The Confederated Tribes of the Colville Reservation

Prepared Statement of the
Confederated Tribes of the Colville Reservation

Presented by the Honorable Michael E. Marchand, Chairman
Colville Business Council

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The Hardrock Mining and Reclamation Act of 2007

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Good morning Chairman Costa, Ranking Member Pearce, and members of the Subcommittee. My name is Mike Marchand, and I am testifying today on behalf of the Confederated Tribes of the Colville Reservation ("Colville Tribes" or "Tribes"). I am the Chairman of the Colville Business Council, the federally recognized governing body of the Colville Tribes. The Colville Tribes appreciates this opportunity to testify regarding our experiences in dealing with proposed mineral development on federal public lands in which the Tribe has reserved rights, specifically a large portion of the Reservation that was opened to the public domain in the late 1800s that we refer to as the "North Half." It is this experience that shapes our view of how the General Mining Act of 1872 ("1872 Mining Law") needs to be reformed.

As explained in more detail below, the Tribes has learned firsthand that the 1872 Mining Law does not provide adequate environmental safeguards for fish and wildlife habitat, hydro-geologic conditions, water quality, and post-mining reclamation. In this regard, H.R. 2262 represents badly needed reform for most of these problems. However, the legislation does not in its current form address another shortcoming of the 1872 Mining Law: its failure to provide any consideration of special tribal rights and interests in the natural resources of federal public lands and the corresponding federal trust duty to safeguard those rights.

A brief legal history of the Colville Tribes and Colville Reservation is necessary to set the context for our experiences and views on the 1872 Mining Law and H.R. 2262. Under its Constitution, which was first approved by the Department of the Interior in 1938, the Confederated Tribes of the Colville Reservation is a single tribe and tribal government formed by confederating 12 smaller aboriginal tribes and bands from all across eastern Washington

State. The Colville Reservation today encompasses approximately 2,275 square miles (1.4 million acres) in north-central Washington State. The Colville Tribes has nearly 9,300 enrolled citizens, making it one of the largest Indian tribes in the Pacific Northwest. About half of the Tribes' citizens live on or near the Colville Reservation.

The North Half and Its Importance to the Colville Tribes

The Colville Reservation was established in the same year as the Mining Law, by the Executive Order of July 2, 1872. At that time, the Colville Reservation consisted of all lands within Washington Territory bounded by the Columbia and Okanogan Rivers, extending northward to the U.S.-Canadian border. As established by the Executive Order, the Colville Reservation encompassed approximately 3 million acres.

During the 1880s, the Colville Tribes came under increasing pressure to cede the North Half of the Colville Reservation, in large part because it was rich in minerals. A federal delegation was dispatched to the Reservation to seek a cession of the Tribes' lands. In 1891, many of the various aboriginal Indian tribes and bands of the Colville Reservation approved the Agreement of May 9, 1891 ("1891 Agreement"), under which the Tribes ceded the North Half, which consists of roughly 1.5 million acres. The North Half is bounded on the north by the U.S.-Canadian border, on the east by the Columbia River, on the west by the Okanogan River, and on the south is separated from the south half of the Colville Reservation by a line running parallel to the U.S.-Canadian border located approximately 35 miles south thereof.

The 1891 Agreement reserved to the Colville Tribes and its citizens several important rights to the North Half, including (a) the right of individual Indians to take allotments within the ceded territory, which allotments would be held in trust for their benefit and excluded from the public domain; (b) payment by the United States for the ceded lands of $1.5 million (one dollar per acre); and (c) express reservation in Article 6 of the Agreement of tribal hunting and fishing rights throughout the ceded lands, which rights "…shall not be taken away or in anywise abridged…" The reservation of these rights in Article 6, in turn, preserved instream and associated water rights for fish and wildlife that a federal appeals court decision, in the *Walton* case discussed below, found were secured in the 1872 Executive Order.

Congress, however, did not immediately ratify the entire 1891 Agreement or provide the payment promised to the Colville Tribes. Instead, in the Act of July 1, 1892, 27 Stat. 62, it restored the North Half to the public domain and opened the lands to settlement. Then, in the Act of February 20, 1896, 29 Stat. 9, Congress provided that the mining laws of the United States, including the 1872 Mining Law, would apply throughout the North Half. Thus, Congress opened the North Half to the public domain and applied federal mining laws to the North Half *before* it actually paid the Tribes for the ceded lands. Congress did not fully ratify the 1891 Agreement to affirm the hunting and fishing rights or pay the Colville Tribes for the North Half until it passed a series of appropriations acts from 1906 through 1910.

