TESTIMONY OF

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ON BEHALF OF THE

INTERSTATE MINING COMPACT COMMISSION
And the
NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS

Re: Legislative Hearing on

H.R. 785 – To Amend the Surface Mining Control and Reclamation Act of 1977

Before the

Energy and Mineral Resources Subcommittee
House Committee on Natural Resources

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Testimony of Gregory E. Conrad, Executive Director of the Interstate Mining Compact Commission on behalf of the Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs re H.R. 785

My name is Gregory E. Conrad and I serve as Executive Director of the Interstate Mining Compact Commission. I am appearing today on behalf of the Interstate Mining Compact Commission (IMCC) and the National Association of Abandoned Mine Land Programs (NAAMLP) regarding a legislative hearing on H.R. 785, a bill to amend the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to clarify that uncertified States and Indian tribes have the authority to use certain payments for noncoal reclamation projects and for the acid mine drainage set-aside program. Both of the organizations I represent strongly support this critical amendment to SMCRA.

The Interstate Mining Compact Commission (IMCC) is an organization of 24 states located throughout the country that together produce some 95% of the Nation's coal, as well as important hardrock and other noncoal minerals. Each IMCC member state has active mining operations as well as numerous abandoned mine lands within its borders and is responsible for regulating those operations and addressing mining-related environmental issues, including the reclamation of abandoned mines. Over the years, IMCC has worked with the states and others to identify the nature and scope of the abandoned mine land problem, along with potential remediation options.

The NAAMLP is a tax-exempt organization consisting of 30 states and Indian tribes with a history of coal mining and coal mine related hazards. These states and tribes are responsible for 99.5% of the Nation's coal production. All of the states and tribes within the NAAMLP administer abandoned mine land (AML) reclamation programs funded and overseen by the Office of Surface Mining (OSM) pursuant to Title IV of the Surface Mining Control and Reclamation Act (SMCRA, P.L. 95-87).

Mr. Chairman, as noted in testimony presented to the Subcommittee on July 14, 2011, nationally abandoned mine lands continue to have significant adverse effects on the environment. Some of the types of environmental impacts that occur at AML sites include subsidence, surface and ground water contamination, erosion, sedimentation, chemical release, and acid mine drainage. Safety hazards associated with abandoned mines account for deaths and/or injuries each year. Abandoned and inactive mines, resulting from mining activities that occurred over the past 150 years, are scattered throughout the United States. The sites are located on private, state and public lands.

As you know, OSM, with the direct assistance of the states and tribes, maintains an inventory of abandoned coal mine sites nationwide. Over the years, several studies have been undertaken in an attempt to quantify the hardrock AML cleanup effort. In 1991, IMCC and the Western Governors' Association completed a multi-volume study of inactive and abandoned mines that provided one of the first broad-based scoping efforts of the national problem. Neither this study, nor any subsequent nationwide study, provides a completely reliable and fully accurate on-the-ground inventory of the hardrock AML problem. Both the 1991 study and a recent IMCC compilation of data on hardrock

AML sites were based on available data and professional judgment. While the data is seldom comparable between states due to the wide variation in inventory criteria, they do demonstrate that there are large numbers of significant safety and environmental problems associated with inactive and abandoned hardrock mines and that remediation costs are very large.

Across the country, the number of abandoned hardrock mines with extremely hazardous mining-related features has been estimated at several hundred thousand. Many of the states and tribes report the extent of their respective AML problem using a variety of descriptions including mine sites, mine openings, mine features or structures, mine dumps, subsidence prone areas, miles of unreclaimed highwall, miles of polluted waterways, and acres of unreclaimed or disturbed land. Some of the types of numbers that IMCC has seen reported in our Noncoal Mineral Resources Report and in response to information we have collected for the Government Accountability Office (GAO) include the following gross estimated number of abandoned mine sites: Alaska – 1,300; Arizona – 80,000; California – 47,000; Colorado – 7,300; Montana – 6,000; Nevada – 16,000; Utah – 17,000 to 20,000; New York – 1,800; Virginia – 3,000 Washington – 3,800; Wyoming – 1,700. Nevada reports over 200,000 mine openings; New Mexico reports 15,000 mine hazards or openings; Minnesota reports over 100,000 acres of abandoned mine lands and South Carolina reports over 6,000 acres. The Navajo Nation constituents have recently advised the Navajo AML program to revisit about 500 abandoned uranium mines that primarily have radioactive mine waste problems.

