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Hardrock Mining on Federal Lands
Oversight Hearing

Committee on Energy and Natural Resources
United States Senate

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Introduction

Chairman Bingaman, members of the Committee, thank you very much for the opportunity to appear before you to discuss implementation of the U.S. mining laws. By way of introduction, I am an attorney with Parsons Behle & Latimer. My firm has offices in Salt Lake City and Reno. We have been working with the mining industry since 1882, when the two original partners—mining lawyers from Carson City—formed the firm in Salt Lake City.

My own legal career includes almost twenty years working for dozens of mining companies with interests on federal lands. My clients have included some of the world's largest companies as well as medium and small mining companies, and individuals and prospecting ventures who are engaged in mineral exploration on public lands. I have served two years as Chair of the American Bar Association's Mining Committee and four years as a vice-chair of the Public Lands Committee. In 2005, I was the Program Chair for the Rocky Mountain Mineral Law Foundation's Annual Institute.

My particular specialization is environmental permitting and compliance for mining operations. I have helped clients with more than 30 plans of operations with the Bureau of Land Management and U.S. Forest Service and the related environmental and reclamation permits from state regulatory authorities. I have also represented mining companies in administrative and judicial appeals relating to their operating permits—before the Interior Board of Land Appeals, state administrative appeal boards, and federal courts in Arizona, Nevada, Montana and Washington.

Before joining Parsons Behle & Latimer, I worked in the office of Utah Governor Scott M. Matheson, where I was his staff assistant on natural resources issues. In that position, I was the primary contact with federal land management agencies, including the BLM, Forest Service and National Parks Service, under cooperative agreements between the State of Utah and those agencies.

For your information, I am registered with the Senate as a lobbyist for Barrick Goldstrike Mines, Inc., which is a subsidiary of Barrick Gold Corporation. However, I am not appearing today on behalf of Barrick Goldstrike or any other mining company. Obviously, my views are

influenced by all of my experiences, including my work for the mining industry, but the views I express here today are my own, and may or may not be the views of my clients.

The Major Issues

Discussions with Committee staff and your invitation letter to appear at this hearing identified five broad categories of issues related to the mining laws:

- **Royalty**
  - Should the law impose a royalty on the production of hard rock minerals from federal lands and, if so, what form should that royalty take?

- **Patenting**
  - Should the opportunity to patent mining claims be revived, or, if not, what alternatives can provide security of land tenure for mining investments?

- **Mining Law Administration**
  - Are there ways to improve the efficiency and administration of the current law?

- **Environmental Regulation**
  - Should the law be amended to include additional environmental standards or regulations?
  - Should a federal land manager be able to deny approval of a mining plan of operations which meets environmental standards to favor other land or resource uses?

- **Abandoned Mines**
  - What is the extent of environmental problems associated with abandoned mining operations on federal lands, and what are the alternatives to address that problem?

Royalty

The question of whether a royalty should be imposed on the production of hard rock minerals from federal lands has been settled since at least 1995, when the mining industry supported legislation contained in the Budget Reconciliation Act which would have imposed a 5% net proceeds royalty on new claims. The debate now focuses almost entirely on the structure and level of the royalty.

With regard to structure, the choices are between a gross royalty, which is based upon the total revenue from the sale of minerals, and a net royalty, which allows the operator to deduct specified costs of production from the value of the minerals before the royalty is calculated. The advantage of the net royalty in the mining context is that it is tied to profitability and does not exaggerate the inevitable price swings in the minerals markets. Royalty payments increase when prices and profits are high, but fall when prices are low and times are hard, allowing operations to cut costs and maintain production and employment.

A profit-based royalty also has a less dampening effect on mining investment. Mining investments typically seek a long-term rate of return based on alternative investments and comparative risks. A royalty payment based on a percentage of the total proceeds from mineral sales directly reduces the potential rate of return—making all mining investments less attractive. Because revenue projections (and rates of return) are typically based on conservative price assumptions, the possibility that prices may exceed expectations—along with profits and royalty payments—does not reduce the initial projected rate of return. A recent study prepared for the World Bank discusses the various royalty options and describes how they might affect investment decisions and the availability of reserves.

