100-101, 125-26. But as BLM concedes, any adjudication or review of the validity of LNC's claims and purported "rights" under the Mining Law is for a future case on a future record.[17]

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[17] The National Mining Association (NMA), in its amicus brief, largely argues that this Circuit got it wrong in Rosemont when it found that post-exploration use and occupancy rights on mining claims can only be based on valid claims under the Mining Law. Dkt. 71. But neither BLM nor LNC appeal the district court's application of Rosemont to this record, and thus NMA's arguments are inapplicable to this case.

The question is not, as BLM frames it, whether the evidence "foreclose[s]" existence of valuable minerals on each claim to be occupied by waste rock and tailings, it is whether it *establishes* their existence. BLM Resp. 105. BLM/LNC rely heavily on the fact, that in Rosemont, there was no evidence that valuable minerals had been found on the claims. But as the Circuit recognized, "that is legally irrelevant. The question is whether valuable minerals have been 'found' on the claims, not whether valuable minerals might be found." 33 F.4th at 1222.

Here, just as in Rosemont, "[i]t is undisputed that no valuable minerals have been found." Id.; *see* BLM Ans. ¶119, 1-WWPFER-30 (admitting that BLM has not determined whether waste dump claims contain valuable minerals, as alleged in ¶119 of WWP's Complaint). "[D]iscovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." Rosemont, 33 F.4th at 1220. The district court thus misapplied Rosemont in its decision not to vacate the illegal ROD.

Indeed, if any minerals exist on the waste dump/tailings claims, they cannot be credibly considered "valuable." LNC made the economic decision to permanently bury them under 190 million tons of waste rock and tailings, essentially eliminating any future potential for mining. *See* LNC SJ Reply at 4, 2-WWPER-103. That was the situation in both Rosemont (Ninth Circuit and district court) and the recent Great Basin Resource Watch decision, 2023 WL 27444682,

as the courts relied on the mining company's plans to bury the waste dump lands as evidence that they did not contain valuable minerals: "As a threshold matter, Rosemont's proposal to bury its 2,477 acres of unpatented mining claims under 1.9 billion tons of its own waste was a powerful indication that there was not a valuable mineral deposit underneath that land." Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738, 748 (D. Ariz. 2019). *See also* Great Basin Resource Watch, 2023 WL 27444682, at *5 (noting company's plans to dump waste on its mining claims "suggests that the land does not contain the requisite valuable mineral deposits."). On this record, and on these directly-relevant court rulings, LNC cannot rebut the presumption that its claims are invalid under the Mining Law, based on its own plans to forever bury these lands under 190 million tons of waste.

BLM's new and rushed claim validity determination cannot cure BLM's error because BLM does not deny that it was required determine whether LNC held valid existing rights *before* approving the Project. In Rosemont, this Circuit rejected the argument that an agency may determine whether a mining claimant holds valid existing rights *after* authorizing the claimant to occupy federal lands. *See* Rosemont, 33. F.4th at 1221 (rejecting argument that "the court erred in holding that the Service must assess the validity of Rosemont's mining claims before approving Rosemont's mining plan."). Allowing BLM to backfill its ROD

conflicts with Rosemont, and is another way in which the district court abused its discretion when it decided not to vacate the illegal ROD.

Where there is an "absence of analysis," rather than a "flawed analysis," by the agency, "the Court cannot determine whether there exists a serious possibility that the [agency would] be able to substantiate its decision on remand." Wildearth Guardians v. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151)(D.C. Cir. 1993)(internal quotation marks omitted).

The existing record does not support claim validity and LNC's "rights," especially due to the presumption that LNC's decision to cover 1,300 acres with 190 million tons of waste shows that the claims do not contain the requisite discovery of valuable minerals. The district court thus abused its discretion when it ignored controlling federal caselaw, and the facts of this case, in believing that BLM could easily substantiate the unlawful ROD.

The district court also failed to recognize the on-the-ground and practical nature of BLM's errors. BLM could not lawfully approve a mine Project with no legally-valid plan for disposing of waste rock and tailings. The ROD's approval of blasting, ground clearing, facility construction and other operations (in addition to the 1,300 acres of the waste and tailings dumps) is premised on approval of a full and complete mine Plan of Operations (PoO) authorized pursuant to rights under

the Mining Law. But, as BLM admits, the ROD was legally invalid. The district court correctly held LNC had no legal right to use or occupy these 1,300 acres. As such, the ROD essentially approved what is now an incomplete and illegal mine.

As the Rosemont district court held, "the Forest Service accepted, without question, that those unpatented mining claims were valid. This was a crucial error as it tainted the Forest Service's evaluation of the Rosemont Mine from the start." Center for Biological Diversity, 409 F. Supp. 3d at 747 (emphasis added). The same is true here, where BLM based its decision not to apply the ARMPA, as well as its overall review of the Project, on its illegal and unsupported assumption that BLM's discretion over the Project was severely limited because LNC held statutory rights to occupy all of public lands at the site. The district court's decision not to vacate the decision was deeply flawed, legally and factually.

ATTACHMENT B to
Barrick Responses to Questions for the Record of December 12, 2023 Hearing

Excerpt, Opening Brief of Appellants Bartell Ranch, LLC and Edward Bartell in *Western Watersheds Project v. McCullough* (9th Cir. 2023), filed March 24, 2023

pp. 54-57

A. *Rosemont* Extends to LNC's Water and Power Lines.

To start with, the district court got the scope and reasoning of *Rosemont* wrong. In *Rosemont*, this Court correctly explained that "discovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." 33 F.4th at 1220 (emphasis added). Accordingly, *Rosemont* extends to all project components of a mining project, contrary to the district court's holding.

The Mine includes guard shacks, fencing, water wells, waste rock piles, a tailings stack, lithium processing facility, sulfuric acid plant, water pipelines, transmission lines, and more. 4-ER-613—619. All of these project features will occupy BLM land on Thacker Pass. The FEIS explains that LNC's mining claims on Thacker Pass provide the surface estate necessary to justify this occupancy. 4-ER-612. Yet, LNC did not prove, and BLM did not find, that LNC's mining claims are valid. 1-ER-15. Instead, BLM assumed validity based on the fact that much, though not all, of the Mine is located upon the McDermitt Caldera, which BLM assumed contains valuable lithium deposits. 1-ER-15; 4-ER-621. However, parts of

the Mine, in particular the water and transmission lines, are located outside the caldera, which is devoid of known mineralization. *Compare* 4-ER-605 *with* 4-ER-606. Appellants raised this issue with the district court. 3-ER-479—480; 2-ER-254—255.

The district court held that *Rosemont* extended only to the waste rock piles and CTFS associated with the Mine, and not other project features. 1-ER-17. The district court justification was merely that *Rosemont* only addressed legality of the Forest Service's approval of a copper mine's massive waste pile and, thus, the case should be extended no further. 1-ER-17. However, nothing in *Rosemont* supports limiting its holding to only waste rock piles.

This Court explained that "discovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." 33 F.4th at 1220. The cases relied on by this Court in *Rosemont* stand for the same rule of law. *See Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346, 39 S.Ct. 308, 63 L.Ed. 635 (1919) (to "create valid rights ... a discovery of mineral is essential."); *Davis v. Nelson*, 329 F.2d 840, 844–45 (9th Cir. 1964) (the mining law grants two rights: "(1) the right to explore and purchase all valuable mineral deposits in lands belonging to the United States; and (2) the right to occupation and purchase of the lands in which valuable mineral deposits are found."); *see also Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971) ("In order for

a mineral claim on public lands to be valid it is necessary that the discovered mineral deposits be 'valuable.'"); *United States v. Rice*, 886 F.2d 334 (9th Cir. 1989) (evidence that claim is not located where actual deposit exists demonstrates lack of valid claim).

This Court's broad holding in *Rosemont* means exactly what it says: that *any* mine-related occupancy of mineral claims must be preceded by a discovery of valuable minerals on each claim, which is clearly lacking here. Focusing on the water and power lines, BLM approved these project features, which are outside known zones of mineralization, simply because LNC had asserted mining claims over those lands.[30] 4-ER-612; 4-ER-621; 4-ER-746. Pursuant to *Rosemont*, BLM should have first determined whether LNC's claims were valid, before allowing LNC the right of occupation and effectively waiving RMP requirements.

There is no dispute that BLM's approval of the water and power lines as part of the Mine constitutes "occupancy" of BLM's lands. There is also no dispute that a

[30] Whether the water and power lines were approved under BLM's regulations at 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. is irrelevant. 43 C.F.R. § 3809.420(a)(3) requires that mining plans of operations be operated "[c]onsistent with the mining laws[.]" 43 C.F.R. § 3715.1 explains that any occupancy must be allowable under the mining laws. Therefore, whether approved pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq., the water and power lines must be consistent with the mining law. Because this Court determined that discovery of valuable minerals is a necessary prerequisite of occupancy under the mining law, occupancy approved pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. must be preceded by a discovery of valuable minerals.

discovery of valuable minerals has not occurred on the mining claims providing the surface estate for the water and power lines. 1-ER-15. Pursuant to *Rosemont*, then, LNC has no right to occupy BLM's lands with its water and power lines pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. until valuable minerals are discovered on the claims underlying the water and power lines. Here, though, such a discovery of valuable minerals is likely impossible because the water and power lines will be located outside the McDermitt Caldera, admittedly beyond zones of lithium mineralization. 4-ER-621; 4-ER-746; *compare* 4-ER-605 *with* 4-ER-606.

This Court should affirm its holding in *Rosemont* that any mine-related occupancy of mineral claims must be preceded by a discovery of valuable minerals *on that claim*. Therefore, the Court should hold that BLM's approval of occupation for the water and power lines was arbitrary and capricious.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
December 12, 2023 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Chris Wood

Questions from Chairman Joe Manchin III

Question 1: In your view, what is the intended purpose and what is the effect of the "fair market value" clause of S. 1281 (subparagraph "(2) – Fulfillment of Federal Land Policy Management Act of 1976")?

Answer: This clause references 43 USC § 1701(a)(9), which stipulates as a Congressional declaration of policy that, "the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute." The clause also references "section 10102" (30 USC 28(g)), which is a location fee in the amount of $25 for each unpatented mining claim, mill site or tunnel.

Taken together, we take this clause to mean that the payment of mining claim fees constitutes fair market value for use of public lands pursuant to the Mining Law of 1872. As of October 1, 2023, these fees total $230 per mining claim for the location fee, claim maintenance fee and processing fee. Should minerals be extracted from a claim located on public land, $235 would be far below fair market value, further underscoring the need for a royalty on hardrock minerals that is consistent with Congress's declaration of policy.

Question 2: Section 4 of the July 23, 1955 Surface Resources Act says that "any mining claim *hereafter* located … shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining on federal lands?

Answer: Pre-Surface Resources Act mining claims can be made subject to the requirements of that Act (i.e., only be used mining purposes) where a determination has been made that a claimant was not "in actual possession of or engaged in the working of such lands". For this reason, pre-Surface Resources Act mining claims must be considered individually to determine what, if any rights, have been retained for use and occupancy that may be in conflict with the restrictions imposed by the Surface Resources Act, or that may interact with future rights that may be conveyed should S. 1281 be enacted. If a pre-Surface Resources Act mining claim was found to not be subject to the restrictions imposed by that Act, and S. 1281 were to become law, then it is reasonable to conclude that the claimant may possess rights to uses other than mining. The issue would, however, be ripe for litigation and the courts would likely decide the outcome in this scenario.

Questions from Senator Martin Heinrich

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
December 12, 2023 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Chris Wood

connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Answer: Any legislation to address the uncertainty created by the *Rosemont* decision must be narrowly targeted and limited in scope to address the two specific issues stemming from the decision:

1) Ancillary facilities necessary to support the extraction of a valuable mineral deposit, and
2) Permanent occupancy of off-site mining claims for these ancillary facilities.

Rosemont only concerns the permanent occupancy of a mining claim without the discovery of a valuable mineral deposit – nothing more. It follows, then, that a legislative solution should not address any other uses or rights that are already conferred by the 1872 Mining Law.

Yet, in attempting to address *Rosemont*, the Mining Regulatory Clarity Act casts an unnecessarily wide net including exploration, prospecting, means of access, and ancillary uses that do not require permanent occupancy.

Changes to mill site provisions would resolve the specific issues stemming from the *Rosemont* decision if mill sites are large enough to accommodate the enormous amount of waste rock produced by modern open pit mines. This would also be a narrowly tailored solution that does not unintentionally create new problems or uncertainty with the application of the 1872 Mining Law. Moreover, a narrowly tailored solution should resolve concerns with the Mining Regulatory Clarity Act establishing rights to use and occupancy of areas withdrawn from mining laws, such as wilderness or national parks.

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any… reasonably incident… activity, regardless of whether that incidental activity is carried out on a mining claim…" change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Answer: Importantly, a determination of valid existing rights is not made at the time public lands are withdrawn from mining laws, but rather if and when notice-level operations or plans of operations are proposed.

Currently, for public lands that have been withdrawn from mining laws, the BLM will not approve a plan of operations or allow notice-level operations unless a validity exam is completed. If the Mining Regulatory Clarity Act were to become law, it would eliminate the valuable discovery standard and could establish an automatic right to use, occupancy, and ancillary uses, including several that are enumerated in the legislation (e.g., road construction, transmission lines) upon payment of mining claim fees. These rights could extend to exploration and prospecting.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining
December 12, 2023 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Chris Wood

Because S.1281 does not distinguish between mining claims located on lands open to mining, versus claims in areas that have been withdrawn, the Act could establish a right to use, occupancy, operations, and ancillary uses that otherwise may not be allowed under existing regulations. For instance, under S. 1281 constructing an off-highway vehicle trail could qualify as an ancillary use for prospecting or exploration on a mining claim located in an area where motorized use is otherwise prohibited, such as a wilderness area or national park. Yet, under current regulations these types of "notice-level" activities cannot be approved unless a mineral examination report finds that there has been the discovery of a valuable mineral deposit. S. 1281 would eliminate this standard both for lands that are already withdrawn, as well as lands that are withdrawn in the future.

Question 2, part 2: Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Answer: S. 1281 would establish, for the first time, a threshold for validity that Congress has explicitly enacted into law. Upon payment of the required fees, the rights enumerated in S. 1281 would constitute existing rights that would have to be honored for all future mineral withdrawals. Trout Unlimited's perspective is that this standard could apply to currently withdrawn lands.

January 12, 2023
Answers to Questions from Members of the Senate Committee on Energy and Natural Resources Submitted by Ms. Katie Sweeney, National Mining Association Executive Vice President & COO Related to December 12, 2023 Hearing Before the Subcommittee on Public Lands, Forests, and Mining

Background to Sweeney Answers to Senators Manchin's and Heinrich's Questions for the Record

The following is intended to provide context for the below answers provided by Katie Sweeney, National Mining Association (NMA) Executive Vice President & COO. The Rosemont litigation[1] and the need for S. 1281 should be evaluated in the context of a highly integrated effort by mining opponents to make the Mining Law unworkable. A primary component of this strategy is undermining the ability to use federal lands surrounding mineral deposits for activities incidental to mining, known as ancillary use activities. These mining opponents know that the economic viability of a mine depends upon the ability to use these nearby lands.

The Mining Law has long been interpreted to allow claimants the right to use public lands prior to making a discovery of a valuable mineral deposit as well as the use of adjoining claims for ancillary uses as any other interpretation thwarts the primary purpose of the Mining Law "to promote development of the mining resources of the United States." As articulated in both the Bureau of Land Management (BLM) and Forest Service's mining regulations, mining "operations" broadly encompasses these ancillary activities and the agencies may approve "operations" on mining claims or open public lands without confirming claim validity and without any additional payment e as long as the use is reasonably incident to the mining activities. For lands that are non-mineral in character, the Mining Law provides another mechanism for the siting of ancillary facilities, the mill site provision.