What becomes obvious in any attempt to characterize the hardrock AML problem is that it is pervasive and significant. And although inventory efforts are helpful in attempting to put numbers on the problem, in almost every case, the states are intimately familiar with the highest priority problems within their borders and also know where limited reclamation dollars must immediately be spent to protect public health and safety or protect the environment from significant harm.

Today, state agencies are working on hardrock abandoned mine problems through a variety of limited state and federal funding sources. Various federal agencies, including the U.S. Environmental Protection Agency, Bureau of Land Management, U.S. Forest Service, U.S. Army Corps of Engineers and others have provided some funding for hardrock mine remediation projects. These state/federal partnerships have been instrumental in assisting the states with our hardrock AML work and, as states take on a larger role for hardrock AML cleanups into the future, we will continue to coordinate with our federal partners. However, most of these existing federal grants are project-specific and do not provide consistent funding. For states with coal mining, the most consistent source of AML funding has been the Title IV grants under the Surface Mining Control and Reclamation Act (SMCRA). Section 409 of SMCRA allows states to use these grants at *high priority* non-coal AML sites. The funding is generally limited to safeguarding hazards to public safety (e.g., closing mine openings) at hardrock sites.

In December 2006, Congress significantly amended the SMCRA AML program to, among other things, distribute funds to states in an amount equal to that previously

allocated under SMCRA but never appropriated. However, while Section 409 was not changed or amended in any way, the Interior Department, through both a Soliticor's Opinion (M-37014) and final rule (73 Fed. Reg. 67576), has now interpreted SMCRA to prohibit this enhanced funding from being used for noncoal projects. This is a significant blow to states such as New Mexico, Utah and Colorado that have previously used SMCRA AML funds to address many of the more serious hardrock AML problems within their borders. In fact, some of the noncoal AML projects previously undertaken by these states have been recognized by OSM for their excellence pursuant to the agency's national AML awards program.

H.R. 785 would remedy the Interior Department's unfortunate interpretation of the 2006 Amendments and as such we strongly support the bill. That interpretation not only disregards the fact that section 409 was left unamended by Congress, it is also inconsistent with assurances repeatedly given to the states and tribes by OSM during the consideration of the legislation that noncoal work could continue to be undertaken with these specific AML funds. The interpretation would also have the unacceptable result of requiring states and tribes to devote funds to lower priority coal sites while leaving dangerous noncoal sites unaddressed. While OSM will argue that this may impact the amount of funding available to uncertified states to address high priority coal problems, Congress did not seem overly concerned with this result but rather deferred to its original framework for allowing both high priority coal and noncoal sites to be addressed.

In its final rule implementing the 2006 amendments to SMCRA (at 73 Fed. Reg. 67576, et seq.), OSM continued to abide by its argument that "prior balance replacement" funds (i.e the unappropriated state and tribal share balances in the AML Trust Fund) are fundamentally distinct from section 402(g) moneys distributed from the Fund. This, according to OSM, is due to the fact that these prior balance replacement funds are paid from the U.S. Treasury and have not been allocated under section 402(g)(1). This is a distinction of convenience for the Interior Department's interpretation of the 2006 Amendments and has no basis in reason or law. The fact is, these funds were originally allocated under section 402(g)(1), are due and owing pursuant to the operation of section 402(g)(1), and did not change their "color" simply because they are paid from a different source. Without the operation of section 402(g)(1) in the first place, there would be no unappropriated (i.e. "prior") state and tribal share balances. The primary reason that Congress appears to have provided a new source for paying these balances is to preserve a balance in the AML Trust Fund to 1) generate continuing interest for the UMW Combined Benefit Trust Fund and 2) to insure that there was a reserve of funding left after fee collection terminates in 2021 to address any residual high priority historic coal problems. There was never an intent to condition or restrict the previously approved mechanisms and procedures that states and tribes were using to apply these moneys to high priority coal and noncoal problems. To change the rules based on such a justification is inappropriate and inconsistent with law.

