

Statement of John D. Leshy

Harry D. Sunderland Distinguished Professor of Law
University of California, Hastings College of the Law

at the

Hearing on H.R. 2262, the Hardrock Mining and Reclamation Act of 2007

Subcommittee on Energy and Mineral Resources
Committee on Natural Resources

U.S. House of Representatives

July 26, 2007

I appreciate your invitation to testify today, and I especially appreciate this subcommittee taking the initiative to address reform of the Mining Law of 1872. There is no more important task among the constellation of issues raised by our public lands, which encompass nearly one-third of the Nation's real estate and a much larger portion of its valuable natural resources, including minerals.

I appear here today as a private citizen, expressing my own views, and not representing any group. I have worked on Mining Law issues for thirty-five years, in academia, in government and in the nonprofit sector. I hope in this testimony to provide some larger perspective on the effort you have initiated with the introduction of HR 2262.

Calls to reform the Mining Law date back to a few years from its passage, and have been made by many U.S. Presidents, from Republicans like Theodore Roosevelt and Richard Nixon to Democrats like Jimmy Carter and Bill Clinton. Almost forty years ago, as Stewart Udall was stepping down after eight years as Secretary of the Interior, he called its repeal the biggest unfinished business on the Nation's natural resources agenda.

Signed into law by President Ulysses S. Grant four years before the telephone was invented, this antiquated relic is the last statutory survivor of a colorful period in the Nation's history that began with discovery of gold in the foothills of the Sierra Nevada in 1848. The mining "rushes" that ensued accelerated the great westward expansion of settlement. And they swept to statehood California (the golden state), Nevada (the silver state), Montana (the treasure state), Idaho (the gem state) and eventually Arizona (the copper state). The same era witnessed the enactment of numerous other laws filling out the framework for that great movement - laws like the railroad land grant acts and the Homestead Act of 1862. A generation later, Congress followed up with landmark laws like the National Forest Organic Act in 1897 and the Reclamation Act of 1902, and a generation after that, with the National Park Organic Act of 1916 and, in 1920, the Mineral Leasing Act and the Federal Power Act.

All of those other laws have long since been repealed, replaced, or fundamentally reformed, often more than once. Today the public lands and resources are managed under laws like the Federal Land Policy & Management Act of 1976, the Federal Coal Leasing Amendments of 1976, the Surface Management Control and Reclamation Act of 1977, the National Forest Management Act of 1978, the Reclamation Reform Act of 1982, and the Federal Oil and Gas Leasing Reform Act of 1987.

Amazingly, despite the fact that, since 1872, the population of the U.S. has grown more than seven-fold (from less than forty million to more than 300 million), the population of the eleven western states plus Alaska (where the Mining Law principally applies) has grown from about one million to nearly 70 million, and our society and economy have changed in ways beyond comprehension, the Mining Law has escaped fundamental overhaul.

It is not for lack of trying. It has long been recognized that the Mining Law is thoroughly out of step with evolving public resource management principles. Indeed, the first Public Land Commission created by Congress to assess public land policies recommended *in 1880* that it be thoroughly rewritten. That recommendation has been echoed by many blue-ribbon commissions since. There is widespread agreement that the Law's three most important shortcomings are as follows:

First, the Mining Law allows privatization of valuable public resources, at bargain-basement rates. This so-called patenting feature is the last vestige in federal law of nineteenth century public land disposal policy. Much abused for purposes that have nothing to do with mining, it has resulted in an area of federal land larger than the state of Connecticut passing into private ownership, much of it in scattershot inholdings that continue to complicate land uses throughout the West to this day. While Congress has since 1994 enacted appropriation riders to forestall new applications for patents, it must do so each year, or patenting resumes.

The fragility of these riders was driven home in the fall of 2005 by the now-infamous Pombo-Gibbons legislative proposal that would have lifted the moratorium on new patents and greatly liberalized the terms of patenting. That ill-conceived proposal - which passed the House but then died under a storm of protest - could have resulted in the privatization of more millions of acres of federal lands.

