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Thank you Mr. Chairman for the opportunity to appear before the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources. My name is Sam Kalen, and I am a Professor of Law at the University of Wyoming College of Law. I am honored to accept this Committee's invitation to testify on H.R. 1937, the *National Strategic and Critical Minerals Production Act of 2015*.

For most of my career, I have focused on the administration of our nation's public lands, whether as an attorney in private practice, as an attorney in the Solicitor's Office of the Department of the Interior, or more recently as a law professor. Because of this background, I am acutely interested in proposals that address whether and how mineral activity occurs on public lands.

My testimony addresses five principal issues associated with H.R. 1937. At the outset, H.R. 1937 has the laudable goal of promoting economic and national security and interests, and meaningful efforts to explore reforming aspects of public land management—such as efforts to examine the 1872 Mining Law—are worthy endeavors. Indeed, Congress in the Mining and Minerals Policy Act of 1970 employs language about "foster[ing] and encourage[ing] certain private enterprise[s]." 30 U.S.C. § 21a. So too, in the policy statement for the Federal Land Policy Management Act, Congress noted the "Nation's need for domestic sources of minerals." 43 U.S. § 1701(a) (12). Yet H.R. 1937's attempt to expand upon these notions is neither

workable in administration nor desirable; indeed, it would most likely be quite difficult for agencies to implement aspects of H.R. 1937, and the bill, moreover, risks allowing mining activities on the public lands to proceed without ensuring that those activities are thoroughly vetted by the public and reviewed by the appropriate agency or agencies for their possible adverse effects.

But most importantly whether, where, and how mining occurs is critical, in order to ensure that the public lands are managed in a sustainable and environmentally sound manner that protects these lands for the future, prevents harming areas of "critical environmental concern," and avoids "unnecessary or undue degradation." 17 U.S.C. § 1732(b). Mining, after all, can require the use of important and potentially scarce water resources, can contaminate water resources, affect wildlife, and cause considerable damage to the landscape. *See generally* NATIONAL RESEARCH COUNCIL, HARDROCK MINING ON FEDERAL LANDS 27 (1999) (Potential Environmental Impacts of Hardrock Mining"); ENVT'L PROTECTION AGENCY, EPA'S NATIONAL HARDROCK MINING FRAMEWORK (Sept. 1997); *see, e.g.*, *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of the Interior*, 588 F.3d 718 (9th Cir. 2009) (discussing BLM's analysis of groundwater impacts for gold mine); *Idaho Conservation League v. United States*, 2012 WL 3758161 (D. Idaho 2012) (discussing Forest Service's treatment of groundwater impacts from proposed project). Historically, after all, the Bureau of Land Management reports that 60 percent of all hazardous waste sites on public lands" have resulted from "commercial uses"---and roughly 50 percent of those from "[l]andfills, mines and mill sites, airstrips, and oil and gas" activities. BLM, PUBLIC LAND STATISTICS 2014 241 (May 2015). *See, e.g.*, GORDON M. BAKKEN, THE MINING LAW OF 1872: PAST, POLITICS, AND PROSPECTS 82-105 (2008) (one historical account). The Department, moreover, has been engaged in litigation over cleaning up

public lands, often seeking recovery (when a potentially responsible party is still available) in the millions of dollars. *E.g.*, *U.S. v. Newmont USA, Ltd.*, 2008 WL 4621566 (E.D. Wash. Oct. 17, 2008).[1] Not surprisingly, therefore, the urgency of reforming the program for hardrock mining and particularly protecting the public lands from environmental damage has been widely recognized, at least since the 1970s. *See generally* COUNCIL ON ENVIRONMENTAL QUALITY: 8TH ANNUAL REPORT 89 (1977) (noting then President's request to draft reform legislation); U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-89-72, THE MINING LAW OF 1872 NEEDS REVISION (March 1989); JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST 57-8 (1992). Indeed, when digesting the Public Land Law Review Commission's report, almost exactly 45 years ago to the day, the *New York Times* reported how "all mineral interests known to be of value should be reserved with exploration and development discretionary in the Federal government and a uniform policy adopted relative to all reserved mineral interests." *Digest of the Commission's Report and Recommendations on Public Land Use,* NEW YORK TIMES, June 24, 1970.

