

August 17, 2007

Hon. Jim Costa
Chairman, Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
U.S. House of Representatives
Washington D.C. 20515

Dear Chairman Costa,

Enclosed are my replies to the questions you submitted to me following the Oversight Hearing on July 26 on H.R.2262, the Hardrock Mining and Reclamation Act of 2007.

I appreciate the opportunity to be of assistance in this important matter.

Sincerely,

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Mining Law Questions and Answers — John D. Leshy

Q 1. The BLM’s current “Part 3809” Regulations governing surface management of hard rock mining on federal lands have been in place since 2001. What is your assessment of the adequacy of these regulations in terms of protecting the environment in hardrock mining operations?

A. In my judgment, the current Part 3809 Regulations are not adequate, for several reasons.

First, early on the Bush (II) Administration weakened these regulations significantly, removing a number of key provisions that had been added by the Clinton Administration. Compare 65 Fed. Reg. 69,998 (2000) with 66 Fed. Reg. 54,837 (2001). One of the most important was to eliminate the federal government’s so-called “right to say no” to proposed hardrock mines that threaten devastating, uncontrollable effects on the natural and cultural resources of the public lands.

The Bush Administration acted on the basis of a Solicitor’s Opinion issued by my successor, which overruled an opinion I had issued in 1999. These legal opinions differed on how to interpret a key phrase in the Federal Land Policy and Management Act of 1976 (FLPMA), where Congress expressly amended the Mining Law to require the Interior Secretary to protect the public lands from “unnecessary or undue degradation” (emphasis added). 43 U.S.C. § 1732(b).

My legal opinion was that “or” means “or,” so that BLM has a responsibility to regulate hardrock mining on the public lands to protect against “undue” degradation, even if that degradation is regarded as “necessary” to mining. My successor’s legal opinion was that “or” really ought to be construed as meaning “and.” Thus, in his view, BLM has no authority to prevent hardrock mining that causes “undue” degradation if such degradation is “necessary” to mining.

Environmental groups asked a federal court to settle this dispute. After full briefing and argument, the court ruled that my reading of FLPMA was correct, and the Department has the responsibility to say no to proposed hardrock mines that cause “undue” degradation even if it is “necessary” to mining.

Somewhat bizarrely, however, the court decided not to set aside the Bush Administration's removal of the express "right to say no" from the 3809 regulations. Conceding the question was "indeed extremely close," the court was persuaded by the Department of Justice's argument that, even if my view was correct and the Bush Solicitor's view incorrect, those regulations need not contain an express right to say no because they could still be interpreted as allowing the Department to prevent "undue" degradation. Environmental groups could, the court reasoned, challenge Interior's implementation of those regulations if they believed the Department was allowing "undue" degradation in particular cases in the future. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 46 n. 18 (D.D.C. 2003). Neither side appealed this ruling.

In my judgment, this is too important a matter to be left in this current muddled state. H.R. 2262 would require the BLM and the Forest Service to deny approval of proposed operations unless they determine that "there will be no undue degradation of natural or cultural resources. (§ 303(d)(1)(H); see also § 301(1) (mineral activities shall be required to "protect the environment, public health, and public safety from undue degradation"). By disjoining "undue" from "unnecessary," H.R. 2262 makes clear that the government has the responsibility to say no to a proposed hardrock mining operation if it finds severe, un-mitigatable adverse impacts would be visited on other public resources and values. As I said in my statement to this Committee on July 25, I believe the public interest requires no less. Every other user of the public lands - oil or coal company, forest products company, rancher, hunter, angler, or hiker - is held to that common-sense standard. Hardrock mining, which has the potential to cause more serious disruption than any of these others, deserves no special exemption.

The current Part 3809 regulations have other shortcomings. For example, they inadequately address hardrock mining's potential for adverse impacts on surface and groundwater supplies, which can be considerable. The Ninth Circuit recently ruled that existing federal law did not require BLM to protect water supplies in approving hardrock mining plans. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006).

They also do not apply to national forest land, and the counterpart U.S.F.S. regulations (36 C.F.R. Part 228) are even weaker. This is not surprising, for the Forest Service was long reluctant to do any regulation of hardrock mining on national forests. Congress gave the U.S.F.S. express authority to regulate mining

to prevent destruction of the national forests way back in 1897 (see 16 U.S.C. §§ 478, 551), but the agency waited more than three-quarters of a century to adopt its first regulations on the subject . The regulations it finally adopted in 1974 were relatively tepid and have changed very little since, despite the vast changes in hardrock mining technology and practices.

