The Hardrock Mining and Reclamation Act (HR 2262)

Energy and Minerals Resources Subcommittee
Committee on Natural Resources
United States House of Representatives

Statement of the Nevada Mining Association
Russ Fields, President

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Elko, Nevada

Good morning, Mr. Chairman. I am Russ Fields, President of the Nevada Mining Association. On behalf of the association, I thank you for this opportunity to discuss our thoughts and concerns about the legislation you are considering, HR 2262. I particularly appreciate that you are bringing these hearings to the communities that would be most affected by the proposed Hardrock Mining and Reclamation Act.

If you will permit me to begin on a personal note, I'd like to take you back in time for a moment – thirty years or so, to be exact. I was just a couple of years out of college with a degree in geology from Nevada's Mackay School of Mines, and I was testifying on many of the same issues we are facing today before a congressional subcommittee in Battle Mountain, Nevada. The topic then was the Federal Public Lands Management Act, also known as the Organic Act. It had followed publication of a federal report on the nation's public lands, titled "*One Third of the Nation's Land*."

As you know, public lands in Nevada are somewhat more than one-third of the state's land – approximately 87 percent. Not surprisingly, public lands, and the uses to which those lands are put, are an important issue for all of us in Nevada.

More than 30 years have passed since my first congressional testimony. I'm no longer a newly minted geologist – indeed, I've recently announced my retirement. I've spent my entire career working in or around this industry, as an employee, as a state regulator, and most recently, as an advocate for the mining association.

In the past 30 years, I've seen almost as many changes in the industry as I've seen in myself. Like many industries, we've had our share of mergers and acquisitions. We've also seen environmental advances, production improvements, new mining exploration, and changes in mining regulation. Much of that regulation has been embraced or even driven by the industry itself – reclamation, hazardous materials handling, mine safety, and, most recently, mercury emissions. Thirty years ago, the industry was firmly opposed to any changes to the General Mining Law. Today, the hardrock mining industry stands ready to work with Congress on reasonable, workable amendments which will update the law but maintain the viability of an industry so critical to this community, this state and this nation.

Some things haven't changed in Nevada since 1977: We still take public lands issues very seriously. And we take our stewardship of those lands equally seriously.

Mr. Chairman, I know you have already heard, or will hear, the concerns of mining companies and other interested parties about the proposed Hardrock Mining and Reclamation Act. So, I am not going to offer an exhaustive analysis of the bill, but rather, would like to focus my comments on just a couple of items: First, the environmental and reclamation requirements; and second, the royalty provisions.

A. The Environmental and Reclamation Provisions of H.R. 2262 are Unnecessary

Let me first address the extensive environmental and reclamation requirements that would be imposed by H.R. 2262 on hardrock mining operations in Nevada and throughout the West. As the Subcommittee may be aware, under current law, companies that engage in hardrock mining and related activities on the public lands are already subject to numerous federal and State environmental, ecological, and reclamation laws and regulations to ensure that operations are fully protective of public health and safety, the environment, and wildlife. These include: (a) the so-called "3809 regulations" administered by Bureau of Land Management and the "Part 228 regulations" administered by the Forest Service that impose comprehensive environmental, reclamation and financial assurance requirements on mining companies; (b) all of the major federal environmental laws administered by the U.S. Environmental Protection Agency ("EPA") and/or delegated States (including NEPA, the Clean Air Act, the Clean Water Act, RCRA, CERCLA and EPCRA); (c) comprehensive Western State laws and regulations dealing with protection of groundwater and imposing requirements on the management and disposal of solid waste; and (d) wildlife protection statutes administered by the Department of the Interior and/or States (including the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald Eagle Protection Act).

In 1998 -- prior to BLM's 2001 amendments to the 3809 regulations to make them even stronger and more comprehensive -- the National Academy of Sciences' National Research Council, at the direction of the Congress, assessed the adequacy of the then-existing regulatory framework for hardrock mining to assure environmental protection. After conducting a comprehensive review, the National Research Council concluded that the existing laws were "generally effective" in ensuring that mining operations provided "mining-related environmental protection."[1]

The National Research Council's conclusions certainly ring true in Nevada. Our State imposes comprehensive requirements relating to the design, operation, closure, reclamation, and wildlife protection at all hardrock mining facilities. Pursuant to Nevada's environmental regulations (which are applicable on public as well as private lands), in areas of the State where annual evaporation exceeds annual precipitation (which include almost all areas where hardrock mining takes place), facilities must achieve zero discharge to surface water. NAC §§445A.433(1)(a). Moreover, with minor exception, groundwater quality cannot be lowered below drinking water standards (including drinking water standards for heavy metals), and the concentration of weak-acid dissociable ("WAD") cyanide in groundwater cannot exceed 0.2 ppm. NAC §445A.424(1). Mining operations must draw up and implement a program to monitor the quality of all groundwater and surface water that may be affected by their operations. NAC §445A.440. If monitoring reveals that any constituent has been released into

[1] Hardrock Mining on Federal Lands, National Research Council, 89-90 (1999).

groundwater or surface water, the operator must conduct an evaluation, and if appropriate, undertake remedial measures. NAC §445A.441.

