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Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests, and Mining

Hearing to Receive Testimony on Pending Legislation
S. 1281 and S. 1742

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Chairwoman Cortez-Masto, Ranking Member Lee, Chairman Manchin, and Members of the Subcommittee, thank you for inviting me to appear before you to offer the views of Barrick Gold Corporation on S. 1281, the Mining Regulatory Clarity Act of 2023, and S. 1742, the Clean Energy Minerals Reform Act of 2023. S. 1281 is an important piece of legislation. I appreciate Chairwoman Cortez-Masto's hard work to get the bill to this hearing and I am pleased to be here to support it.

Barrick is the second largest gold producing company in the world and biggest gold producer in the United States. Barrick has gold and copper mining operations and projects in 13 countries in North and South America, Africa, Papua New Guinea, and Saudi Arabia. Barrick has also owned and operated mines in Australia during my tenure with the company. Accordingly, although I am primarily a U.S. Mining Lawyer, I am familiar with the mining legal and fiscal regimes in other mining jurisdictions around the world.

Most of our U.S. gold production comes from Nevada where we operate Nevada Gold Mines LLC, a joint venture of Barrick and the Newmont Mining Corporation. Nevada Gold Mines is the largest gold-mining complex in the world, with more than 7,000 employees and 4,000 contractors, who employ thousands more people, in Nevada and around the country. These jobs pay average annual wages of $94,000 – higher than any other industry in Nevada.

Most of Nevada Gold Mines' operations take place on unpatented mining claims on public lands managed by the Bureau of Land Management. About 85% of the land in Nevada is owned and managed by the Federal Government, more than any other state. Not all of this federal land in Nevada is open to mining exploration and development. About 22 percent of the State is withdrawn from mineral entry and another 10 percent has been proposed for withdrawal for Greater Sage Grouse management. The dominance of federal lands in Nevada means that the Mining Law is more important in Nevada than in any other state.

Before retiring as Barrick's General Counsel in 2022, I worked for Barrick for 25 years and was an in-house lawyer in the gold mining industry for 30 of the 38 years I have been practicing law. I also served as Barrick's global Vice-President of Environment for three years. I am familiar with almost every aspect of this company's U.S. operations, including the Nevada Gold Mines joint venture. I continue to serve as a Senior Advisor to the company.

The Mining Law

In my career I have participated in many administrative and Congressional debates and far too much litigation concerning the Mining Law. I reject the often-repeated criticism that the Mining Law should be changed because it is old. It was signed into law in 1872, the same year as the act that created Yellowstone National Park.

The Mining Law has survived so long for a simple reason: because it does what it was designed to do very effectively. The Mining Law is a land tenure law. It incentivizes the discovery and production of American mineral resources on federally owned lands. It also governs the relationships between claimholders and the U.S. government as paramount title holder, and between competing private claimants. The Mining Law can continue to function effectively if Congress passes the Mining Regulatory Clarity Act of 2023 to restore the longstanding interpretation and application of the law.

We have recently passed through an era in American history when not everybody thought it was a good idea to incentivize mining. During the last 40 years of unprecedented globalization, American businesses could obtain metals and metal products from any number of countries around the world. Mining exploration dollars and capital investment went to countries where it was easier or more attractive to mine for various reasons, including lower costs, especially labor, faster permitting timelines, and even in some cases government subsidies. It was cheaper to import minerals than to find and mine them in the United States. Some began to believe that in a global economy, a domestic mining industry was unnecessary. Congress closed the Bureau of Mines, and policymakers paid scant attention to the health of the domestic mining industry. At the same time, those who opposed mining, particularly on public lands, took the opportunity to attack the Mining Law as a problem to be resolved and sought to minimize domestic mining.

I hope we can agree that those days are over. Today, many of the minerals we need for energy, our economy and defense are produced in countries that cannot be trusted to remain good trading partners, or that don't adhere to American labor, environmental, and other standards. The President and a bipartisan majority in Congress agree that America once again needs to incentivize the production of domestic mineral resources. It is in the economic and security interest of the United States to do so. There is no dispute that we need reliable domestic supplies of minerals for economic development, electric vehicles, wind turbines, solar panels, semiconductors, medical technologies and treatments, mobile phones, computers, and satellites. We also cannot ignore the increasing need for minerals in national defense, including for vehicles, traditional weaponry, high-tech weaponry and munitions. Congress has appropriated billions of dollars to finance development of domestic mineral supplies for these uses.

We should not be drawn into a debate about which minerals matter the most or somehow think that different economic or regulatory schemes for different minerals would make sense. One broad lesson from the emerging energy economy of the last ten years and the overnight recognition of the importance of lithium (as an example) is that we do not know which minerals will become vitally important to our nation's economy and security in the future. For example, gold is widely used in space exploration because of its extremely advantageous properties of heat and corrosion resistance and high reflectivity. With China's view that the U.S. is militarily and economically vulnerable to China's space-directed initiatives, we cannot afford to create unneeded obstacles to domestic production.[1]

The Mining Law should continue to provide the land tenure framework for this renewal of domestic mineral exploration and production. I recognize the Mining Law is not perfect, and parts of it can be updated, but that is not unusual. Congress has amended the Mining Law many times in the past one hundred and fifty years, and as recently as the 1990s, when it ended patenting and added claim maintenance fees.

Barrick has supported updates to the Mining Law – including the imposition of a reasonable net royalty – since the early 1990s and continues to support needed changes. But we don't endorse change for the sake of change. We support a reasonable ***net*** royalty – this is long overdue – and other changes that will streamline the Mining Law, encourage exploration and bring more American mines into production. But here is the most important thing: changes to the Mining Law cannot make it more difficult to find and mine minerals or lessen or remove the incentives that draw mining capital to the United States. The Mining Law must unleash American brainpower and entrepreneurial spirit again to solve the riddles of mineral discovery and with speed and agility meeting future production needs for whatever minerals are necessary at the time for economic or national security. This is exactly what the incentives and self-initiation principle of the Mining Law do best—encouraging exploration and enabling production of whatever American minerals are needed at any given time.

Those are the standards by which any proposed Mining Law amendments should be measured. The purpose and effect of any changes to Mining Law must be to increase supplies of domestic minerals. If Congress makes it harder to find minerals and get mines into production, there will be less mining in the United States and we will not produce the minerals necessary for a successful carbon neutral transition and for our national security and to sustain the high quality jobs and taxes that mining provides, often in communities with little other economic opportunity. If royalties and fees are excessive, and permitting is prolonged by uncertainty and litigation, mining will happen in other countries, not here. It cannot be stated more simply than that.

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[1] "China's goal to establish a leading position in the economic and military use of outer space, or what Beijing calls its 'space dream,' is a core component of its aim to realize the 'great rejuvenation of the Chinese nation.' In pursuit of this goal, China has dedicated high-level attention and ample funding to catch up to and eventually surpass other spacefaring countries in terms of space-related industry, technology, diplomacy, and military power. … China views space as a critical U.S. military and economic vulnerability, and has fielded an array of direct-ascent, cyber, electromagnetic, and co-orbital counterspace weapons capable of targeting nearly every class of U.S. space asset." U.S.-China Economic and Security Review Commission, Chapter 4, Section 3, "*China's Ambitions in Space: Contesting the Final Frontier,*" 2019 Annual Report to Congress, November 2019, 359-60, https://www.uscc.gov/annual-reports.

