Statement of John D. Leshy

at the

Hearing on H.R. 699, the Hardrock Mining and Reclamation Act of 2009

Subcommittee on Energy and Mineral Resources
Committee on Natural Resources

U.S. House of Representatives

February 26, 2009

I appreciate your invitation to testify today, and I applaud your subcommittee once again taking the initiative to address reform of the Mining Law of 1872. There is no more important task among the constellation of issues raised by our public lands.

I am the Harry D. Sunderland Distinguished Professor of Law at the University of California, Hastings College of the Law, and was Solicitor of the Department of the Interior from 1993 until 2001. I appear here today as a private citizen, expressing my own views, and not representing any group. I have worked on Mining Law issues for thirty-five years, in academia, in government and in the nonprofit sector. I have testified many times on the subject of Mining Law reform. I am appending to this statement my testimony before this subcommittee nineteen months ago.

Rather than simply repeat that testimony, in this statement I will address four specific issues:

1. The profitability of the industry and its ability to compensate the American public for the privilege of extracting the public's minerals.

2. Determining what adequate compensation is. H.R.699 would require those extracting hardrock minerals from federal land to pay a royalty. But many large hardrock mining operations in the west extract no or very little ore from federal lands. This is because , because the ore bodies have been previously patented under the Mining Law and become private property. Yet these same operations use large tracts of federal lands for waste dumps and tailings piles. Under current law, they pay the federal government nothing for that privilege, and it is possible they would continue to be exempt from significant payments under H.R. 699 as it is currently written.

3. The so-called "right to say no" issue; namely, whether reform legislation should unambiguously authorize the federal government to reject proposals to locate mines on federal lands if they pose unacceptable environmental damage or sacrifice other important values found on federal lands.

4. Whether uranium, currently governed by the Mining Law for the most part, should be made leasable under the principles of the Mineral Leasing Act.

On the first issue, profitability, gold is by far, by every measure, the most important hardrock mineral governed by the Mining Law of 1872. Exhibit A charts U.S. gold production since 1840. The vast majority of that production is found on federal or formerly federal lands. As it shows, during the 1980s, production greatly increased above historical levels and has remained high ever since. This increase resulted from two factors: high gold prices, and development of heap-leach techniques to recover gold from disseminated low-grade deposits, particularly in Nevada. It is also worth noting that this increase coincided with the federal government's first serious efforts to control hardrock mining to protect the environment.

Today, the U.S. is the fourth largest gold-producing country in the world (behind Australia, South Africa and China). The vast majority of US production (more than 80%) comes from gigantic open pit mines in Nevada. Only those other three countries and Peru produce more gold than is produced in the state of Nevada.

Exhibit B charts the price of gold over the past forty years. It shows a rapid increase in price in the late 1970s and the relative high values since then. Indeed, since April 2001 gold has more than tripled in value against the US dollar, and it has been hovering around $1000 an ounce. While in real dollar terms this is well below the January 1980 peak, many investors have long tried to preserve assets by investing in precious metals in times of serious economic difficulty like we face today, and therefore many observers expect the price of gold to remain high for the foreseeable future.

The costs of mining that gold are well under one-half of the current gold price. See, e.g., the 2006 Economic Overview of Nevada Mining. This report, which may be found at http://www.nevadamining.org/position/economy, shows a 2006 average cost of production of $365 to $435 per ounce, depending upon whether non-cash costs like depreciation, reclamation are included). A February 2008 white paper by Standard & Poor's showed that Barrick and Newmont, the two largest gold mining companies in Nevada, had company-wide cash costs of betweem $282 and $377 per ounce.
https://www.compustatresources.com/support/pub/whitepapers/pdf/Mining.pdf

Gold is, and has been for quite a long time, a very profitable industry. Its current position is indeed enviable in comparison to the economic carnage currently being visited across much of the American economy. It can readily absorb the modest royalties levied in H.R. 699.

On the second issue, making sure the government is adequately compensated, the royalty in HR 699 would apply, according to section 102, to the "production of all locatable minerals from any

mining claim located under the general mining laws and maintained in compliance with this Act." This means the royalty would presumably apply only to mineral ore extracted *from federal lands*. It would not, in other words, include any kind of charge for the use of federal lands to support the extraction of minerals from formerly federal lands.