The integrated nature of these attacks is demonstrated by the overlapping involvement of key players in the recent litigation advocating interpretations of the Mining Law which make the law unworkable by departing from historic interpretation and practice. The Rosemont litigation involved the following: Center for Biological Diversity; Save the Scenic Santa Ritas; Sierra Club Grand Canyon Chapter; Western Watersheds Project; Wildlands Defense; and Great Basin Resource Watch. The plaintiffs in the Thacker Pass mine litigation,[2] who argued that the Rosemont decision should apply in equal force to BLM lands, include: Western Watersheds Project; Wildlands Defense; Great Basin Resource Watch; and

[1] *See Center for Biological Diversity v. United States Fish and Wildlife Service*, 409 F. Supp. 3d 738 (D. Ariz. 2019) (*Rosemont*) and *Center for Biological Diversity v. United States Fish and Wildlife Service*, 33 F.4th 1202, 1212 (9th Cir. 2022) (Affirming the District Court's ruling).
[2] *Bartell Ranch v. McCullough*, 2023 U.S. Dist. LEXIS 19280 (D. Nev. 2023) (*Thacker Pass*) and *Western Watersheds Project v. McCullough*, 2023 U.S. App. LEXIS 18063 (9th Cir. 2023), (Thacker Pass appeal to the 9th Circuit).

January 12, 2023
Answers to Questions from Members of the Senate Committee on Energy and Natural Resources Submitted by Ms. Katie Sweeney, National Mining Association Executive Vice President & COO Related to December 12, 2023 Hearing Before the Subcommittee on Public Lands, Forests, and Mining

Basin and Range Watch. Finally, the plaintiffs in the ongoing U.S. Court of Appeals for the District of Columbia mill site challenge,[3] who frequently cite the Rosemont decision in their briefs, are: Earthworks; Western Shoshone Defense Project; High Country Conservation Advocates; Great Basin Resource Watch; and Save the Scenic Ritas. And nearly every one of these parties joined a petition for rulemaking to the Department of the Interior on the very issues litigated in Rosemont and those currently before the D.C. Circuit. The volleys from all sides on ancillary uses as emboldened by the Rosemont decision – whether through requiring validity determinations, separate fees, or limiting the use of millsites – demonstrates the need for S. 1281, the Rosemont legislative solution.

The attacks on the Mining Law's and the existing regulatory structure's treatment of ancillary uses have taken several forms, all intended to reduce mining activity on federal lands by dramatically increasing the burdens and risks of mining on federal lands. As explained in the Dec. 12, 2023, testimony of Mr. Rich Haddock, Senior Advisor, Barrick Gold, some of the arguments used by today's mining opponents are rooted in opinions issued by former Solicitor of Interior John Leshy, who prior to that appointment argued that in the absence of Mining Law legislative reform "it might even be appropriate for the Interior Department and the courts to consciously reach results that make [the Mining Law] unworkable."[4] The latest litigation attacks mirror and build on the arguments advocated by Mr. Leshy and seek to upend the Mining Law through novel interpretations of key provisions. Courts hearing these cases have repeatedly noted that these mining opponents are mischaracterizing their arguments as restoring longstanding interpretations of the Mining Law.[5]

Questions from Chairman Joe Manchin III

Question 1: In your view, what is the intended purpose and what is the effect of the "fair market value" clause of S. 1281 (subparagraph "(2) – Fulfillment of Federal Land Policy Management Act of 1976")?

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[3] *Earthworks v. United States Department of the Interior*, 496 F. Supp. 3d 472 (D. D.C. 2020) (*Earthworks*), (on appeal to the D.C. Circuit with oral arguments scheduled for Jan. 16, 2024).

[4] John D. Leshy, Reforming the Mining Law: Problems and Prospects, 9 *Pub. L. L. Review*, 1, 11 (1988) and John D. Leshy, The Mining Law: A Study in Perpetual Motion, 282 (1987).

[5] *See e.g.*, In denying an injunction in *Thacker Pass*, the U.S. District Court for the District of Nevada stated: "The Court specifically noted in the Merits Order that it would be inequitable to remand with vacatur based on Rosemont because BLM was following its longstanding regulations when it decided not to evaluate claim validity and Rosemont was not even published until after merits briefing began in this case. Said otherwise, while the Court agreed in the Merits Order that BLM's longstanding regulations are inconsistent with the Mining Law as interpreted in *Rosemont*, the Court is the first court to make that ruling and made it for the first time in the Merits Order. Environmental Plaintiffs' attempt to characterize a novel finding favorable to them as long-settled law is unpersuasive." Similarly, the Earthworks district court debunked plaintiffs' arguments about claim validity requirements ("The Mining Law, its implementing regulations, and related case law have never required Interior or BLM to verify the validity of a claim by independently confirming discovery. . . The Court will not strain to read either [previous Mineral Policy Center decision] or the FLPMA as silently working such a fundamental change to longstanding practice under the Mining Law.") 496 F. Supp. 3d 472 (D. D.C. 2020).

January 12, 2023
Answers to Questions from Members of the Senate Committee on Energy and Natural Resources Submitted by Ms. Katie Sweeney, National Mining Association Executive Vice President & COO Related to December 12, 2023 Hearing Before the Subcommittee on Public Lands, Forests, and Mining

Sweeney Answer to Manchin Question 1: The intended purpose of the "fair market value" clause is to continue the longstanding interpretation of the Mining Law that provides the necessary security of tenure to give mining companies the confidence to invest hundreds of millions or even billions of dollars in projects on federal lands. The effect of the language is to maintain the status quo that additional fees under the Federal Land Policy and Management Act (FLPMA) are not required, as asserted by mining opponents, for ancillary uses (or any operations) that do not occur on valid mining claims or occur on claims of unknown validity. In a 2008 rulemaking BLM codified its historic position that (1) the agency is not required to determine the validity of a claim prior to approving a mine plan of operations and (2) FLPMA's goal to receive fair market value for the use of public lands does not apply to mining activities authorized by the Mining Law.

The U.S. District Court for the District of Columbia upheld the 2008 rule in the aforementioned *Earthworks* litigation. The court rejected the argument that validity determinations must be required, finding that interpretation would "have quietly upended the current claim system under the Mining Law."[6] Similarly, the court upheld BLM's conclusion on application of to the FLPMA fair market value requirement. Despite dropping these claims in the ongoing appeal to the DC Circuit, the mining opponent litigants continue to include backhanded references to its interpretation of the Mining Law on these matters in its briefing on appeal. Similarly, they attempt to leverage some of the reasoning of the Rosemont decision despite the D.C. District Court's distinguishing and dismissal of the Rosemont district court analysis, finding it of "little relevance" because it dealt with different statutes and regulations.[7] In summary the fair market value provision referenced in this question closes off one of the efforts to make the Mining Law unworkable through mandatory validity determinations prior to plan approvals or imposition of new FLPMA fees particularly in the context of ancillary uses.

Question 2: Section 4 of the July 23, 1955 Surface Resources Act says that "any mining claim *hereafter* located … shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining?

Sweeney Answer to Manchin Question 2: The language of S. 1281 on the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" does not alter the requirements that pre-Surface Resource Act claims must be used for mining purposes. In fact, the refenced language, read in conjunction with the bill's saving clause and its definition of operations, reaffirms that the long-standing

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[6] *Earthworks v. U.S. Dep't of the Interior*, 496 F. Supp. 3d 472, 492.
[7] Id. at 490 n.12.

January 12, 2023
Answers to Questions from Members of the Senate Committee on Energy and Natural Resources Submitted by Ms. Katie Sweeney, National Mining Association Executive Vice President & COO Related to December 12, 2023 Hearing Before the Subcommittee on Public Lands, Forests, and Mining

interpretation that use and occupancy of any mining claim is limited to activities reasonably incident to mining operations.

Questions from Senator Martin Heinrich

Question 1: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

Sweeney Answer to Heinrich Question 1: Changes to the Mining Law's mill site provisions would not solve the uncertainties created by the Rosemont litigation. First, even the most favorable changes to the mill site provisions would create enormous regulatory uncertainty given that relatively minor past changes to the Mining Law have resulted in years or decades of regulatory rulemakings, planning efforts, uncertainties and court challenges. Additionally, this question suggests that if mill sites were more widely available, there would be no need for the siting of ancillary uses on other public land. Under the Mining Law, however, mill sites are designed to be located on nonmineral land. Depending on the type of deposit and its dissemination, determining which lands are nonmineral in character might be extraordinarily difficult and could likely trigger legal challenges from mining opponents seeking a formal showing of the lack of mineralization prior to a plan of operations encompassing mill sites can be approved.

As the Mining Law has been interpreted over the last century and as reflected in agency regulation and practice, mill sites are not the sole mechanism for the siting of ancillary facilities. As the U.S. Department of Justice explained in its opening brief in the appeal of the Rosemont decision to the U.S. Court of Appeals for the Ninth Circuit, "the district court misunderstood the Mining Law's mill site provision to provide the exclusive avenue for miners to use additional lands for processing or milling facilities. . . But [the mill site provision] simply confers upon miners the *option* to secure property interests in non-mineral lands for mining and milling, just as they may secure property interests in mineral lands under other [Mining Law] provisions: In fact, its reference to land "used or occupied" implicitly acknowledges that miners used unclaimed land for mining or milling, even before staking a mill site. *See, e.g., Conway v. Fabian*, 108 Mont. 287, 305 (1939) (explaining that the "owner of tailings may deposit them either upon the public domain or on lands of which he has possession)."[8]

Congress intended, and companies require, the optionality of locating ancillary facilities on mill sites or other lands open to mining. As explained above, for certain types of deposits it is difficult to determine which lands are nonmineral in character, which may result in mill sites being located a great distance from the relevant mining claim to meet the non-mineral in character provision. In such circumstances, it is more desirable to locate ancillary facilities, especially for waste rock and tailings, on mining claims or

[8] *See* DOJ opening brief at pp. 29-30, filed June 5, 2020.

other open lands surrounding the mine to not only avoid the costs of movement of waste off-site but as importantly to minimize environmental impacts and reduce land use conflicts.

Rather than creating further uncertainty by tinkering with the mill site provision in an attempt to solve the problems created by the Rosemont decision, the NMA supports passage of S. 1281. S. 1281 is elegant in its simplicity. It reinstates much needed clarity in the face of a fundamentally flawed court decision that conflicted with more than a century of legal precedent, including Supreme Court decisions. It returns us to the longstanding framework that existed prior to the Rosemont decision – nothing more/nothing less. Additionally, based on the *Earthworks* district court decision related to mill sites, the NMA predicts the D.C. Court will uphold the BLM's mill site regulations – a result that will make it more difficult for opponents to continue challenging the use of mill sites (and potentially obviates the need for the changes to the mill site provisions suggested by this question).

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any… reasonably incident… activity, regardless of whether that incidental activity is carried out on a mining claim…" change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Sweeney Answer to Heinrich Question 2: S. 1281 does not affect the existing BLM regulations that mandate validity determinations prior to approval of a mine plan of operations on lands that have been segregated or withdrawn from appropriation under the Mining Law.[9] To the extent there are remaining concerns about the application of this provision to withdrawn lands, the NMA believes a simple savings clause could be added to further clarify that nothing in S. 1281 affects the existing validity determination requirement for claims on segregated or withdrawn lands.

[9] 43 C.F.R. 3809.100, What special provisions apply to operations on segregated or withdrawn lands?

Statement for the Record
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Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining

Legislative Hearing

S. 1281, Mining Regulatory Clarity Act of 2023

December 12, 2023

Dear Chair Manchin, Ranking Member Barrasso, Chair Cortez Masto, Ranking Member Lee, and members of the Committee,

Advanced Energy United ("United") appreciates the opportunity to submit this statement for the record on S. 1281, the Mining Regulatory Clarity Act of 2023.

United is an association of businesses that educates, engages, and advocates for policies that allow our member companies to compete to power our economy with 100% clean energy. We work with decision makers at every level of government as well as regulators of energy markets to achieve this goal. The businesses we represent are lowering consumer costs, creating thousands of new jobs every year, and providing the full range of clean, efficient, and reliable energy and transportation solutions.

This goal of reaching a 100% clean energy future is what drove United's endorsement of S. 1281 when it was first introduced. Making the transition to a 100% clean, fully electrified economy necessitates the production of more critical resources, from lithium to nickel and copper to graphite. This understanding that our clean energy future is intrinsically tied to our national minerals policy is what led to the development of United's policy principles on the mining, reuse, and recycling of critical minerals earlier this year. These principles – which pair the need for permitting reform that protects workers, surrounding communities, and the environment with comprehensive reuse and recycling policy – have served as our guide for evaluating bills in this space. S. 1281 was an easy fit with these principles.

To build a robust supply chain for U.S. manufacturers of advanced energy technologies, we need to expand U.S. mineral production in a responsible and sustainable manner. By expanding mineral production here in the U.S., we are not only addressing the issue of foreign dependance for these commodities, but we are also ensuring that the mining will be subject to stringent U.S. regulations that protect workers, communities, and our natural resources. Unfortunately, the Rosemont decision, which prompted the need for this legislative clarification in the first place, injects needless uncertainty into the future of domestic mining operations.

Ultimately, we see the "Mining Regulatory Clarity Act" as a necessary step to reestablish business certainty around our mining rules and regulations in light of this decision. It seeks only to reaffirm prior legal interpretations and historical applications of the law. We're at a critical juncture for the clean energy future. Unfortunately, we're currently operating without a comprehensive permitting reform package to address this issue and more, meaning the business community needs certainty around the rules and regulations currently in place in order to respond to the growing demands that have already arrived amid our national clean energy transition. This clarifying law is part of the beginning of what the nation needs to secure domestic supply chains for the clean energy future. Certainly there is more to be done and United is committed to being a willing and active participant in these larger, follow up conversations on comprehensive permitting reform. However, in order to avoid irreversible risks to those supply chains, we need this Rosemont fix now.

As evidenced by our statement for the record, as well as our endorsement when the bill was introduced in April, United supports this bipartisan legislation brought forward by Senators Cortez Masto and Risch and wishes to see it move expeditiously.

Sincerely,

Harry Godfrey
Managing Director, Advanced Energy United

American Exploration & Mining Association
EST. 1895

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December 12, 2023

The Honorable Joe Manchin
Chairman
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The Honorable John Barrasso
Ranking Member
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The Honorable Catherine Cortez Masto
Chairwoman
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The Honorable Mike Lee
Ranking Member
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Re: AEMA Statement for the Record for the December 12, 2023 Senate Subcommittee on Public Lands, Forests, and Mining of the Energy and Natural Resources Committee Hearing

Dear Chairman Manchin, Ranking Member Barrasso, Chairwoman Cortez Masto, and Ranking Member Lee:

The American Exploration & Mining Association (AEMA) appreciates the opportunity to provide the following statement for the record for the December 12, 2023 hearing to receive testimony on S. 1281, the Mining Regulatory Clarity Act, and S. 1742, the Clean Energy Minerals Reform Act. For the foregoing reasons, AEMA strongly supports S.1281 and strongly opposes S. 1742.

We Need a Reliable Domestic Mineral Supply Chain

The COVID-19 pandemic and recent geopolitical have exposed the United States' supply chain vulnerabilities, highlighting the importance of an abundant and affordable supply of domestic minerals for America's future.

The fact is, global mineral demand is skyrocketing. As noted in a recent report from the International Energy Agency, keeping global temperature rise to below 2 degrees Celsius above preindustrial levels will quadruple the demand by 2040 for the minerals needed to build wind turbines, solar panels, and electric vehicles.