Second, H.R. 1937's approach toward the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347, while understandably seeking to reduce unnecessary duplication and avoiding unnecessary delay, presents several issues warranting careful consideration. Rather than strengthening the ability to protect the nation's public lands, it could

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[1] Historically, various regulatory gaps contributed to fewer controls over operations on the public lands, with statutes such as the Resource Conservation and Recovery Act including provisions exempting certain wastes from hazardous waste regulation. *See* 42 U.S.C. § 6921 *et seq*., § 6921(b)(3)(C). At least until recently, the Clean Water Act too had limited ability to affect operations that principally impacted groundwater and involved simply withdrawals. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006) (withdrawals); *cf. Klamath Siskiyou Wildlands Center v. U.S. Forest Serv*. (E.D. Cal. 2014) (noting that withdrawal examined in NEPA document). *See generally* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, MANAGING INDUSTRIAL SOLID WASTES FROM MANUFACTURING, MINING, OIL AND GAS PROTECTION, AND UTILITY COAL COMBUSTION – BACKGROUND PAPER, OTA-BP-0-82 (GPO Feb. 1992) (examining management of solid wastes).

do the converse. When it passed NEPA, Congress established an environmental charter that ensured that proposed major federal actions "significantly affecting the quality of the human environment" would be examined through a broad lens; and, while the Supreme Court has since held that the act imposes only procedural not substantive obligations on federal agencies, it provides a now well-trodden procedural path for ensuring that agencies take a hard look at the environmental consequences of the proposed action, seek public input, and render informed decisions. To the extent, therefore, that H.R. 1937 would diminish NEPA's role and function in assisting the agencies' decision-making process for whether, when, and how activities, such as mining, occur on the public lands is problematic. Indeed, in one instance where the court rejected a challenge to an expansion of mining operations, the court nevertheless emphasized the importance of the NEPA process: "The NEPA process worked here as it was designed to work. Plaintiffs, the public, and other state and federal agencies had the opportunity to comment on the Mine expansion. As a result of those comments and the Agencies' response, the ultimate action is more protective of the environment than it would have been without the process." *Greater Yellowstone Coalition v. Larson*, 641 F. Supp.2d 1120, 1151 (D. Idaho 2009), *aff'd* 628 F.3d 1143 (9th Cir. 2011). Indeed, the National Research Council had earlier noted how it believed "that the NEPA process and its various state equivalents provide the most useful and efficient framework for evaluating proposed mining activities." NATIONAL RESEARCH COUNCIL, *supra* at 110.

Third, section 102(b)(1) of H.R. 1937 is likely to create significant problems by employing a functional equivalence standard for satisfying NEPA. This section seemingly allows a waiver of NEPA when the appropriate federal agency determines that any federal agency's process or any accompanying state process examines six factors drawn from the NEPA

process. This presumably adopts the concept from some NEPA cases sanctioning avoiding NEPA when the agency's process is functionally equivalent—albeit it is not clear that these six factors, moreover, parallel what an adequate NEPA document would explore. The functional equivalency idea first surfaced with respect to certain actions by the Environmental Protection Agency (EPA), some of which were incorporated into legislation.[2] For these courts, EPA's special role as an environmental agency presumably influenced their decision, but even so there often was hesitation surrounding the "functional equivalence" notion. *E.g.*, *Merrill v. Thomas*, 807 F.2d 776, 781 (9th Cir. 1986). Courts, therefore, generally declined to extend the concept beyond EPA, and instead constructed other ideas such as lack of discretion, "displacement," or congressional intent involving decisions designed specifically to protect environmental values.[3] And EPA, acting pursuant to specific congressional charges, operates quite differently than land managers who must decide how best to manage, given the array of considerations, our nation's public lands. While many of these decisions may well be problematic, they nonetheless collectively underscore the importance of *applying NEPA* to decisions by agencies other than the EPA or that are not specifically designed by Congress as intended to protect environmental values. Indeed, when Congress considered NEPA, a concern by some legislators was whether the NEPA process could be entrusted to agencies such as federal land managers whose mission was not necessarily perceived of at the time as limited to environmental protection. Yet Congress chose to trust the agencies, but in doing so relied on NEPA (and invested the Council on Environmental Quality (CEQ) with certain responsibilities) and shortly thereafter bolstered its

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[2] Certain EPA actions under the Clean Air Act were an example, later codified. *See Am. Trucking Ass'n v. U.S. EPA*, 175 F.3d 1027, 1041 (D.C. Cir. 1999), *rev'd and aff'd in by part by Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); *see also Mun. of Anchorage v. United States*, 980 F.2d 1320, 1329 (9th Cir. 1992) (Clean Water Act); *W. Neb. Res. Council v. U.S. EPA*, 943 F.2d 867, 871 (8th Cir. 1991).