The urgency of advancing this legislation has been heightened, Mr. Chairman, by statements in OSM's proposed budget for Fiscal Year 2013. Therein, OSM is proposing to further restrict the ability of states to expend AML funds on noncoal reclamation

projects. This will apparently occur as part of a legislative proposal that the Administration supposedly intends to continue pursuing in the 112th Congress. While the primary focus of that proposal will be the elimination of future AML funding for states and tribes that are certified under Title IV of SMCRA (which we adamantly oppose), OSM is also proposing to establish a hardrock AML reclamation fee in order to "hold each industry [coal and noncoal] responsible for the actions of its predecessors." We are uncertain exactly what OSM has in mind with respect to this aspect of the legislative proposal, but we suspect it has to do with clarifying the very issue that is the subject of H.R. 785. And while there may be merit for a hardrock AML reclamation fee, the potential for enacting this fee in the near future is highly unlikely. In the meantime, we are losing valuable time and resources by failing to authorize the use of unappropriated state and tribal share balances to address what even OSM has characterized as "a legacy of abandoned mine sites that create environmental hazards." It should be kept in mind, in this regard, that the availability of these funds for noncoal reclamation work will expire after FY 2014 when the last of the unappropriated state/tribal share funds will have been distributed.

For the same reasons that Congress needs to clarify this misinterpretation for noncoal AML work, it should also do so for the acid mine drainage (AMD) set aside program. Section 402(g)(6) has, since 1990, allowed a state or tribe to set aside a portion of its AML grant in a special AMD abatement account to address this pervasive problem. OSM's recent policy (and now regulatory) determination is denying the states the option to set aside moneys from that portion of its grant funding that comes from "prior balance replacement funds" each year to mitigate the effects of AMD on waters within their borders. AMD has ravaged many streams throughout the country, but especially in Appalachia. Given their long-term nature, these problems are technologically challenging to address and, more importantly, are very expensive. The states need the ability to set aside as much funding as possible to deal with these problems over the long term. Congress clearly understood the magnitude of this challenge given the fact that it increased the amount of money that states could set aside for this purpose from 10 to 30 percent in the 2006 Amendments. We therefore strongly support the inclusion of language in H.R. 785 that will correct the current policy interpretation by Interior and allow the use of unappropriated state and tribal share balances ("prior balance replacement funds") for the AMD set aside, similar to the use of these balances for noncoal work.

The subject of acid rock and acid mine drainage remediation efforts brings up another aspect of AML cleanups that should be addressed in legislation. This concerns liability under the Clean Water Act associated with these cleanup efforts. Citizen, environmental and watershed groups who may have a desire to fund the cleanup of impacted waters are often dissuaded from doing so because the previously mined and abandoned sites have contaminated mine drainage discharges which, if reaffected, would subject these "Good Samaritans" to liability under both state and federal law, thereby requiring them to be responsible for permanently treating the discharge to Clean Water Act standards. They could incur this liability even though they did not create the discharge and even if their cleanup efforts improved the overall quality of the discharge. This situation has been

further exacerbated by a recent decision by the U.S. Fourth Circuit Court of Appeals in *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010). The court held that certain treatment systems for treating water from abandoned coal mines qualify as point sources and require NPDES permits under the Clean Water Act. While focused on bond forfeiture sites under SMCRA, the reasoning of the decision may apply equally to the construction and operation of passive treatment systems employed by watershed groups to address acid mine drainage at abandoned coal mines. This situation must be rectified.