A faster energy transition — reaching net zero globally by 2050 as the Biden Administration has called for— would require critical mineral inputs to increase sixfold by 2040.

Solar panels require silver, tin, copper, and lead; wind turbines use rare earths, copper, aluminum, and zinc; electric vehicles are built with copper, aluminum, iron, molybdenum; and rechargeable storage batteries use lithium, vanadium, nickel, cobalt, and manganese. Approximately 40% of the gold now produced is used in electronics and computer chips that are needed for clean energy technologies to meet carbon emission reduction objectives to address climate change.

A recent Reuters article noted that President Biden has promised to convert the entire U.S. government fleet – about 640,000 vehicles by 2030 – to EVs. That plan alone could require a 12-fold increase in U.S. lithium production-to manufacture the lithium-ion batteries that power EVs, according to Benchmark Minerals Intelligence, as well as increases in output of domestic copper, nickel, and cobalt - and that's just for the U.S. government vehicle fleet. The magnitude of the minerals needed for a 100 percent EV market is even more staggering, and simply cannot be ignored.

Unfortunately, a lack of access to economically viable mineral deposits and a lengthy, inefficient federal permitting system has resulted in the U.S. being increasingly dependent on foreign sources of strategic and critical minerals. It's time that we, as a Nation, recognize this vulnerability and the vital importance of minerals to our national security, our economy, and our everyday lives. We have heard a lot over the years about the importance of energy independence, but it is equally as important, if not more so, that we are minerals independent.

In September 2016, the Government Accountability Office ("GAO") published a report entitled "Strengthened Federal Approach Needed to Help Identify and Mitigate Supply Risks for Critical Raw Materials." This reported evaluated "certain metals, minerals, and other "critical" raw materials [that] play an important role in the production of advanced technologies across a range of industrial sectors and defense applications." The GAO report found several limitations in the scope of federal critical mineral programs that are inconsistent with the directives in the National Materials and Minerals Policy, Research and Development Act of 1980. (30 U.S.C. §§ 1602 – 1605), hereinafter referred to as the 1980 Act.
In the 1980 Act, Congress found:

> "the United States lacks a coherent national materials policy and a coordinated program to assure the availability of materials critical for national economic well-being, national defense, and industrial production, including interstate commerce and foreign trade." (30 U.S.C. § 1601(7).

In response to this finding, Congress declared:

> "...it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between

> resource production, energy use, a healthy environment, natural resource conservation, and social needs." (30 U.S.C. § 1602)

Relying on adversaries and allies for the minerals needed for U.S. manufacturing has created our currently unsustainable dependence on foreign countries for minerals. The most recent USGS *Mineral Commodity Summaries* published in 2023 indicates that the U.S. is now import-dependent for 51 different metals and minerals, and 100 percent import-dependent for 15 of those. Stated differently, the U.S. now imports the majority of 51 different minerals, half of the naturally-occurring elements on the Periodic Table, most of which can be mined in the U.S.

As important as recycling is, it cannot meet this burgeoning mineral demand. The IEA's report estimates that by 2040, recycling metals from spent batteries could only supply about ten percent of the minerals that will be needed.

Made in America must include "mined in America" and sourcing minerals from U.S. mines that use state-of-the-art environmental protection measures, put a premium on worker health and safety, and have financial assurances that guarantee reclamation when mining is complete.

Background on Hardrock Mining

American miners continue to play an indispensable role in building and defending our Nation. From foundations to roofs, power plants to wind farms, roads and bridges to communications grids and data storage centers, America's infrastructure begins and ends with minerals and mining.

Minerals are also essential to fighting climate change, and for zero-emission technologies such as wind turbines, solar panels, storage batteries and EVs. As these technologies are deployed in ever-greater numbers, the demand for minerals is skyrocketing, and our Nation must do more to keep up. The International Energy Agency (IEA) published a report at the end of July 2022 titled "Global Supply Chains of EV Batteries," and noted that demand for EV batteries will increase from 340 GWh today to about 3500 GWh by the year 2030. To meet that demand, 50 new lithium mines, 60 more nickel mines and 17 more cobalt mines would need to come into production.[1]

Congress has taken note of this surge in demand, and through the Infrastructure Investment and Jobs Act of 2021 and the Inflation Reduction Act, has decided that it is inappropriate, unwise and dangerous to rely on hostile, untrustworthy or unstable countries to supply our country's minerals. Notably, the Inflation Reduction Act contains provisions requiring automakers to source significant portions of their EV batteries and components from domestic supply chains, or from countries with which the United States has free trade agreements. Congress has sent a clear message – Now is the time to get serious about building a reliable mineral supply chain. The U.S. mining industry stands ready to help build that supply chain right here in America.

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[1] https://iea.blob.core.windows.net/assets/4eb8c252-76b1-4710-8f5e-867e751c8dda/GlobalSupplyChainsofEVBatteries.pdf

AEMA members take great pride in producing the metals and other important minerals America needs for national and economic security, as well as the materials people use in their everyday lives. We are proud of our members' contributions across the communities and regions where they operate, many of which are rural areas facing significant economic and social development challenges. Notably, the U.S. mining industry is the safest, most environmentally responsible mining industry in the world. Our members have repeatedly demonstrated that mining and protecting the environment are compatible, as mineral producers make possible the development of society's basic needs and consistently minimize modern society's impacts on the environment.

The challenge of finding and developing mineral resources in the United States, or anywhere in the world, is very difficult because mineral deposits are geologically rare and hard to discover Exploration and mining projects must undergo multiple lengthy stages of development. First, there is the initial identification of deposits that hold potentially developable mineral reserves. To this point, the United States has only explored and mapped the mineral potential on approximately 12 percent of the country's lands. The USGS estimates that it would take more than 10 years just to find and map all domestic resources, using modern technologies, with at least another 7-10 years to get those resources to market. Consequently, mining companies often do most of this work themselves and cover all the investments needed to advance a potential mineral deposit towards an operating mine.

It is also important to recognize that many federal lands across the western United States already have been closed to exploration and mining. Further restrictions would inevitably prevent mining in areas where there is insufficient information to determine whether critical and strategic minerals exist and need to be developed. There is no clear reasoning for such harmful restrictions, and they limit the flexibility of extracting our Nation's critical and strategic minerals where they are located and can be found.

AEMA's members operate their respective exploration and mining activities in a responsible manner through a wide range of social and environmental conditions across the United States. Their operations are subject to extensive evaluations at the project level where there is ample opportunity to ensure resource protection through federal and state permitting actions. To meet our imminent metal and mineral needs, the Congress and the administration should be focusing on how to expand areas that should be open to potential mining and exploration activities, instead of looking for ways to restrict regions from exploration.

After a potential deposit is identified through exploration, which often takes years of exploration-level permitting to ascertain, mining companies must determine a path to confirm the nature and scale of any developable resources. They must identify the amount of additional exploration necessary to properly define the mineral deposit, gain approvals to conduct further studies, and then explore and report on the exploration results. Defining the deposit generally requires multiple years of drilling to establish the extent and quality of any valuable mineralization. This process can take up to several decades for large and complex orebodies. Exploration drilling and associated activities require significant investment, especially since they are often undertaken in geographically remote and challenging areas where access and infrastructure are limited. It is worth noting that only about 1 in every 1,000 prospective mineral deposits has the potential to

become a producing mine.[2] It's also noteworthy that a single deposit is rarely confined to one tenure type—that is, it may consist of federal tenure, private tenure or even State lands where any successful operation could, for example, provide a revenue stream to the school kids of that State.

In the event a mineable resource is defined, the work continues for mining companies to determine whether there is an economical and feasible mine development scenario. This generally involves preparation of a Feasibility Study, sometimes preceded by a Pre-Feasibility Study, and requires several additional years to produce information sufficient to support a mine investment decision. Multiple years of baseline data collection and analysis are often undertaken to provide information for the feasibility work as well as for future permitting. While mining companies may start their pre-permitting work early, including at the exploration stage through Feasibility Study preparation, they often do not submit formal applications until a developable project is identified through the Feasibility Study.

Thus, while it is easy to focus on a single part of the mineral development process, it is important to recognize all of the crucial stages involved with development of an operating mine. When projects require 15-20 years, or more, to take a potential mineral resource to the point of mine construction, any government action that could lengthen this process or create disincentives, or create risk to the security of tenure, should be carefully weighed in terms of its ramifications. Moreover, even when a project has matured through the permitting process, litigation and other actions that jeopardize or delay further development or ancillary operations at mine sites can have severe consequences. Based on current trends, the next domestic mining project to help fill this Nation's critical needs could be decades away from providing any substantial benefit.

The General Mining Law Works Well

The Mining Law, as amended, invites U.S. citizens to make substantial investments of time, knowledge, and money to explore for minerals on federal lands with the hope of discovering a mineral deposit that can be developed into a mine. This process, known as "self-initiation," greatly benefits our Nation because it effectively leverages private investments that transform undeveloped federal land into mining operations that create jobs, pay taxes, and provide the minerals the country needs – at no risk or expense whatsoever to U.S. taxpayers.

It has always been Congress' intent that the law must support and encourage mining on public lands. Although Congress has amended the Mining Law and developed other laws pertaining to public lands management since 1872, the purpose of the Mining Law has not changed. Congress has repeatedly preserved the foundational rights under Section 22 of the Mining Law that authorize citizens to enter, use, and occupy public lands to explore for minerals and to develop mines.

The "self-initiation" process is essential. It allows U.S. citizens to enter federal lands open to operation of the Mining Law, and to locate mining claims on lands that may have favorable geologic conditions for finding a mineral deposit. Once the claim is located, the claim owner can

[2] https://burgex.com/improving-mineral-exploration/#:~:text=The%20success%20rates%20are%20low,producing%20mine%20(at%20best).

use the surface of a mining claim for mineral exploration and development purposes, and all uses reasonably incident to mining, so long as the claim owner complies with the surface management regulations and other environmental protection requirements.

Self-initiation is especially critical to the prospecting and early-stage mineral exploration phases of the mining lifecycle when geologists continually test and refine their mineral target concepts and exploration techniques. Because exploration is an iterative process that uses new information to vector towards mineralized zones, the ability to expand a claim block based on new information is critically important. The 1 in 1,000 odds of making a discovery are akin to looking for the proverbial needle in the haystack and drive the need to preserve self-initiation to facilitate locating additional claims on lands with potentially favorable geology in response to the on-the-ground realities of exploring for rare mineral deposits that are very difficult to find.

The Mining Law is Not Antiquated

Since its enactment in 1872, Congress has made many important changes to the Mining Law including:

The Minerals Leasing Act – In 1920, Congress removed coal, petroleum, natural gas, phosphates, sodium, sulfur, and potassium from the law and established leasing programs for these resources in part because they have different geologic characteristics than locatable minerals;

The Federal Land Policy and Management Act (FLPMA) – In 1976, Congress created an environmental protection mandate prohibiting unnecessary or undue degradation of lands subject to mineral activities, established a claims recordation requirement that documents where claims are located and who owns mining claims, and created special environmental protection measures for claims in wilderness study areas and in the California Desert Conservation Area;

1993 to Present – Starting in 1993, Congress has used the appropriations process to establish an annual fee, the Claims Maintenance Fee, for use of federal lands for mineral exploration and development purposes, and to continue a moratorium on patenting. Claimants currently pay $165 per claim, and the fee is adjusted every five years to reflect the Consumer Price Index. These fees have raised significant revenue. According to BLM's most recently available statistics, in FY 2019, BLM received over $71 million in CMF and location fees. Less than $40 million of that was retained for administration of the Mining Law program; the remainder going to the general Treasury. Since enactment of these fees in 1993, the federal government has collected approximately $1.3 billion.[3] By making timely payment of this fee, claimants secure the right to use and occupy federal lands, subject to compliance with the 43 CFR 3809 and 36 CFR 228A surface management regulations and all other applicable state and federal environmental protection regulations.

[3] https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf

A statutory mandate exists to encourage and facilitate the private development of the minerals our society needs. When Congress enacted the Mining and Minerals Policy Act of 1970, it declared 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." (30 U.S.C. § 21a). The mineral directives in this Act apply to BLM-administered public lands and National Forest System lands. These are compatible objectives that operate to encourage deployment of privately-funded, domestic mineral production while protecting the environment.

Congress made other important changes to the Mining Law when it enacted FLPMA in 1976. Among other things, FLPMA mandated a claim filing and recordation system to give BLM a mechanism to rid the federal lands of stale mining claims and created an environmental protection mandate prohibiting unnecessary or undue degradation (UUD) of public lands subject to mineral activities. When mining critics assert the Mining Law needs to be changed because it does not include environmental protection requirements, they are ignoring how FLPMA significantly changed the Mining Law by inserting the UUD environmental performance standard, which specifically applies to mineral exploration and mining projects.

In 1980, BLM finalized the 43 CFR 3809 surface management regulations for locatable minerals to implement the FLPMA UUD mandate. The stated purpose of these regulations is to "[p]revent unnecessary or undue degradation of public lands by operations authorized by the mining laws [and to] establish procedures and standards to ensure that operators and mining claimants meet this responsibility... and reclaim disturbed areas." (43 CFR § 3809.1) The UUD provisions in the 43 CFR 3809 regulations contain explicit directives that mineral activities must comply with all applicable state and federal regulations to protect the environment and cultural resources and satisfy a long list of environmental performance standards. Prior to commencing mineral activities on public lands, project proponents must provide BLM with financial assurance (reclamation bonds) to guarantee that lands affected by exploration and mining will be properly reclaimed.

The laws governing National Forest System lands are similarly protective. In 1976, Congress enacted the National Forest Management Act, which mandates a land use planning process that ensures mineral resource development is given proper consideration consistent with the mandate in the Mining and Minerals Policy Act of 1970 while minimizing resource conflicts and balancing environmental concerns.

The Forest Service's 36 CFR 228 Subpart A surface management regulations for locatable minerals include environmental protection measures that require operators of mineral exploration and mining projects to minimize adverse impacts on National Forest surface resources where feasible (36 CFR § 228.8). Like the BLM, the Forest Service's surface management regulations provide comprehensive and effective environmental protection at mineral projects on National Forest System lands including requirements for financial assurance before activities can commence.

The Claims Maintenance Fee (CMF), which has been continued in annual appropriations measures since 1992, gives BLM a powerful land management tool that accomplishes several important objectives. First, it provides real-time information about where claims are located, who owns the claims, and whether the claims remain in good standing. Claims for which the fee is not paid by the August 31 fee payment deadline are categorically voided. Secondly, the substitution of a fee for the on-the-ground assessment work requirement has virtually eliminated unnecessary ground-disturbances associated with performing the annual assessment work that was previously required to maintain a claim in good standing. The fee has thus significantly reduced the environmental impact of mineral exploration activity. Third, the fee raises sufficient revenue to fund the Department of the Interior's Mining Law program, with leftover revenue that currently goes to the general Treasury. AEMA supports use of CMF revenue in excess of that required to fund the Mining Law program to fund abandoned mine land remediation.

The 1920 Mineral Leasing Act, FLPMA, and the annual Claims Maintenance Fee are examples of how Congress has continually updated the Mining Law since its enactment in response to evolving land management requirements, and clearly demonstrate that the law is not antiquated.
To the contrary, the Law as amended serves the country well. If the Law is amended in the future, the changes should be surgical and tailored to respond to specific land management objectives, recognizing the need, and the statutory mandate, to satisfy the Nation's demand for minerals.

Comprehensive Environmental Protections Are Working

Federal land management agencies' current environmental protection requirements for locatable minerals provide effective and comprehensive environmental protection that safeguard all aspects of the environment including water resources, wildlife, special status species, air quality, cultural resources, soils, vegetation, and visual resources.