Efforts to Make the Mining Law Unworkable, Department of Interior Response, and Litigation

In the past, ***some*** opponents of mining attacked the Mining Law because they didn't want mining to happen, particularly on public lands. There is no sugarcoating that reality. Some Mining Law reform efforts were (and still are) ***intended*** to reduce the amount of mining that happens in the United States. The Subcommittee should beware of reform proposals that make it more difficult and more expensive to mine, reduce lands available for exploration and mining, or that increase litigation and delay.

Part of the long-term strategy for mining opponents has been to reduce the public land available to support mining—lands for uses such as construction and operation of processing facilities, storage of waste rock or tailings, ore and soil stockpiles, truck shops, powerlines, pipelines, storage ponds, roads—all of the infrastructure that is necessary to get the ore out of the ground and turn it into a useful product. In the legal debate, these land uses have come to be called "ancillary" uses or activities, but they are absolutely essential for mineral production.

Two notable critics of the Mining Law— Interior Secretary Bruce Babbitt and his Solicitor, John Leshy – made legislative reform of the Mining Law a priority in the early 1990s. Ultimately their efforts failed. My view was that mining opponents were unsatisfied with the final proposed legislation. Though it offered a royalty, it did not include enough restrictions on mining on federal lands or create a completely separate set of environmental restrictions for mining. In short, they wanted more.

Following that legislative failure, Secretary Babbitt and Solicitor Leshy announced that they would seek to accomplish as much of the reform package as possible through administrative action.[2] Key components of that administrative package were two Solicitor's Opinion that restricted the lands available for ancillary uses. These opinions put into action a mining law strategy advocated by Solicitor Leshy before he became Solicitor, when he said that "it might even be appropriate for the Interior Department and the courts to **consciously reach results that make [the Mining Law] unworkable"**[3] in order to force reform. In other words, it might be necessary to break the Mining Law so that Congress would be forced to act. Those opinions planted the legal seeds that bring us all to this hearing room today.

The first prong of the effort to make the Mining Law unworkable involves the use of mill sites. In 1997, when Solicitor Leshy issued an opinion concerning the patenting and use of mill sites.[4] The Mining Law allows location and patenting of mill site claims of up to five acres, provided that they are 1) nonmineral, and 2) used for mining and milling purposes. The Millsite Opinion announced that the Department of the Interior should not approve patents or plans of operations that included a greater number of mill sites than associated lode claims. In other words, the

[2] See Patrick Garver and Mark Squillace, Mining Law Reform—Administrative Style, 45 *Rocky Mtn. Min. L. Inst.* 14-1 (1999).
[3] John D. Leshy, Reforming the Mining Law: Problems and Prospects, 9 *Pub. L. L. Review*, 1, 11 (1988) and John D. Leshy, The Mining Law: A Study in Perpetual Motion, 282 (1987).
[4] Department of Interior, Opinion M-36988, "Limitations on Patenting Millsites Under the Mining Law of 1872," (1997).

Millsite Opinion claimed that the law only allowed a claimant to locate one five-acre mill site for each mining claim. The Millsite Opinion was never implemented. When the Department relied on the opinion to deny approval of the Crown Jewel Mine in Washington, Congress acted to block application of the limitation in the Millsite Opinion to that project or any other plan of operation that had been submitted prior to the opinion.[5]

In 1999, the Bureau of Land Management proposed a rule that would have limited claimants to five acres of mill site land "for each 20-acre parcel or patented or unpatented placer or lode mining claims . . . regardless of the number of lode or place claims located in the 20-acre parcel."[6] Similar to the Mill Site Opinion, this mill site rule was never adopted. Instead, after public comment, BLM adopted a rule allowing operators to locate as many mill sites as are "are reasonably necessary to be used or occupied for efficient and reasonably compact mining or milling operations."[7] The rule was challenged by environmental plaintiffs who urged the court to adopt the mill site acreage ratio as the only permissible interpretation of the mining law. The rule was upheld by a Federal District Court decision in 2020, [8] but an appeal is pending. Oral argument on the appeal is scheduled before the D.C. District Court of Appeals in January 2024. Thus, the long-term viability of the use of mill sites to support ancillary facilities remains uncertain.

The second prong of the effort to make the Mining Law unworkable involves restricting the ability of miners to site the ancillary uses mentioned above. In January, 2001, just days before a new a President was to be sworn in, Solicitor Leshy issued a second opinion addressing the use of mining claims for ancillary uses.[9] When approving a proposed plan of operations, the Ancillary Use Opinion directed BLM to inquire into the validity of the mining claims used for ancillary uses, and if there were "grounds" for questioning the validity, then BLM should not approve the plan until the operator either moves the facility, properly stakes mill site claims, obtains a discretionary permit from the BLM, or acquires the land through exchange or sale. The Ancillary Use Opinion was never implemented. It was contrary to BLM mining regulations adopted in 2001, and it was eventually formally withdrawn.

In the years since, environmental plaintiffs repeatedly attempted to revive the reasoning of the Ancillary Use Opinion in litigation challenging BLM's mining rules. Indeed, that effort and litigation led to the *Rosemont* and *Thacker Pass* decisions. In one of the early rounds of litigation over the ancillary use question BLM's mining regulations (including the definition of "operations") were upheld by a Federal District Court in 2003, apart from one question that was remanded to the BLM.[10] The question was whether FLPMA's preference that the government acquire "fair market value" for use of federal lands had been considered in the 3809 Regulations.

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[5] Consolidated Appropriations Act, 2000, Pub. L. No. 106-31, § 3006, 113 Stat. 57.
[6] 64 Fed. Reg. 47,023, 47,037 (proposed Aug. 27, 1999). Mining lawyers had quickly figured out that the one to one claim ratio in the Millsite Opinion could be manipulated by dividing lode and placer claims, which have a **maximum** size of 20 acres, into smaller claims.
[7] 43 C.F.R. § 3832.32.
[8] Earthworks v. U.S. Dept of the Interior, 496 F. Supp. 3d 472, 485 (D.D.C. 2020), *appeal docketed*, No. 20-05382 (D. D.C. Cir. Dec. 30, 2020).
[9] Department of Interior, Solicitor's Opinion M-37004, *Use of Mining Claims for Purposes Ancillary to Mineral Extraction* (Jan. 18, 2001.
[10] Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003).

BLM was directed to consider whether FLPMA required the agency to charge "fair market value" for operations conducted on "unclaimed or inadequately claimed land." This was essentially the same argument as the Ancillary Use Opinion, because plaintiffs argued that BLM had to assess the validity of every claim within a plan of operations and address "invalid" claims under other FLPMA authority. On remand, BLM conducted a rulemaking and determined that there were no such on operations on unclaimed or inadequately claimed lands, but acknowledging there were many claims that were properly located by of unknown validity. BLM determined that evaluating those claims place an unbearable financial burden on the agency and disrupt mining regulations because the Mining Law and the 3809 regulations "create a 'cradle to grave' framework" based on a "long-established . . . practice of permitting mining operations on mining claims without requiring formal claim validity exams."