Among other things, they claim authority only to “minimize” adverse impacts to the forests. In other words, the Forest Service, like the Interior Department, currently takes the position that the government cannot say “no” to a proposed hardrock mine on lands it manages that threatens dire environmental harm. The courts have agreed that existing law applicable to the Forest Service requires no more. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 4676 (9th Cir. 2000).

Neither the BLM nor the Forest Service do a very good job regulating small-scale mining operations - so-called “notice only” mines and wildcat explorations. These kinds of operations can devastate fish and wildlife habitat, because some of these operators mishandle toxic chemicals and use earthmoving equipment carelessly. Yet many times the government land managers (as well as other users of federal lands and the public) do not even get notice in advance of these operations, and compliance with laws like NEPA, the Clean Water Act or the Endangered Species Act are often wanting.

Finally, there is the matter of “bonding,” where the government requires operators to provide financial assurance for cleanup so that the taxpayer does not foot the bill if the operator defaults or goes bankrupt. The Part 3809 regulations are better than they used to be on bonding. (To its credit, the Bush Administration did not water down the Clinton Administration’s stiffening of bonding standards in the Part 3809 regulations intact.) The Forest Service regulations here too are not as good, leaving it with much more discretion on bonding.

As several governmental reports document, bonds are still sometimes set at inadequate levels, putting the taxpayers at risk. See, e.g., Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs (GAO # 05-377, June 2005) (reporting on a 2004 survey showing 48 mining operations on public lands had closed without cleanup since BLM began requiring financial assurances; in more than half the cases, the financial assurance was inadequate, to the tune of at least \$56 million, to cover the cleanup costs); see also Environmental Liabilities: Hardrock Mining Cleanup

Obligations (GAO #06-884T, June 14, 2006) (recommending hardrock mining be given a high priority in developing financial assurance requirements, because it presents taxpayers with an especially serious risk of having to pay cleanup costs, with some mine owners defaulting on multiple occasions, leaving taxpayers to bear cleanup costs); Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations (GAO #05-658, August 17, 2005); US EPA, Office of Inspector General, Nationwide Identification of Hardrock Mining Sites (Report No. 2004-P-00005, March 31, 2004).

Federal officials require financial assurances in the amount sufficient to repair and reclaim what they forecast will be the adverse effects of the proposed mine, but their forecasts often prove to be unduly optimistic. Recent studies show they often underestimate the amount of environmental degradation from proposed hardrock mines, particularly from disruption and pollution of water supplies. See Ann Maest and Jim Kuipers, Comparison of Predicted and Actual Water Quality at Hardrock Mines: The Reliability of Predictions in Environmental Impact Statements (2006); and Predicting Water Quality at Hardrock Mines: Methods and Models, Uncertainties, and State-of-the-Art (2006). The cost to repair or control that kind of damage can be high, and the bond amount -- which is often calculated simply on the basis of moving dirt, replacing soil and reestablishing a vegetative cover -- can be woefully insufficient to cover it.

Q2. Do you think there are any circumstances under which patenting, or transferring title to federal land to hardrock mining companies, is ever justified?

A. I have thought hard about this question over the years. At one time, I thought the answer was clearly no - patenting was never justified. But as I have continued to ponder the matter, I have come to a somewhat different conclusion, and believe that privatization of the federal lands involved in large hardrock mining operations can be justified under certain carefully defined conditions.

I start with the proposition that many, perhaps even most, major hardrock mining operations in the West are on lands in a mixture of ownerships - private, state and federal. Often the federal lands, particularly those where the ore body is found, may be mere slivers or odd-shaped parcels intermixed with others. See, e.g., Mineral Resources: Value of Hardrock Minerals Extracted From and Remaining on

Federal Lands (GAO/RCED-92-192, August, 1992).

Giving mining companies title to federal lands involved in these active, major, heavily capitalized mining operations would consolidate and simplify ownership and reduce regulatory and other complexities. After major hardrock mining operations cease, the lands involved often serve very little public value for other uses. Moreover, continuing federal ownership can cloud the responsibility for protecting public health, safety, and the environment from pollution endemic to these sites.

On the other hand, I can think of at least two federal interests that ought to be protected.