Surface management regulations govern how mineral activities must be conducted on public lands to minimize environmental impacts. Both the U.S. Bureau of Land Management and the U.S. Forest Service have specific regulations for locatable mineral activities that have been in effect for decades. These regulations, in conjunction with state environmental laws and regulations, establish environmental performance standards and reclamation bonding requirements to protect the environment and guarantee mineral projects will be reclaimed when exploration and mining have been completed.

The American people are not on the hook for and have not paid any money to clean a mine site permitted on federal lands since 1990. Today's comprehensive suite of federal and state environmental laws and regulations, combined with robust financial assurance requirements, ensure that new abandoned mines are not being created.

The BLM and Forest Service must prepare NEPA environmental reviews prior to authorizing mineral projects that already analyze impacts, identify ways to eliminate, minimize, and mitigate impacts, and verify that proposed projects will comply with all applicable state and federal regulations.

The BLM, Forest Service, EPA, and state regulatory agencies have the authority to say no to mining if there are doubts that the project can meet specific environmental protection regulatory requirements. During the permitting process, regulators can require project proponents to go back to the drawing board to redesign a project to address concerns about environmental impacts.

Numerous other federal environmental statutes also govern mining, including but not limited to the Endangered Species Act, the Clean Air Act, the Clean Water Act, the National Historic Preservation Act, Archaeological Resources Protection Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response Compensation and Liability Act. The current system achieves the appropriate balance between mine development and environmental protection. There is no exalted status for mining. Rather, a rigorous demonstration is required to show that all aspects of the environment at a proposed mine will be protected.

Mining Law Rights Must be Clarified – Support S. 1281

A threat to the future of mining on U.S. public lands is the U.S. District Court's July 2019 decision in litigation challenging the Forest Service's approval of the Rosemont Mine, Rosemont Copper Company's proposed Arizona copper mine. The court's decision incorrectly restricts the rights to use public lands for mineral purposes to claims that contain a discovery of a valuable mineral deposit and interprets the Mining Law in a manner that interferes with claim owners' Mining Law rights to use public lands to explore for and develop minerals.

The Rosemont ruling incorrectly limited the jurisdiction of the Forest Service's surface management regulations to claims with a discovery of a valuable mineral deposit. BLM's and the Forest Service's regulations govern all aspects of locatable mineral activities to ensure all mineral activities comply with environmental protection mandates and to confirm that all mining facilities are reasonably incident to the mining project. Claim status is irrelevant in determining the applicability of these regulations.

We therefore strongly support the bipartisan Mining Regulatory Clarity Act (S.1281). This bill clearly recognizes that maintaining security of land tenure is essential for mining to occur on public lands and is especially important in light of the skyrocketing demand for minerals.

The Clean Energy Minerals Reform Act will Impede Domestic Mineral Production

A. Leasing Proposal: Now is Not the Time to Upend Our Mining System

The Mining Law[4] governs property rights and the process by which United States citizens may explore for and obtain hardrock mineral rights on western public domain lands. The current legal framework should not be changed. Under this Act, our citizens may take their own initiative to explore for mineral deposits that could potentially discover a mineral deposit that can become a successful mine. Once a deposit is identified, exploration and mineral development activities are subject to environmental protection mandates and permitting approvals, put in place

[4] Mining Law of 1872 § 1, 17 Stat. 91

by our country's federal and state agencies and mandated under our system of cooperative federalism. One central purpose of the Mining Law, however, is to provide certainty with respect to obtaining property interests and land rights on public domain lands open to mineral entry. In fact, an essential component to this law is the protection and security of tenure claimants rely on to justify large expenditures across public lands when locating and developing valuable mineral deposits. Replacing the Mining Law with a leasing system would eliminate this self-initiation and security of land tenure crucial to motivate and enable mining claimants and miners to search for mineral deposits across public domain lands. In fact, most leasing systems add years and layers of unpredictability to the ability of miners to acquire, own or develop any discovered mineral deposits. This unpredictability disincentivizes investment in the exploration and production of U.S. minerals and would result in alternative investments overseas. In this regard, most leasing system proposals directly conflict with the Biden administration's claimed policies to increase domestic critical mineral production.

The system already implemented under the Mining Law is an effective way for the public to benefit from private-sector investment in the exploration and development of hardrock mineral deposits. This self-initiation process leverages private-sector investment in a way that develops minerals, including most critical minerals, creates jobs, results in widespread tax revenues, and feeds our country's supply chains. Instead of U.S. taxpayers, or the federal government, shouldering the risks of exploration and development, those burdens are carried completely by the private sector. Self-initiation enables prospectors and geologists to pursue their theories about where mineral deposits exist and ultimately identify and delineate promising mineral targets. This process requires a lot of expertise together with trial and error. In fact, as indicated in the introduction, the National Research Council/ National Academy of Science has stated that 1,000 mineral targets must be identified in order for a single hardrock deposit to become a mine.[5]

By contrast, a leasing system would discourage exploration and development of hardrock minerals. It would shift the burdens of exploration and development from the private sector to the government and U.S. taxpayers, and it would result in a loss of revenues to the country. In this regard, the current mining claim system generates annual maintenance fees for both developed and undeveloped claims, resulting in more than $100 million in annual revenues for the United States treasury.[6] Under a new leasing system, there would be no such fees collected for undeveloped mining claims or areas, and a drop-off in new exploration targets, mining claims, or potential mines would result in a significant decrease in federal revenues.

Recent legislative attempts to change the Mining Law into a leasing system attempt to copy the hardrock leasing program previously implemented for acquired lands.[7] This 75-year-old system has a proven track record of being both impractical and unproductive in terms of exploration, mineral production and any generation of royalty revenues. If such a program were to be implemented for hardrock minerals across western public domain lands, it would destroy the self-initiation process and the security of land tenure needed to incentivize private exploration for critical minerals. Instead of private investment, the federal government would be required to

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[5] Hardrock Mining on Federal Lands, page 24.
[6] https://www.blm.gov/sites/default/files/docs/2022-07/Public_Land_Statistics_2021_508.pdf, page 160.
[7] The Minerals Leasing Act for Acquired Lands of 1947, 30 U.S.C. §§ 351-359

decide when and where geologists look for minerals and how long developers should operate their mines. These governmental conditions and restrictions would bottle-neck the supply of critical minerals and diminish incentives for any mineral investment in federal lands. Our country's supply chains would be negatively affected, and there would be an increased reliance on foreign minerals. Unlike the leasing systems currently set-up for coal, oil and gas (which work because most of these deposits are already discovered and relatively well-known), hardrock development requires ongoing exploration and complex and costly geological work to find and identify the grade, depth, size and economic viability of each hardrock deposit. Then, even once a deposit has been sufficiently defined through drilling and exploration, it often requires hundreds of millions or even billions of dollars to develop and build the mining and processing facilities required for the extraction and processing of hardrock minerals.

Hardrock mineral deposits are very different from oil, gas, and coal deposits because, most hardrock mineral deposits occur in areas with much more complex and diverse geology. Additionally, hardrock deposits typically have unique geologic, geochemical, and metallurgical characteristics which make each valuable mineral deposit different and result in many deposits being difficult to discover and develop. Generally, neither the federal government nor the mineral prospector knows beforehand where hardrock mineral deposits are located, and they need flexibility to explore large swaths of potentially mineralized zones. This unpredictability is one of the reasons that hardrock leasing on acquired lands has failed, even though there is promising geology in acquired lands.

In his July 2021 testimony before the Subcommittee on Energy and Mineral Resources, U.S. House of Representatives, Jim Cress provided a detailed and informative discussion of the many reasons why the federal hardrock mineral leasing program on acquired lands has failed. Some of the reasons he identified for failure include the following:

- The hardrock mineral leasing program was not designed to promote discovery and development of hardrock minerals;
- The hardrock mineral leasing program contains no rights of self-initiation or rights to mine any discovered minerals;
- Prospecting licenses or permits require prior consent from the surface management agency, are typically multi-year efforts to obtain through a NEPA process, are limited to two years with a maximum four-year discretionary extension to make the "discovery", and are restricted to 2,560 acres per permit and a 20,480-acre per person/company per state limit; and
- Hardrock mining leases are limited to a primary term of 20 years, which is not long enough to develop and mine most deposits. This artificial time constraint is not in the public's best interest. A mining lease must provide security of tenure for as long as it takes to develop and mine a deposit.

A recent situation which highlights industry security of tenure concerns with the existing leasing scheme on acquired lands is the Biden administration's decision to cancel the Twin Metals mineral leases in the Superior National Forest in Minnesota. This cancellation vividly illustrates the risks associated with a leasing system lacking security and tenure, as the government used its

"discretion" to cancel leases on acquired federal lands after the mining company invested hundreds of millions of dollars to explore and develop mineral deposits under its leasehold acreage.[8] This rescission of leasehold rights clearly demonstrates the perils of relying on a mineral leasing scheme. Adoption of such mineral leasing procedures, and the implementation of blanket control by the federal government over mineral rights on western public domain lands, would similarly eliminate any security of tenure relied upon for the development of hardrock minerals.

Based on the current extraordinary demand for minerals to build clean energy infrastructure, to power EVs, and to electrify the Nation, this is an exceptionally inappropriate time to make sweeping changes to the land tenure system in the Mining Law. Even if a satisfactory leasing scheme were implemented that provided security of tenure, this is the wrong time to seek such changes because the transition from claims to leases would dramatically slow mineral exploration and development, thereby amplifying our current supply-chain issues. The net result would be reduced mineral production during a multi-year transition period and an increased reliance on foreign minerals.

It is also worth noting that the U.S. Constitution prohibits governmental "takings" of mining claim rights without just compensation.[9] A taking occurs if there is (1) an "actual" taking by the government, whereby it physically or legislatively confiscates property interests, or (2) a "regulatory" taking whereby legislation or regulations deprive the private owner of its economically reasonable use of the property. Whenever government action constitutes a taking — even a partial taking — it is required to pay the property owner just compensation or fair market value to cover the loss. Courts have consistently ruled that mining claim rights are protected under the Fifth Amendment.[10] To avoid constitutional takings claims, and the attendant risks of litigation and potential damages, any leasing scheme implemented by the federal government for hardrock minerals would have to be limited in nature and include savings or grandfather clauses so that the law does not adversely affect the rights of current mining claim owners. Any reduction to the actual property interests held by these mining claim owners, including the imposition of lease term limits or transformation of mining claims into leases, would trigger Fifth Amendment takings concerns.[11]

B. Hardrock Royalty Proposal

For many years, the mining industry has presented testimony in hearings before Congress explaining why a gross royalty structure, like that used in the federal oil and gas royalty program, is unworkable for hardrock minerals and would lead to significantly less mining on federal lands. This testimony demonstrates that using coal, oil, and gas royalty programs as a template for a hardrock royalty would be impractical due to the different geologic characteristics of oil, gas,

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[8] Twin Metals Minnesota has invested over $500 million to develop a world-class critical minerals deposit containing nickel, cobalt, copper, platinum, and palladium, https://www.mprnews.org/story/2022/02/15/mn-dnr-suspends-environmental-review-of-controversial-twin-metals-mine-proposal

[9] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[10] See American Exploration & Mining Association July 2021 white paper entitled "Mining Law Fifth Amendment Takings Analysis."

[11] See supra note.

and coal as compared to hardrock minerals. Moreover, oil, gas, and coal are more abundant than hardrock mineral deposits, making these energy minerals easier to find, develop, and produce. By comparison, discovering and developing a hardrock mineral deposit takes much longer and requires a much larger investment.

Additionally, the raw minerals produced at most hardrock mines are not salable, as they must undergo costly processing steps to create a product that can be sold. Although federal royalties for oil, gas, and coal are often referred to as gross royalties, these are actually more comparable to a net royalty in that they are based on the value of the *marketable* products extracted from the well or a mine (See Attachment 3, at 5). If a workable federal hardrock royalty is desired, that royalty should only be effective at the point in time when value-added steps have created a marketable product from the mine. Then the costs incurred by the mine operator to produce the marketable product would need to be deducted in the royalty calculation.

If a realistic royalty scheme is to be implemented, royalty payments to the United States must be based on the value of the federal government's ownership interest in the raw minerals, as they are found in the ground, thereby allowing the mine operator to deduct costs associated with the value-added mineral processing steps necessary to produce a salable mineral product. Although the federal government, through the Mining Law, has made land available for mineral exploration, it currently contributes nothing to the immense costs and efforts required to find, produce, and process valuable hardrock minerals. Without relying on federal subsidies, mining companies invest their own funds in a way that already benefits federal taxpayers at the end of these processes. Despite the costs and daunting odds against discovering a valuable mineral deposit and development of a mine, the Mining Law stimulates private-sector investment in a way that transforms undeveloped federal land into mining operations and results in jobs, taxes, and critical minerals the country needs.

A gross royalty such as that proposed in S. 1742 is also inappropriate because it has a very different effect on mining investment than a net royalty, especially during price cycles. Royalties assessed on gross proceeds discourage investment by raising economic risks and increasing the initial outlay required to commence operations. As a result, projects subject to gross royalties generally require higher pretax and after-tax rates of return to accommodate this increased risk. By comparison, net royalties have a smaller effect on the variability of after-tax rates of return and are less of a deterrent to ongoing investment.

When commodity prices decrease, the rate of return required to justify mining investment increases more dramatically under a gross royalty than under a net royalty. Because most mine operating costs are fixed, a gross royalty takes a bigger piece out of the mine's reduced income during periods of low commodity prices. A gross royalty is especially problematic during times of low commodity prices because it causes a greater reduction in cash flow during periods when profits are already suffering. During low commodity price cycles, low-grade ores often become uneconomic to mine and process and become waste which is not processed or not mined at all. This shortens the life of the mine and reduces the total amount of minerals (including critical minerals) produced from the mine. In this way, gross royalties would contribute to premature

mine closures with the effect of lost jobs; reduced local, state, and federal tax revenues; decreased royalty payments; and business losses for the mine's vendors and suppliers.

By comparison, a net proceeds or net income royalty would not force mines to operate at a loss because the royalty owed is automatically reduced during periods of low prices, and it increases again when prices start to rise. A net royalty would allow mining operations to continue during periods of low commodity prices and also enable maximum recovery of low-grade ore during periods with higher prices. Because mineral demand is cyclical and commodity prices fluctuate, a net royalty provides a better incentive to explore for minerals on federal lands in spite of variable mineral demand and commodity price cycles.

If the federal government were to impose a royalty burden on existing mining claims (or rights already vested under the Mining Law), such an imposition would trigger Fifth Amendment takings concerns. As discussed above, the seizure or reduction of any privately held property interest constitutes an actual (per se) taking and requires compensation under the U.S. Constitution. This concept applies to partial actual takings, which take a portion of the overall property rights, and it applies to any reduction of the claim holder's net revenue interests (the basic purpose behind imposition of any royalty burden). In fact, the Fifth Amendment's restriction against actual partial takings has been applied to mining claims on multiple occasions, not only in federal actions, but cases where the government's power of eminent domain has been exercised to condemn easements or right of ways through mining claims. To avoid constitutional takings issues, and the attendant risks of litigation and potential damages, any royalty scheme implemented by the federal government would have to be limited to future mining claims and avoid imposing royalty burdens on the existing property rights of current mining claim owners.