The history of the ratification of the 1891 Agreement and the nature of the tribal rights reserved are set forth in the U.S. Supreme Court's decision in *Antoine v. Washington*, 420 U.S. 194 (1975). The specific issue in *Antoine* was whether the State of Washington could regulate hunting and fishing on the North Half by citizens of the Colville Tribes. The Court held that the hunting and fishing rights reserved by the Colville Tribes in the 1891 Agreement were in full force and effect, and that Congress's method of ratification had the same Supremacy Clause effect as a treaty to pre-empt State regulation of tribal hunting and fishing activities. Also, it is important to note that the U.S Court of Appeals for the Ninth Circuit has examined the events leading up to the establishment of the Colville Reservation under the 1872 Executive Order, and has emphasized the elements of a bargain, analogous to a treaty, between the Indians and the United States. *Confederated Tribes of the Colville Reservation v. Walton*, 647 F.2d 42, 44, 46-7 (9th Cir. 1981). In *Walton*, the Court concluded that one of the inducements for the Indians to confine themselves to the Colville Reservation (and give up valuable tracts of land with improvements outside the Reservation) was to secure access to traditional salmon fisheries in the Columbia River and its tributaries. Accordingly, the Court found that the 1872 Executive Order reserved federal water rights to the Tribes for fisheries preservation and irrigated agriculture. 647 F.2d at 47-48. As noted above, the Tribes' federal water rights for fish and wildlife were preserved for the North Half in the 1891 Agreement.

Today, the North Half remains a critically important subsistence and cultural hunting area for Colville tribal citizens. The area is remote and mountainous, with substantial forest resources, much of it in federal public lands administered by the U.S. Forest Service or the Bureau of Land Management. The Colville Tribes exclusively regulates North Half hunting by tribal citizens in much the same manner as it regulates on-Reservation hunting, and coordinates with the Washington Department of Fish and Wildlife for habitat and population surveys. Deer, elk, and moose from the North Half continue to be an important source of food for tribal families. Although the construction of the Grand Coulee Dam in 1940 immediately eliminated salmon from the Columbia River on the North Half, salmon are still present in the entire length of the Okanogan River and the Tribes is actively working to restore their abundance in that river.

The fish, wildlife, and ground and surface water resources of the North Half are of critical cultural and legal importance to the Colville Tribes. The federally protected rights in these resources that the Tribes has preserved from its original ownership of the North Half, together with the potential impact within adjacent Colville Reservation watersheds from development activities on the North Half, make the Tribes' interests in this area unique. And of course, mineral development entails a very high level of environmental impact.

Mining Development in the North Half in the Last Decade

During the 1990s and continuing today, the Colville Tribes has been very actively involved in responding to attempts to develop a gold deposit located on Buckhorn Mountain, near the Canadian border within the North Half. In the early 1990s, Battle Mountain Gold

Company proposed the Crown Jewel project—a huge open-pit, cyanide leach process mine for the Buckhorn Mountain and its vicinity. This proposal was governed by the 1872 Mining Law.

The Colville Tribes actively opposed the Crown Jewel proposal because it would have caused great disruption to wildlife in an area where many tribal members hunt and would have permanently altered the geohydrology and water quality in the mine area and adjacent streams. It would have created a large, permanent pit lake of dubious water quality, and left hundreds of tons of potentially toxic waste rock and tailings in the vicinity of the mine. This would have adversely affected our hunting, fishing, and water rights under the 1891 North Half Agreement, and also seemed in direct conflict with the basic cultural values of the Colville Tribes.

In opposing the Crown Jewel proposal, we filed at least two major lawsuits in federal court, a patent protest with the Department of the Interior, and two appeals in Washington State administrative and judicial tribunals. Ultimately, Washington State law provided the basis for defeating the open-pit proposal. A state administrative appeal board reversed the 16 water rights permits that had been granted by a state agency, on the grounds that the company's mitigation plan in fact did not mitigate for streamflow depletions and shifts in groundwater behavior. *Okanogan Highlands Alliance, Colville Tribes, et al. v. State of Washington, Dept. of Ecology et al.*, Pollution Control Hearings Board, State of Washington, No. 97-146 (Final Findings of Fact, Conclusions of Law and Order, Jan. 19, 2000). That same appeal tribunal also found fundamental flaws in the company's proposed water quality protection plans. The company ultimately decided not to pursue all its appeal opportunities for the adverse state decisions, and instead abandoned the open-pit proposal.