First, taxpayers have an interest in getting a fair return on valuable publicly-owned resources. But I see no reason why the U.S. could not protect this fiscal interest while still privatizing these lands. Congress could make privatization contingent upon the mining operation making a payment (lump sum or periodic) to the Treasury to capture an appropriate share of future income streams made possible by the use of these federal lands in these mining operations.

Mining companies have sometimes showed a willingness to entertain such arrangements and pay real money to simplify and secure their land positions. In the last Congress and again in this one, for example, legislation has been introduced to approve a complex series of land exchanges in Arizona between the United States and the Resolution Copper Company (a joint venture between BHP Billiton and Rio Tinto). According to news reports, Resolution is seeking to tap a large deep underground copper deposit. While it already owns or controls considerable land in the area, it wants title to some federal land (which may or may not include part of the ore body) to facilitate the operation. To gain title (through a proposed congressionally-approved exchange), Resolution is apparently willing to pay the United States substantially more than it would be required to pay to gain title under the Mining Law (assuming Congress failed to renew the annual moratorium on patenting, and assuming Resolution qualified for patents). That is, Resolution has acquired title to and is offering to trade to the United States considerable land of high conservation and recreational value. Not having examined the details of this proposal, I am not prepared to comment on whether the arrangement represents a fair return to the federal taxpayer. But it is an example of a major mining entity being willing to pay genuine value for privatizing federal land in order to facilitate

a major mining operation..

Second, the U.S. should ensure that privatization does not unduly threaten the environment in general, and nearby federal lands in particular. So long as the U.S. retains title to some of the lands affected, some environmental regulations and procedures that attach only to activities on public lands would continue to apply – such as NEPA, Endangered Species Act § 7, National Historic Preservation Act, Native American consultation and protection laws, and parts of the Clean Water Act. Here too, however, I believe it should be possible, with some creativity, to fashion ways to protect this federal environmental interest. For example, privatization could be conditioned on working out an agreement or compact between state and federal regulators that establishes a regulatory framework to allow this interest to be protected.

For these reasons, I think privatizing federal lands involved in major hardrock mining operations can be considered. I hasten to point out that Mining Law patenting has a long and sorry history of abuse. Most of the 3.2 million acres patented have in fact never been used, or used very little, for mining. Instead, they have been used for residential or other kinds of development, as private recreational retreats, spas, golf courses, and many other things. Given that record, any legislation that retains some opportunity to privatize lands in connection with hardrock mining must be very carefully drawn.

In short, I think privatization is an option worth considering, so long as it (a) is narrowly tailored to apply only to active or approved bona fide major mining operations; (b) retains for the U.S. the discretion to decide whether, under all the circumstances, the public interest is better served by deeding the land to the mining company rather retaining it in public ownership; (c) provides appropriate compensation to the United States for the fair value of the federal lands and minerals involved in the land being privatized; and (d) accommodates federal interests in protecting federal lands and resources not being privatized through some arrangement worked out in advance with state regulators.

Q3. Should uranium be treated separately from other Mining Law minerals?

A. I believe a very powerful case can be made that uranium ought to be treated more like the fossil fuels and other energy minerals. Coal, oil and gas, tar sands,

oil shale, and geothermal resources are all governed by leasing systems, most of them dating back to 1920. These industries have generally flourished under leasing systems, and the public's fiscal and environmental interests are (at least for the most part) adequately protected. Uranium is the only energy mineral treated differently, and only to some extent, for some federal uranium is already subject to leasing rather than to the Mining Law – a result of some post World War II withdrawals of some federal land on the Colorado Plateau which transferred jurisdiction to the Atomic Energy Commission (the Department of Energy has since succeeded to this jurisdiction). Moreover, uranium is often found in geological beds and thus shares characteristics with the other fossil fuels.

Furthermore, there is no justification for continuing to subsidize the domestic uranium industry (and with it the civilian nuclear power industry) by allowing publicly-owned uranium to be mined without a royalty or other payment to the Treasury. As with hardrock mining, past uranium mining and milling has left a big cleanup bill for the taxpayer. The government is currently spending many millions of dollars, for example, to move a large mill tailings pile away from the banks of the Colorado River adjacent to Moab, Utah, and has spent much public money in cleaning up uranium mines and mills in the past. And there is more to do. Consumers of uranium should pay these bills, not taxpayers. Finally, there is no strategic argument for subsidizing domestic uranium production (some of which might in fact be exported). Canada and Australia, two friendly countries, have abundant uranium resources.