Many, perhaps most, of the very large hardrock mining operations in the West which comprise the bulk of domestic production are on lands in a mixture of ownerships - private, state and federal. The ore body itself may not include any federal lands, or at most mere slivers or odd-shaped parcels intermixed with others. Very often, in other words, all or most of the actual ore body is on non-federal land , usually because it has already been patented under the generous terms of the Mining Law. See, e.g., Mineral Resources: Value of Hardrock Minerals Extracted From and Remaining on Federal Lands (GAO/RCED-92-192, August 1992).

Even where the U.S. no longer owns any part of the ore body, the federal lands usually play a key role in bringing the ore body into production - by providing lands for mineral processing, for dumping waste rock and mine tailings, and so forth. It is not unusual for the ore body of a large mine to be 90% or more in private ownership (having been previously patented under the Mining Law, at a price of $2.50 or $5.00 *per acre*). Yet that same mining operation may occupy thousands of acres of nearby federal land as waste rock dumps and tailings piles, which are a permanent and exclusive use, as the land is of little use for things like wildlife habitat.

Under current administration of the Mining Law, the U.S. receives no compensation for the use of its land for waste dumps and tailings piles, if they are claimed as "millsites." Yet mining companies were required to secure access to federal land for these purposes under Title V of the Federal Land Policy and Management Act of 1976 – which would be the case if this were a power plant, a transmission line, a water recharge project, or a factory -- they would be required to pay fair market value for the land.

Mine operators who permanently encumber thousands of acres of federal land as dumping grounds for waste ought to be required to pay a fee that reflects the value these federal lands contribute to the entire mining operation.

I am not comfortable that H.R. 699 addresses this important issue clearly enough. It provides, in section 304, that a mining company securing an operations permit can conduct that mine on "any valid mining claim, valid millsite claim, or valid tunnel site claim," and may also use "such additional Federal land as the Secretary may determine is necessary to conduct the proposed mineral activities, if the operator obtains a right-of-way permit for use of such additional lands under Title V of [FLPMA] and agrees to pay all fees required under that title for the permit under that title." This language leaves room for the industry to argue that it can locate and accumulate unlimited numbers of 5 acre millsites, and thereby secure the right to occupy thousands of acres of federal land at a token cost, and not have pay the federal government fair market value, as it would if it used the permit process of FLPMA Title V for that purpose.

Whether the Mining Law allows the accumulation of an unlimited number of millsites has never been finally and definitively resolved. When I was Solicitor of the Department of the Interior in

1997, my office prepared a legal opinion affirming a long-standing legal interpretation that mining claimants were limited to one millsite per lode or placer mining claim. My successor in the Bush Administration signed an opinion in 2003 disagreeing with that conclusion. No federal court has squarely addressed this disagreement. The reference in the current legislation to "valid" millsites may be read as endorsing the 1997 Opinion, but a more forthright declaration of that principle would be welcome, because the American public which owns these lands ought to be fairly compensated for their use.

On the third issue, the right to say no, the hardrock mining industry has argued that the government already has sufficient authority to protect the environment and other values of the federal lands from hardrock mining operations. Yet they resist saying so in any Mining Law reform legislation.

The record is clear that existing standards and practices are not adequate to protect multiple uses of the public lands and a healthy environment, and clarifying and upgrading environmental standards is a principal reason to reform the Mining Law.

Looking first at the Bureau of Land Management's current "Part 3809" regulations governing surface management of hard rock mining on BLM-managed lands, early on the George W. Bush Administration weakened these regulations significantly, removing a number of key provisions that had been added by the Clinton Administration. Compare 65 Fed. Reg. 69,998 (2000) with 66 Fed. Reg. 54,837 (2001). One of the most important was to eliminate the federal government's explicit authority to disapprove proposed hardrock mines on federal lands that threatened devastating, uncontrollable harm on other important natural and cultural resources.

The Bush Administration acted on the basis of a Solicitor's Opinion issued by my successor, which overruled an opinion I had issued in 1999. These dueling legal opinions differed on how to interpret a key phrase in the Federal Land Policy and Management Act of 1976 (FLPMA), in which Congress expressly amended the Mining Law to require the Interior Secretary to protect the public lands from "unnecessary or undue degradation" (emphasis added). 43 U.S.C. § 1732(b).