With regard to rate, there are two considerations. The first is how the royalty payments fits with the overall economic contribution from mining activities. Mining produces substantial government revenue, even without a federal royalty. Mining operations pay property taxes, sales and use taxes, and business fees and taxes. In Nevada, for example, where mine operators pay a 5% net proceeds tax that is shared between state and county governments, the industry paid more than $192 million in direct tax payments in 2006, including almost $62 million in net proceeds tax. That calculation includes only direct taxes and does not account for the income taxes paid by mine owners or shareholders or the taxes paid by mine employees and businesses that sell products and services to the mining industry. The second consideration is how that rate will affect mine investment. It is axiomatic that if the government takes too much of the potential profit, investors will put their dollars elsewhere.

Environmental Regulations

Mining operations on federal lands are subject to the full range of federal and state environmental laws as well as federal regulations and state laws and regulations relating specifically to mining operations, reclamation and closure. When mines are expanding or new mines are being built, mining clients come to me to help them navigate through the procedural rules of these various laws and regulations. Before construction, the typical mining operation on federal lands will be required to obtain:

- Approval of a plan of operations from the BLM or Forest Service, including a reclamation plan, closure plan, and cultural resources plan
    - Applications for plans of operations are supported by environmental baseline studies for air, water, and wildlife, geochemical testing of ore, tailings and waste rock material, geochemical and hydrological modeling, cultural resources studies and reclamation studies.
- Air quality permits from EPA or state agencies with delegated programs under the Clean Air Act. The complexity of the air quality permits increases if there are substantial onsite processing facilities. All sites must have an approved fugitive dust control program.
- Water quality permits from EPA or state agencies with delegated programs under the Clean Water Act. Water quality permits can include discharge permits, stormwater

management permits and section 404 permits. States also require permits to address potential impacts to ground water.

- Rights to use or consume water from appropriate state authorities.

- Hazardous waste permits that govern storage, transportation and disposal of laboratory or processing wastes.

- Authorization under the National Historic Preservation Act if cultural or historic resources are present.

- Permits to construct tailings ponds or other impoundments.

- Financial assurance equal to the cost that would be borne by the government if it had to contract with a third party to complete reclamation of the site.

Each of these permits is typically accompanied by an agency and public review process. Every operation that requires a federal decision to authorize mining activities is subject to the National Environmental Policy Act ("NEPA"). For any large project, this requires preparation of an environmental impact statement, which evaluates potential environmental impacts of the mining operation, assesses alternatives and requires the identification of mitigation measures to reduce potentially significant environmental impacts. Public review and comment is invited at the beginning of the process, to determine the scope of the environmental evaluation, and when a draft environmental impact statement is completed. The federal agency preparing the EIS is obligated to consider and respond to all substantive comments on the draft document.

All of the permits including monitoring and reporting requirements. Monitoring may be constant, as in the case of some air and water quality permits, or season, as in the case of some water use authorizations, which require season monitoring of stream flow, seep or springs.

These different pieces of the regulatory process work together—in a way that the National Academy of Sciences report called "generally well coordinated"—to provide a comprehensive regulatory framework for hardrock mining on federal lands.

The regulatory process for mining is constantly evolving. Changes in federal water and air laws, regulations and policies translate directly into on-the-ground requirements for mining operations. States are constantly updating and revising their reclamation and environmental programs. At the federal level, substantial changes were made to BLM's 3809 regulations in 2000 and 2001. The complicated history of the changes in the 3809 regulations—and contemporaneous changes in the administration of the mining law—are spelled out in a chronology that is attached to this statement as Table 1.