[3] *Compare, e.g.*, *Douglas Cnty v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *with Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish and Wildlife Serv*., 75 F.3d 1429 (10th Cir. 1996).

decision by adopting section 309 of the Clean Air Act affording EPA a role in reviewing environmental impact statements (EIS)—a function that H.R. 1937 would obviate (along with possibly the role of CEQ). Consequently, H.R. 1937's provision for allowing land managing agencies to determine whether another process is functionally equivalent with the NEPA process is troubling and ignores Congress' choices in NEPA as well as the judiciary's struggle with functional equivalence.

Fourth, sections 102(e)-(g) of the H.R. 1937 would, likewise, not only impair some of the goals and objectives of NEPA but also might become unwieldy. This section apparently seeks to ensure that project proponents and the appropriate land-managing agency agree to a structured process for complying with NEPA. For those who have been involved in such projects, the idea of outlining how a process might unfold for particular activities has some merit. The difficulty, of course, is in how to achieve such a result without compromising NEPA and any other statutory processes and objectives. Take, for instance, the concept of determining up front the "scope of any" NEPA document—if that document is an EIS then such a process would conflict with the idea of "scoping" under NEPA, where the interested public is able to assist in exploring the range of issues that should be addressed. Similarly, while currently the agencies and project proponents do enter into agreements, such as for funding of an EIS, those agreements are more limited than what is contemplated by this section and this section could limit public participation in the process. Or, section 102(e)(1) would require an agreement on whether and what type of NEPA document to prepare, and yet the decision under NEPA is ultimately a federal decision and it is not clear what happens if the project proponent and the federal agency cannot agree even though section 102(e)(1) appears to require an agreement ("shall enter into an agreement"). Also, section 102(e)(6) would require an agreement

presumably covering consultations under laws other than NEPA, and yet is not clear how that would occur pursuant to the Endangered Species Act, the National Historic Preservation Act, or other laws.

Finally, several aspects of H.R. 1937 are potentially vague and could become problematic in implementation. To begin with, the definition of "strategic and critical minerals" is not established in the usual fashion for definition-type language and what is included may too easily change with little defining contours, depending upon broad determinations by an agency about whether a particular mineral is "necessary" for "national defense," or "for the Nation's energy infrastructure," to "support" certain industries, or "for the Nation's economic security and balance of trade." And, it is unclear how an agency will make any such determination, whether for rare earths, solid and hardrock minerals, or even for sand and gravel, and then how any court would have the ability to review that decision because the language does not necessarily the leave the court with any law to apply—thus leaving the decision potentially within the agency's sole discretion.

A similar problem could surface with the agency's determination under section 102(b)(2). It will be quite difficult, at the outset, for any agency to conclude that other processes are functionally equivalent with the six identified factors in section 102(b), because that would force the agency to examine and interpret the scope of other authorities, assess the breadth of those authorities, and conclude that they mirror the six factors—all within 90 days. And then the agency would need to document that conclusion in a written finding that, presently, it is not clear whether that determination would be a final agency decision immediately capable of judicial review (aside from whether the matter would be ripe), but nevertheless would likely be reviewable at some point. And how during this process the agency will examine "facts" in the

record before any administrative record is established is unclear. The following are a few additional observations:

* It is not clear whether section 102(f) was intended to refer to section 102(d) or 102(e);
* Section 102(h) would appear to cap financial assurances unnecessarily by adopting a potentially unworkable third party standard that may lead to litigation;
* Section 104 on preparing Federal Register notices appears vague and it is not clear how it would work in practice, particularly because it would require that the notice originate in any office where any meeting has occurred, where—and it is not clear whether some or all—documents are housed, or the activity has been initiated, and the requirement to publish the notice within "30 days after its initial preparation" may similarly be unworkable and not provide sufficient time for intra and/or interagency review, and could simply delay having the agency prepare in writing any "initial preparation";
* Section 203 on intervention as of right would unnecessarily trump well-defined principles under F.R.C.P. 24, a right that generally most project proponents are afforded currently under the rule;
* Section 205 limiting prospective relief unnecessarily intrudes into the role of the judiciary, under well-defined principles for awarding preliminary and injunctive relief, and could easily cause appellate courts difficulty when reviewing lower court decisions allegedly violating the proscription in section 205; and

* Section 206 limiting recovery of attorney fees is contrary to the notion that citizens ought to be rewarded when they prevail in lawsuits that, in particular, protect congressionally decided principles—whether in enforcing agency organic statutes, NEPA, or the APA.

Again, thank you for the opportunity to present my views on H.R. 1937 to the Subcommittee. I welcome your comments and questions.