My legal opinion was that "or" means "or," so that BLM has a responsibility to regulate hardrock mining on the public lands to protect against "undue" degradation, even if that degradation is regarded as "necessary" to mining. My successor's legal opinion was that "or" is better understood as meaning "and." Thus, in his view, BLM has no authority to prevent hardrock mining that causes "undue" degradation if such degradation is "necessary" to mining.

Environmental groups asked a federal court to settle this dispute. After full briefing, the court ruled that my reading of FLPMA was correct. Somewhat bizarrely, however, the court decided not to set aside the Bush Administration's removal of that express authority from the Part 3809 regulations. Conceding the question was "indeed extremely close," the court was persuaded by the Department of Justice's argument that -- even conceding that the Bush Administration's

Solicitor was wrong on the law -- those regulations need not articulate that authority in so many words. Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 46 n. 18 (D.D.C. 2003). Neither side appealed this ruling.

The counterpart U.S. Forest Service regulations (36 C.F.R. Part 228) are even weaker. This is not surprising, for the Forest Service was long reluctant to regulate hardrock mining. Congress gave it express authority to regulate mining to prevent destruction of the national forests way back in 1897 (see 16 U.S.C. §§ 478, 551), but it did not exercise this authority for more than three-quarters of a century. The regulations it finally adopted in 1974 were relatively tepid and have changed little since, despite vast ensuing changes in hardrock mining technology and practices.

The Forest Service regulations require mining operations to "minimize," "where feasible," environmental impacts on national forest resources, 36 C.F.R. § 228.8 (emphasis added), and to take only "practicable" measures to "maintain and protect fisheries and wildlife habitat which may be affected by the operations,"id., at 228.8(e) (emphasis added). In other words, the Forest Service, like the Interior Department, currently takes the position that the government cannot turn down a proposal to locate a hardrock mine on lands it manages even if it threatens dire environmental harm. The courts have refused to overturn this position. Okanogan Highlands Alliance v. Williams, 236 F.3d 468 (9th Cir. 2000).

Also in this connection, the hardrock industry sometimes tries to draw a distinction between environmental regulation standards and standards to protect other land resource values. This distinction is very hard to draw, and is not useful in this context. Environmental standards are imposed to protect other resource values. For example, the government controls air and water pollution in part to protect viewsheds and wildlife habitat found on federal lands.

Every decision made to allow a particular use of public lands ought to consider the impact of that use on other uses and values. The government routinely does that when it decides whether to authorize any and all other uses of the federal lands. There is no persuasive reason to give proposals to open hardrock mines an exemption.

H.R. 699 properly recognizes that this is too important a matter to be left ambiguous. It states, in section 301, that the operative principle is that the government will "not grant permission to engage in [hardrock] mineral activities" if it determines that "undue degradation would result from such activities." The public interest requires no less. Every other user of the public lands -- oil or coal company, forest products company, electric utility, rancher, hunter, angler, or hiker -- is held to that common-sense standard. Hardrock mining, which has the potential to cause more serious disruption than practically any of these others, deserves no special exemption.

On the fourth issue, whether uranium should be made a leasable mineral, the answer seems to me is clearly yes. All the other energy fuels -- coal, oil and gas, tar sands, oil shale, and geothermal resources -- are governed by leasing systems, most dating back to 1920. Leasing enables the

government to better protect the public's fiscal and environmental interests. Past and current controversies about uranium mining around such national treasures as the Grand Canyon only underscore how ill-suited the Mining Law is to govern uranium development. Indeed, some federal uranium is already subject to leasing rather than to the Mining Law – a result of post-World War II withdrawals of some federal land on the Colorado Plateau that vested the old Atomic Energy Commission with jurisdiction, now exercised by the Department of Energy.