As long as privatization remains a core feature of the Mining Law, the temptation remains for future mischief-makers to try similar stunts. Patenting is not necessary to mine; indeed, the Supreme Court recognized in 1884 that the "patent adds little to the security of the party in continuous possession of a mine he has discovered or bought." Many large mines are found at least partly on un-patented federal lands. It is time for Congress to repeal, once and for all, the Mining Law policy allowing willy-nilly privatizing of the federal lands.

Second, the Mining Law fails to produce any direct financial return to the public. Mining companies are charged no rental, pay no royalty, and make no other payment that recognizes that the people of the U.S. own the minerals being mined. This is unique in two ways. First, virtually all other users of the public lands - oil and gas and coal developers, timber

harvesters, energy companies that run transmission lines across the federal lands, cattle graziers, and even, these days, hunters, anglers and other recreationists - pay the government something (in most cases, something like market value) for the publicly-owned resources being used or removed. Second, everywhere else hardrock mining companies operate on this earth --- on state or private lands in the U.S., and just about everywhere abroad – they pay royalties to the governments and others who own the minerals.

It is time for Congress to close this glaring loophole. Whatever justification might once have been offered for such a giveaway of public property - such as when gold had strategic value and the West was sparsely settled - has long since disappeared. Today 85% of the gold mined is used to make jewelry, and the West has long been the fastest-growing region of the country.

Third, the Mining Law results in inadequate protection of the environment and other uses of the public lands. All other users of the public lands who can cause significant environmental disruption are subject to a straightforward system of regulation which requires them to minimize the environmental effects of their activities and clean up any mess they create. And all other users are subject to the fail-safe authority of the government to say no to proposed activities that threaten major environmental harm which cannot be prevented or mitigated appropriately.

The Mining Law itself is utterly silent on environmental regulation. While it is the case that operations carried out under it no longer escape regulation, thanks to laws like the Clean Water Act, these other laws do not comprehensively address the myriad of environmental threats posed by hardrock mining (such as groundwater depletion and pollution and disruption of wildlife habitat), nor do they weigh the value of mining against other values and uses of the public lands. The hardrock mining industry has long used the silence of the Mining Law on such issues to stoutly contest the reach of the government's authority over its activities.

The industry has long had powerful allies in the government on these matters. For example, just within the last few years my two immediate successors as Solicitor of the Interior Department issued legal opinions agreeing with the industry that the Mining Law hamstring government authority. One concluded that the government lacks authority to say no to Mining Law hardrock mining operations proposed for the public lands even if they pose huge threats to the environment. Another concluded that the Mining Law gives the mining industry the right to use as much public land as it thinks it needs as a dumping ground for the residue of its vast hardrock operations - operations which these days can involve hundreds of millions of tons of waste from gigantic open pits several miles across and a mile or more deep. It is no wonder that the federal land management agencies continue to feel cowed when they contemplate exercising regulatory controls over this industry.

Mining is a dirty business, and must be carefully controlled to prevent environmental disasters. History teaches not only that things can go bad with hardrock mining operations, but when they do, the costs to repair the damage can be enormous. Well over a century of

mining under the Mining Law of 1872 has saddled the Nation's taxpayers with a cleanup cost for thousands of abandoned mines that, according to some estimates, approaches *fifty billion dollars*. While the industry is now subject to some regulation, bad things still happen. Montana and U.S. taxpayers are paying millions of dollars to clean up the Zortman-Landusky mine in Montana – a mine which was approved under so-called “modern” regulatory standards that the industry argues are adequate and don’t need strengthening.

It is long past time to close these regulatory loopholes and eliminate these ambiguities so as to make clear to all in the industry – as well as to federal land managers -- that the hardrock mining industry will be held to the same standards, and be subject to the same kinds of regulatory authority, that apply to all other users of the public lands.