We believe that the best approach to address this situation is through the enactment of legislation that clarifies the application of Clean Water Act requirements to both coal and hardrock AML remediation efforts where contaminated or polluted mine drainage is involved. We have seen the positive results from this type of approach in states such as Pennsylvania, which enacted its own Good Samaritan law to provide protections and immunities to those groups and individuals who were not legally liable but who voluntarily undertook the reclamation of abandoned mine lands or abatement of mine drainage. However, even Pennsylvania Good Samaritans are still exposed to potential liability under federal law for their good deeds, which is having a debilitating effect on watershed cleanup efforts. The recent Fourth Circuit decision has further complicated this situation given its broad holding. We would be willing to work with your Subcommittee to develop legislative language amending SMCRA that addresses the implications of the Fourth Circuit decision for AML programs, especially as it relates to the treatment of acid mine drainage.

A new complication for state and tribal AML work that also must be addressed is the limited liability protection related to applicable federal environmental laws such as the Clean Water Act where noncoal AML work is undertaken with SMCRA Title IV funds. OSM's recent rulemaking implementing the provisions of the 2006 Amendments to SMCRA removed this protection and that action has had a significant chilling effect on the ability of the states and tribes to undertake their noncoal projects with SMCRA funds. Given OSM's reluctance to address this administratively, the issue needs to be addressed with a perfecting amendment to SMCRA. A bill introduced by Senator Tester (S. 1455) specifically addresses this concern and the inclusion of similar language as an amendment to H.R. 785 would be seriously worth considering.

Over the past 30 years, tens of thousands of acres of abandoned mine lands have been reclaimed, thousands of mine openings have been closed, and safeguards for people, property and the environment have been put in place. There are numerous success stories from around the country where the states' and tribes' AML programs have saved lives and significantly improved the environment. Suffice it to say that the AML Trust Fund, and the work of the states and tribes pursuant to the distribution of monies from the Fund, have played an important role in achieving the goals and objectives set forth by Congress when SMCRA was first enacted – including protecting public health and safety, enhancing the environment, providing employment, and adding to the economies of communities impacted by past coal and noncoal mining. Passage of H.R. 785 will further these congressional goals and objectives.

In support of our position on H.R. 785, we also request that you include for the record the attached resolution (No. 07-8) adopted by the Western Governors that urges the continued use of funds collected or distributed under Title IV of SMCRA for the reclamation of high priority, hard-rock abandoned mines. This resolution is in support of the Western Governors' policy statements B.4 and B.5.

Thank you for the opportunity to present our views on H.R. 785. We welcome the opportunity to work with you to complete the legislative process and see this bill become law.

Western Governors' Association
Policy Resolution 10-3
Cleaning Up Abandoned Mines in the West

A. BACKGROUND

1. Mining has a long history in the West. The western states are rich in hardrock minerals like gold, silver and copper as well as coal, much of it low sulfur.

Hardrock Mines

2. Historic hardrock mining in the West, unregulated until recent years, has left a legacy of thousands of historic abandoned mines, which pose a threat to human health and safety and to the environment. These historic mines pre-date modern federal and state environmental regulations which were enacted in the 1970s. Often a responsible party for these mines is not identifiable or not economically viable enough to be compelled to clean up the site. Thousands of stream miles are impacted by drainage and runoff from such mines, one of the largest sources of adverse water quality impacts in several Western states.

3. Cleanup of abandoned hardrock mines is hampered by two issues -- lack of funding and concerns about liability. Both of these issues are compounded by the land and mineral ownership patterns in mining districts. It is not uncommon for there to be dozens of parties with partial ownership or operational histories associated with a given site.

4. Recognizing the potential for economic, environmental and social benefits to downstream users of impaired streams, Western states, municipalities, federal agencies, volunteer citizen groups and private parties have come together across the West to try to clean up some of these abandoned hardrock sites. However, due to questions of liability, many of these Good Samaritan efforts have been stymied.