Land-based process components must comply with very stringent design standards, including standards dealing with engineered liners, leachate collection systems, and secondary containment systems. NAC §445A.434-435. There are also stringent rules regarding the treatment and monitoring of waste facilities and/or heaps at closure. See NAC §445A.430-.431.

Nevada has also enacted and successfully implemented a law specifically designed to protect wildlife from dangers posed by artificial ponds containing chemical substances, including cyanide-bearing ponds that are often located at gold mining facilities. See NRS § 502.390. The law and its implementing regulations impose permit, fencing, cover, containment, chemical neutralization, and reporting requirements tailored to the specific artificial ponds operated by the permittee and require the permittee to take all measures necessary to preclude any wildlife death due to contact with the artificial pond. See NAC §502.460 et seq.

The State has also adopted comprehensive reclamation regulations designed to ensure that, after closure, lands used for mining operations are returned to a safe stable condition for productive post-mining use. The reclamation law and its implementing regulations specify, in some detail, the factors that must be addressed in a reclamation plan and that must be addressed by the regulators before approving that plan, to ensure that public health and safety and the environment are fully protected once mining operations have ceased.

The Nevada reclamation law and regulations also require the operator to estimate the cost of implementing the reclamation plan as if the plan would have to be completed by a federal or state agency, and then to post financial assurance to assure that adequate funds will be available at the end of mining activities to assure that reclamation can be completed in accordance with the plan. NAC § 519A.350. Forms of financial assurance include trust funds, surety bonds, irrevocable letters of credit, insurance, and in some cases a corporate guarantee. A corporate guarantee cannot, however, be used to cover financial assurance for more than 75% of the cost of reclamation (NAC § 519A.350(7)); but in any event, in order to obtain a corporate guarantee, the operator must satisfy very stringent financial tests and must submit to annual review of its finances, in order to assure that it continues to meet that test. Id., NAC § 519A.382. The State has also set up a bond pool mechanism for smaller operators to obtain financial assurance for their mining operations. See NAC § 519A.510 et seq.

The comprehensiveness of Nevada's regulatory programs have been recognized by the U.S. Environmental Protection Agency. In a 1997 report, the EPA praised the Nevada regulatory program applicable to gold mining facilities as "the most advanced cyanide mill tailings facility regulatory framework" in the nation.[2] This EPA report discusses in detail the "extensive set" of Nevada regulations that "govern the design, operation and closure of mining facilities" in the State and how these regulations "ensure" that the "design and operation of [each] facility is appropriate for the physical, geological and

[2] U.S. Environmental Protection Agency, Office of Solid Waste, Nevada Gold Cyanide Mill Tailings Regulation §1.1 (1997).

hydrogeological conditions at the site."[3] Indeed, this EPA report concludes that, in virtually all respects, the Nevada regulations applicable to mining facilities are more protective of health and the environment then regulations that have been adopted by EPA for radioactive uranium and thorium mill tailings.[4] The conclusions in this EPA report are consistent with both the views of the National Research Council noted above and the views expressed in 1992 by EPA's Office of Pollution Prevention about the comprehensiveness of Nevada's regulatory programs.[5]

I should add that the mining industry has embraced -- not fought -- the enactment and implementation of these comprehensive environmental and reclamation laws and regulations. The reason is as I have said above: here in Nevada we take our stewardship of the public lands very seriously. For instance, in 1989, when Nevada passed the reclamation law, I was executive director of what was then the Nevada Department of Minerals. It shouldn't surprise anyone that I, as a state regulator, supported the measure. But it might surprise you to learn that representatives of major mining companies, as well as the director of the Nevada Mining Association, also testified in support. Back then, the director of the association had this to say:

"Reclamation is not new to Nevada mining. We are proud of the reclamation that has been, and is being, accomplished. . . Indeed, reclamation must be considered to be an integral part of mining itself."