C. AML Funding Options Need Not Rely on Royalties or New Fees

With respect to AML reclamation funding, amending the Mining Law to impose new fees or royalties is not the only way to create an AML reclamation fund. Recognizing the importance of developing a funding source to reclaim hardrock AML sooner rather than later, AEMA points to the annual claim maintenance fees and service fees (together, "Claim Holding Fees") already paid by mining claim holders as a potentially significant source of funding. Annually, BLM collections exceed the cost for BLM to administer the Mining Law. For example, BLM's 2020 Public Lands Statistics Report shows BLM collected $69,420,974 in Mining Law fees in Fiscal Year 2020 and Congress appropriated $40,196,000 for Mining Law Administration program operations, including the cost to administer the mining claim fee program, with the excess of $29,224,974 deposited to the general fund.[12] Similarly, in Fiscal Year 2021, BLM collected hardrock mining fees of $100,820,256 and was authorized to retain $39,696,000 for Mining Law Administration program operations, including the cost to administer the mining claim fee program, with the excess of $61,124,256 deposited to the general fund.[13] Congress has provided no directive to use these excess Claim Holding Fees for public land management but could easily direct them towards AML efforts.

[12] https://www.blm.gov/sites/blm.gov/files/docs/2021-08/PublicLandStatistics2020.pdf, Table 3-32, page 158.
[13] https://www.blm.gov/sites/default/files/docs/2022-07/Public_Land_Statistics_2021_508.pdf, Table 3-32, page 160.

Section 40704 of the Infrastructure Investment and Jobs Act ("IIJA") established a new abandoned hardrock mine reclamation fund to jumpstart abandoned mine cleanups. Additionally, there are at least eight states that generate revenue to work on abandoned hardrock mines. Revenue sources include mine license taxes and royalties on oil and gas, hardrock mines, and other mineral extraction, and other sources such as the state general fund.[14] If these funds were pooled with the federal Claim Holding Fees and spent efficiently, much could be accomplished. For example, the federal agency-Colorado model of collaboration on a watershed approach could be deployed uniformly nationwide to maximize efficient use of resources.[15] Nevertheless, liability issues still often prevent public-private partnerships from capitalizing on these initiatives on a wider scale. By passing Good Samaritan legislation, Congress can begin to remove these common hurdles and achieve faster results.

AEMA has a number of other suggestions to generate AML reclamation funding. For example, a *voluntary* mitigation system could be established to enable new mine applicants or existing operators to fund reclamation of AMLs in the regions where they operate. Any voluntary reclamation activities could further be considered as "sustainability credits" or social license credits to "offset" and be included in the overall evaluation of environmental and social impacts of new mining development projects. For such an approach to work, the federal and/or state agencies would need to maintain a list or "pool" of AML sites or eligible projects to which the funding or reclamation work could be directed in order to prioritize where the AML reclamation work would be performed. Additionally, to enable actual reclamation work, Congress must enact Good Samaritan legislation to eliminate liability for conducting such reclamation work.

Most legacy sites have environmental impacts because environmental laws did not yet exist at the time of historic mining operations and waste management practices were at best rudimentary at most old mine sites. Environmental impacts also resulted from the limited mineral processing technologies that were historically available that left behind residual metals that were unrecoverable at the time that are now leaching out of old mine wastes and contaminating ground water and surface water at some AML sites. Robust environmental laws are now in place throughout the United States and mineral processing technologies have advanced over the years. The result is that what was a "waste" historically may now have recoverable mineral value with today's technologies. Studies done at Idaho National Labs, Los Alamos National Labs, with the Critical Minerals Institute, among others have documented that there are rare earth element ("REE") deposits and other critical minerals at a number of AML sites. Accordingly, the remining and reprocessing of mine tailings and waste could serve both to reclaim some or all of an AML site and result in the responsible production of valuable minerals. "Waste" deposits at certain AML sites could hold sufficient mineral reserves that little or no additional funding would be required if remining and reprocessing options, along with liability relief for legacy issues, were available. Again, Good Samaritan legislation to relieve liability concerns is needed to enable most such remining and reprocessing opportunities.

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[14] GAO Report: "Abandoned Hardrock Mines, Information on Number of Mines, Expenditures, and Factors That Limit Efforts to Address Hazards," at 29-30.
[15] *See Id.* at 36-37.

For over two decades, starting with the "Good Samaritan Abandoned or Inactive Mine Waste Remediation Act", S. 1787, introduced by Senator Baucus in 1999, the mining industry has advocated for bi-partisan legislation to facilitate AML cleanup by addressing the Clean Water Act and CERCLA liability issues that are a serious barrier to Good Samaritan AML cleanup efforts. AEMA has actively worked with members of Congress, EPA, non-profit organizations such as Trout Unlimited, the WGA, the NMA, and industry members to build coalitions to craft workable legislation to facilitate AML cleanups.

AEMA thus strongly supports S. 2781, the current Good Samaritan legislation that Senators Heinrich and Risch introduced earlier this year in the Senate Environmental and Natural Resources Committee. That legislation establishes a seven-year pilot program for fifteen Good Samaritan remediation projects of orphan mine sites on federal, state, tribal and private lands. The pilot program is limited to orphaned sites (i.e., sites without a liable responsible owner or operator). This pilot program is designed for environmentally lower risk projects and involves activities designed to result in partial or complete remediation of the orphan mine site, improving or enhancing water quality or site-specific soil quality or otherwise protecting human health and the environment. EPA and the BLM and Forest Service would coordinate application review and permitting, with EPA leading the non-public land projects and the BLM and Forest Service leading projects in their respective land management areas. Under this proposed program, applications must document baseline site conditions and include a detailed remediation plan. For projects on federal public lands, reprocessing of materials is only allowed if the federal land management agency has approved reprocessing as part of the remediation plan, and the proceeds are used to defray costs of remediation. Any remaining proceeds must be deposited into a Good Samaritan Mine Remediation Fund, which is also established by this legislation. The fifteen AML remediation pilot projects authorized in this bipartisan bill would begin to pave the way towards addressing liability issues at AML sites that do not have complex water quality issues. We strongly urge Congress to pass S. 2781.

Conclusion

Demand for minerals in our advanced society is increasing every day. Minerals are critical to developing the innovative technologies that will propel our economy, enable America to compete globally and improve our quality of life. They are the building blocks for the manufacturing, construction, and automotive industries, and are essential to growth in fields such as advanced energy and healthcare. Current efforts to transition to a "green energy" economy are not possible without a robust domestic mining industry to provide the required minerals and metals.

Our mineral import reliance must be addressed. Americans and the environment lose when we offshore our mineral requirements. It makes no sense to create mining jobs elsewhere and import minerals from countries, often adversaries like China and Russia, with inferior environmental protection and worker health and safety standards. President Biden's decarbonization aspirations demand that we minimize the carbon footprint of our minerals by getting them from domestic mines rather than creating the substantial carbon emissions to ship minerals from around the globe.

Mining makes every aspect of our lives possible. Most people never think about the pivotal role mining plays in their lifestyle and standard of living, but mined products are key to the advanced, technological, comfortable, and more healthful existence we enjoy. Like food and water, energy and minerals are essential. We are fortunate that America is blessed with a rich mineral endowment, and it is more important than ever to responsibly utilize our own mineral resources. In fact, it is a national imperative.

It is therefore imperative that lands with important mineral deposits remain accessible to responsible mineral exploration and development and that federal and state permitting processes can be completed in a timely manner.

The Mining Law, as amended, has served this Nation well by providing the necessary framework and security of tenure, or certainty, required to attract mineral investment and take the risk to find that true needle-in-a-haystack, one-in-a-thousand economically viable mineral deposit.

By keeping our existing mines operating and getting new mines in operation, the economic impact ripples out far and wide: to employees, mine suppliers, local economies, and the downstream domestic industries we supply with our products. Not to mention the tax revenues we generate for local, state, and federal governments as a result of this economic activity. Few industries pack such an economic punch.

Addressing climate change, creating union jobs, and pushing "Buy American" requirements are pillars of the Biden Administration's priorities. The U.S. mining industry is the foundation upon which those pillars stand.

AEMA therefore urges you to support S. 1281, the Mining Regulatory Clarity Act, and oppose S. 1742, the Clean Energy Minerals Reform Act. We look forward to continuing to work with you to ensure America has a secure and affordable supply of the minerals and metals needed for our modern society.

Sincerely,

Mark Compton
Executive Director

December 12, 2023

The Honorable Joe Manchin
Chairman, Committee on Natural Resources
United States Senate
306 Hart Senate Office Building
Washington D.C. 20510

The Honorable John Barrasso
Ranking Member, Committee on Natural Resources
United States Senate
307 Dirksen Senate Office Building
Washington, DC 20510

Re: Advancing comprehensive mining legislation

The undersigned hunting, fishing, outdoor recreation, and conservation organizations are writing to share our perspective regarding mining legislation before the Senate Energy and Natural Resources Committee, including the *Mining Regulatory Clarity Act* (S. 1281/H.R.2925), which includes provisions passed by the House of Representatives in Section 20307 of the Lower Energy Costs Act (H.R. 1). The provisions included in the *Mining Regulatory Clarity Act* go far beyond the historic application of the 1872 Mining Law and jeopardize fish and wildlife habitat and public lands. We request that Congress address unintended consequences in the *Mining Regulatory Clarity Act* or similar legislation, and that it be paired with legislation that modernizes the 1872 Mining Law.

The *Mining Regulatory Clarity Act* seeks to address legal uncertainties stemming from the Rosemont judicial decision. In short, the approach of this legislation is to simply make all mining claims valid – with or without the discovery of a valuable mineral deposit – so long as required fees are paid. While this approach would resolve the Rosemont decision, it would also create unintended consequences because it does not distinguish between lands that are open for mining and those that have been withdrawn from mining laws, such as wilderness areas and national monuments. This is problematic because numerous mining claims preexist designations for many of these areas, including approximately 1,100 mining claims in National Park units.

In the Rosemont case, the proponent had a valid mining claim. Its plan of operations, however, proposed to dispose of nearly two billion tons of waste rock on adjacent National Forest land. The District Court and the Ninth Circuit court of appeals found that Rosemont needed to establish they had a valid and existing right prior to allowing the dumping of the waste.

Under existing regulations, mining can only be allowed in protected areas if preexisting claims are valid, meaning that there has been the discovery of a valuable mineral deposit.[1] This requirement establishes a high bar to meet before a valid right is established on mining claims within protected areas where mining is otherwise prohibited. However, if provisions of the *Mining Regulatory Clarity Act* were to become law, it would eliminate the valuable discovery standard, even in "protected" areas, and it would be unlawful to deny mining and exploration activities on all mining claims.

Moreover, under the proposed legislation these absolute rights also apply to incidental activities that are not located on mining claims, such as road construction across public land to access a mining claim. Importantly, these absolute rights do not just apply to plans of operations for commercial mining

[1] See 43 CFR § 3809.100, "after the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid."

operations; these provisions would extend to all phases of mining, including prospecting and exploration. The effect is that a claim holder in good standing would now have a right explicitly codified in law to not only mine on any claim upon which required fees have been paid, but to also construct reasonably incidental roads and other infrastructure, even just for the purposes of prospecting on a mining claim.

A more targeted, holistic solution is needed that not only provides certainty for the mining industry, but that also establishes a 21st century mining law that conserves and restores fish and wildlife habitat, sacred sites and drinking water supplies. We urge Congress to enact a comprehensive solution that provides a path forward balancing conservation with a sustainable domestic mining industry, including the following elements:

1) **Security of tenure**. Legislation to resolve uncertainties surrounding the Rosemont decision must be narrowly focused to address ancillary uses reasonably necessary and incident to a plan of operations to actually mine a valuable mineral deposit. These absolute rights should not extend to prospecting and exploration activities. Additionally, exploration, mining or related activities should not be allowed in protected areas withdrawn from mining laws unless a valid right (i.e., valuable mineral discovery) was established prior to the protective designation.

2) **Modernize mining law**. Congress should establish a royalty and/or fee on the extraction of hardrock minerals from public lands that is both fair for the mining industry and that generates revenue to help clean up the legacy of abandoned hard rock mines. Additionally, a modern mining law should provide some level of discretion for public land management agencies to determine – upfront – lands available for mining activities. This is the same way public land management agencies determine lands suitable for oil and gas leasing and other industrial land uses. An analogue for Congress to consider is the Surface Coal Mine Reclamation Act and its Abandoned Mineland Fund which has generated more than $11 billion to help clean up abandoned coal mines.

3) **Empower Good Samaritan cleanups**: Volunteer, third parties want to help clean up some of the tens of thousands of abandoned mines polluting the environment. Unfortunately, enormous liability risks preclude cleanup efforts. The Good Samaritan Remediation of Abandoned Hardrock Mines Act would create a pilot program that provides non-liable Good Samaritan parties with a targeted, narrow liability shield would allow projects to move forward that improve water quality for the environment and downstream communities impacted by abandoned mines.

We recognize that the Rosemont decision has created a great deal of uncertainty for mining on public lands that are open to mining, but a solution should not create uncertainty for the future of protected public lands. We stand ready to work collaboratively with lawmakers, the mining industry, and other public land stakeholders to chart a path forward for comprehensive legislation that helps clean up the mistakes of the past and prevents future impacts to clean water and healthy fish and wildlife habitat.

Sincerely,

Backcountry Hunters & Anglers
National Deer Association
Theodore Roosevelt Conservation Partnership
Trout Unlimited

December 8, 2023

Senators,

On behalf of our millions of members and supporters, the following conservation, climate, Indigenous and tribal-affiliated organizations call on you to oppose S. 1281, the so-called "Mining Regulatory Clarity Act." We write to share the below concerns and reasons for opposition for the Senate Energy and Natural Resources Subcommittee on Public Lands, Forests and Mining on December 12th 2023.

The Mining Regulatory Clarity Act represents an unprecedented, de facto giveaway of America's cherished public lands to mining corporations, upending and reversing over one hundred years of public land law precedent. Under the bill, anyone—for a nominal fee—gains permanent rights to occupy land, construct massive waste dumps, and build roads and pipelines across public lands to the detriment of all other values. This would preclude all other types of development and use, including renewable energy projects, recreation, and traditional cultural uses.

The Mining Regulatory Clarity Act is not a return to "status quo" as some proponents have argued. Instead, this legislation undermines the federal government's long standing authority to safeguard public lands, threatening the protection of irreplaceable cultural, environmental, water, and economic resources. That's because **the bill conveys mining claimants (including international mining conglomerates) with a right to permanently occupy federal public lands.** If an alternative use—like an electric transmission line or a renewable energy project—needed to cross "claimed" public lands, mining companies could extract large sums of money from the federal government in exchange for giving up their claim. As an example, if this bill were law in the 1900's, Grand Canyon National Park wouldn't exist as it does today. Future Senator Ralph Cameron filed mining claims covering the famous Bright Angel Trail, but they were invalidated due to a lack of a valuable mineral deposit. Had S. 1281/H.R. 2925 been law, Cameron would have had a vested right to undertake a wide variety of exclusionary or destructive activities on these claims and those claims would have superseded the Grand Canyon National Monument's (later National Park's) protections. Under S. 1281, all future prospective protected lands could suffer this fate.

This legislation would lead to vast unintended consequences by allowing mining companies, and any individual, to easily weaponize it for their own gain. A person or company wishing to block a solar, wind, or transmission project could simply file a claim in the path of the project by pounding four stakes into the ground and paying a nominal fee and then exercise their new right to occupy the land to block it from moving forward.

Under Section 2(e)(1)(B) of S. 1281/H.R. 2925, mining companies would receive a statutory right to permanently occupy and bury our federal public lands under tons of toxic waste. Modern large scale mines often produce far more toxic waste than the minerals they extract, risking water contamination and other harms. Further, Section 2(e)1(A) grants mining companies automatic rights-of-way for far-flung infrastructure such as new pipelines, transmission lines, and roads across public lands. The change eliminates a central provision of the Federal Land Policy and Management Act (FLPMA) that requires mining companies to receive a permit for such uses, just like everyone else operating on public lands. Section 2(e)(2) would also eliminate FLPMA's requirement that the mining company pay "fair market value" for using public lands for these facilities.