About fourteen years ago, the House of Representatives handily approved a comprehensive reform proposal introduced by Chairman Rahall and others. That effort nearly succeeded, failing in the last hours of the 103rd Congress. In the years since then, much has changed. Today, Mining Law reform is both more imperative and, in my judgment, more achievable. I’d like to take a few moments to explain why.

First, the industry structure, operations and economic impact have evolved considerably. The domestic hardrock industry now produces much more gold than it ever did - the U.S. is the third leading producer in the world. And the industry is heavily concentrated, with many fewer companies and many fewer mines than ever before. More than four-fifths of U.S. gold production now comes from a single state - Nevada. The four largest mines, all in Nevada, account for well over half the total domestic production. The thirty biggest mines (more than half in Nevada, including twelve of the fifteen largest) yield 99% of total production. Barrick Gold, a Canadian company, is the biggest, accounting for about 40% of domestic U.S. (and 8% of world) gold production. Production of copper and other precious metals are similarly concentrated. Moreover, the hardrock industry now operates with such ruthless efficiency that it employs far fewer people than it used to. Its workers may be relatively well-paid, but they are far fewer in number and much more geographically concentrated than they ever were.

In the meantime, the economies of the western states have evolved rapidly away from their historic roots dependent on resource extraction. Today the regional economy where the Mining Law applies - the western states in the lower 48 plus Alaska - has changed dramatically. While mining used to be a dominant industry in many western locales, today in most places its impact is small, even minuscule. The west is now the most urban and fastest growing region in the country. Moreover, its dynamic growth and economic health are fundamentally linked to the quality of life provided by the open spaces and recreational amenities of the public lands.

As a result, the politics of the region have changed at the ground level. Westerners are increasingly unsympathetic to the idea that the hardrock mining industry deserves these special exemptions from the laws and policies that apply to everyone else. It is not surprising, then, that when the mining

industry seeks to exploit its favored position under the Mining Law, more and more local people -- ranchers, hunters, anglers, retirees, land developers, tourist industry officials, municipal water providers and other local government officials – are asking why this nineteenth century policy still exists. And their concerns are growing because soaring mineral prices, particularly for gold, copper and uranium, have led to a new rush of claimstaking under the Mining Law in areas with high values for other uses.

People in the west are also more familiar than most with the consequences of failing to control the industry. They live with the thousands of abandoned mines scattered throughout the region, and are familiar with the sorry legacy of polluted streams and disrupted landscapes that will require billions of dollars to repair. And they resent the fact that, under the current regime, the dollars to pay for this cleanup will come more from taxpayers than from the industry that created the mess.

Another noteworthy change in recent years is that, for the first time, the hardrock mining industry is facing some pressure to reform from the demand side - the jewelry industry that consumes much of its product. With leadership from Tiffany and other major jewelers, this movement has helped persuade some major mining companies, concerned about their reputations as well as their impacts, to work to improve their practices and make other accommodations to modern social and environmental values. In short, the industry is no longer so monolithic and so reflexively hostile to change.

It bears repeating that the H.R. 2262's reforms do no more than put in place practices and policies that oil and gas operators, coal miners, electrical utilities, ski areas, and other intensive users of the federal lands have operated under quite successfully for decades. I have no doubt that the innovative, progressive companies in this industry – and there are some, who have flourished around the world by being so – will adapt readily to such reforms, just like other public land users have.

I am also confident that reforming the archaic Mining Law will not - as some industry spokespeople have ritually maintained - put an end to the domestic hardrock mining industry. Every year Canada's Fraser Institute surveys mining industry executives and uses the results to rank the most favorable jurisdictions in the world for hardrock mining, considering a variety of factors, including political stability. The American West is always at or near the top of the rankings. Furthermore, skyrocketing mineral prices means the industry is thriving as never before, and any modest increase in production costs that might result from reforms like H.R. 2262 can readily be absorbed.

Once again, I commend your leadership for taking up this important issue. You have the best opportunity in a generation to achieve a landmark legacy in public land policymaking. I stand ready to help any way I can to move this forward, and I would be happy to answer any questions you may have.