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HR 761, the *Critical and Strategic Minerals Production Act of 2013*

Thank you Mr. Chairman for the opportunity to testify before your committee in opposition to HR 761, the Critical and Strategic Minerals Production Act of 2013. My name is Jennifer Krill, and I am the Executive Director of Earthworks. We are a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral and energy development. We work closely with a broad coalition of local governments, Native Americans, citizen groups and other conservation organizations to improve the policies governing hardrock mining and oil and gas development.

The authors and advocates of HR 761 – the mining industry lobby and its champions -- would have you believe that mining companies in the United States are stifled by the current regulatory system. They describe a country where mineral development is stymied by federal rules that divert companies to spend their mineral investment dollars elsewhere. But the mining lobby's vision of a mining-hostile United States is pure fantasy.

In reality, hardrock mining companies in the United States enjoy subsidies and loopholes that create an extremely friendly regulatory environment for them.

It starts with the 1872 Mining Law – a law that allows mining companies, foreign and domestic, to take gold, copper, silver, uranium and any critical or strategic minerals from public lands for free, without paying a royalty to the taxpayer. Years of case law define hardrock mining as the highest and best use of public lands; federal land managers now give hardrock mineral extraction precedence over hunting, fishing, sacred sites and all other uses of public lands. The Forest Service has repeatedly said that because of this antiquated law, they cannot deny mine proposals on our national forests.

In addition to royalty-free mining, the 1872 Mining Law collects no reclamation fee from the industry. The EPA estimates that the clean up cost of these hardrock abandoned mine sites is $50 billion– all of which is currently being paid for by the taxpayer.

While operating under this 140-year-old law, mining companies are also given free rein to pollute our waters thanks to two Clean Water Act loopholes that allow mining waste to be dumped directly into streams, rivers, lakes and wetlands. The metals mining industry is the single largest source of toxic waste and one of the most environmentally destructive industries in the country. In fact, the Environmental Protection Agency estimates hardrock mining pollutes 40 percent of the headwaters of watersheds in the western United States.

An extremely favorable tax code rounds out the regulatory fantasy for hardrock mining companies in the United States. The Percentage Depletion Allowance (PDA) permits a company to deduct a fixed percentage from their gross income according to the mineral extracted, ranging from 22% for uranium to 15% for silver and other hardrock minerals. In some cases this deduction actually exceeds costs. The result is a situation where mining companies not only pay virtually nothing for the deposit royalty for the public's minerals, but also get paid by the government to mine public minerals they were freely given under the PDA. This subsidy costs taxpayers over 500 million dollars every year.

This trifecta of an outdated mining law, the ability to dump mine waste directly into fresh water and enormous tax breaks for the industry makes hardrock mining unique in this country, and renders HR 761 unnecessary and absurd.

The United States of America is one of the world's best places for mining investment. We have stable Democratic institutions, courts that enforce contracts, favorable tax and environmental policy, and an orderly and reliable process for public input in permitting decisions.

Just ask the mining companies. According to the Fraser Institute – a center-right Canadian think tank who annually survey approximately 700 mining, exploration, development companies around the world -- Nevada, Utah, and Wyoming, rank in the top 10 most attractive jurisdictions for mineral exploration investment, according to mining company managers and executives surveyed.

THE NEVADA EXAMPLE

According to the University of Nevada Reno, more than 80% of Nevada's surface area is public land managed by the federal government in trust for all Americans by the Bureau of Land Management and the U.S. Forest Service. Consequently, federal law – and NEPA in particular – applies to the vast majority of Nevada.

As a result, if permitting delays imposed on public lands were so burdensome, one would expect that Nevada would be unattractive relative to other potential mineral investment destinations.

The opposite is true.

Consider again the Fraser Institute survey and its most important criteria included in the composition its "Policy Potential Index" (i.e. policy attractiveness):

> "The Policy Potential Index is a composite index that measures the effects on exploration of government policies including uncertainty concerning the administration, interpretation, and enforcement of existing regulations; environmental regulations; regulatory duplication and inconsistencies; taxation; uncertainty concerning native land claims and protected areas; infrastructure; socioeconomic agreements; political stability; labor issues; geological database; and security."

Note what is absent from that ranking: mineral potential. The ranking is based on policies, and things that result from policies, alone.