Environmental plaintiffs challenged BLM's response to the remand, urging the Federal District Court to adopt the reasoning of the Ancillary Use Opinion and require BLM to conduct claim validity examinations before approving mining plans of operations. In 2020, the District Court upheld BLM's rule.[11] The court stated that plaintiffs' interpretation of the law would "quietly upend the current claim system under the Mining Law" and it declined to read FLPMA "as silently working such a fundamental change to longstanding practice under the Mining Law."

Subsequently, in Federal District Court in Arizona, some of these same environmental plaintiffs who are litigating in the DC Circuit revived the reasoning of the Ancillary Use Opinion to challenge the Forest Service's approval of the plan of operations for the Rosemont Mine and found a more sympathetic judge. The District Court reversed approval of the Rosemont plan because the Forest Service did not confirm that the mining claims underlying proposed waste rock and tailings storage facilities were valid before approving the plan.[12] In May, 2022, in a 2-1 opinion, a Ninth Circuit panel affirmed the District Court's decision (though on different legal reasoning) and that brings us to S. 1281 and this hearing today.

S. 1281 - The Mining Regulatory Clarity Act

In September of this year, the full Committee held a hearing on issues affecting the domestic mineral supply chain. Dr. Daniel Yergin, Vice President of S&P Global predicted that U.S. demand for copper will double over the next twelve years, and demand for nickel, cobalt and lithium will increase over twenty-three times during the same period. Dr. Yergin identified permitting delays, uncertainty and litigation risk as the primary obstacles to meeting domestic mineral needs. At the same hearing, Deputy Interior Secretary Tommy Beaudreau, identified conflict and litigation as the biggest impediments to domestic mineral production.

In a report issued a few weeks ago, the Fraser Institute looked at just one slice of expanded mineral demand: electric vehicles. Based on existing goals for electric vehicle production and

[11] Earthworks v. U.S. Dept of the Interior, 496 F.Supp. 3d 472 (D.D.C. 2020). Plaintiffs initially appealed both parts of the District Court decision but withdrew their appeal of the Fair Market Value rule after the Ninth Circuit issued the *Rosemont* decision.

[12] Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738 (D. Ariz. 2019), *aff'd*, 33 F.3d 1202 (9th Cir. 2022).

sales in the U.S. and Canada, the world will need 50 new lithium mines by 2030, along with 60 new nickel mines, and 17 new cobalt mines. The materials needed for cathode production will require 50 more new mines, and anode materials another 40. The battery cells will require 90 new mines, and EVs themselves another 81. In total, this adds up to 388 new mines. For context, as of 2021, there were only 270 metals mines operating across the U.S. and only 70 in Canada.[13]

These same themes have been identified by multiple witnesses in multiple hearings before multiple Senate and House committees and subcommittees. In response, Congress has appropriated billions and has begun to address significant permitting reform, with important NEPA reforms in the Fiscal Responsibility Act and permitting bills authored by the Chairman and Ranking Member of this Committee and others. But these efforts are doomed to fail unless Congress acts to resolve the uncertainty and litigation risk caused by *Rosemont.*

S. 1281 addresses the single most important source of legal uncertainty and litigation to the U.S. mining industry today. In May of 2022, the second prong of the effort to make the Mining Law unworkable finally bore fruit. After more than twenty years and many court and IBLA rejections of the rationale of the 2001 Ancillary Use Opinion, a panel of the Ninth Circuit Court of Appeals vacated Forest Service approval of a mining plan of operations for the Rosemont Copper Mine in Arizona. Two judges found that the Mining Law required that the Forest Service confirm that validity of mining claims that were proposed to be used for storing waste rock and tailings and remanded the decision back to the agency for further work. The dissenting judge would have found that the agency acted properly and in accordance with the intent and text of its longstanding mining regulations. The dissent pointed out correctly that the majority's reasoning in fact, made the mining law "self-defeating."

As we have had the time to analyze the impacts of the *Rosemont* decision, see it applied by two federal district courts in Nevada and interpreted by the Department of Interior's Solicitor, and evaluate the arguments that the anti-mining litigants still want to press, it is clear that leaving *Rosemont* unaddressed creates major uncertainty in mine permitting on federal lands and will lead to further litigation to resolve questions about the scope of the decision.

Before *Rosemont*, the scope of mining regulation on federal lands had been well settled in regulation and practice for over 40 years. The regulators and the operators both have had certainty concerning which lands are available for locating ancillary facilities. The Forest Service adopted regulations in 1974 and the BLM in 1980. Both required operators to submit plans of operations for review by the agencies before mining could begin on federal lands. Both sets of regulations have been revised and fleshed out with detailed agency guidance. The Forest Service regulations are published at 36 C.F.R. Part 228A and referred to as the "228 Regulations." The BLM regulations are published at 43 C.F.R. Subpart 3809 and referred to as the "3809 Regulations." Both sets of regulations cover mineral activities from initial exploration through production and reclamation, mine closure and post-closure maintenance, applying environmental performance standards and requiring financial assurance at each and every stage of the process to all facilities.

[13] Kenneth P. Green, Fraser Institute, *Can Metal Mining Match the Speed of the Planned Electric Vehicle Transition?* (2023).

Both sets of regulations broadly define the "operations" that are subject to the regulations without regard to mining claim status. The Forest Service defines "operations" to mean:

> [a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, **regardless of whether said operations take place on or off mining claims.**[14]

BLM's regulations are similar, defining "operations" as:

> [a]ll functions, work, facilities and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction and processing of mineral deposits locatable under the mining laws; reclamation, or disturbed areas; and all other reasonably incident uses, **whether on a mining claim or not**, including the construction of roads, transmission lines, pipelines and other means of access across public lands for support facilities.[15]

BLM explained that it adopted the broad definition of operations so that it could manage mining on federal lands from "cradle to grave."[16] Since their adoption, BLM and the Forest Service have applied these regulations to hundreds of mining and exploration plans of operations. In no case, until the *Rosemont* decision, has the BLM or Forest Service investigated as part of mine permitting the mining claim status of lands proposed for mining operations on lands that were open to location under the mining laws.

The Rosemont Decision in Detail

The Rosemont copper mine was a typical large, open pit copper mine proposed to be located on National Forest lands in Arizona. The open pit was on a mix of private land and unpatented mining claims. The Forest Service reviewed the proposed plan under its 228 regulations and prepared an environmental impact statement. The EIS evaluated five different configurations for the storage of waste rock and tailings. In the decision approving the plan, the Forest Service selected a particular alternative that had the smallest disturbance footprint and avoided an important cultural site. The Forest Service also approved a reclamation plan that would require that the waste rock and tailings storage areas be reclaimed and returned to the prior land uses, wildlife habitat and grazing, after mining was concluded. Consistent with practice since the inception of the Mining Law, the Forest Service did not consider the status of any of the mining claims included in the plan of operations and did not constrain its selection of the preferred alternative based on mining claim status.