The Mining Regulatory Clarity Act was authored in reaction to recent court decisions that affirmed and enforced longstanding law. According to proponents of this egregious corporate handout, the need for this bill arises from a court case known as *Rosemont*, as well as two subsequent federal court rulings, where companies proposed using invalid mining claims to dump enormous quantities of waste generated at the mine site. The problem with that was obvious and courts blocked them: holding an invalid mining claim confers no right to use or occupy the lands covered by the claim unless a valuable mineral is discovered.

The proponents also argue that this legislation is essential to secure our clean energy supply chain. Contrary to industry's sky-is-falling rhetoric about critical mineral supply shortages, there are a variety of ways to meet the demand for these minerals during our transition to a clean energy economy. This includes—in conjunction with carefully sited mines governed by high environmental standards—deep investment in a circular minerals economy that recycles and reuses the maximum amount of these minerals possible. In addition, mining companies have options to acquire the lands needed for new mines, waste sites, and processing facilities without violating the law or seeking handouts from Congress. In fact, one large copper operation in Arizona, ASARCO's Ray Mine, recently obtained over 9,000 acres in an exchange to allow for continued mining. There cannot be a just and equitable transition to a carbon-free future, with legislation like this that sacrifices our lands, waters, public health, sacred sites and communities.

The mining law of 1872 is already overly permissive—mining has polluted the headwaters of 40 percent of western watersheds, fiscal assurances for clean up are routinely inadequate, and companies pay no royalties for the minerals they extract from public lands. Reform is needed to safeguard waters, communities, and the environment.

This bill would do the opposite, further tipping the scales away from communities, the environment, and our clean energy future—giving the mining industry the power to dictate how we use our public lands. Instead, Congress should work to balance our nation's clean energy mineral needs with all other public land uses, such as for renewable energy projects, cultural and historical resources, ranching, recreation, water resources, and wildlife. Our organizations ask you to oppose this legislation in all its forms and reject it as a part of any conversation around energy permitting.

Sincerely,

Center for Biological Diversity
Defenders of Wildlife
Earthjustice
Earthworks
Endangered Species Coalition
GreenLatinos
Information Network for Responsible Mining
League of Conservation Voters
Native Movement
Natural Resources Defense Council
Patagonia
Public Citizen
Sierra Club
The Wilderness Society

Uranium Watch
Western Watersheds Project
Alaska Clean Water Advocacy
Alaska Community Action on Toxics
Alaska Longline Fishermen's Association
Alaska Wilderness League
Anthropocene Alliance
Arizona Faith Network
Arizona Mining Reform Coalition
Arizona Trail Association
Arkansas Valley Conservation Coalition
Black Hills Clean Water Alliance
Californians for Western Wilderness
Cascade Forest Conservancy
Citizens Awareness Network
Citizens to Protect Smith Valley, NV
Clark County Adventure Riders (NV)
Coalition for Wetlands and Forests
Coalition to Save the Menominee River
Conservation Northwest
Cook Inletkeeper
Dot Lake Village
Friends of Buckingham
Friends of the Inyo
Friends of the Kalmiopsis
Friends of the Sonoran Desert
Gila Resources Information Project
Grand Canyon Trust
Great Basin Resource Watch
Great Bear Foundation
Healthy Environment Alliance of Utah (HEAL Utah)
Hispanic Access Foundation
Idaho Conservation League
Idaho Rivers United
Kahtoola, Inc
Kalmiopsis Audubon Society
LEAD Agency, Inc.
Living Rivers
Los Padres ForestWatch
Malach Consulting
Mother Kuskokwim Tribal Coalition
Multicultural Alliance for a Safe Environment
Nevada Conservation League
New Mexico Environmental Law Center
New Mexico Sportsmen
New Mexico Wild
Northern Alaska Environmental Center
Northern Front Range Broadband of Great Old Broads for Wilderness

Norton Bay Watershed Council
Okanogan Highlands Alliance
Oregon Natural Desert Association
Patagonia Area Resource Alliance
People of Red Mountain
Physicians for Social Responsibility Pennsylvania
Progressive Leadership Alliance of Nevada
Quiet Use Coalition
Rio Grande Indivisible, New Mexico
San Juan Citizens Alliance
Save Our Cabinets
Save the Scenic Santa Ritas Association
Save the South Fork Salmon, Inc.
Silver Valley Community Resource Center
Sisters of Mercy of the Americas Justice Team
Sky Island Alliance
Soda Mountain Wilderness Council
Southern Utah Wilderness Alliance
Standing Trees
The Alaska Center
The Clinch Coalition
Trustees for Alaska
Tucson Audubon Society
WaterLegacy
Western Mining Action Network- Indigenous Caucus
Western Shoshone Defense Project
Wild Arizona
Wisconsin Mining

The Great Spirit created Man and Woman in his own image. In doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other; in doing so, happiness and contentment was achieved then, as it should be now.

The connecting of the Hair makes them one person; for happiness or contentment cannot be achieved without each other.

The Canyons are represented by the purples in the middle ground, where the people were created. These canyons are Sacred, and should be so treated at all times.

The Reservation is pictured to represent the land that is ours, treat it well.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us.

The Sun is the symbol of life, without it nothing is possible – plants don't grow – there will be no life – nothing. The Sun also represents the dawn of the Hualapai people. Through hard work, determination and education, everything is possible and we are assured bigger and brighter days ahead.

The Tracks in the middle represent the coyote and other animals which were here before us.

The Green around the symbol are pine trees, representing our name Hualapai – PEOPLE OF THE TALL PINES –

HUALAPAI TRIBE
OFFICE OF THE CHAIRPERSON
P.O. Box 179 / 941 Hualapai Way • Peach Springs, Arizona 86434
(928) 769-2216

Sherry J. Parker
Chairperson

Shelton "Scott" Crozier
Vice Chairman

June 6, 2023

VIA Email Paawee.rivera@who.eop.gov
VIA Email Daron.t.carreiro@who.eop.gov
VIA Email Brenda_mallory@ceq.eop.gov

VIA Email chris_phalen@sinema.senate.gov (Sen. Kyrsten Sinema)
VIA Email paul_babbitt@kelly.senate.gov (Sen. Mark Kelly)
VIA Email emma.reidy@mail.house.gov (Rep. Ruben Gallego)
VIA Email tracee.sutton@mail.house.gov (Rep. Greg Stanton)
VIA Email sarina.weiss@mail.house.gov (Rep. Raul Grijalva)

The President
The White House
1600 Pennsylvania Ave.
Washington, DC 20500

RE: Hualapai Tribe's Opposition to the Mining Regulatory Clarity Act

Dear President Biden, Senators and Representatives:

The Hualapai Tribe firmly opposes the Mining Regulatory Clarity Act, which represents an unprecedented giveaway of public lands to mining corporations. Under the bill, mining corporations would gain a near unlimited right to occupy as much public land as they wanted for their mining operations. The companies would gain the right to dump waste, dispose of toxic tailings, bulldoze roads, and construct pipelines across public lands, even on lands of deep cultural and ecological significance to the Hualapai Tribe. We urge you to oppose the legislation, which would exacerbate the harms caused by the mining industry.

We are especially concerned with this legislation because four key minerals that will be used for the energy transition – 97% of nickel, 89% of copper, 79% of lithium, and 68% of cobalt – are

located within 35 miles of Native American Reservations. In addition, many existing and proposed mines are located on federal lands adjacent to tribal lands. The Tribe is very concerned with a lithium exploration project located on Bureau of Land Management lands directly adjacent to tribal lands in the Big Sandy Valley that threatens Ha'Kamwe, a sacred medicinal spring. In addition, numerous notice-level activities are occurring throughout the Sandy Valley for a variety of minerals.

The proposed legislation contains a series of provisions designed to undermine the Federal Government's authority to safeguard public lands. Under Section 2(e)(1)(B) of the Mining Regulatory Clarity Act, mining companies would receive a statutory right to permanently occupy and bury public lands under tons of toxic waste. Further Section 2(e)(1)(A) grants mining companies automatic rights-of-way for new pipelines, transmission lines, and roads across public lands – eliminating a central provision of the Federal Land Policy Management Act that requires mining companies to receive a permit for such uses just like every other industry operating on federal lands. The mining law of 1872 is already overly permissive- having caused disastrous consequences for our Indigenous communities, our health and our sacred sites, and this legislation would only increase those harms in the future.

The Mining Regulatory Clarity Act is poised to have devastating consequences on our ancestral lands and resources. The creation of tribal sacrifice zones in the name of the clean energy transition must stop. Indigenous communities use what are now federal public lands for resource collection, ceremonies, and other traditional cultural uses. This Administration has vowed to safeguard our cultural resources and to listen to tribes. The Mining Regulatory Clarity Act will impair our ability to use our ancestral lands forever and we ask that you reject it.

Sincerely,

Sherry J. Parker

Sherry J. Parker
Chairwoman

169

December 6, 2023

Hon. Catherine Cortez Masto, Chair
Hon. Mike Lee, Ranking Member
Subcommittee on Public Lands, Forests, and Mining
Energy and Natural Resources Committee
Dirksen Senate Office Building
United States Senate

Re: Comments on S. 1281, scheduled to be heard by the subcommittee on December 12, 2023

Dear Senators Cortez Masto and Lee,

We write to express our strong opposition to S. 1281. We have helped administer the Mining Law (while working in the Department of the Interior in both career and non-career positions) and have taught and written about Mining Law issues for many years.

Simply put, S. 1281 is the worst so-called "reform" of the Mining Law we have ever seen. It is shocking, and we use that word advisedly, in the way it opens to extortion the hundreds of millions of acres of national forests and other public lands to which the Mining Law applies. The problem is apparent on the face of the act: it gives one who locates a mining claim on public land and pays the modest location and claim maintenance fees "the right to … occupy" that land "without the discovery of a valuable mineral deposit."

This extends an open invitation to unscrupulous people to locate mining claims on every available acre of federal land, with no intention to extract minerals, but instead to extort money. Those who would pay to get rid of the claims would include, besides the government, those who want access to the lands for permissible uses that require substantial investment, such as renewable energy projects, logging, recreational projects like ski areas, and even mining. Indeed, it is remarkable that, despite considerable contemporary discussion about whether the Mining Law should be reformed to facilitate the development of so-called strategic minerals on federal land, this legislation would almost certainly thwart, rather than facilitate, their extraction!

By eliminating the bedrock requirement that mining claims are not legally valid unless they are supported by a discovery of a valuable mineral deposit—a requirement that has been in the Mining Law since 1872—the proposed legislation leaves a buyout as the only practical way to eliminate such claims. And in the negotiation of the buyout amount, practically all the leverage would be with the claimant.

We are not just imagining this. The Mining Law has historically been subject to widespread abuse of exactly this kind. One notorious example arose more than a century ago, when for years Ralph Cameron used spurious mining claims he located on the most popular hiking trail in the Grand Canyon to extort money from park visitors. In the 1960s, Merle Zweifel located many thousands of mining claims over hundreds of thousands of acres of public lands for the same reason, including along the proposed route of the Central Arizona Project aqueduct and on public land thought to be valuable for oil shale development in western Colorado.[1] (His motivation, as he later admitted to a Wall Street Journal reporter, was "a lust for money."[2]) It took years of litigation to eliminate these and other similar abusive claims, which was only possible because the abusers could not show a discovery of a valuable mineral deposit on their claims.[3]

S. 1281 would remove that vital tool from the toolbox, substituting instead an open-ended "right to occupy" public lands. It would leave those seeking to make legitimate use of public land, and the government itself, with no remedy against such abuses.

What makes it even more troublesome is that the so-called "problem" S. 1281 purports to address—the *Rosemont* court decision[4]—does not shackle the legitimate mining industry. Hudbay Minerals, the foreign company seeking to develop Rosemont, made a deliberate decision to try to use regular mining

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[1] These and similar abuses are recounted in detail, with sources, in Leshy, *The Mining Law: A Study in Perpetual Motion* (1987), at 77-83.
[2] B. Newman, "Never Mined: Merle Zweifel Claims Acres of Public Land, But What Is He Up To?" Wall Street Journal, January 20, 1972, p. 1, col. 1.
[3] See, e.g., *Cameron v. United States*, 252 U.S. 450 (1920); see also United States v. Zweifel, 508 F.2d 1150 (10th Cir.), cert. denied *sub nom Roberts v. United States*, 423 U.S. 829 (1975).
[4] *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022).

claims for the huge waste dumps and tailings piles its mine would produce, locating them on 2700 acres of national forest land. Its decision left it vulnerable to the challenge that these claims did not support a valuable mineral deposit. In fact, both the geological evidence and Hudbay's intent to bury the claimed land under hundreds of millions of tons of waste rock and tailings convincingly demonstrated that the claims contained no valuable mineral deposits. Upon reaching that conclusion, the federal courts set aside the Forest Service's decision to allow Hudbay to use the public lands it claimed that way.

It was clear to us (and we believe to all knowledgeable observers) that Hudbay sought to use mining claims for its waste/tailings dumps because it was cheaper than any alternative. While it could have pursued other available avenues to secure sites for such uses—such as land exchanges and acquisitions of nonfederal lands—each would cost it more. (In fact, several large mines found on public lands have been facilitated by land exchanges.)

This was made abundantly clear by Hudbay's revelation when the Ninth Circuit Court of Appeals turned down its appeal. *On the very same day* the court decision was released, it announced that it had acquired approximately 4,500 acres of private land in the vicinity precisely for such use.[5]

Hudbay could also have obtained sites for its waste/tailings dumps by locating "millsites" on the public land, something the Mining Law has permitted since 1872. Hudbay initially chose not to do that because millsites are smaller (maximum five acres, compared to twenty acres for a regular mining claim) and involve more red tape.[6] And it could have applied for special use permits under various laws. The Interior Department's Solicitor recently discussed

[5] See May 12, 2022 Press Release of Hudbay Minerals, The U.S. Department of Justice and Hudbay Receive Rosemont 9th Circuit Court Ruling; Hudbay Continues to Advance Copper World (May 12, 2022), found at https://hudbayminerals.com/investors/press-releases/press-release-details/2022/The-U.S.-Department-of-Justice-and-Hudbay-Receive-Rosemont-9th-Circuit-Court-Ruling-Hudbay-Continues-to-Advance-Copper-World/default.aspx.

[6] Around the time the federal district court issued its initial ruling, the company located mill sites as a kind of hedge against an adverse ruling.

these and other various ways the hardrock mining industry could pursue large mining operations on federal land without the need for legislative "reform."[7]

Although those alternatives were and still are available to the hardrock mining industry, it has chosen instead to seek to have Congress intervene. But calling S. 1281 a fix grossly understates the mischief it would cause. It would, we believe, likely prove to be a public land policy disaster. Once its consequences were made clear, we think the only realistic course left to cut off further opportunity for extortionate abuses of the Mining Law would be for the executive branch to withdraw all federal lands from the location of new mining claims until Congress revisits the matter.

Finally, it is remarkable that, in addition to wreaking havoc, S. 1281 makes no effort to correct obvious problems with the antiquated Mining Law. Most glaring is the fact that it gives mining companies a free ride, as they pay no royalty for the privilege of extracting valuable minerals from the public lands. By comparison, every other mineral owner in the nation—whether on state, tribal or private land—receives some value-based payment when it allows the minerals to be extracted. (Congress itself, in legislation it adopted in 1927, insisted that states must receive fair market value for minerals extracted from lands the U.S. gave them at statehood![8])

Further showing the uniqueness of the Mining Law's policy of free minerals, Congress has required the U.S. to receive fair market value when fossil fuels or fertilizer minerals are extracted from public lands. But not when so-called hardrock minerals are extracted from public lands, including national forests, under the Mining Law of 1872.[9] Indeed, those lands may be the only ones on

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[7] Solicitor's Opinion M-37077, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057 (May 16, 2023), https://www.doi.gov/media/document/m-37077-use-mining-claims-mine-waste-deposition-and-rescission-m-37012-and-m-37057-5.