As president of the association now, I can repeat without hesitation my predecessor's comments about reclamation: It's not new to Nevada, we're proud of what we're doing and what we'll continue to do, and we consider reclamation integral to mining.

Given the industry's concern that public lands be adequately protected, you may ask why the Nevada Mining Association would oppose the environmental and reclamation provisions in H.R. 2262. The reason is straightforward.

In view of the comprehensive federal and State regulations that already adequately ensure environmental protection and adequate reclamation of hardrock mining facilities, the Nevada Mining Association believes that there is no need to now engraft onto existing programs a whole new set of environmental and reclamation prescriptive requirements, as H.R. 2262 would do, that focus on the same environmental issues that are already dealt with adequately under existing laws. As the National Academy of Sciences found, the existing laws and regulations are fully adequate to ensure protection in all of these areas. Those laws and regulations already focus on the same environmental issues that are addressed in H.R. 2262, including soils; stabilization; hydrological balances; surface restoration; vegetation; excess waste; sealing; structures; cultural, paleontological and cave resources; road and structures; drill holes; leaching operations and impoundments; and fire prevention and control. Moreover, the existing laws and regulations have a proven track record, and are familiar to both operators and regulators. There is simply no need to require mining operators, and regulators, to learn a whole new set of rules, and to limit their discretion in ways not limited by current law,

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[3] Id., Sections 2.1, 2.2.1.

[4] Id. Table 2-1 and accompanying chart.

[5] See U.S. Environmental Protection Agency, Office of Pollution Prevention and Toxics, Cyanidzation Mining Initiative 30 (March 9, 1992) ('Nevada's regulations are considered to be among best and most comprehensive").

by imposing "one size fits all" prescriptive standards, as H.R. 2262 would do in all of these areas.

B. A Net Smelter Return Royalty is Unfair and Will Lead to Mine Closures.

The second issue I would like to discuss is the royalty provisions of HR 2262. The Bill proposes an eight percent net smelter return royalty on all future production of locatable minerals on federal lands. We at the Nevada Mining Association do not believe that this type of royalty fairly balances the need to provide a fair return to the public with the needs of the minerals industry. A net smelter return is effectively a gross royalty since the Internal Revenue Service does not allow deductions for direct mining costs. Various studies have concluded that this type of royalty would result in significant job losses, substantial revenue losses to State and federal treasuries, mine closures and discouragement of new mines.[6]

To a large extent, this is because in the hardrock mining industry, we have no control over price – ours is a commodity market. Accordingly, a gross royalty makes it very difficult to adjust to economic downturns, which, in turn, would make us susceptible to significant job losses and mine closures during difficult times. Obviously, the effects of mine closures and lack of new exploration and mine openings would also result in loss of state and federal tax revenues. In a rural area such as those in which most Nevada mining occurs, a mine closure is particularly devastating across all sectors of the economy – not just mining.

In contrast to a net smelter return royalty, a net income production payment based on production from new mining claims on public lands would provide the public with a fair return, but would also appropriately take into account the need to foster a strong domestic minerals industry. Such a payment could use a formula analogous to that used in the net proceeds of mine tax that has been in effect in Nevada since statehood. The net proceeds tax primarily funds the counties, cities, and school districts in which mining occurs, and that contribution is a significant one to these counties. In addition, the net proceeds tax provides millions of dollars every year to the state. Of course, this Subcommittee should not seek to impose a net proceeds tax on production, but rather, as noted above, a net income production payment or royalty, since the payment that should be required by any law approved by the Congress should only apply to production on public lands -- not to all production in the State.

Moreover, the net income production payment should only apply to claims located after the enactment of the production payment or royalty provision. Such an approach will protect financial expectations and sunken investments and prevent "takings" litigation.

Thirty years ago, I first had the privilege of addressing a congressional subcommittee in our state. I believed then, and I believe now, that mining is good for this state. We are partners in our community and good stewards of the land. We have led the nation in reclamation. We provide jobs and revenues to our schools and local governments.

The Nevada Mining Association does not oppose the development of a fair, predictable, and efficient national minerals policy through amendments to the Mining Law of 1872.

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[6] See Otto, Mining Royalties: A Global Study of Their Impact on Investors, Government and Civil Society. Washington DC: World Bank, 2006 at 3.

This association and its members stand ready to work with you to achieve this goal. But we strongly urge that, in developing that policy and those amendments, this subcommittee consider the long-standing and successful history of the net proceeds model and local regulation – both of which have enabled this industry and the communities in which it operates to thrive and contribute to this state's and the nation's welfare.

Mr. Chairman, it is an honor to present these views before you today.