The Center for Biological Diversity and other groups challenged the Forest Service decision in federal court. The District Court reversed the agency's decision and held that the Forest Service applied the wrong regulations to the proposed waste rock and tailings storage facilities. According to the court, the Forest Service should have applied its special use regulations, rather than the 228 mining regulations because the mining claims were not valid. The court reasoned that the mining regulations only governed mining

[14] 36 C.F.R. § 228.3(a) (emphasis added).
[15] 43 C.F.R. § 3809.5 (emphasis added).
[16] 65 Fed. Reg. at 70,013 (Nov. 21, 2000).

activities on valid mining claims and because the Forest Service failed to confirm that the operator's mining claims were valid, it could not approve the mining plan under its mining regulations.[17]

But the Forest Service special use regulations contain no provision for the review or management of any mining or mining-related facilities. In fact, those regulations explicitly disavow any application to mining plans of operations. The special use regulations also prohibit the approval of facilities that include disposal of solid waste on Forest lands. Paradoxically, the district court mandated application of a legal framework that would not allow the Forest Service to approve the mine as proposed.

The Forest Service and the operator appealed to the Ninth Circuit Court of Appeals. Two judges in the three-judge panel affirmed the lower court's decision, but on different reasoning. A third judge dissented, finding that the Forest Service properly reviewed the mining plan of operations under its 228 regulations.

The majority opinion ignored the district court's conclusion that the agency had used the wrong regulations. It found that concern, as well as the dissent, "premature." Instead, the majority found that the Forest Service had erred when it "assumed that Rosemont's mining claims on [the land proposed to be used for waste storage] were valid." Of course, the Forest Service made no such assumption—the agency determined, in accordance with the long-standing definition of mining "operations," that all activities in the proposed plan of operations were to be reviewed under its mining regulations without regard to the status of the claims. The majority opinion dismissed that inconvenient fact in a parenthetical: "In the FEIS, the Service either assumed that Rosemont's mining claims on that land were valid or **(what amounted to the same thing)** did not inquire into the validity of claims."[18]

The majority opinion then determined that the record before the Forest Service included "no evidence" that the claims were valid and the agency's reliance on the 228 regulations was in error. The court remanded the decision back to the Forest Service to determine if its 228 regulations "are applicable to Rosemont's proposed occupancy of invalid mining claims with its waste rock, . . ."[19]

Application of the Rosemont Decision Today

The majority opinion's holding is quite narrow and based on an incorrect reading of the agency record, but the opinion also includes a long discourse on the Mining Law that as subsequently applied by lower courts and interpreted by the Department of Interior, leaves mining regulation on federal lands incredibly muddled. Further litigation is certain. Indeed, in a decision earlier this year, the United States District Court for the District of Nevada directed BLM to inquire into the validity of certain mining claims associated with the Thacker Pass lithium mine project, but did not vacate the approval of the mine plan of operations. Opponents of the mine appealed the decision not to vacate approval of the mine plan of operations, but that appeal was denied on procedural grounds. Appellants raised issues regarding the scope and application of the Rosemont

[17] Center for Biological Diversity v. U.S. Forest Service, 409 F. Supp. 738 (D. Ariz. 2019), *aff'd* 33 F. 4th 1202 (9th Cir. 2022).
[18] Center for Biological Diversity v. U.S. Forest Service, 33 F.4th, 1202, 1212 (9th Cir. 2022) (emphasis added).
[19] 33 F.4th at 1224.

decision, including specifically that the BLM was required to perform a claim validity determination akin to the examination required to support a patent application, but those were found to be untimely and were not considered by the Ninth Circuit panel, which ruled that the plaintiffs must first raise those arguments before the district court.

Shortly after the district court's decision on the Thacker Pass project, another Federal District Court in Nevada relied on the *Rosemont* decision to vacate BLM's approval of the proposed Mount Hope molybdenum mine. The Mount Hope deposit is considered one of the largest and highest-grade molybdenum deposits in the world. Molybdenum of course is used to make all manner of alloys, including steel alloys to increase strength, hardness, electrical conductivity, and to increase resistance to corrosion and wear—all uses that make it important for the future of this country. Unfortunately, the permitting history of the Mount Hope project is but another example of how appeals and litigation can unreasonably delay mining projects.

The proposed plan of operations for the Mount Hope molybdenum mine was originally submitted to BLM in June, 2006. The notice of intent to prepare an environmental impact statement was published in the Federal Register in March, 2007. The Draft EIS was made available for public comment in December, 2011, the final EIS was published in October, 2012 and the Record of Decision approving the project was issued the next month. BLM's decision was challenged by Great Basin Resource Watch and the Western Shoshone Defense Project. The Federal District Court for the District of Nevada upheld BLM's decision in July, 2014. Notably, in that appeal, these plaintiffs argued that BLM erred when it did not confirm validity of the Mount Hope mining claims before approving the plan of operations—the *Rosemont* argument. Consistent with every other decision on mining opponents' ancillary use attacks up to that time, the Nevada court applied established precedent and rejected that argument finding that the Mining Law did not require that BLM inquire into claim validity.

Plaintiffs appealed the 2014 decision to the Ninth Circuit Court of Appeals raising several environmental claims, but they did not pursue their ancillary use argument. In December, 2016, the Ninth Circuit affirmed most of BLM's decision, but remanded the project back to the agency for additional environmental analysis on two air quality issues and asked BLM to clarify the legal status of certain springs. BLM completed that work and published a Draft Supplemental EIS for public review in February, 2019, and a final Supplemental EIS in July, 2019. The Record of Decision approving the project was reinstated the next month. The same plaintiffs again challenged BLM's decision. In April, 2023, following briefing on the impact of the *Rosemont* decision, the same federal judge who approved the project nine years earlier, vacated the decision and sent the project back to BLM to evaluate the project's mining claims in light of the *Rosemont* decision.

The Department of Interior Recent Solicitor's Opinion

In May, 2023, the Solicitor of the Department of Interior issued an opinion,[20] binding on the agency, that extended the *Rosemont* court's strained reading of the Mining Law beyond the Ninth Circuit and ignored the text of the 3809 regulations and BLM's application of those regulations over the past 40 years. The Department offers the Solicitor's Opinion, and perhaps some subsequent guidance that has not yet been made public, as a solution to the practical

[20] Department of the Interior, Office of the Solicitor, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057, May 16, 2023.

problems created by the *Rosemont* decision. Respectfully, I do not agree. Instead, the Solicitor's Opinion creates more uncertainty, guarantees further legal challenges to mining projects, and undermines the stated policy of this administration and a bipartisan majority of this Congress to encourage domestic mineral exploration and production.

The Solicitor's Opinion directs that BLM shall not approve "plans of operations where the operator proposes to place significant waste or tailings facilities on mining claims where BLM's record lacks evidence of the discovery of valuable mineral deposits underlying those facilities." The agency is given no guidance but to reject the proposed plan of operations. In those circumstances, the burden shifts back on to the operators to 1) submit additional evidence, 2) "re-site the ancillary uses on mill sites (as appropriate)," 3) seek a land use authorization under other BLM regulations ,or 4) seek to acquire title to the land through a land exchange or sale.

The Opinion effectively rewrites the 3809 regulations without any public notice or comment. The current regulations and 40 years of practice are dismissed in a footnote where the Solicitor "acknowledges that the Department's reading of the Mining Law has not remained static in the last several decades, and that BLM may have approved mining plans that, at least in part, are not strictly consistent with this memorandum."[21]

Congress should move forward and enact S. 1281 in the face of the Solicitor's Opinion for two important reasons: First, the Opinion does not settle the matter. Further litigation is certain. As I noted above, anti-mining plaintiffs continue to argue in the DC Circuit that the Mining Law only allows one five-acre mill site for each 20-acre lode claim. Second, and more to the point of the Committee's work, application of the Opinion is bad mining policy and will discourage and delay mining investment, exploration and production.

