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Oversight Hearing before the
Committee on Natural Resources
U.S. House of Representatives

On "Creating American Jobs by Harnessing Our Resources: Domestic Mining Opportunities and Hurdles"

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I appreciate your invitation to testify today. I am a law professor at the University of California, Hastings College of the Law, although this semester I am a visiting professor at Harvard Law School. I appear today as a private citizen, expressing my own views. I have worked on mining and public lands issues for nearly four decades, in government (including service as Solicitor of the Department of the Interior throughout the Clinton Administration and on the staff of this Committee), and in academia, and in the nonprofit sector. I have published books and many articles that address legal and policy issues concerning mineral development on federal lands.

I want to make four points:

First, mining is a very intense, industrial use of land. It can create serious conflicts with other land uses. Open pit mining, for example, destroys the value of lands for livestock grazing, logging, wildlife habitat and recreation. Practically all forms of mineral development can result in serious pollution, often long-term and very costly to mitigate. Surface and groundwater are especially at risk.

These concerns are hardly theoretical. Many of the most expensive environmental cleanups in U.S. history have resulted from mineral development, from the Macondo well blowout in the Gulf of Mexico in 2009 to the Zortman-Landusky gold mine in Montana (itself just one of dozens of Superfund sites found in mining regions around the country). The pollution can persist a very long time. During the California Gold Rush more than a century and a half ago, miners discharged about fifteen million pounds of mercury (more than ten times the amount of gold taken out) in the watersheds of the Sierra Nevada mountains to facilitate the extraction of gold. Much of that toxic heavy metal is still there, or has moved downstream to line the bottom of San Francisco Bay, now posted with signs to warn anglers against eating the fish they catch. We are, in other words, still paying every day a price for our ancestors' lack of foresight.

Decisions to open federal land to mineral activity need to be made with care and as much foresight as we can muster. Moreover, mineral activity that is allowed needs to be carefully regulated to protect the environment and other values of these lands.

The current controversy over whether to keep federal lands around the Grand Canyon in northern Arizona open to uranium claim-staking and mining under the Mining Law of 1872 epitomizes these concerns. This awe-inspiring natural landscape – "[t]he one great sight which every American should see," according to President Theodore Roosevelt, who first protected it for future generations using his authority under the Antiquities Act – now attracts visitors from all over the world. Tourism in the Grand Canyon region is responsible for many thousands of jobs, and is the economic engine driving the region's economy. The Colorado River flowing through the Canyon's heart is a primary source of drinking water for more than 26 million people in Arizona, California, and Nevada. Its waters also help irrigate hundreds of thousands of acres of farmland, and support wildlife habitat and recreational uses.

In the last few years, the area around the Canyon has been the scene of a "uranium rush." Companies have filed thousands of mining claims on federal lands, looking to develop uranium mines. Industrial mining for uranium here could pose grave threats to those who depend on the River. The leaders of the biggest municipal users of lower Colorado River water – the Metropolitan Water District of Southern California, the Southern Nevada Water Authority, and the Central Arizona Project -- have said that it is "critical that potential water quality effects are fully understood prior to the exploration and mining or uranium and other minerals in all areas proximate to the Colorado River and its tributaries," and that federal agencies overseeing mineral activity in the Lower Colorado River Basin "must use their authority to prevent any potential for deterioration of this critical water supply…." (Letter of May 3, 2011) These public servants wisely do not want a repeat of the California Gold Rush experience.

Given the threat uranium development around the Grand Canyon not only to water supplies, but also to tourism and the economy dependent on it, there is wide support for closing the federal lands in the River's watershed to uranium development. As a first step, Interior Secretary Ken Salazar has proposed to withdraw about a million acres in the area from further claim-staking under the Mining Law. This would be effective for twenty years, and would be subject to valid existing rights. Secretary Salazar's action is prudent, and I believe the House Appropriations Committee's recent action to strip him of authority to complete the withdrawal is unwise.

My second point is mostly a "good news" one. In recent decades, as the economic and environmental costs of un-regulated mining have become clearer and more widely appreciated, the federal government has made considerable progress addressing concerns about where and how mineral development should take place on federal lands. Painful lessons about the price of regulatory failure are, in other words, being learned. Today, generally speaking, federal law gives federal land managers ample authority to close special places to mineral activity when the costs to other values are too great. Moreover, with one exception noted further below, federal law general subjects mineral activities to regulation to prevent recurrences of the costly disasters that mark our history. Besides the federal land management laws, the environmental assessment processes of the National Environmental Policy Act (NEPA) can be especially valuable in forecasting environmental impacts of mining and laying out ways to avoid or mitigate such impacts. For the most part, federal regulators have implemented their authority responsibly, although the Macondo well blowout is a sad reminder that this is not always the case.