[8] See 44 Stat. 1026 (1927), codified at 43 U.S.C. §870; see also *The Mining Law*, supra n. 1, at 328-39.

[9] It is also worth noting that the Mining Law covers not only metals like gold, silver, and copper, but also so-called "uncommon varieties" of common substances like sand, gravel, and building stone. 69 Stat. 368 (1955), codified at 30 U.S.C. §611. If not an "uncommon variety," such substances must be purchased from the government for fair market value. According to a recent GAO study, well over a hundred currently approved operations, covering tens of thousands of acres of public lands, produce "uncommon varieties" of common substances. https://www.gao.gov/products/gao-20-461r. The "uncommon variety" issue has given rise to a number of controversies, such as a recent one involving the vast expansion of a limestone quarry on public lands on the outskirts of Glenwood Springs, Colorado, triggering opposition from local governments and their

the entire planet where the landowner receives no such payment for such mining.

Even the National Mining Association recognizes that this defect in current law should be corrected.[10] Yet S. 1281 does nothing to redress it. Instead, it would exacerbate the Mining Law's serious defects by giving claimants effective control of vast tracts of public lands for the price of modest claim filing and maintenance fees.

For these reasons, we strongly urge the committee not to approve S. 1281 in its current form. We appreciate your consideration of our views.

Sincerely,

John Leshy[11]

Sam Kalen[12]

Mark Squillace[13]

Bret Birdsong[14]

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allies. https://loveglenwood.org/legal-action/glenwood-springs-citizens-alliance-v-u-s-bureau-of-land-management/.

[10] See http://www.nma.org/pdf/041508_mining_law.pdf. To be sure, the NMA favors a net royalty that would apply only prospectively, to new mining claims, thus exempting the hundreds of thousands of existing mining claims currently found on millions of acres of public land.

[11] Emeritus Professor, University of California College of the Law San Francisco, and former Associate Solicitor (1977-1980) and Solicitor (1993-2001), U.S. Department of the Interior.

[12] Visiting McKinney Family Chair in Environmental Law (2023-2024), IU Robert H. McKinney School of Law; William T. Schwartz Distinguished Professor of Law, University of Wyoming College of Law (for identification only).

[13] Raphael J. Moses Professor of Natural Resources Law, University of Colorado Law School (for identification only).

[14] Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas (for identification only).

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December 12, 2023

Lithium Americas Corp (LAC) is developing the Thacker Pass Project in Northern Nevada. Thacker Pass will be the largest source of lithium carbonate produced in North America, initially furnishing enough battery-grade lithium for as many as 750,000 electric vehicles per year. The Project will dramatically improve our country's goals to build a domestic battery supply-chain and secure our country's energy future.

The Thacker Pass Project is permitted, and construction has begun. Over the next three years, roughly 2,000 skilled workers will be utilized to complete phase 1 construction. Once in production, Thacker Pass will employ more than 350 trained employees to operate the mine and processing plants.

In January 2021, Lithium Americas received a Record of Decision to proceed with Thacker Pass. The approval to move forward was based on an extensive Environmental Impact Statement conducted by the Bureau of Land Management. The EIS has sustained several subsequent legal challenges, validating the work was done right and that Thacker Pass will be built with minimal impacts to the environment and surrounding areas.

There is a notion that the General Mining Law is outdated and doesn't sufficiently protect the environment. The following summary highlights the comprehensive list of environmental laws and regulations that complement the Mining Law and help ensure responsible environmental stewardship at new projects like Thacker Pass.

Summary of Environmental Laws Applicable to Mining

As the Department of the Interior-led Interagency Working Group on Mining Law, Regulations, and Permitting ("IWG") recently recognized in its final report, overlaying the General Mining Law is a "web of more recent laws enacted to protect air, water, wildlife, communities, and public health." As the IWG explains, these environmental laws promote informed decisions, protect Americans, and build confidence that development is conducted with proper standards and oversight.[1]

Mining Regulations Require Environmental Protection and Reclamation

Federal and state laws create what the National Academy of Sciences/National Research Council in 1999 termed a "complicated but generally effective" web of environmental protection.[2] These laws apply throughout mine development, including exploration, construction, reclamation, closure, and post-closure monitoring. Mines use state-of-the-art environmental technologies including liners, water treatment facilities, air emission

[1] IWG Report, page 4.
[2] National Academy of Sciences/National Research Council, *Hardrock Mining on Federal Lands* 5 (1999).

control equipment, and environmental monitoring systems to comply with these regulations.

From the inception of work long past closure, mines must abide by, among other major federal laws, the Federal Land Management Policy Act (FLPMA) and associated BLM regulations, the National Environmental Policy Act (NEPA), the Clean Water (CWA) and Safe Drinking Water (SDWA) Acts, the Clean Air Act (CAA), the Endangered Species Act (ESA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), and the Emergency Planning and Community Right-to-Know Act.

States, too, require mines to abide by laws protecting groundwater, establishing standards for management and disposal of solid waste, and providing for mine closure and reclamation.

The Forest Service and BLM require reclamation plans and bonds for all mining activity on public land. And the bipartisan Western Governors Association observed in 2014 that "[a]ll Western states have developed regulatory bonding programs to evaluate and approve the financial assurances required of mining companies."[3] Nevada has developed a Standardized Reclamation Cost Estimator (SCRE) which is now used by federal agencies and internationally to calculate site-specific appropriate reclamation requirements.

I. Bureau of Land Management Regulations

BLM has promulgated mining regulations under FLPMA that include the following:

1. To obtain a permit to mine on BLM land, an operator must submit a plan of operations that includes plans for water management, rock characterization and handling, spill contingency, and reclamation. 43 C.F.R. § 3809.1–6.

2. This plan of operations cannot be approved until thirty days after a final Environmental Impact Statement has been prepared and filed with EPA. *Id.* Approval of a plan of operations is subject to NEPA, discussed below.

3. The operator must also submit, and the agency must approve, a plan for reclamation of disturbed areas and a financial guarantee (generally a reclamation bond) sufficient to fund completion of the reclamation plan. 43 C.F.R. Part 3800, Subpart 3809.

[3] Western Governors Association, Policy Resolution 2014-07 - Bonding for Mine Reclamation 1 (2014). *See also id.* ("The states have developed the staff and expertise necessary to calculate the appropriate amount of the bonds, based upon the unique circumstances of each mining operation, as well as to make informed predictions of how the real value of current financial assurance may change over the life of mine, even post-closure.").

4. The required reclamation plan must detail stabilization of land disturbed for mining, reclaiming and reshaping the land, wildlife rehabilitation, controlling potentially hazardous materials, and post-closure management. 43 C.F.R. 3809.1–3(d).

5. BLM Reclamation Bonding Requirement History and Guidance: Since 1981, BLM has required companies conducting exploration or mining activities affecting more than five acres to provide a reclamation bond as well as a reclamation plan and cost estimate in the plan of operations. In 2001, BLM expanded its bonding program to include Notice-level projects that disturb fewer than five acres of public land. State offices have also published guidance on reclamation bonding.[4]

II. Forest Service Regulations

The Forest Service has promulgated similar regulations:

1. It requires a plan of operation that includes a plan for reclamation of mining disturbances on Forest Service lands. 36 C.F.R. Part 228. Approval of a Forest Service plan of operations is also subject to NEPA.

2. Forest Service-specific requirements for environmental protection are set forth at 36 C.F.R. § 228.8 and include compliance with all air quality, water quality, and solid waste standards; protection of scenic values; and reclamation to control erosion and water runoff, isolate, remove or control toxic materials, reshape and revegetate disturbed areas, and rehabilitate fisheries and wildlife habitat.

3. The Forest Service requires a bond to cover the cost of stabilizing, rehabilitating, and reclaiming the area of operations. 36 C.F.R. § 228.13.

4. USFS Reclamation Bonding Requirement History and Guidance: In 1974, USFS promulgated reclamation regulations at 36 C.F.R. Part 228A; these require a bond for exploration, road building, trenching, and drilling projects as well as for all major mineral projects. USFS has also published agency-wide guidance for reclamation bonding.[5] Among other aspects, that guidance describes extensive monitoring requirements during reclamation and post-closure. *Id.* at 32.

III. Nevada

States also have developed extensive statutes and regulations governing environmental protection at mines and agencies equipped to monitor compliance. Nevada is the state with the most mining on federal lands and has developed some of the most extensive and strict environmental requirements for mining in the world.

A. Reclamation & Bonding Requirements

[4] *See, e.g.,* BLM Nevada, 3809 Reclamation Bonding Guidelines (May 2005).

[5] See USFS, Training Guide for Reclamation Bond Estimation and Administration for Mineral Plans of Operation Authorized and Administered Under 36 CFR 228A (April 2004).

Stringent reclamation and financial assurance (i.e., reclamation bond) requirements apply to mining on public, state, and private lands in Nevada.[6] Reclamation and closure designs and requirements provide the basis for the amount of required financial assurance, and Nevada has repeatedly expanded its bond program, significantly increasing the bond amount required.[7] Under state law, all projects in Nevada affecting more than five acres require a reclamation plan and bond. The Nevada Division of Environmental Protection (NDEP) and the State's Bureau of Mining Regulation and Reclamation manage the Nevada reclamation bonding program cooperatively with BLM and USFS under the terms of an interagency MOU, permitting an operator to submit a single bond, usually held by NDEP, that satisfies its obligations to the state and BLM.[8]

In 2021, NDEP reported holding more than $3.4 billion in reclamation bonds and other financial assurance.[9]

B. State Environmental Laws Governing Mining

Nevada's reclamation bond requirements complement other mining-specific laws in Nevada, including Nev. Adm. Code 445A.350-447, Water Controls—Mining Facilities, and Nev. Adm. Code 535.010-420, Dams and Other Obstructions, and Nev. Adm. Code 445B governing air quality and emission sources. The 445A regulations govern design of the tailings impoundment and process pond and include minimum design criteria to achieve zero-discharge of process solutions to surface waters and minimum discharge to groundwater. They also govern storm event design requirements, engineering containment standards, minimum liner design criteria, closure stabilization criteria, temporary and permanent closure. And they apply to tailings impoundments throughout the life of the impoundment, including closure and post-closure.

IV. National Environmental Policy Act

Under NEPA, a federal agency permitting a project on public lands must assess a project's compliance with the laws described above, before permitting the project.[10] That

[6] Nev. Ann. Code 519A.010-445, Reclamation of Land Subject to Mining Operations and Exploration Projects—Regulation of Mining Operations and Exploration Projects, establishes the financial assurance (i.e., reclamation bond) requirements for Nevada mineral exploration and development projects.

[7] In 1990, Nevada instituted a state bonding requirement. NAC 519A.

[8] The MOU is available here: https://ndep.nv.gov/uploads/land-mining-regs-guidance-docs/20190313_NDEP.FS_.BLM_MOU_._fjp_da2_tg_ADA_.pdf. Nevada has also implemented management plans that provide state regulators immediate access to funds for emergency management and interim fluid management. For disturbance greater than five acres, it uses a Standardized Reclamation Cost Estimator, developed by NDEP and now used by federal agencies and internationally, to calculate site-specific appropriate reclamation requirements. Generally, reclamation and closure designs, established in a plan of operations, and requirements, established by federal and state law, are the basis for the amount of required financial assurance.

[9] Nevada Commission on Mineral Resources, *Major Mines of Nevada 2021* 24 (2022) https://minerals.nv.gov/uploadedFiles/mineralsnvgov/content/Programs/Mining/MiningForms/MM2021_Major_Mines_2021.pdf.

[10] 42 U.S.C. § 4332.

includes issuance of federal permits or permission to use federal lands,[11] so mining activities on federal lands (beginning with exploration) are generally subject to NEPA. The Environmental Impact Statement (EIS) or Environmental Assessment (EA) prepared for mineral exploration or a mine will ensure that the plan of operations, through post-closure, complies with the statutes listed above, and will consider impacts of the project to, *inter alia*, surface water, ground water, air, soils, ecosystems, wetlands, endangered species, and flood plains.

An EIS will evaluate all environmental impacts, necessary mitigation, and the effectiveness of mitigation. Environmental analysis includes consideration of the project under at least the following environmental laws: the Clean Water Act, the Clean Air Act, RCRA, the Endangered Species Act, BLM's 3809 Regulations under FLPMA to avoid undue and unnecessary degradation of the public lands, and other regulations and guidance documents, such as the Golden Eagle Protection Best Practices for the Nevada Mineral Exploration and Mining Industry (where applicable, such as at Thacker Pass), the 2019 Nevada Greater Sage-Grouse Conservation Plan, and applicable state laws such as those described above.

V. Summary

Modern projects like Thacker Pass function under a comprehensive set of federal and state laws and regulations governing their design, construction, operation and closure.

[11] 40 C.F.R. § 1508.18.

NPCA Position on S.1281 the Mining Regulatory Clarity Act and S.1742 the Clean Energy Minerals Reform Act

December 11, 2023

Dear Chairwoman Cortez Masto, Ranking Member Lee, and members of the Subcommittee on Public Lands, Forests, and Mining:

Since 1919, the National Parks Conservation Association (NPCA) has been the leading voice of the American people in protecting and enhancing our National Park System. On behalf of our 1.6 million members and supporters nationwide, I write to share our positions on S.1281, the Mining Regulatory Clarity Act and S.1742, the Clean Energy Minerals Reform Act.

We appreciate the subcommittee seriously looking at the mining law of 1872 and the need to bring our nation's mining system to the same standards as other types of extractive development on public lands. This is especially relevant due to the growing demand for minerals essential for the clean energy transition and the subsequent growth of domestic mining on our public lands. Extreme flooding, drought, storms and fires pose a significant threat to the national park system, often destroying the unique landscapes, wildlife, ecosystems and cultural and historical objects that make these so special. We must take immediate action to reduce greenhouse gases from fossil fuels to prevent climate change from getting worse while preparing these treasured landscapes for the impacts they cannot avoid. This includes a rapid transition to renewable energy technologies.

Investments in the clean energy economy have grown significantly in recent years and need to grow exponentially in the years and decades ahead. This growth has been spurred by the passage of two landmark bills -- the Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA) -- as well as executive actions from both the Trump and Biden administrations. The issue our nation faces is how do we get the materials necessary to build out these renewable energy technologies. Demand reduction through energy efficiency improvements, recycling and developing a robust circular economy are all helpful, but the reality is that some amount of mining is necessary. To fully transition to a renewable energy economy under current conditions requires more minerals and metals than we currently have in circulation today. The mining for these clean energy minerals must be done with the highest environmental safeguards and with the greatest consideration for national parks, special places, sacred sites and local communities. We believe this means meaningful changes to the mining law.

S. 1281--The Mining Regulatory Clarity Act: NPCA opposes this bill, which disrupts the effective management of our public lands, including vital conservation efforts. While the proposed intent of the bill is pitched as a "fix" to the ancillary uses issue raised by the Rosemont Decision, S.1281 goes **further than** fixing that decision by abolishing the discovery requirement altogether, one of the longest standing pieces of the claim system under the 1872 law. Under current law, the discovery of a valuable mineral must be proven on a claim for the claim to be considered valid. Without the discovery of a valuable mineral, a claim can be challenged, and the mineral rights revoked.