5. Potential liability exists for Good Samaritans under Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program because a party can inherit liability for any discharges from an abandoned mine site remaining after their cleanup efforts, even though the volunteering remediating party had no previous responsibility or liability for the site, and has reduced the water quality impacts from the site by completing a cleanup project.

6. Potential liability exists for Good Samaritans under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

7. Liability concerns also prevent mining companies from going back into historic mining districts and remining old abandoned mine sites or doing volunteer cleanup work. While this could result in an improved environment, companies

that are interested are justifiably hesitant to incur liability for cleaning up the entire abandoned mine site.

Coal Mines

8. Congress authorized creation of the Abandoned Mine Land (AML) Program under Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program is funded by fees from current coal production. The coal AML program provides funding to states to restore lands mined for coal and abandoned or left inadequately restored before August 3, 1977.

9. Section 409 of SMCRA also authorizes states to use AML grant funds to address high priority non-coal mine hazards. While the state AML programs are limited to using SMCRA funds to only address public health and safety hazards at abandoned non-coal mines, and not purely environmental threats, the state programs have employed this provision to make a dent in the public safety threats posed by abandoned mines.

10. In December 2006, Congress amended Title IV of SMCRA to reauthorize the fee collection authority, to provide for the distribution of the unappropriated stateshare balance of the AML Trust Fund, to increase the minimum program funding to $3 million per year. Section 409 of SMCRA was not amended and no limits were placed on non-coal projects.

11. However, the Office of Surface Mining (OSMRE) adopted rules to severely limit certain states from using AML funds for non-coal mine hazards. For Colorado, New Mexico and Utah, over 70 % of their funds are now off limits for non-coal projects. These states are required to fund lower priority coal mine reclamation projects while higher priority non-coal hazards would remain unfunded. The Administration is also proposing to deny AML funds to states which have "certified" completion of coal AML projects, contrary to agreements codified in 2006.

12. The new interpretation of SMCRA by OSMRE conflicts with the clear language of the law authorizing the use of coal AML funds for high priority non-coal mine hazards. OSMRE's new interpretation will leave the public exposed to significant hazards to public health and safety at abandoned non-coal mines being ignored while states are required to expend coal AML funds at lower priority coal mine sites.

B. GOVERNORS' POLICY STATEMENT

Hardrock Mines

1. Western Governors believe Congress should amend the Clean Water Act to protect volunteering remediating parties who conduct authorized remediation

from becoming legally responsible under section 301(a) and section 402 of the CWA for any continuing discharges from the abandoned mine site after completion of a cleanup project, provided that the remediating party -- or "Good Samaritan" -- does not otherwise have liability for that abandoned or inactive mine site. Legislative and administrative remedies to address potential CERCLA liabilities should also be considered.

2. The Governors encourage federal land management agencies, such as the U.S. Bureau of Land Management, the National Park Service and the U.S. Forest Service, as well as support agencies, such as the U.S. Environmental Protection Agency, the U.S. Geological Survey and the U.S. Army Corps of Engineers, to coordinate their abandoned hardrock mine cleanup efforts with state efforts to avoid redundancy and unnecessary duplication, and to employ the expertise and knowledge of state AML programs.

3. Western Governors urge Congress to designate a dedicated source of funding for the cleanup of abandoned hardrock mines.

Coal Mines

4. Western Governors urge the Administration to uphold the intent of Congress to allow states to exercise discretion on the use of their AML grant funds to address high priority non-coal abandoned mine hazards and to return funds due “certified” states under existing law.

5. Western Governors urge Congress to adopt legislation to restore the flexibility under SMCRA for the states to use AML funds at both coal and high priority noncoal abandoned mine sites and to ensure appropriate liability protections remain in place.

C. GOVERNORS' MANAGEMENT DIRECTIVES

1. WGA staff will advance the policy positions stated above in appropriate venues as warranted and report to Governors and Staff Council on progress and impediments.

2. WGA shall transmit this resolution to Congress, the Secretary of the Interior, Administrator of the Environmental Protection Agency, the Director of the Office of Management and Budget and other appropriate parties as warranted.