This Subcommittee should not assume that this Solicitor's Opinion will survive legal challenge any better than prior opinions. The majority opinion in the *Rosemont* case swept aside a 2020 Solicitor's Opinion that comprehensively evaluated the Mining Law and BLM practice and interpretation in two sentences, according the Opinion no deference because "the Solicitor has taken inconsistent positions" on the issue. The new Opinion is simply another inconsistent position.

The *Rosemont* decision left many questions unanswered targets for further legal challenges. The Solicitor's Opinion attempts to limit the *Rosemont* decision to its facts: an inquiry into claim validity is necessary only where an operator proposed to permanently occupy land with significant waste rock or tailings facilities. But mining opponents have already challenged that limitation and litigate both the scope of the decision—to which ancillary facilities does the claim validity requirement apply—and the process for determining claim validity, insisting on complete claim validity examinations on each and every claim.

In litigation over the Thacker Pass project, some plaintiffs argued that the *Rosemont* decision applied to every facility in the plan of operations, not just "permanent" features as argued by the Solicitor's Opinion, attempting to capture pipelines, transmission lines, roads, stockpiles, processing facilities, and all other uses. The court, however, found that argument untimely, so it was not resolved. Those plaintiffs argued that BLM cannot approve <u>any</u> mining facility on public land until it has determined that the underlying claims are valid. Thus, despite the Department of Interior's protestations to the contrary, the Solicitor's Opinion has resolved

[21] Solicitor's Opinion at p. 9, n.7.

nothing. Those same opponents argue that BLM must conduct a full claim validity examination for each claim included in the plan of operations—that the suggestion in the Solicitor's Opinion that BLM need only "some evidence" of claim validity is far too little. As they have already done, it is inevitable that mining opponents will continue to seek opportunities to raise these legal challenges.

The alternatives suggested by the Solicitor's Opinion will also result in further uncertainties and delays. Since the 3809 regulations were adopted in 1980, all major mine facilities have been reviewed under those regulations. After decades of pre-*Rosemont* consistency, switching to new systems and processes now will only cause further uncertainty and harm. The learning curve on putting a square peg in a round regulatory hole will add years of delay to every mining project forced to obtain new permits. The regulatory program was designed to review mining operations holistically. Requiring different permits for individual mine features will unduly complicate the permitting process, resulting in additional delays. Indeed, given the arguments that plaintiffs are making regarding ancillary uses in current litigation and permitting, mine proponents must necessarily engage in a guessing game to determine which facilities should be permitted under which regulations. Issuing special use permits or rights-of-way for mining facilities, rather than permitting them through plans of operations (as intended under FLPMA and done for decades) will also add more opportunities for litigation. Under BLM's 3809 regulations, mine plans are approved if the BLM finds that those plans include adequate measures to prevent "unnecessary or undue degradation," the standard imposed by FLPMA and defined in the regulations. Rights-of-way and other permits have different standards and afford BLM more discretion in making decisions. The exercise of that discretion is subject to legal challenge.

The Solicitor has also failed to consider important practical problems imposed by the opinion in mine permitting. For example, BLM's 3809 regulations require that every plan of operations with an open pit include an analysis of the feasibility of backfilling the open pit with waste rock. Waste rock is nothing more than naturally occurring material that must be moved from one place to another so miners can access ore. But miners need somewhere to place the waste rock. Backfilling is a preferred method of reclamation where a pit is mined out and the backfill rock will not create the risk of water quality problems. Nevada Gold Mines has placed billions of tons of waste rock as open pit backfill, essentially putting the rock back where it came from. Backfilling can work where the operator is mining in one portion of a pit, an adjacent pit, or a nearby underground mine but then places the backfill rock in the mined-out portion of a completed pit or the mine-out portion of an underground mine. But under *Rosemont* and the Solicitor's Opinion, the status of mining claims in a mined out open pit or underground mine creates a vexing legal question. Applying the *Rosemont* analysis, an operator must either show that the claims remain valid or that the lands are nonmineral in character and the operator must then stop and relocate the area as mill sites. Both create complex geologic questions of fact that are ripe for litigation. The necessary showings will be almost impossible to make. For surface mines, the pit has been designed to **the economic limits of mining at that date**, and the value has been removed but the rock just outside of pit wall is still mineralized, so it may not be available for location as either a mining claim or mill sites. For underground mines, the mining areas (stopes) have also been designed to the economic limits of mining at that date, but the adjacent rock will be mineralized and there may be mineralization stratigraphically above or below the mining areas that make location with a mining claim or mill site a vexing question. Further, after mining is completed, *Rosemont* (and the Solicitor's Opinion) require that miners must reevaluate their claim locations and decide which type of claim is appropriate, which as

noted above is anything but clear, and then go through the process of locating those claims on already located and mined ground. Again this complexity and uncertainty created by *Rosemont* and adopted by the Solicitor's Opinion, litigation is certain in either case.

Further experience with the *Rosemont* decision will lead to additional absurd results. We have underground mines where we are using the surface above the underground mine for ancillary uses, including rock crushers, roads, pipelines and even waste rock storage. While the valuable minerals remain in the ground, those claims are "valid," but when the underground mining is completed, those same claims would lose their validity under the *Rosemont* paradigm, even under a narrow reading of the decision, yet they certainly remain mineralized, again bringing into question whether the operator can relocate the claims as mill sites.

The suggestion of a land exchange or land sale is even more unrealistic. Experience, and litigation, has made land exchanges essentially unavailable for mining projects.

In 1994, ASARCO proposed a land exchange with the BLM to acquire land adjacent to its Ray Mine in Arizona for waste rock storage and other ancillary facilities. Asarco had mining claims on all of the lands that it sought to acquire. BLM completed an EIS in 1999 and issued a record of decision approving the land exchange in 2000. Then the litigation began.

First, the Center for Biological Diversity, the plaintiff in the *Rosemont* case, together with two other environmental groups filed a protest of exchange with the BLM. That protest was denied in May, 2001. The same parties filed an administrative appeal with the Interior Board of Land Appeals. In August, 2004, the IBLA denied the appeal and affirmed the BLM. The same parties then filed a complaint in United States District Court in Arizona. In June, 2007, the court upheld BLM's decision. The plaintiffs then appealed to the Ninth Circuit. In 2010, in a 2-1 opinion written by Judge Fletcher, the same judge who wrote the majority opinion in the *Rosemont* case, the court reversed BLM's decision approving the exchange because BLM did not require and evaluate a detailed mining plan for the lands that would be transferred to BLM.[22] In other words, the court required that BLM essentially evaluate a mining plan of operations for the lands that would be exchanged.

In a dissenting opinion, Judge Richard Tallman said that "the majority's holding is shortsighted and unreasonably impairs the BLM's ability to effectively manage the public lands in a manner that we all desire. In practice, the new minted quasi-[Mining Plan of Operations] requirement will unquestionably stifle, if not altogether stymie, land exchanges, especially whenever mining companies are involved or mining-related activities are contemplated. Indeed, this judicially created obstacle would be, in application, an impenetrable wall."[23]

But Asarco and BLM continued to pursue the exchange. **Nine years later**, a supplemental environmental impact statement was published and in October, 2019, BLM issued a record of decision approving the exchange. Another BLM protest followed, filed by the Center for Biological Diversity and the Arizona Mining Reform Coalition (also plaintiffs in the *Rosemont* case). That protest was denied, and in May, 2020, **twenty-six years after the exchange application was filed, the land was transferred**.