In the most recent survey (2012-2013 edition), Nevada -- in terms of the aggregate effect of the various policies that apply to mining within the state -- is the 7th most attractive mineral investment destination in the world. Wyoming, another state known for its abundance of public lands, ranks 5th. Utah, another public lands state, follows close behind.

The aforementioned Policy Potential Index includes areas in which Nevada would score well but is conceivably not directly attributable to regulation (e.g. infrastructure). Do environmental regulation and permitting drag down mineral investment in Nevada and the rest of public lands in the United States?

The answer is 'no'. In fact, the Fraser Survey also includes a ranking of the relative attractiveness of regions' "current mineral potential with no regulations in place and assuming [only] industry best practices".

If the claim that existing regulations actually restrict mineral investment in Nevada and federal public lands around the nation were true – then one would expect survey participants to find the absence of regulations to increase Nevada's mineral investment appeal.

Instead, the opposite is true. According to the Fraser Survey, when mining industry insiders were asked to assume no government regulations in a jurisdiction, Nevada's mineral investment attractiveness ranking in the 2012-13 survey remains unchanged. In past years, it actually dropped.

Furthermore, the 2012-13 Fraser Survey directly asks survey respondents whether a jurisdiction's environmental regulations deter investment, encourage investment, or have no effect. 69% of respondents said environmental rules in Nevada – 80% of whose area is subject to federal oversight – either encourage mineral investment or do not deter it.

Taken as a whole, the Fraser Survey is a direct refutation for the need for this bill. In fact, the only evidence found in the survey suggest that existing oversight – including federal policies like NEPA – is a relative competitive advantage, not disadvantage.

DEFINITON OF STRATEGIC MINERALS

The bill broadly defines critical and strategic minerals as those that "support domestic manufacturing, agriculture, housing, telecommunications, healthcare, and transportation infrastructure." In other words, all minerals including gold, the most valuable mineral mined in Nevada.

Gold is particularly inappropriate for designation as a critical or strategic mineral for the simple reason that the majority of it in the U.S. -- 54% in 2011 according to the USGS -- is used in jewelry fabrication. 54% is actually quite low in terms of jewelry's historic percentage of U.S. gold demand. As recently as 2008, it was 84%.

Since jewelry fabrication is neither a critical nor strategic use for gold, then no critical or strategic purpose is served by exempting its mining from our most basic environmental protections like NEPA review.

THE IMPORTANCE OF PUBLIC PARTICIPATION, PUBLIC LANDS, AND ENVIRONMENTAL PROTECTION

When the National Environmental Policy Act (NEPA) was enacted in 1969 by an overwhelming bi-partisan majority and signed by President Richard Nixon, the goal of the legislation was to create a process by which the environmental impacts of large industrial projects could be explored, weighed and eventually mitigated.

NEPA makes sure that in addition to government and industry input, everyday citizens can take part in the development and oversight of projects that affect our social, economic, and environmental health. The NEPA process provides citizens an opportunity to learn about proposed federal actions and offers agencies an opportunity to receive valuable input from the public.

The average time it takes BLM to permit a large mine is four years- not ten, not even seven. When a particular permit takes longer, the reason either has to do with state processes or, more likely, delays created by the mining company themselves- sometime for perfectly legitimate reasons like changes in market conditions.

Under current law, agencies must fully evaluate the environmental impacts of actions that may significantly affect the environment. Though, it is important to point out that the law does not require that the decision-making agency choose the most environmentally-friendly option, it only requires that they weigh all the options.

Furthermore, the NEPA process is the public's window on how a mining operator plans to comply with environmental law. Without NEPA, the public is forced to rely on the mining company, and the permitting agency, to verify that mining operator's plan of operations can realistically do so.

While such faith is touching, the facts indicate it is sadly unfounded.

In a unprecedented 2008 research paper commissioned by Earthworks, conducted by a member of the National Academies of Science Earth Science Board, and reviewed by regulators and industry, mining industry promises of environmental compliance for "major" mines undergoing full NEPA review were compared against what actually happened at the mines. The most disappointing finding: 100% of mines in the study predicted environmental compliance; 75% of them did not.

The only reason we know of industry (and permitting agencies') failure to adequately govern mining operations: NEPA review. If not for NEPA, citizens would not know how badly the mining industry performs, nor be able to use this information to pressure permitting agencies to improve its behavior.

This legislation would run roughshod over the values of transparency and public participation that are at the heart of NEPA – essentially taking public review out of potential uses of our public lands.