There is, moreover, no justification for continuing to subsidize the domestic uranium industry (and with it the civilian nuclear power industry) by allowing publicly-owned uranium to be mined without a royalty or other payment to the Treasury. As with hardrock mining, past uranium mining and milling has left a big cleanup bill for the taxpayer. The government is currently spending many millions of dollars, for example, to move a large mill tailings pile away from the banks of the Colorado River adjacent to Moab, Utah, on top of much public money it has already spent cleaning up uranium mines and mills. And there is more to do. Consumers of uranium should pay these bills, not general taxpayers. Finally, there is no strategic argument for subsidizing domestic uranium production when the friendly countries of Canada and Australia have abundant uranium resources. For all these reasons, I believe the idea of simply putting uranium under the Mineral Leasing Act ought to be given very serious consideration. It would be a welcome part (but only a part) of Mining Law reform.

Conclusion

Once again, I applaud your taking up this important issue of public policy, and I stand ready to advance this effort any way I can.

EXHIBIT A:

Graph of US gold production 1840-2006. Data 1900-2006 from http://minerals.usgs.gov/ds/2005/140/ . Data 1840-1899 from: US Census Bureau (1960) Historical Statistics of the United States, p.371.

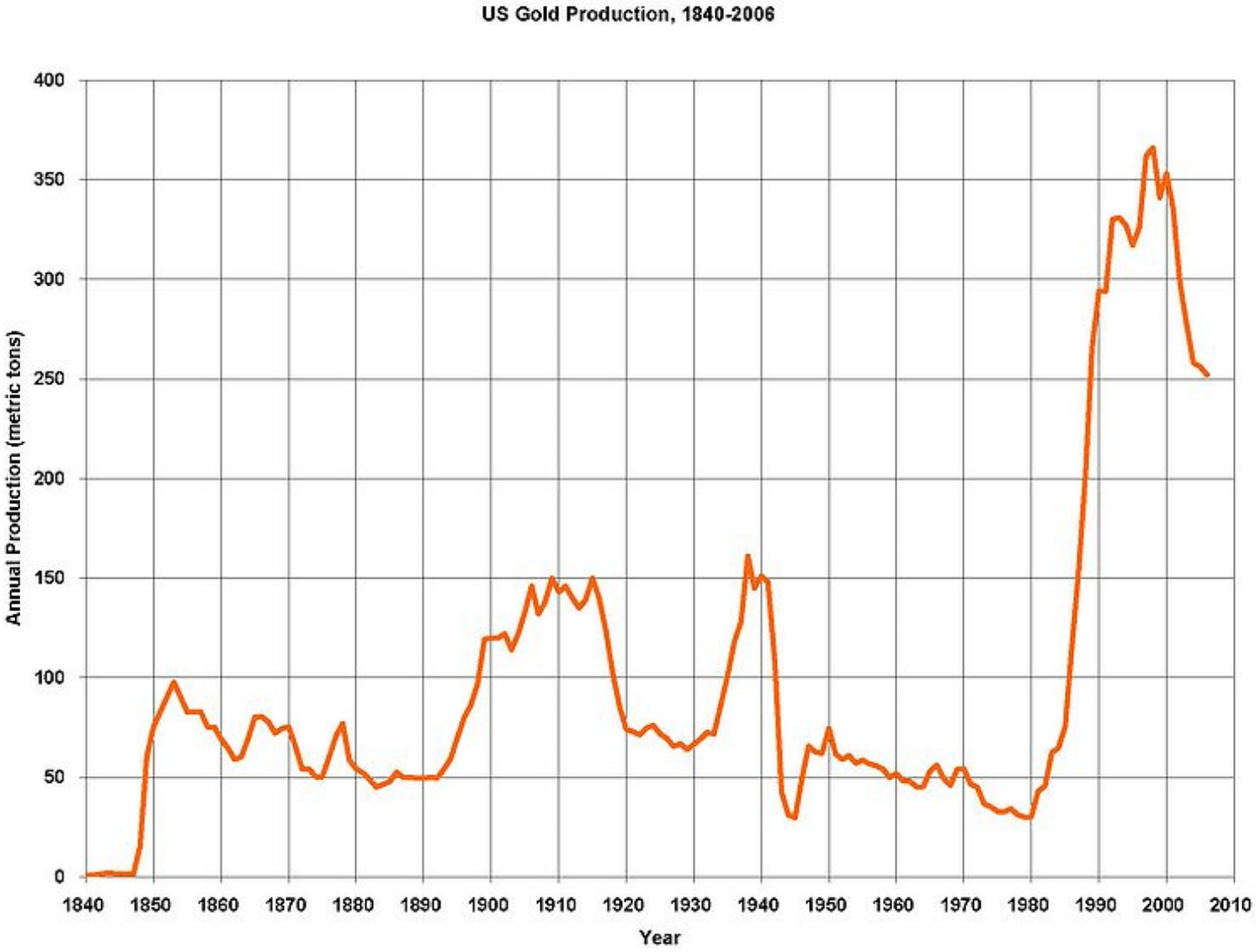

EXHIBIT B

File:Gold Price (1968-2008).gif - from Wikipedia, the free encyclopedia
A historic long term candlestick chart in a logarithmic scale of the gold price measured in the United States dollar for the years 1968 — 2008. Source: produced from London Bullion Market Association gold fixing. 24 Jan, 2009

ATTACHMENT A
Statement of John D. Leshy

at the

Hearing on H.R. 2262, the Hardrock Mining and Reclamation Act of 2007

Subcommittee on Energy and Mineral Resources
Committee on Natural Resources

U.S. House of Representatives

July 26, 2007

I appreciate your invitation to testify today, and I especially appreciate this subcommittee taking the initiative to address reform of the Mining Law of 1872. There is no more important task among the constellation of issues raised by our public lands, which encompass nearly one-third of the Nation's real estate and a much larger portion of its valuable natural resources, including minerals.

I appear here today as a private citizen, expressing my own views, and not representing any group. I have worked on Mining Law issues for thirty-five years, in academia, in government and in the nonprofit sector. I hope in this testimony to provide some larger perspective on the effort you have initiated with the introduction of HR 2262.