Despite success under State law, we were very disappointed to discover during the course of our efforts against the Crown Jewel proposal that federal agencies—including the Bureau of Land Management, but in particular, the U.S. Forest Service—took the position that the 1872 Mining Law all but gave the company a right to mine in whatever manner it deemed necessary to promote its economic interests. At best, the Forest Service paid lip service to the concept that as the lead federal agency responsible for the Environmental Impact Statement, it also had a special trust responsibility to safeguard the Colville Tribes' rights and interests in the natural resources of the North Half. The Forest Service took the position that its special trust responsibility was in fact not special at all, and could be entirely satisfied by complying with other federal statutes related to natural resources protection. The federal courts essentially agreed. *Okanogan Highlands Alliance et al. v. Williams*, 236 F.3d 468 (9th Cir. 2000). In other words, a project that was found to be fundamentally flawed under state law triggered no red flags or trust responsibility concerns under federal law. This remains deeply troubling to the Colville Tribes, and serves as an example of why H.R. 2262 needs to include some provisions specific to the reserved rights of tribes.

More recently, the Kinross Gold Company has been pursuing an underground mine proposal for the Buckhorn Mountain gold deposit. Although it seems apparent that the underground mine would eliminate some of the more grossly adverse environmental impacts (for

instance, there will be no huge open-pit lake that would fill with water likely to violate Washington water quality standards for several heavy metals), this proposal still involves potentially serious adverse impacts to the Colville Tribes' interests. At this point, we have not launched an all-out campaign of appeals and litigation to block this project, but that does not mean we actively support the proposal or that we are satisfied it can be implemented without potentially serious harm. We are attempting to work with Washington State agencies to develop acceptable mitigation requirements for certain key permits that have not yet been issued. In general, the federal presence on the project is minimal compared to the open-pit proposal, in part because the lands for the project have been patented in the past few years. If H.R. 2262 had been the law governing the underground proposal, patenting would not have occurred and federal responsibilities would have been greater.

Mining Development on Tribal Lands

It should also be noted that since the late 1970s, the Colville Tribes has on three occasions formally considered development of its own mineral resources (which is governed not by the Mining Law but by statutes specific to Indian lands). In each case, however, the Tribes' governing body—recognizing the significance of the mining issue—has sought the input of tribal citizens. One such proposal involved a molybdenum mine at Mt. Tolman on the Colville Reservation. That project was initially approved by a referendum vote of tribal members in the late 1970s. The Tribes subsequently entered into a lease agreement with Amax Mining Co. (now an affiliate of the Phelps Dodge Corporation) to proceed with the project. Amax walked away from the project in the early 1980s, however, in response to a severe depression in the molybdenum market.

The recent rise in molybdenum prices has prompted renewed interest in Mt. Tolman. In 2006, the Tribes conducted another referendum vote of Colville tribal citizens for guidance on whether to revive the Mt. Tolman project. Despite the need for governmental revenue and jobs, the referendum was overwhelmingly rejected, and the Tribes' governing body has no plans at this time to consider it further. In addition, in the 1990s, the Tribes conducted a series of public meetings to ascertain the views of its citizens regarding gold development on the Reservation, again because of the potential for governmental revenue and jobs. The response at that time was also strongly against such development.

Recommendations for H.R. 2262

If H.R. 2262 had been the governing law for the Crown Jewel open pit proposal, there is no question that the federal agencies would have had to do more to identify potential impact on the natural resources of the North Half in which the Colville Tribes holds reserved rights, and to do more to require mitigation for those impacts. So this bill is undeniably a good effort at reform.

H.R. 2262, however, does not have any provisions (a) requiring mining applicants to identify potential tribal rights in the area to be affected by a proposal; or (b) requiring federal agencies to understand the nature of those rights and how they are currently exercised, or to ensure that mitigation is required for impacts to those rights.

Conclusion

The Colville Tribes has grave concerns about mining on the North Half, particularly under the terms of the 1872 Mining Law, and we have also been wary of proceeding with any mineral development within the Reservation (where the Mining Law does not apply). However, the Colville Tribes is not driven by an anti-mining ideology. We cannot rule out that the Tribes or its citizens may one day conclude that there is a way to have responsible mineral development on the Colville Reservation. We are pragmatists, not romantics or ideologues, and we appreciate from our experiences in managing our forest resources the value of sustainable natural resources development. For us, the key concepts are pragmatism and sustainability, consistent with the protection of basic tribal rights and values. Mineral development in the 21st century under a 19th century Mining Law is neither pragmatic nor sustainable.

The Colville Tribes appreciates the opportunity to testify. We will be providing the Subcommittee with our proposed changes to H.R. 2262 that will address the issues we raise in this testimony, and look forward to working with the Subcommittee on these and other issues affecting Indian tribes. At this time, I would be happy to answer any questions the Subcommittee may have.