NATIONAL PARKS CONSERVATION ASSOCIATION
777 6th Street NW, Suite 700, Washington, DC 20001 | 800.628.7275 | npca.org

The proof of discovery is essential for conservation tools such as mineral withdrawals, monument designations and even the creation of new national parks. When any of these conservation tools are used, all existing and valid rights are still preserved. Valid claims pose a threat to park resources due to the potential for new mining to happen as allowed under the Mining in the Parks Act. Under the proposed changes in S.1281, there would no longer be a requirement for claimants to prove the discovery of a valuable mineral to hold or validate their claim to the land. This essentially removes the ability of the federal government to contest superfluous claims on lands reserved for conservation. Despite what proponents contend, **this legislation does NOT return the mining law to the status quo.**

The Rosemont decision has apparently created new issues for mining companies, many of which have found other ways of addressing it already. By potentially undermining other conservation goals and important public lands, S. 1281 as written is not the appropriate solution to this problem. Other options already exist, such as those in the May 2023 DOI solicitor's opinion, for mining companies to pursue for the ancillary activities, such as Mill-site claims and tools available under the Federal Land Policy and Management Act (FLPMA).

S. 1742-The Clean Energy Minerals Reform Act: NPCA supports this legislation. The Rosemont decision and S.1281 are both symptoms of the larger issue: the laws that govern mining on public lands are badly in need of reform. The claim system, the idea that any entity can stake ownership of public land prior to the discovery of a valuable mineral deposit, is inconsistent with the rest of our 21st century public lands management. It is past time that we modernize our mining system to ensure efficient and responsible permitting of mining projects without sacrificing communities and special places. The Clean Energy Minerals Reform Act (S.1742) is a good place to start.

NPCA supports our country's clean energy transition and acknowledges some domestic mining for the transition, we look forward to working with the members of this committee and the rest of Congress to come to an agreement and meaningfully modernize our mining laws to both advance the development of less-damaging mining projects and to ensure that special places, communities and the environment are not irreparably harmed.

Thank you for considering our views. If you have any questions or need additional information, please contact me at (colsen@npca.org).

Sincerely,
Charlie Olsen
Climate Policy Manager
National Parks Conservation Association

July 25, 2023

The Honorable Kevin McCarthy
Speaker
United States House of Representatives
H-232, U.S. Capitol
Washington, D.C. 20515

The Honorable Hakeem Jeffries
Democratic Leader
United States House of Representatives
H-204, U.S. Capitol
Washington, D.C. 20515

The Honorable Chuck Schumer
Senate Majority Leader
United States Senate
S-221, U.S. Capitol
Washington, D.C. 20510

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
S-230, U.S. Capitol
Washington, D.C. 20510

Dear Speaker McCarthy, Leader Jeffries, Majority Leader Schumer, and Minority Leader McConnell:

We write today in support of Section 444 within H.R. 4821, legislation which would provide the certainty needed for critical mineral production to continue in the United necessary for a cleaner and more secure energy future, we hope you will give every possible consideration to enacting this measure before the end of the year.

The legislative language contained in Section 444 within H.R. 4821 is reflective of the strong bipartisan support this provision enjoys in the United States Senate and the United States House of Representatives. In the Senate, corresponding bipartisan legislation (S. 1281; Mining Regulatory Clarity Act) has been introduced by Senators Cortez Masto, Rosen, Sinema, Risch, Crapo, and Murkowski and in the House of Representatives, Congressman Amodei and Peltola have introduced H.R. 2925. Their combined advocacy for this measure not only highlights the importance critical minerals play in our clean energy future, but also a substantial number of jobs across the United States attributable to responsible mining companies.

The necessity for this measure is highlighted by the fact that decisions stemming from *Center for Biological Diversity et al. v. U.S. Fish and Wildlife Service et al* have effectively paralyzed the ability for the United States to operate mines efficiently and responsibly. In the absence of the enactment of the Mining Regulatory Clarity Act, decades of precedent and investment in the clean energy economy and corresponding good-paying American jobs have been thrown into turmoil. The enactment of this legislation is the single best way to provide the appropriate amount of certainty needed to underpin the ability of the United States to meet the extraordinary mineral demand necessary to meet the challenge of clean energy future.

Thank you for your attention to this matter, your work to help improve the federal permitting process, and your public service.

Sincerely,

Rich Nolan
President and CEO
National Mining Association

Albert Gore
Executive Director
Zero Emission Transportation Association

ONC
ORUTSARARMIUT NATIVE COUNCIL
117 Alex Hately
Box 927, Bethel, AK 99559
(907)543-2608 PHONE; (907)543-2639 FAX

July 25, 2023

RE: Orutsararmiut Native Council's Opposition to the Mining Regulatory Clarity Act

Dear President Biden, Senators and Representatives:

The Orutsararmiut Native Council firmly opposes the Mining Regulatory Clarity Act, which represents an unprecedented giveaway of public lands to mining corporations. Under the bill, mining corporations would gain a near unlimited right to occupy as much public land as they wanted for their mining operations. The companies would gain the right to dump waste, dispose of toxic tailings, bulldoze roads, and construct pipelines across public lands, even on lands of deep cultural and ecological significance to Orutsararmiut Native Council. We urge you to oppose the legislation, which would exacerbate the harms caused by the mining industry.

We are especially concerned with this legislation because four key minerals that will be used for the energy transition – 97% of nickel, 89% of copper, 79% of lithium, and 68% of cobalt – are located within 35 miles of Native American Reservations. In addition, many existing and proposed mines are located on federal lands adjacent to tribal lands. Our lives, unique culture, and safety are at stake on our Ancestral Lands. The threat to our ecosystem in which we truly depend upon is under immediate danger. Our indigenous population will be decimated because our food security from our natural environment will disappear with any ecosystem imbalance.

The proposed legislation contains a series of provisions designed to undermine the Federal Government's authority to safeguard public lands. Under Section 2(e)(1)(B) of the Mining Regulatory Clarity Act, mining companies would receive a statutory right to permanently occupy and bury public lands under tons of toxic waste. Further Section 2(e)(1)(A) grants mining companies automatic rights-of-way for new pipelines, transmission lines, and roads across public lands – eliminating a central provision of the Federal Land Policy Management Act that requires mining companies to receive a permit for such uses just like every other industry operating on federal lands. The mining law of 1872 is already overly permissive- having caused disastrous consequences for our Indigenous communities, our health and our sacred sites, and this legislation would only increase those harms in the future.

The Mining Regulatory Clarity Act is poised to have devastating consequences on our ancestral lands and resources. The creation of tribal sacrifice zones in the name of the clean energy transition must stop. Indigenous communities use what are now federal public lands for resource collection, ceremonies, and other traditional cultural uses. This Administration has vowed to safeguard our cultural resources and to listen to tribes. The Mining Regulatory Clarity Act will impair our ability to use our ancestral lands forever and we ask that you reject it.

Sincerely,

Brian M. Henry
Executive Director
Orutsararmiut Native Council

RESOLUTION NO. 2023-_12

RESOLUTION OF THE PIMA COUNTY BOARD OF SUPERVISORS OPPOSING THE PERMITTING FOR MINING NEEDS ACT AND THE MINING REGULATORY CLARITY ACT, AND SUPPORTING MEANINGFUL MINING REFORM

WHEREAS, Pima County and the Pima County Board of Supervisors have long advocated for meaningful reform of the 1872 Mining Law, acknowledging that mining is necessary and should occur in places and with methods that protect the health, safety, and welfare of our County's residents; and

WHEREAS, on January 2, 2023, the "Permitting for Mining Needs Act of 2023" was introduced as H.R. 209 in the United States House of Representatives; and

WHEREAS, on April 25, 2023, the "Mining Regulatory Clarity Act" was introduced as S. 1281 in the United States Senate; and

WHEREAS, both Acts do not provide meaningful mining reform and instead would make it easier for mining companies to gain access to federal lands at the expense of all other uses such as recreation, tourism, conservation, watershed protection, climate mitigation, traditional uses by Tribal Nations, cultural and historic preservation, healthy forest management, and other uses that contribute significantly to the local, state, and national economies; and

WHEREAS, both Acts would allow mining companies to "... use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit." This includes dumping waste and tailings on federal land without the need to prove valid mining claims, as well as on federal land absent of claims; and

WHEREAS, both Acts would authorize actions where mining companies secure rights on our federal public lands through unpatented mining claims without proving that the claims are valid, actions that have occurred for too many years; and

WHEREAS, both Acts are intended to legislatively reverse recent decisions by the United States District Court for the District of Arizona ("District Court") in 2019 and the Ninth Circuit Court of Appeals ("Ninth Circuit") in 2022 halting the construction of the proposed Rosemont Mine on the eastern slopes of the Santa Rita Mountains, located in Pima County, and the dumping of waste rock and tailings on 2,500 acres of unpatented mining claims in the National Forest; and

WHEREAS, the District Court's ruling, which the Ninth Circuit later affirmed, confirmed a long-standing concern, raised by Pima County since the beginning of the Rosemont Mine federal review process in 2006, that Federal agencies such as the U.S. Forest Service failed to consider whether Rosemont held valid unpatented mining claims; and

WHEREAS, the District Court's ruling confirmed that the Forest Service needs to consider reasonable alternatives when reviewing mining proposals, providing the opportunity for a more balanced approach to public lands management.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Pima County Board of Supervisors opposes the Permitting for Mining Needs Act and the Mining Regulatory Clarity Act, as well as any similar legislation that attempts to allow mining projects on public lands in areas without mining claims and in areas with unproven mining claims, and supports meaningful mining reform;
2. The Pima County Board of Supervisors calls on Arizona's Congressional delegation to oppose the Permitting for Mining Needs Act and the Mining Regulatory Clarity Act;
3. The Pima County Board of Supervisors directs the County Administrator and the County's Federal lobbyists to take the necessary measures to communicate Pima County's opposition to the Permitting for Mining Needs Act and the Mining Regulatory Clarity Act;
4. The Pima County Board of Supervisors directs that communications to our Congressional delegation emphasize Pima County's support for meaningful mining reform and our record of supporting mining projects in Pima County that adhere to local health, safety, and conservation guidelines;
5. The Pima County Board of Supervisors opposes piece-meal legislation that does not address the issue of mining reform comprehensively; and
6. The Pima County Board of Supervisors affirms support for the rulings by the District Court and the Ninth Circuit Court of Appeals, which is consistent with past resolutions and actions of the Pima County Board of Supervisors.

Passed by the Board of Supervisors of Pima County, this 16th day of May, 2023.

Adelita S. Grijalva MAY 16 2023
Chair, Pima County Board of Supervisors

ATTEST:

Clerk of the Board

APPROVED AS TO FORM:

Daniel Jurkowitz, Deputy County Attorney

WESTERN SHOSHONE DEFENSE PROJECT

c/o 401 Railroad Street, Suite 312
Elko, Nevada 89801
defenseprojectwesternshoshone@gmail.com

November 21, 2023

House Committee on Natural Resources
1324 Longworth House Office Building
Washing, DC 20515

RE: Western Shoshone Defense Project Opposition to the Mining Regulatory Clarity Act

Dear President Biden, Senators and Representatives:

The Western Shoshone Defense Project (WSDP) firmly opposes the Mining Regulatory Clarity Act, which represents an unprecedented giveaway of public lands to mining corporations. Under the bill, mining corporations would gain a near unlimited right to occupy as much public land as they want for their mining operations. The companies would gain the right to dump waste, dispose of toxic tailings, bulldoze roads, and construct pipelines across public lands, even on lands of deep cultural and ecological significance to Western Shoshone people. We urge you to oppose the legislation, which would exacerbate the harms caused by the mining industry.

Western Shoshone to this day use, occupy, live, hunt, gather and pray on the land now called Nevada. In 1863, the Western Shoshone by way of treaty allowed safe passage through Western Shoshone territory. The 1863 Treaty of Ruby Valley also allowed mining, as mining was known in 1863 by people who did not understand or comprehend the English language. In 1864 Nevada became a state and eight short years later the 1872 Mining Law was established. This plan was orchestrated by a governmental body that foresaw a future of mining resources at the expense of everything the land has to offer including plant life, animal life, and the most important resource, water. This same governmental body would deceive the Western Shoshone people and would break their own laws in order to achieve the end goal. Since the coming of Europeans to our territory, the Western Shoshone have been forced to sacrifice everything for the "greater good" to "enhance the economy" while we watch that same entity destroy our land.

The Western Shoshone and the United States government have a long-drawn-out legal history, where the legal system is stacked against all Indigenous Nations in its jurisdiction. In 1999 and in the early 2000's the United Nations and other international legal fora have recognized that many of the legal problems and political obstacles facing the Western Shoshone people stem from the foundations of United States Federal Indian Law and Policy which falls far short of internationally recognized standards of Indigenous rights. These laws and policies which have been used against the Western Shoshone and other indigenous peoples in the U.S. stem from antiquated, racist concept known as the "doctrine of discovery." See Johson v M'Intosh, 21 U.S. (8 Wheat) 543

(1823). This "doctrine" claims that Indigenous Peoples are "heathen", "savage" and "childlike in nature".

The U.S. has been directed previously through international communication to review all existing laws and policies and to ensure they are in compliance with contemporary human rights standards. Our position continues to be that the antiquated laws such as the 1872 Mining Law, and aspects of federal Indian law such as the plenary power doctrine must be addressed and reformed as they continue to impact Indigenous peoples such as the Western Shoshone in an unequal and racist manner based on colonial concepts such as the doctrine of discovery.

Declaration of the violation of Western Shoshone rights to due process, equality under the law, and right to property by the Inter-American Commission on Human Rights (IACHR) is found in the (Final Report 75/02). On March 6, 2002 the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) confirmed the Inter American Commission's decision and rendered a full Urgent Action decision (68(1)) against the United States. The decision specifically instructs the United States to stop any further actions on Western Shoshone lands and calls for the opening of an immediate dialogue.

As you know, we are currently in a time of change fundamentally, environmentally, culturally and spiritually. As leaders of this "free" world it is time for you to examine your hearts and consider righting the historical wrongs this government has done not only to the Western Shoshone but to all Indigenous peoples of this nation.

We now are especially concerned with this legislation because four key minerals that will be used for the energy transition – 97% of nickel, 89% of copper, 79% of lithium, and 68% of cobalt – are located within 35 miles of Native American Reservations. In addition, many existing and proposed mines are located on "federal lands" that is actually treaty lands of the Western Shoshone as written in the 1863 Treaty of Ruby Valley.

The proposed legislation contains a series of provisions designed to undermine the Federal Government's authority to safeguard public lands. Under Section 2(e)(1)(B) of the Mining Regulatory Clarity Act, mining companies would receive a statutory right to permanently occupy and bury public lands under tons of toxic waste. Further Section 2(e)(1)(A) grants mining companies automatic rights-of-way for new pipelines, transmission lines, and roads across public lands – eliminating a central provision of the Federal Land Policy Management Act that requires mining companies to receive a permit for such uses just like every other industry operating on federal lands. The mining law of 1872 is already overly permissive- having caused disastrous consequences for our Indigenous communities, our health and our sacred sites, and this legislation would only increase those harms in the future.

As individuals with backgrounds in environmental health, forestry and as outdoorsmen who once cared about the environment and who want to protect resources for future generations; ask yourselves if this legislation is one of "enhancing conservation through innovation" as is the mission of this body. Your yes vote on this legislation will negatively affect the future of the environment and people you are sworn to protect.

The Mining Regulatory Clarity Act is poised to have devastating consequences on our ancestral lands and resources. The creation of tribal sacrifice zones in the name of the clean energy transition must stop. Indigenous communities use what are now federal public lands for resource collection, ceremonies, and other traditional cultural uses. This Administration has vowed to safeguard our cultural resources and to listen to tribes. The Mining Regulatory Clarity Act will impair our ability to use our ancestral lands forever and we ask that you reject it.

Sincerely,

Fermina Stevens

Fermina Stevens, Director
Western Shoshone Defense Project

The Western Shoshone Defense Project is an affiliate of the Seventh Generation Fund for Indigenous Peoples.

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