Another land exchange, proposed in 1994 by the J.R. Simplot company in Idaho and seeking only 719 acres of public land, still has not been completed. BLM initially approved the

[22] Center for Biological Diversity v. U.S. Department of Interior, 623 F.2d 633 (9th Cir. 2010).
[23] Id. at 665.

exchange under an Environmental Assessment and Finding of No Significant Impact in 2007. That was followed by a protest and appeal to the IBLA. The protest and appeal were denied, but the plaintiffs challenged the BLM's decision in Federal District Court in Idaho. In May, 2011, the Federal District Court reversed BLM's approval of the exchange and required preparation of an EIS.

If ancillary uses cannot be effectively and efficiently reviewed and approved by the federal land managers, those uses and the mines they support will not happen. That is the inescapable reality. In the bills under consideration today, Senator Cortez Masto's Mining Regulatory Clarity Act would reestablish the understanding of the Mining Law that has been settled law for 100+ years, until the *Rosemont* court upset it, and Senator Heinrich's Clean Energy Minerals Reform Act also makes efforts to address the problems created by the *Rosemont* decision. Legislation is absolutely necessary. If *Rosemon*t is not addressed effectively by Congress, you will be leaving in place a problem that will ensure years of litigation and delay, a result that is contrary to the goal of using domestic minerals to address climate, economic and defense needs.

Rosemont and its progeny leave the federal land managers and the mining industry with a permitting system that is unworkable for most mines in most circumstances. The prior interpretation and the existing regulations provide the cradle-to-grave framework necessary for rational regulation and operation. If Congress fails to clarify the regulatory requirements and return the federal land permitting regulations to the status quo before the *Rosemont* decision, domestic exploration and mineral production will not increase, they will decline.

S. 1742 - The Clean Energy Minerals Reform Act

Barrick applauds some aspects of S. 1742 but cannot support other provisions of the bill. To Barrick, the most important feature of S. 1742 is that it recognizes and retains the core principles of the Mining Law: self-initiation and security of tenure. Barrick appreciates that Senator Heinrich seeks to build on those two important Mining Law features instead of replacing them.

S. 1742 also retains most of the existing claim maintenance and location fee system, while putting into place a mechanism for both fees to be adjusted to keep up with inflation. This system has worked well since the 1990s. However, Barrick does not believe this system needs to be included into this new legislation, particularly in the manner proposed. S. 1742 incorporates some parts of the existing regulatory language but not others, which would cause problematic confusion in an otherwise well-understood program.

Barrick also appreciates that, unlike other Mining Law reform proposals, S. 1742 does not attempt to insert separate environmental protection standards into the Law. Barrick applauds and supports the bill's recognition that – like every other industry in the U.S. – the mining industry must already comply with all of the federal, state, (and sometimes tribal and local) environmental and historic/cultural protection requirements. An obvious mark of anti-mining sentiment in Mining Law advocacy is the contention that the Mining Law is outdated because it contains no environmental standards. By that logic, legislation governing other American industry also must be deficient. The mining industry – like every other industry in the U.S. – is subject to the many

environmental laws and rules that have been adopted at the federal and state levels since the 1960's. S. 1742 acknowledges this reality.[24]

- **Royalty and Fees.**

As I already noted, Barrick supports a reasonable net royalty, but is opposed to the imposition of a gross royalty as proposed by S. 1742. Initially, it is important that this royalty discussion not be muddled by nomenclature. Rather, it is important to actually examine how the royalties are applied. Coal and oil and gas royalties are commonly described as "gross" because they nominally attach at the mine mouth or wellhead, but in application are "net" of any downstream processing costs because those costs are deducted before the royalty is calculated. In fact, the DOI's rules have always allowed deductions for "processing" when calculating the royalty on gas, and transportation costs for both oil and gas. *See* 30 C.F.R. §§1206.109, 110, .111 (transportation deductions for oil); §1206.156 (transportation deductions for gas); §§ 1206.158., 159 (processing deductions for gas). Similarly, DOI allows deductions for transportation and washing of coal. 30 C.F.R. §§ 1206.262, -.263, -.264 (transportation deductions for coal); §§ 1206.267, -.268, -269 (washing deductions for coal). Of course, coal washing is an expense incurred to make the coal saleable, akin in the hardrock world of processing that the raw ore must undergo to become a saleable product.

The proposed gross royalty also ignores that different ores are of different qualities and require different kinds of extraction techniques and, more importantly, bespoke processing facilities to make them into the end metal product. Hardock geologic deposits are incredibly metallurgically complex, and often different ore bodies carrying the same commodity (such as copper or gold for example) require completely different processing facilities (i.e., "mills") to convert the raw ore into a commodity product that can be sold. Creating such bespoke processing facilities is an enormously expensive and complex undertaking, requiring hundreds of millions of dollars and sometimes billions of dollars in engineering, pilot mill design and construction, full-scale mill design and construction, and commissioning. A gross royalty is a tax burden on all that massive capital investment. Rather than assessing the royalty on the value of what the miner separates from the ground, the proposed royalty is assessed at the end of the refinery. It is akin to assessing the oil & gas royalty on gasoline instead of on crude oil.

[24] Among others, mining operations must comply with the following federal laws, which belies the oft-repeated argument that the mining law is "old" or has not been "updated:" Federal Land Policy and Management Act 43 U.S.C. § 1703(b); Forest Service Organic Act 16 U.S.C. § 478; National Environmental Policy Act 42 U.S.C. § 4321 et seq.; Clean Air Act 42 U.S.C. § 7401 et seq.; Clean Water Act 33 U.S.C. § 1251 et seq.; Safe Drinking Water Act 42 U.S.C. § 300f et seq.; Resource Conservation and Recovery Act 42 U.S.C. § 6901 et seq.; Emergency Planning and Community Right to Know Act 42 U.S.C. § 11001 et seq.; Toxic Substances Control Act 15 U.S.C. § 2601 et seq.; Mercury Export Ban Act; 15 U.S.C. §§ 2607, 2611; 42 U.S.C. § 6939f; Endangered Species Act 16 U.S.C. § 1531 et seq.; Wilderness Act; 16 U.S.C. § 1131 et seq.; Wild and Scenic Rivers Act, 16 U.S.C. § 1271; National Historic Preservation Act, 54 U.S.C. §§ 300101.

By asking that any royalty be "net" the mining industry is simply asking that we be treated fairly and that the investment we make in converting the rock into saleable product be recognized, just as Nevada's Net Proceeds of Minerals Tax does. One positive aspect of S. 1742's royalty provisions is that they would be imposed prospectively, and not on operating mines with commercial production existing on the date of enactment. These are mining operations whose economics were determined without counting a federal royalty as a cost; imposing a royalty on existing producing mines would be especially disruptive and could be viewed as a taking of large capital investments.