The most important changes are included in the revised 3809 regulations which were adopted during Secretary Babbitt's tenure and ratified by the Bush Administration. Those regulations implement changes which were supported by the National Academy of Sciences report on hardrock mining on federal lands, including:

- Expanded bonding requirements. Regulations now require that all mining and exploration disturbance, no matter how small, be fully bonded before activities can proceed. Regulations, and subsequent BLM guidance, also revise how bonds will be calculated, maintained and released.

- Full NEPA review for small operations. Earlier regulations included an exception from NEPA for small operations that disturbed less than 5 acres. As the National Academy of Sciences report recommended, that exception has been dropped for all mining activities, but retained for exploration activities. Even exploration activities disturbing less than 5 acres, however, must be bonded.

- Strengthened water quality measures. Regulations incorporated key aspects of two prior BLM policy documents regarding management of cyanide in mining operations and acid rock drainage. Those same provisions required increased frequency of inspections of mining operations that use cyanide or may result in acid rock drainage. BLM has adopted additional guidance documents to implement specific water quality objectives in the regulations.

The National Academy of Sciences Committee identified seven "regulatory gaps" in the laws and regulations that were reviewed by the 1999 report. Five of those seven gaps were filled by changes to the 3809 regulations and BLM guidance and policies. Two of those "gaps" require legislative action and include 1) a recommendation that "existing environmental laws should be modified to allow and promote the cleanup of abandoned mine sites in or adjacent to new mine areas without causing mine operators to incur additional environmental liabilities," and 2) a recommendation that "BLM and the Forest Service should have both (1) regulatory authority to issue administrative penalties for violations of their regulatory requirements, subject to appropriate due process, and (2) clear procedures for referring activities to other federal and state agencies for enforcement."[1]

Patenting and Mining Law Administration

The mining law has a long and colorful legal history. Some of the complexities in the law and the details of mining claim location and maintenance that were drafted in the 19th century seem unnecessary today. At the same time, the mining law has unquestionably succeeded in its primary purpose to encourage mineral exploration and development. Though some disputes still arise, the mining has generally learned to live with thee complexities.

The primary legal issue associated with what we traditionally consider to be the "mining law" in the early 21st century is whether unpatented mining claims offer sufficient security in the land to support investments which may be measured in the billions of dollars. The patenting provisions of the mining law allowed claimants to acquire full title to the land and mineral deposits that were claimed, but those provisions have been the lightning rod for substantial

[1] Hardrock Mining on Federal Lands, National Research Council, 9 (1999).

criticism of the law and Congress has allowed no new patent applications since 1994. The security issue can be solved in a number of ways. The most straightforward method is to allow claimants to secure title to unpatented mining claims through the payment of annual claim maintenance fees.

Abandoned Mines

There is a broad range of estimates of the number of abandoned mines and physical hazards on the federal lands. There is little disagreement that eliminating these sites deserves more attention. In the context of mining law legislation, an abandoned mines reclamation program should include two components. First, Congress should adopt the recommendation from the National Academy of Sciences and enact legislation that would allow mining companies—and other parties—to reclaim abandoned sites without incurring additional liability under environmental laws.

Second, Congress should support and expand existing programs that work, not create a new program. Again, Nevada provides a model for designing a program that works.[2] The Nevada program is funded by a modest fee ($1.50) on county mining claim filing fees and a one-time fee of $20 per acre of new permitted mining disturbance. The Nevada program also applies for grants from BLM's abandoned mines program. The Nevada program secured 540 hazards in 2006 with total revenue of nearly $350,000. The Nevada program encourages cooperation from mining claimants, private property owners, volunteers (including mining companies) and other agencies. The bulk of the work includes fencing or backfilling mine openings on public land. The Nevada Division of Minerals, which administers the Nevada program, is also working with the Nevada Department of Wildlife, Nevada Natural Heritage Program, BLM and Forest Service to secure mine openings in Clark County, but preserve those that may be suitable for bat habitat by constructing bat-compatible enclosures, i.e., enclosures that restrict public access but allow continued use of the mine opening by bats.

BLM's abandoned mine land program has also evolved. The most recent information available on that program states that nearly 500 physical hazards were eliminated and more than 1000 acres of water quality in riparian areas improved during fiscal years 2004 and 2005.