For all these reasons, I believe the idea of simply putting uranium under the Mineral Leasing Act ought to be given very serious consideration. It would be a welcome part (but only a part) of Mining Law reform.

Q4. What improvements might be made to HR 2262? What are your thoughts on the bill's treatment of the royalty issue?

A. As I read H.R. 2262, it applies a royalty only to mineral ore extracted *from federal lands*. It does not apply any kind of rental (other than the claim holding fee already in law) or royalty to the use of federal lands to support minerals that have already been patented. Yet it is very common, as I noted in response to question 2, above,, for there to be a jumbled mixture of private, state and federal ownership of large hardrock mines. Sometimes all or most of the actual ore body is on non-

federal land (often, because it has already been patented under the generous terms of the Mining Law).

Even where the U.S. no longer owns any part of the ore body, the federal lands play a key role in bringing the ore body into production - by providing lands for mineral processing, for dumping waste rock and mine tailings, and so forth. The United States should, in my judgment, receive a return for the use of its land in these circumstances that reflects its contribution, both past and present, to the overall operation.

Suppose, for example, that the ore body of a large producing mine was 75% in private ownership, having been previously patented under the Mining Law, and 25% federal land. And suppose that thousands of acres of federal land are being used as waste rock dumps and tailings piles for the mining operation. It seems to me that a royalty or payment to the Treasury which is limited to the 25% of the ore body still in federal ownership is inadequate return to the public for this use of the public's resources. Mine operators who use thousands of acres of federal land as a dumping ground ought to pay something more than a nominal fee. Their payment ought to reflect some measure of the value these federal lands contribute to the entire mining operation. I would be happy to work with the committee to try fashion something that would do that.

Regarding other improvements in HR 2262, I would note that previous reform bills addressed various matters connected with claim location, claim size and the like, trying to simplify the red tape that has long plagued the on-the-ground implementation of the old Mining Law. I devoted some attention in my book on the Mining Law to some of these anachronistic- even silly, to modern eyes - features, such as the distinction between lode and placer claims. The Mining Law also contains, in my judgment, inadequate protection for legitimate explorers against claim-jumping by rival miners, and has some limits on claim size that seem arbitrary and anachronistic. HR 2262 is silent on these matters. It is worth considering whether to address these matters in reform legislation.

As I said in my written statement to the Committee, I believe the most important reasons to reform the Mining Law are to end the opportunity for wholesale patenting, to capture some revenue for the public which owns the minerals and land involved, and to hold the hardrock mining industry to the same kinds of environmental standards and regard for other uses of the federal lands that are

routinely applied to all other users of the federal lands.

If the legislation contains adequate measures on these three points, I believe it is appropriate for the Congress to consider and incorporate any reasonable suggestions the hardrock mining industry has to make the Law more simple and efficient from its perspective. The Congress should, however, take care to ensure such improvements do not undermine or defeat the thrust of the legislation on the three most important points.

Finally, I have one other suggestions for improvement in H.R. 2262. Section 307 is a generally thoughtful attempt to mesh federal and state regulatory authority and responsibility by providing for a “common regulatory framework.” §307(c)(2). As I noted in response to question 2, this is especially important because many large mines are on a mixture of federal and state or private lands. So long as federal lands are involved, however, the federal government needs to have the right unilaterally to inspect and enforce federal regulations, and this should not be left to implication, as it is now. Therefore, I recommend adding, at the end of this subsection, a new sentence along the following lines: “Under this common regulatory framework the United States shall retain the right independently to inspect the mining operations and to bring enforcement actions.”

Q5. At the hearing on July 26, the Administration suggested that applying a royalty to existing mining claims might be unconstitutional. What are your views on this? In your answer, please address generally the extent to which Congress’s authority to apply reforms of the Mining Law to existing mining claims might be limited by constitutional protections for private property.

A. There are very few limits on Congress’s ability to apply reforms to existing mining claims. First of all, it has long been clear - and reaffirmed in many decisions of the U.S. Supreme Court - that a mining claim located on the federal lands does not automatically carry with it a constitutionally protected property right. Mining claims where there has not yet been a “discovery” of a “valuable mineral deposit” are mere licenses to occupy the federal lands. Their legal status is no different from that of a hunter or angler or other recreational user of federal lands. “[I]t is clear that in order to create valid rights . . . against the United States [under the Mining Law] a discovery of mineral is essential.” Union Oil v. Smith, 249 U.S. 337, 346 (1919); see also Cole v. Ralph, 252 U.S. 286, 296 (1920).