To be clear, the foregoing are not arguments against imposing a royalty; Barrick believes the federal government should receive compensation for its minerals. Barrick and other miners supported a net royalty that was included in a 1995 budget reconciliation package passed by Congress, but which was vetoed (on other grounds) by President Clinton. But Barrick believes firmly that is short-sighted and bad policy to focus on just the royalty, which is only one aspect of the government's "take." Governments around the world choose the manner in which they take a share of mineral production for the nationally owned resource. In doing so there are three basic levers: equity, taxes (including fees and duties) and royalties. In deciding what is an appropriate share for the government to receive, Congress should be looking at "total government take", the sum of all three levers. Also, in our federal system, Congress cannot ignore taxation at the state level.

Barrick appeared before the full Committee in a hearing on October 5, 2021, and submitted testimony and responses to written questions that explained in detail the policy and economic underpinnings of our position on royalties. Rather than repeating those arguments in this limited space, we recommend those materials and incorporate them here by reference. *See* Responses of Rich Haddock, General Counsel of Barrick Gold Corporation, Questions for the Record of the October 5, 2021 Hearing of the Senate Energy and Natural Resources Committee to Examine and Consider Updates to the Mining Law of 1872 (October 29, 2021).[25]

In addition to the gross royalty discussed above, S. 1742 would require a land use fee of four times the amount of the claim maintenance fee (in addition to the claim maintenance fee), and a reclamation fee of between 1% and 3% of the gross value of mine production. This reclamation fee as proposed is just additional gross royalty. Combined with the primary gross royalty, location fees, and claim maintenance fees, these additional fees will impose a significant and

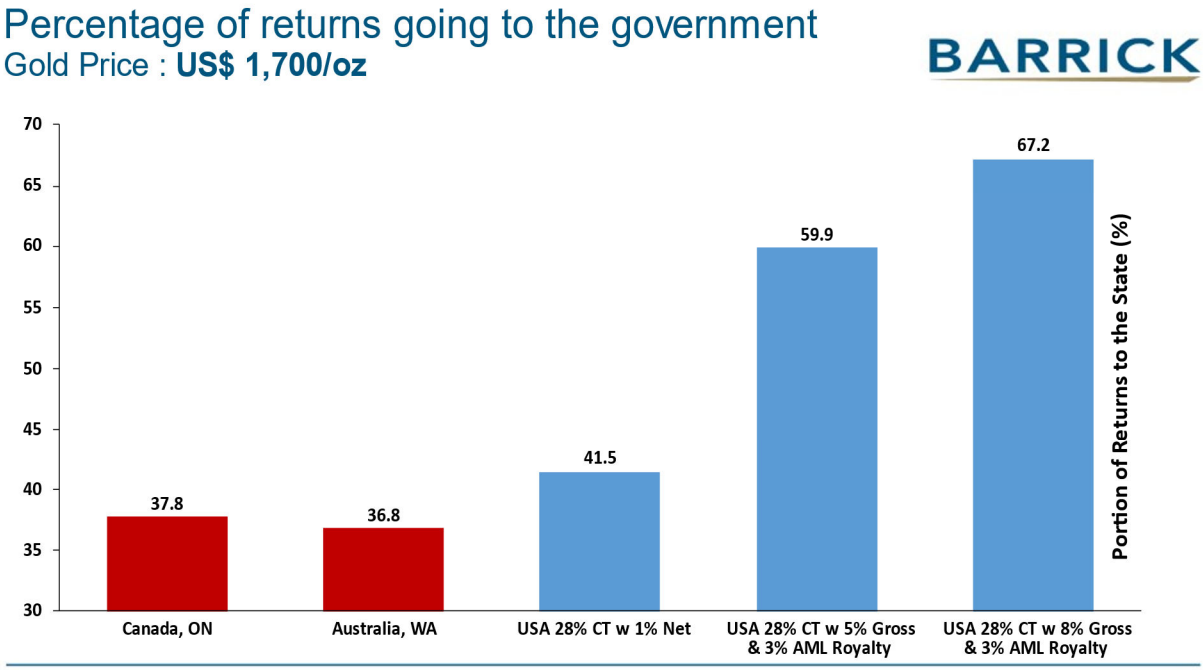
[25] S. 1742 authorizes the Secretary to set royalty rates (within a range), and to offer royalty relief. Both provisions suggest an understanding that hardrock minerals are diverse, and that royalty relief is sometimes necessary in an industry characterized by price cycles. A net royalty addresses both of these problems, and in a way that involves significantly fewer administrative burdens than those caused by the gross royalty in S. 1742. First, a net royalty "normalizes" for ore grade, differences in mineral processing costs, global market prices, and other variables. In that way, a net royalty makes it unnecessary to conduct and periodically updated complicated rulemaking processes to determine appropriate royalty rates for different hardrock minerals. Second, a net royalty accounts for price cycles, ensuring that royalties are not the cause of mine closures in down cycles, and making it unnecessary for the Secretary to engage in the factfinding necessary to determine if royalty relief is warranted.

unworkable cost burden on U.S. hardrock mines. As Congress considers Mining Law amendments and the imposition of royalties and fees, it must remember that the overall goal is to incentivize and grow the domestic mining industry, which creates jobs and tax revenue, and the minerals the country will need in the coming decades.

The amounts of royalties and fees matter a great deal. These are policy choices as much as revenue choices for the United States. If government taxes, royalties, and fees are excessive or punitive, they will raise the cost of investing in the United States too much and discourage, not ensure, future domestic mining, at a time when the U.S. government has recognized that it needs a domestic supply chain.

As mentioned above, Congress should not ignore that miners, like any other businesses, evaluate the "total government take" in deciding where to invest their capital. Mineral economists have developed an approach that allows the total tax burden (all forms of taxes, fees, royalties, duties, etc.) in one jurisdiction to be compared to that in others. This provides a standardized way in which to compare the government tax burden in different countries. When considering changes to the Mining Law, and especially the appropriate level of royalties and fees, Congress must understand how the U.S.'s total government takes compares to other favorable mining jurisdictions, and how that figure may result in more- or less- future mining investment in the United States.

To evaluate the impacts of the proposed royalties and fees in S. 1742 we created a hypothetical mine in order make an apples-to-apples comparison between jurisdictions. We compared what the total government economic take would be if the mine were in Australia or Canada and what it would be in the U.S. (Nevada) under the type of royalty proposed by Barrick and the royalty and fees proposed by S. 1742. The hypothetical mine is a "tier one" gold mine, which means it has more than 10 year of mine life with at least 500,000 oz. of annual production. This mine would be a very robust mine. A less robust mine would see even a greater percentage of government take. The percentage of Government take would increase at lower metal prices if royalties are gross. Note we assumed a corporate income tax rate of 28%, well below even the 40 year average rate. The graph speaks for itself.



In short, the royalties and fees proposed by S.1742 would be hugely more than governments receive in the developed world, leaving the miner little incentive to invest or develop here and forcing Americans to leave home if they want to work in mining, or worse stifling the development of American know-how. In the west, where public lands dominate, this reduces the ability of U.S. citizens to access good-paying mining jobs and acts as a socioeconomic penalty.