Those are my initial comments on the issues raised by the Committee. I expect these issues will be addressed in more detail in questions to Mr. Leshy and myself, or to members of the second panel. With the brief time that remains, I would like to set the context for your consideration of these specific issues that relate to mining on federal lands in the U.S. These are narrow issues, but occur in a world that is much different from the last Congressional consideration of these issues in 1995. Specific legislative decisions on these particular issues should be informed by a broader world view.

The Context for Mining Law Discussion in 2007: China Dominates the World Market for Minerals

[2] This information is drawn from the Nevada Abandoned Mine Lands Report, 2006, prepared by the Nevada Division of Minerals.

The last half of the early 1990s and early years of this century were difficult economic times for the mining industry. Copper prices hovered at less than $1 per lb. and gold prices were typically below $300 per ounce. Depressed prices lead to predictable results—incomes dropped, mines closed, a handful of mining companies went bankrupt, and there was a significant consolidation in the industry. For example, I looked back at the record of hearings held by this Committee in 1993. The supplementary material in the record included information on the top nine North American gold producers. Seven of the companies—Placer Dome, Homestake Mining, Lac Minerals, Echo Bay Mines, Battle Mountain Gold, Pegasus Gold and Amax Gold—no longer exist. Only two of the top producers, Barrick and Newmont, remain in business. There has been a similar trend in the copper industry.

The market for metals began to rebound in 2002 and 2003, based almost exclusively on demand associated with the modernization of China and the growing Chinese economy. Chinese demand is today, and is expected to continue to be, the biggest single influence on the global minerals market. Copper consumption in China has more than tripled since 1998 and it is now the biggest consumer of copper in the world. The story is the same for most other minerals. China is also the world's largest consumer of aluminum, nickel, tin, lead, zinc and iron ore. Since 1999, China has consumed two-thirds of the world's growth in base-metals output. Since 2002, China has accounted for half the world's growth in consumption of steel, copper and aluminum, almost all the world's growth of nickel and tin, and much of the growth in lead and zinc.[3] The new demand has driven commodity prices up. Market prices for copper, zinc, lead and iron ore have all more than tripled since 2002.

In the past few years, the Chinese, concerned about future reserves and prices for the minerals necessary to continue economic expansion, have invested heavily in global mining companies and reserves. In 2005, the Chinese mining company entered into an agreement with Chilean copper producer Codelco, guaranteeing delivery of refined copper for 15 years and giving the Chinese an opportunity to invest directly in one of the Codelco mines. Chinese companies have sought to diversify their supplies with investments in South America, Australia, Africa and even the United States. Within the past few weeks, it has been reported that China is seeking to invest more than $5 billion in the Democratic Republic of the Congo, which could lead to Chinese ownership of important reserves of copper, cobalt, iron ore, gold and uranium.

To date, the growing global demand has not translated into increased production in the U.S. According to U.S.G.S. data, mine production of copper in the U.S. is essentially flat. Copper production from U.S. mines in 2006 was actually lower than production between 1991 and 2001. Imports of copper have increased. Again, based on U.S.G.S. data, about half of the refined copper consumed in the U.S. was imported. Through 2006, production of other major metals in the U.S., including gold, which is a major export commodity, also remained flat.

Experts disagree as to what these developments for the global mining industry and potential U.S. production. Some predict that prices will moderate as global production—especially from Australia and South America and within China—increases. That may mean little

[3] China Business, Sept. 1, 2007.

long-term change in U.S. mining. Others see that any lagging demand from China will be offset by new demands from India. If prices remain at current levels, domestic exploration will continue and eventually some new mines will make it to production. Most agree that any prolonged downturn in the Chinese economy would dramatically impact metal prices and halt growth in the industry.