The locator of a claim on which a discovery is lacking does have the right to exclude other miners from the claim, so long as the original locator is actively exploring for a mineral. This is the “*pedis possessio*” (foothold) doctrine recognized by the Supreme Court almost ninety years ago. Union Oil v. Smith, supra. But the locator has *no rights against the United States* until a discovery is made. This means the United States can change its policy or rules, and even effectively extinguish such claims, at any time before a discovery is made, without any obligation to pay compensation.

In practice, almost all mining claims are located in advance of discovery, to provide a foothold on public lands in order to explore for valuable mineral deposits; that is, people locate mining claims in speculation that a mineral might possibly exist and be profitably mined from the claimed land. But hopes and speculations, the courts have long made clear, are not tantamount to a “discovery.” See, e.g., United States v. Coleman, 390 U.S. 599 (1968); Sullivan v. Iron Silver Mining Co., 143 U.S. 431 (1892). Thus most mining claims do *not* carry with them constitutionally protected property rights, and Congress retains practically unfettered authority to change the rules regarding them.

With regard to mining claims that *are* buttressed by a “discovery” of a “valuable mineral deposit,” the analysis is a little different. These contain property rights that are good against the government, so that if the government utterly prevents or shuts down mining operations, the claimant may - and I emphasize *may* - have a legal argument for compensation. Whether the argument for compensation is successful depends on a case-by-case, fact-intensive analysis. See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). It is clear, for example, that the government retains ongoing regulatory authority over even unpatented mining claims that have a discovery and a property right. The government can tighten up regulations or impose new regulations if it has a reasonable case for doing so. The U.S. Supreme Court addressed this exact question in 1985, and its guidance is worth quoting at some length:

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the

legislature acts within its powers in imposing such new constraints or duties.
* * *

This power to qualify existing property rights is particularly broad with respect to the "character" of the property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, we have recognized that these interests are a "unique form of property." * * * The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). * * *

Claimants thus take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests. * * * In addition, the property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life.

United States v. Locke, 471 U.S. 84, 104-05 (1985). As the last-quoted sentence makes clear, the government retains the right to require a payment (whether labeled a tax, royalty, fee, or something else) from a holder of a mining claim on federal lands, even one with a discovery and a property right, as part of its continuing redistribution of the benefits and burdens of economic life.

Finally, it is important to note that the discovery creating a property right against the government is dependent upon the marketability of the mineral. This means it may disappear - and with it the property right against the government - as a result of changing market conditions and other factors relevant to marketability. As the Supreme Court has held, a "locator who does not carry his claim to patent . . . does take the risk that his claim will no longer support issuance of a patent." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

In this connection, the Interior Department and the federal courts have long held that, in determining whether a discovery exists, the cost of complying with environmental laws and regulations must be taken into account. The courts have recognized that adding environmental restrictions may in fact affect claim validity,

and thus in effect reduce or eliminate the government's obligation to compensate claimants. See, e.g., Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994) (“virtually all forms of [government] regulation of mining claims - for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage - will result in increased operating costs, and thereby will affect claim validity. However, the . . . case law makes clear that such matters may be regulated by the government”); Reeves v. United States, 54 Fed. Cl. 652 (2002) (person who located mining claims in a wilderness study area had no compensable property right to have a mining plan approved).

For all these reasons, I believe it is well settled that the government has nearly unfettered authority to apply newly enacted laws and regulations, including a royalty, to mining claims that are not accompanied by a discovery; that is to say, most of the several hundred thousand claims currently of record. It also has very considerable power to apply to new regulations to mining claims that have a discovery without creating any obligation to compensate the claimants.

Because of the strength of the case for congressional authority, I was wholly unpersuaded by the rather casual assertion in BLM Deputy Director Bisson's testimony on July 26 that a royalty on existing claims would raise constitutional “takings” questions. Given the analysis I set out here, I recommend the Committee give no weight to his assertion unless the executive branch – and I would include here the Department of Justice as well as the Solicitor's Office of the Interior Department – supplies the committee with a legal memorandum backing up Mr. Bisson's statement and refuting my analysis.