- **Exploration Permits**

S. 1742 would require an exploration permit for all mineral exploration on federal lands. BLM currently allows exploration to proceed under a notice (i.e., does not require a plan of operations) if the total surface disturbance is five acres or less and the operator has an approved reclamation plan with financial assurance. S. 1742 would eliminate notice-level exploration. This provision would create a severe disincentive to the most necessary and basic form of grassroots exploration in the U.S., reducing the opportunity for, and the value of, the Mining Law's self-initiation principle. Notice-level activity is the geologic equivalent of a litmus test, the most basic exploration activity, that gives a geologist some real information, but nowhere near full information, to begin to develop a geologic understanding and plot the next (expensive) geologic investigations. Finding valuable ore deposits takes a huge amount of exploration activity, and a lot (perhaps most) of that exploration is performed by smaller companies or even individuals that prospect and locate deposits and then sell them or enter into joint ventures with larger operators (like Barrick). Ultimately, less than 1 in 10,000 exploration projects become mines.[26] Requiring each one of these exploration activities to obtain a permit will burden the exploration process and

[26] "Mining 101," Ontario Mining Association, at https://oma.on.ca/en/ontario-mining/Mining101.aspx (accessed Dec. 4, 2023).

delay, not enhance, the discovery of promising mineral deposits. Even on the very conservative assumption that the Ontario Mining Association was off by a factor of 10 it would still take 1,000 notice-level exploration projects to lead to a mine, and with an added cost of $100,000 to each to obtain the permit, which is also a conservative cost figure for the development and processing of an exploration permit application with NEPA compliance, you have added at least $100 million dollars to the capital cost of the next mine project (10^3 x 10^5). That added cost alone would kill many projects. Eliminating notice-level activity would also create a severe administrative burden for the BLM, which already struggles to keep up with its Mining Law and NEPA responsibilities. Indeed, it would impose the same magnitude of costs on the BLM.

Further, eliminating the notice system is unnecessary. The existing system already requires miners to notify BLM of its activities, to avoid cultural resources and sensitive species, to reclaim completely at the conclusion of the notice-level work, and to provide financial assurances. If the notice-level activity is proposed in a sensitive area or would otherwise pose unusual risks or raise significant environmental issues, BLM already has the authority to require that a full plan of operations be submitted.

Some critics complain that the existing notice system does not keep tribes, communities, and other stakeholders informed, leaving them in the dark about mineral activities that may affect them. S. 1742 may be trying to address that concern by requiring public notice before an exploration permit is issued. However, such a statutory requirement is simply not necessary to inform the public. The information is already public; BLM just needs to make it more accessible. Notices are public documents and could be shared by BLM creating a publicly accessible database, such as a web-based register of notice-level operations. BLM already has the information necessary about notice-level activities to inform the public, and Barrick supports prompt delivery of that information to stakeholders and the public.

- **Status of the General Mining Laws.**

Barrick is concerned about the potential for confusion, delay, and litigation arising from Section 506(c)(2) of the bill, which provides that the Act "supersedes the general mining laws, except for the provisions of the general mining laws relating to the location of mining claims that are not expressly modified by this Act." The provision is so ambiguous and vague that the reader is left to figure out what it is intended to eliminate and what it is intended to preserve. In any event, this language ensures disagreement and litigation about its meaning. Barrick believes that changes to the Mining Law should be specific and surgical, and that the parts of the Law that are working well should be left in place, along with the decades of administrative and judicial precedent that surround and support them. An example (also noted above) are the claim maintenance provisions in Section 102, which appear to restate existing law but also exclude some provisions. The significance of the inclusions and exclusions here and elsewhere in the bill will translate into administrative confusion, delay, and litigation.

- **"Undue Degradation".**

Another most troubling concern is the bill's definition of "undue degradation," which is a *sub rosa* amendment of the Federal Land Policy and Management Act Section 302(b)'s "unnecessary

or undue degradation" standard. The definition would displace decades of administrative and judicial interpretation of FLPMA by grafting into it the "substantial irreparable harm" standard that mining opponents have sought for decades. Section 306(c) of the bill then finishes the job by declaring that the Secretaries must withhold permission for any mineral activity that will result in undue degradation – the "mine veto."

Barrick cannot support this radical and unwarranted change to FLPMA and the Mining Law. It is fundamentally inconsistent with the other provisions of S. 1742 that purport to keep the existing mining claim system in place. The new standard will be a cudgel for opponents of any and all mine projects on federal lands; it will result in project delays and litigation that will make today's permitting problems seem modest by comparison. And that assumes that major mining investments will continue to happen. It is more likely that mining companies simply will not invest the capital necessary to bring a mine into production when the project can be stopped apparently at any time, even after hundreds of millions of dollars have been spent and all standards and requirements of state and federal environmental laws are met.

- **Withdrawals**

The appropriate way to identify lands unsuitable for mining is via the land use planning process and withdrawal of such lands, before significant capital is invested. FLPMA provides for administrative withdrawals and millions of acres have been withdrawn from mining under that authority. Section 307 of the bill proposes to build on that process, but it does so in an expansive way.

Rather than taking a measured approach, the withdrawal portion of the bill will vastly expand the lands considered and eligible for withdrawal. For example, the bill specifically calls out "National Conservation Areas" for withdrawal. But National Conservation Areas are designated for a completely different purpose—to make federal funds available for the U.S. Fish & Wildlife Service to purchase conservation easements on private land. Those designations are often outsized because they are meant to make as much private land as possible eligible for the federally funded easements. As such, they should not be used for land management planning for *public* land, which is of course addressed in a robust way under the land management statues, such as FLPMA for BLM managed lands. The recently proposed Missouri Headwaters Conservation Area in Montana is a perfect example—the U.S. Fish & Wildlife Service has designated almost 6 million acres to enable conservation easement purchases of only 125,000 acres of private land. But under this bill, that full 6 million acres is specifically called out for withdrawal because it would be a National Conservation Area.[27] But now is not the time to withdraw massive tracts of land from mineral exploration. Indeed, the United States Geological Survey announced in July 2023 a plan to conduct geological surveys for critical mineral resources in a portion of this very same area in Southwest Montana.[28]

[27] Another example is the Dakota Grassland Conservation Area, which covers approximately 30 million acres of North and South Dakota—vast portions of each state—to enable conservation easements on 2 million acres of private land. Land Protection Plan, Dakota Grassland Conservation Area, North Dakota and South Dakota, https://www.govinfo.gov/content/pkg/GOVPUB-I49-PURL-gpo38042/pdf/GOVPUB-I49-PURL-gpo38042.pdf.

[28] Press Release, U.S. Geological Survey, Bipartisan Infrastructure Law Funding Helps Map Critical Mineral Resources in Montana (July 13, 2023), https://www.usgs.gov/news/national-news-release/bipartisan-infrastructurelaw-funding-helps-map-critical-mineral.

- **Mine Veto**

Section 306 of S. 1742 appears to contain a new mine veto mechanism whereby BLM can veto a mine plan of operations after all of the investment has been made and the permitting completed. This language is closely related to the definition of "unnecessary or undue degradation." This language requires significant clarification before we can provide meaningful comments. At best, the vague and ambiguous nature of this language would lead to uncertainty, risk, and litigation, and as a result diminish and discourage mineral investment.

Conclusion

Barrick welcomes the opportunity to work with Senator Heinrich and other members of the Committee to refine the suggested approach of screening and protecting sensitive lands via land use planning. The "mine veto" is not the answer nor is expansive but vague withdrawal power outside the land management statutes; both will discourage mining investments and undermine the goal of establishing domestic sources of minerals.