Under either view, it is important that decisionmakers in Congress understand how much the world has changed in the past fifteen years. Decisions about the mining law and the mining industry should not be made based on a view of the world that is 15 to 20 years out of date. If a healthy domestic mining industry is important—and I believe that it is—then we need to look closely at policy decisions which affect the long-term cost and availability of minerals. Gross royalties that shrink reserves and prematurely close mines, additional hurdles in the permitting process that increase investment risk and delay permit decisions, and decisions that further restrict the availability of lands for exploration and development will inevitably reduce the production of minerals from federal lands. In the future, if we look abroad for those resources, they may not be available, at least at prices that American consumers are willing to pay.

Conclusion

I appreciate the opportunity to make this opening statement and look forward to your questions.

Table 1

Chronology of Administrative Changes to the Mining Law, 1994 to 2007

Sept. 1994	Congress imposes moratorium on processing of patent applications (renewed annually since 1994).
April, 1996	BLM adopts new acid rock drainage policy as agency guidance.
July, 1996	BLM adopts regulations addressing use and occupancy on mining claims.
Feb. 1997	BLM promulgates new bonding regulations (subsequently struck down in 1998 in Northwest Mining Ass'n v. Babbitt because BLM failed to comply with Regulatory Flexibility Act).
Nov. 7, 1997	Solicitor Leshy issues "Millsite Opinion," which limits the availability of millsite claims for mining support facilities.
Nov. 14, 1997	Department of Interior Appropriations Act for 1998 requires that BLM consult with Western Governors before proposing any changes to the BLM's 3809 regulations.
Nov. 17, 1997	BLM Director Pat Shea sends letter to Chairmen of Congressional Energy and Appropriations Committee certifying that consultation required by Interior Appropriations Act has been completed.
Oct. 1998	Department of Interior Appropriations Act for 1999 requires National Academy of Sciences to study and report on adequacy of federal and state environmental, reclamation and permitting laws regarding hardrock mining on federal lands.
Feb. 1999	BLM publishes proposed revisions to the 3809 regulations.
May, 1999	Congress limited application of the Millsite Opinion in 1999 Supplemental Appropriations Act.
June, 1999	Supplemental Appropriations Act of 1999 requires that BLM reopen the public comment period on the proposed 3809 regulations after the publication of the National Academy of Sciences report.
Sept. 1999	National Academy of Sciences Report, Hardrock Mining on Federal Lands is released.
Nov. 1999	Appropriations Act for FY 2000 requires Secretary of Interior to promulgate 3809 regulations that are "not inconsistent" with the recommendations of the National Academy of Sciences report.
Sept. 2000	Requirement of Appropriations Act for FY2000 is extended in FY 2001.
Oct. 2000	BLM publishes final 3809 regulations.
Dec. 2000	State of Nevada and others file suit challenging certain provisions of the final 3809 regulations.
Jan. 2001	Solicitor Leshy issues "Ancillary Use Opinion," which restricts the use of

	mining claims for mining support facilities.
Jan. 2001	Final 3809 regulations go into effect.
March, 2001	BLM suspends certain provisions of the 3809 regulations and reopens public comment period on other provisions.
June, 2001	BLM retains bonding provisions of the 3809 regulations.
Oct. 2001	BLM issues final rule revising 3809 regulations. Final rule includes four substantive changes: 1) remove "mine veto" provision, 2) replace provisions relating to water use and water quality with prior regulations 3) remove provision imposing joint and several liability on claim owners and operators for reclamation 4) remove provision authorizing imposition of administrative civil penalties.
Nov. 2001	Mineral Policy Center and others file suit challenging the revised 3809 regulations.
Oct. 2003	Department of Interior rescinds the Millsite Opinion.
Nov. 2003	District Court's decision in Mineral Policy Center v. Norton, upholds the revised 3809 regulations with the exception of the application of FLPMA's "fair market value" requirement for certain lands, which is remanded to BLM for further consideration.
Oct. 2005	BLM adopts new rules requiring cost recovery for processing of mining plans of operations.
Dec. 2005	Department of Interior rescinds the Ancillary Use Opinion and clarifies process for review of plans of operations.