My third point is also a "good news" one. The minerals industry has, for the most part, learned how to live with this new regime while still profitably developing minerals on federal land. Of course they do not like being shut out of areas that they would like to explore, and they do not always welcome regulation. But they have generally successfully accommodated. It is worth underscoring this fact: Even as we have become more careful about where and how mining takes place on federal lands, the mining industry has *thrived*.

A few facts show this: Regarding oil and gas development, which takes place under the Mineral Leasing Act of 1920, as of FY 2010, more than forty million acres of federal land onshore are currently under lease. This acreage figure has been relatively steady for the past twenty years (in FY 1993, about 42 million acres were under lease). Also in FY 2010, more than 114 million barrels of oil and nearly 3 TCF of natural gas were produced from federal lands. This was the largest amount of oil for any single year since FY 1997, and the largest amount of gas for a quarter of a century (excepting one year). More applications for permits to drill were approved in FY 2010 than in all but six of the previous 25 years.

Regarding so-called hard rock mineral development under the Mining Law of 1872, well over one hundred million acres of federal land remain open to claim-staking. Gold production from western lands has increased at least *fivefold* since 1980. With the price of gold currently hovering at a record high of more than $1800 per ounce, and with the cost of production in the neighborhood of $300-400 per ounce, the gold industry is enormously profitable and healthier than it has ever been.

My last point is not a "good news" one. It has two parts. First, one particular corner of the minerals industry – the one operating under the Mining Law of 1872 -- has not conceded that the U.S. as landowner can fully regulate their activities to protect the public interest. Hard rock mining companies still take the position that filing a claim under this law gives them a "right to mine" which shields them from the full exercise of regulatory authority by the government. Specifically, they say that the U.S. can regulate them, but only up to a point – the government cannot say no to them. This right to mine is, they argue, embedded in the Mining Law itself – their "Magna Carta," as they like to call it. Their aggressive stance feeds resistance to federal regulation, and makes federal land managers very wary about pushing the industry to protect the environment. I have long argued that hard rock mining claimants do not have a "right to mine" under the current state of the law, and have urged Congress to confirm this by clarifying legislation. It is long past time for this industry to be treated like every other user of federal lands, fully subject to appropriate federal environmental regulation.

The second part of my "not good news" point is this: Even though the mineral resources on the federal lands are owned by all the people of the Nation, the sad fact is that we, the owners, do not receive an adequate financial return from their development. Federal law and policy bestows a number of subsidies on the minerals industry, such as the depletion allowance for oil and gas development and other kinds of favorable tax treatment, and royalty reduction in certain undeserved circumstances.

Even more glaring, companies developing gold, silver, copper and uranium on public lands pay no rental or royalty to the U.S. government. This free ride is something no other significant user of federal land enjoys; not utilities, renewable energy companies, the forest products industry, or ranchers. Moreover, everywhere else this industry operates on earth – on state or private lands here in the U.S., or everywhere abroad, -- it pays the owner something for resource it extracts. Yet for hard rock minerals on federal land, we are still operating under the same regime applicable to the California Gold Rush in 1849 – Uncle Sam's gold is free for the taking.

These subsidies and sweetheart deals are indefensible, especially at a time of growing insistence to bring the federal budget deficit under control. Meanwhile, every year the federal government spends many millions of taxpayer dollars to clean up abandoned, polluting mine sites.

For this reason, I strongly favor the Obama Administration's proposal to charge the hard rock industry no less than a 5% gross royalty on their production from federal land, and to require the industry to pay a reclamation fee to help pay for the cleanup of the many thousands of abandoned hard-rock mines found on western public lands.

There is ample precedent for these ideas. Even though it is subsidized in several other ways, the fossil fuel industry currently pays much higher royalties for mining federal coal and oil and gas than the hard rock industry would pay under the Administration proposal. Also, for the last third of a century the coal industry has paid a fee to help clean up abandoned mine sites. These cleanups create jobs, and their costs are appropriately borne by the industry that created the problem and their customers, the consumers of those minerals (which in the case of gold, is primarily jewelry purchasers).

Conclusion

The overriding lesson from these four points is this: The basic problem with mineral development on federal land today is not unneeded or unwise environmental constraints. Regulations can always be fine-tuned and improved, but they must be maintained to balance the benefits of mineral development against other values these lands provide, and to protect future generations from a legacy of poison.

Instead, the basic problem is that legislative reforms are needed to make this industry pay its own way, to provide a fair measure of compensation for the value of the public's minerals they extract, to assume full responsibility for the cleanup of past environmental damage and, in the case of hard rock mining, to clarify that the government has the regulatory authority it needs to protect the public interest.

Thank you for the opportunity to testify. I am of course happy to answer questions.