Calls to reform the Mining Law date back to a few years from its passage, and have been made by many U.S. Presidents, from Republicans like Theodore Roosevelt and Richard Nixon to Democrats like Jimmy Carter and Bill Clinton. Almost forty years ago, as Stewart Udall was stepping down after eight years as Secretary of the Interior, he called its repeal the biggest unfinished business on the Nation's natural resources agenda.

Signed into law by President Ulysses S. Grant four years before the telephone was invented, this antiquated relic is the last statutory survivor of a colorful period in the Nation's history that began with discovery of gold in the foothills of the Sierra Nevada in 1848. The mining "rushes" that ensued accelerated the great westward expansion of settlement. And they swept to statehood California (the golden state), Nevada (the silver state), Montana (the treasure state), Idaho (the gem state) and eventually Arizona (the copper state). The same era witnessed the enactment of numerous other laws filling out the framework for that great movement - laws like the railroad land grant acts and the Homestead Act of 1862. A generation later, Congress followed up with landmark laws like the National Forest Organic Act in 1897 and the Reclamation Act of 1902, and a generation after that, with the National Park Organic Act of 1916 and, in 1920, the Mineral Leasing Act and the Federal Power Act.

All of those other laws have long since been repealed, replaced, or fundamentally reformed, often more than once. Today the public lands and resources are managed under laws like the Federal Land Policy & Management Act of 1976, the Federal Coal Leasing Amendments of 1976, the

Surface Management Control and Reclamation Act of 1977, the National Forest Management Act of 1978, the Reclamation Reform Act of 1982, and the Federal Oil and Gas Leasing Reform Act of 1987.

Amazingly, despite the fact that, since 1872, the population of the U.S. has grown more than seven-fold (from less than forty million to more than 300 million), the population of the eleven western states plus Alaska (where the Mining Law principally applies) has grown from about one million to nearly 70 million, and our society and economy have changed in ways beyond comprehension, the Mining Law has escaped fundamental overhaul.

It is not for lack of trying. It has long been recognized that the Mining Law is thoroughly out of step with evolving public resource management principles. Indeed, the first Public Land Commission created by Congress to assess public land policies recommended *in 1880* that it be thoroughly rewritten. That recommendation has been echoed by many blue-ribbon commissions since. There is widespread agreement that the Law's three most important shortcomings are as follows:

> *First, the Mining Law allows privatization of valuable public resources, at bargain-basement rates.* This so-called patenting feature is the last vestige in federal law of nineteenth century public land disposal policy. Much abused for purposes that have nothing to do with mining, it has resulted in an area of federal land larger than the state of Connecticut passing into private ownership, much of it in scattershot inholdings that continue to complicate land uses throughout the West to this day. While Congress has since 1994 enacted appropriation riders to forestall new applications for patents, it must do so each year, or patenting resumes.
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> The fragility of these riders was driven home in the fall of 2005 by the now-infamous Pombo-Gibbons legislative proposal that would have lifted the moratorium on new patents and greatly liberalized the terms of patenting. That ill-conceived proposal - which passed the House but then died under a storm of protest - could have resulted in the privatization of more millions of acres of federal lands.
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> As long as privatization remains a core feature of the Mining Law, the temptation remains for future mischief-makers to try similar stunts. Patenting is not necessary to mine; indeed, the Supreme Court recognized in 1884 that the "patent adds little to the security of the party in continuous possession of a mine he has discovered or bought." Many large mines are found at least partly on un-patented federal lands. It is time for Congress to repeal, once and for all, the Mining Law policy allowing willy-nilly privatizing of the federal lands.
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> *Second, the Mining Law fails to produce any direct financial return to the public.* Mining companies are charged no rental, pay no royalty, and make no other payment that recognizes that the people of the U.S. own the minerals being mined. This is unique in

two ways. First, virtually all other users of the public lands - oil and gas and coal developers, timber harvesters, energy companies that run transmission lines across the federal lands, cattle graziers, and even, these days, hunters, anglers and other recreationists - pay the government something (in most cases, something like market value) for the publicly-owned resources being used or removed. Second, everywhere else hardrock mining companies operate on this earth --- on state or private lands in the U.S., and just about everywhere abroad – they pay royalties to the governments and others who own the minerals.

It is time for Congress to close this glaring loophole. Whatever justification might once have been offered for such a giveaway of public property - such as when gold had strategic value and the West was sparsely settled - has long since disappeared. Today 85% of the gold mined is used to make jewelry, and the West has long been the fastest-growing region of the country.

Third, the Mining Law results in inadequate protection of the environment and other uses of the public lands. All other users of the public lands who can cause significant environmental disruption are subject to a straightforward system of regulation which requires them to minimize the environmental effects of their activities and clean up any mess they create. And all other users are subject to the fail-safe authority of the government to say no to proposed activities that threaten major environmental harm which cannot be prevented or mitigated appropriately.

The Mining Law itself is utterly silent on environmental regulation. While it is the case that operations carried out under it no longer escape regulation, thanks to laws like the Clean Water Act, these other laws do not comprehensively address the myriad of environmental threats posed by hardrock mining (such as groundwater depletion and pollution and disruption of wildlife habitat), nor do they weigh the value of mining against other values and uses of the public lands. The hardrock mining industry has long used the silence of the Mining Law on such issues to stoutly contest the reach of the government's authority over its activities.

The industry has long had powerful allies in the government on these matters. For example, just within the last few years my two immediate successors as Solicitor of the Interior Department issued legal opinions agreeing with the industry that the Mining Law hamstrings government authority. One concluded that the government lacks authority to say no to Mining Law hardrock mining operations proposed for the public lands even if they pose huge threats to the environment. Another concluded that the Mining Law gives the mining industry the right to use as much public land as it thinks it needs as a dumping ground for the residue of its vast hardrock operations - operations which these days can involve hundreds of millions of tons of waste from gigantic open pits several miles across and a mile or more deep. It is no wonder that the federal land management agencies

continue to feel cowed when they contemplate exercising regulatory controls over this industry.

Mining is a dirty business, and must be carefully controlled to prevent environmental disasters. History teaches not only that things can go bad with hardrock mining operations, but when they do, the costs to repair the damage can be enormous. Well over a century of mining under the Mining Law of 1872 has saddled the Nation's taxpayers with a cleanup cost for thousands of abandoned mines that, according to some estimates, approaches *fifty billion dollars.* While the industry is now subject to some regulation, bad things still happen. Montana and U.S. taxpayers are paying millions of dollars to clean up the Zortman-Landusky mine in Montana – a mine which was approved under so-called "modern" regulatory standards that the industry argues are adequate and don't need strengthening.

It is long past time to close these regulatory loopholes and eliminate these ambiguities so as to make clear to all in the industry – as well as to federal land managers -- that the hardrock mining industry will be held to the same standards, and be subject to the same kinds of regulatory authority, that apply to all other users of the public lands.