While mining on public lands helps stimulate economic activity, protection of those lands is also vital to the western economy. Last year, over 100 economists including 3 Nobel laureates, sent a letter to President Obama stressing the importance of the protection of our public lands to our national economy. They said:

"The rivers, lakes, canyons, and mountains found on public lands serve as a unique and compelling backdrop that has helped to transform the western economy from a dependence on resource extractive industries to growth from in-migration, tourism, and modern economy sectors such as finance, engineering, software development, insurance, and health care."

They also note, "increasingly, entrepreneurs are basing their business location decisions on the quality of life in an area. Businesses are recruiting talented employees by promoting access to beautiful, nearby public lands…Together with investment in education and access to markets, studies have repeatedly shown that protected public lands are significant contributors to economic growth."

Section 103 reprioritizes the entire field of public land and environmental law regarding mineral operations, making "development of the mineral resource" the "priority of the lead agency."

Under current law, the federal land agencies are subject to a variety of congressional mandates that attempt to balance mineral production with the protection of human health, water and air quality, wildlife, etc. For example, if a mining project may adversely affect a threatened or endangered species, then as the Supreme Court has held pursuant to the Endangered Species Act, "Congress intended endangered species to be afforded the highest of priorities." TVA v. Hill, 437 U.S. 153 (1978). If the ESA is not applicable, then other congressional policies apply, such as the prevention of "unnecessary or undue degradation" to public land under the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1732 (b). See Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 33 (D.D.C. 2003)(discussing competing congressional mandates for mining operations on Interior Department lands).

HR 761 essentially eliminates these long-standing congressional mandates, and subjects the BLM and Forest Service to a new "maximize mineral development" standard. Although Section 103 states that the agency must "mitigate environmental impacts," that vague language does little to protect environmental values in light of the new overarching development standard. For example, under current environmental law, "mitigation" can mean simply "minimizing impacts" or "reducing the impact over time." 40 CFR 1508.20. Coupled with the "maximize development" priority, as well as the requirement that the agencies ensure that "more of the mineral resource can be brought to the market place," an agency's "mitigation" authority is thus severely curtailed.

EQUAL ACCESS TO JUSTICE ACT

HR 761 also allows regulators to exempt mining projects from the Equal Access to Justice Act (EAJA). In many cases, affected communities cannot afford to hire a lawyer, much less the litany of scientific and technical experts needed to mount a serious challenge to a major multinational mining corporation. The practical effect of this provision would leave many communities unable to sue for the contamination of their lands and waters.

CONCLUSION

In sum, environmental reviews and legal challenges do not substantially affect mining investment, employment, or the reserves of certain critical minerals. The market has long ago priced in these costs and the result is that many of our Western states are among the best places for mineral investment and have substantially lower unemployment rates than surrounding communities. This is not an issue of too many lawyers or regulators; it's an economics issue. Mining occurs where the target mineral price makes the process economically viable.

NEPA has been in place for more than forty years. Federal government agencies and the mining companies they regulate understand the process well and value the market certainty NEPA creates and investors crave. Dismantling this well-established process could undermine the purported purpose of this bill of encouraging investment and securing more critical mineral resources.

The consequences of HR 761 would negatively impact the environment of publicly owned lands within mining states, and the communities surrounding them, while doing little to give mining companies the social license to operate that they often claim they desire. By seriously impairing the public's ability to review and provide input on the uses of its lands, this legislation simply adds another special favor to an already overly blessed industry.

HR 761 is a bill in search of a problem that does not exist. What is really needed is a concerted mining industry effort to work with communities to build more responsible mines, to reform the outdated policies that haunt them, and to play by the rules with which other industries profitably, comply.

HR 687, Southeast Arizona Land Exchange and Conservation Act of 2013

On behalf of Earthworks and the thousands of members we represent in Arizona and nationwide, we also urge you to oppose HR 687 the Southeastern Arizona Land Exchange and Conservation Act of 2013 (the "land exchange bill") that would, in part, revoke a mining prohibition on 760 acres of public lands in the Tonto National Forest in the area of the Oak Flat Campground 60 miles east of Phoenix.

Resolution Copper Company (RCC), a foreign-owned mining company, is planning a massive block-cave mine and seeks to acquire Oak Flat Campground and the surrounding public lands through this land exchange bill. If they succeed, the campground and an additional 2,300 acres of the Tonto National Forest will become private property, forever off limits to many recreationists and other users. Privatization of this land would end public access to some of the most spectacular

outdoor recreation and wildlife viewing areas in Arizona. And massive surface subsidence will leave a permanent scar on the landscape, eliminating the possibility of a diversified economy for the region.

The Eisenhower Administration recognized the Oak Flat Campground as an important recreational resource in 1955, specifically placing it off limits to future mining activity. Oak Flat should remain under federal jurisdiction for its continued protection. With tens-of-thousands of visitors each year, Oak Flat contains a world-class natural resource for birding, bouldering, camping, hiking, hunting, picnicking, rock climbing and other recreational uses. On the eastern border lies Gaan Canyon, one of the crown jewels of Arizona's state trust lands with some of the finest remaining riparian habitat in the state.

Oak Flat Campground and the surrounding area has long been an important cultural site for Western Apaches. The Tonto National Forest recognized at least a dozen archeological sites in and around Oak Flat and traditional Apache continue to use the Campground area for performing religious and cultural rites. Privatizing Oak Flat and destroying its surface would forever eliminate Apache traditional practices in the area, since they would be unable to access the site.

Transfer of part of our national forests to a multinational copper mining company will almost certainly deplete and contaminate water resources and nearby watersheds. Surface water, tributary water, and aquifers are located where the copper ore body resides. Excavating this ore risks contamination. Many billions of gallons of water are necessary to carry migrating slurry to and from the ore body over the decades long life of the mine. Altering the surface and subsurface geological structure of this area via the impending subsidence will forever change the natural state of aquifers and drainage of watersheds through out the region.

Section 4(j) of HR 687 provides sham compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321). This is because the environmental impact statement (EIS) occurs only after privatizing the land. By that point, the government loses the opportunity to act on reasonable alternatives, and the mine becomes a forgone conclusion regardless of the potential impacts the EIS finds.

In addition, as soon as this bill becomes law, the land becomes available for mining activities. Section 4(h) mandates that only laws pertaining to mining on private land will apply. The Secretary will also issue a special use permit for exploration of Oak Flat within 30 days of Resolution Copper's request (Section 4(f)). Only after Resolution Copper has built mine shafts, adits, tunnels, and tailings deposition areas will the Secretary then receive a mine plan of operations.

Finally, this land exchange bill would set a chilling precedent allowing for the revocation of similar land withdrawals such as parks, recreation areas, and wildlife refuges. Public lands such as Oak Flat that are set aside for recreation should remain protected for future generations. This land exchange bill would sacrifice the interests of Arizonans, and all Americans, to enrich foreign shareholders. It would destroy sacred sites for short terms gains. Thirty years from now—when the mining jobs once again leave—the region will be much worse off because the landscape will be

ruined. We strongly urge you to protect these public lands for the public's future use and preserve the unique opportunities for Arizonans that the Oak Flat area provides.

H.R. 957, American Soda Ash Competitiveness Act

Earthworks also respectfully opposes HR 957, The American Soda Ash Competitiveness Act. The experience gained from the last time Congress lowered the royalty on soda ash and related sodium minerals teaches us that this industry remains competitive regardless of the royalty rate. The US Department of Interior's Report to Congress on the Soda Ash Royalty Reduction Act of 2006 makes this clear.

Despite cutting the royalty from a weighted average of 5.6% to 2%, the soda ash industry experienced almost no change in the volume of production, leases, or sales. Overall capital investment since FY 2006 has fallen. Domestic employment in the soda ash industry has similarly dropped since FY 2006. While industry revenues increased significantly, the Department of Interior attributes this to a spike in prices coupled with a sharp decline in production costs- due to historically low prices of the natural gas used to power these operations.

Instead, this bill amounts to an unnecessary extension of a taxpayer giveaway first granted in 2006. Without the royalty reduction, DOI estimates states alone would have received $62.1 million more from FY 07-10. They estimate total lost royalty revenues between FY 07-11 at more than $150 million. Additionally, BLM regulations (43 CFR 3513) provide an administrative process through which Federal sodium lessees may individually seek royalty rate reductions. Creating an industry wide reduction only encourages a trend toward shifting soda ash extraction from state and private lands to federal lands just to take advantage of the lower royalty. The end result is simply lower government revenues, without the benefits of more jobs or greater global competitiveness.