About fourteen years ago, the House of Representatives handily approved a comprehensive reform proposal introduced by Chairman Rahall and others. That effort nearly succeeded, failing in the last hours of the 103rd Congress. In the years since then, much has changed. Today, Mining Law reform is both more imperative and, in my judgment, more achievable. I'd like to take a few moments to explain why.

First, the industry structure, operations and economic impact have evolved considerably. The domestic hardrock industry now produces much more gold than it ever did - the U.S. is the third leading producer in the world. And the industry is heavily concentrated, with many fewer companies and many fewer mines than ever before. More than four-fifths of U.S. gold production now comes from a single state - Nevada. The four largest mines, all in Nevada, account for well over half the total domestic production. The thirty biggest mines (more than half in Nevada, including twelve of the fifteen largest) yield 99% of total production. Barrick Gold, a Canadian company, is the biggest, accounting for about 40% of domestic U.S. (and 8% of world) gold production. Production of copper and other precious metals are similarly concentrated. Moreover, the hardrock industry now operates with such ruthless efficiency that it employs far fewer people than it used to. Its workers may be relatively well-paid, but they are far fewer in number and much more geographically concentrated than they ever were.

In the meantime, the economies of the western states have evolved rapidly away from their historic roots dependent on resource extraction. Today the regional economy where the Mining Law applies - the western states in the lower 48 plus Alaska - has changed dramatically. While

mining used to be a dominant industry in many western locales, today in most places its impact is small, even minuscule. The west is now the most urban and fastest growing region in the country. Moreover, its dynamic growth and economic health are fundamentally linked to the quality of life provided by the open spaces and recreational amenities of the public lands.

As a result, the politics of the region have changed at the ground level. Westerners are increasingly unsympathetic to the idea that the hardrock mining industry deserves these special exemptions from the laws and policies that apply to everyone else. It is not surprising, then, that when the mining industry seeks to exploit its favored position under the Mining Law, more and more local people -- ranchers, hunters, anglers, retirees, land developers, tourist industry officials, municipal water providers and other local government officials – are asking why this nineteenth century policy still exists. And their concerns are growing because soaring mineral prices, particularly for gold, copper and uranium, have led to a new rush of claimstaking under the Mining Law in areas with high values for other uses.

People in the west are also more familiar than most with the consequences of failing to control the industry. They live with the thousands of abandoned mines scattered throughout the region, and are familiar with the sorry legacy of polluted streams and disrupted landscapes that will require billions of dollars to repair. And they resent the fact that, under the current regime, the dollars to pay for this cleanup will come more from taxpayers than from the industry that created the mess.

Another noteworthy change in recent years is that, for the first time, the hardrock mining industry is facing some pressure to reform from the demand side - the jewelry industry that consumes much of its product. With leadership from Tiffany and other major jewelers, this movement has helped persuade some major mining companies, concerned about their reputations as well as their impacts, to work to improve their practices and make other accommodations to modern social and environmental values. In short, the industry is no longer so monolithic and so reflexively hostile to change.

It bears repeating that the H.R. 2262's reforms do no more than put in place practices and policies that oil and gas operators, coal miners, electrical utilities, ski areas, and other intensive users of the federal lands have operated under quite successfully for decades. I have no doubt that the innovative, progressive companies in this industry – and there are some, who have flourished around the world by being so – will adapt readily to such reforms, just like other public land users have.

I am also confident that reforming the archaic Mining Law will not - as some industry spokespeople have ritually maintained - put an end to the domestic hardrock mining industry. Every year Canada’s Fraser Institute surveys mining industry executives and uses the results to rank the most favorable jurisdictions in the world for hardrock mining, considering a variety of factors, including political stability. The American West is always at or near the top of the rankings. Furthermore, skyrocketing mineral prices means the industry is thriving as never

before, and any modest increase in production costs that might result from reforms like H.R. 2262 can readily be absorbed.

Once again, I commend your leadership for taking up this important issue. You have the best opportunity in a generation to achieve a landmark legacy in public land policymaking. I stand ready to help any way I can to move this forward, and I would be happy to answer any questions you may have.