January 30, 2024

Hon. Pete Stauber, Chair
Hon. Alexandria Ocasio-Cortez, Ranking Member
Subcommittee on Energy and Mineral Resources
House Natural Resources Committee
1324 Longworth House Office Building

Re: Comments on H.R. 2925, scheduled to be heard by the subcommittee on January 31, 2024

Dear Congressmembers Stauber and Ocasio-Cortez,

We write to express our strong opposition to H.R. 2925. We have helped administer the Mining Law (while working in the Department of the Interior in both career and non-career positions) and have taught and written about Mining Law issues for many years.

Simply put, H.R 2925 is the worst so-called "reform" of the Mining Law we have ever seen. It is shocking, and we use that word advisedly, in the way it opens to extortion the hundreds of millions of acres of national forests and other public lands to which the Mining Law applies.

The problem is apparent on the face of the act.

> "A [mining] claimant **shall have the right to use, occupy**, and conduct operations on **public land** … **without discovery of a valuable mineral deposit**, **if** … the claimant makes a timely payment of the location fee … and the claim maintenance fee…" (emphasis added)

This text does not explicitly require a claimant to conduct "operations" in order to "use" or "occupy" public lands. Moreover, it defines "operations" very broadly, as "any activity reasonably incident to" things like "prospecting," "exploration," "development," or "processing."

In short, H.R. 2925 gives any locator or holder of a mining claim the "right to use [and] occupy … public land" for payment to the U.S. government of a mere

$205 per year per 20-acre claim. (Currently, the current claim location fee is $40; the claim maintenance fee, $165.) And it explicitly authorizes loosely defined “operations” on public land “regardless of whether that incidental activity is carried out on a mining claim . . ..” This “Clarity Act” is such a mischievous giveaway of a “right to occupy public land” that it ought to be called the “Mining Charity Act.”

Consider what is likely to happen if the Clarity Act became law. Suppose X wants to occupy a lovely tract of public lands as a base for hunting, angling, a yoga retreat, or any of a myriad of other things. Or suppose X learns that a large tract of public land is being considered for, say, legitimate mineral activity, or for a site for a renewable energy project, a transmission line, a ski area, or for any number of other possible uses. Lacking all scruples, X seizes the opportunity the Clarity Act presents for making an easy buck (some might call it blackmail).

After checking to make sure the lands are open to new claim location (as tens of millions of acres are), it locates one or more mining claims, pays the $205-per-claim fee, and begins to occupy the public lands claimed and other public lands in the vicinity.

> **Variation One**: X brings along tools and devices that could be used for prospecting, and perhaps scratch a little dirt, to make a facial case for “prospecting” to meet the Clarity Act’s loose definition of an “operation.” **Variation Two**: X builds a power generation or other kind of industrial facility on public lands (as noted above, whether or not it is actually on a mining claim is irrelevant under the Clarity Act’s definition of “operations”) and, if questioned, asserts that it is “reasonably incident” to mineral activity.

The U.S. government, Native American entities with ancestral connections to the lands, and other members of the public (which could include legitimate mineral developers[1]) protest X’s occupancy as interfering with legitimate uses and objectives served by public land.

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[1] It is stunning to us that, despite much contemporary discussion about reforming the Mining Law in order to facilitate the development of so-called “strategic minerals” on

What if anything can they do about it under the Clarity Act?

Nothing, so far as we can see.

Under current law, the government could challenge X's claim on the ground it has not made a discovery of a valuable mineral deposit. But the Clarity Act removes that vital tool from the government's toolbox.[2]

By eliminating the bedrock requirement that mining claims are not legally valid unless they are supported by a discovery of a valuable mineral deposit—a requirement that has been a fundamental part of the Mining Law for nearly 152 years—the proposed legislation leaves a buyout as the only practical way to eliminate such claims. And in the negotiation of the buyout amount, practically all the leverage would be with the claimant.

We are not just imagining this. The Mining Law has historically been subject to widespread abuse of exactly this kind. One notorious example arose more than a century ago, when for years Ralph Cameron used spurious mining claims he located on the most popular hiking trail in the Grand Canyon to extort money from park visitors. In the 1960s, Merle Zweifel located many thousands of mining claims over hundreds of thousands of acres of public lands with a similar objective, including along the proposed route of the Central Arizona Project aqueduct and on public land thought to be valuable for oil shale development in western Colorado.[3] (His motivation, as he later admitted to a Wall Street Journal reporter, was "a lust for money."[4]) It took years of litigation to eliminate Cameron's, Zweifel's and other similar abusive claims, and it was only possible because the abusers could not show a discovery of a valuable

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federal land, the industry and its allies are promoting legislation that would almost certainly thwart, rather than facilitate, their extraction!

[2] While the BLM and the Forest Service have rules regulating occupancy and other uses of mining claims (36 CFR Part 228; 43 CFR Part 3715), they would become unenforceable to the extent they are contradicted by the Clarity Act's new grant of a broad statutory right to "occupy" public land simply upon payment of the requisite fees.

[3] These and similar abuses are recounted in detail, with sources, in Leshy, *The Mining Law: A Study in Perpetual Motion* (1987), at 77-83.

[4] B. Newman, "Never Mined: Merle Zweifel Claims Acres of Public Land, But What Is He Up To?" Wall Street Journal, January 20, 1972, p. 1, col. 1.

mineral deposit on their claims.[5] H.R. 2925's grant of an open-ended "right to occupy" public lands would mean that would no longer work.

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What makes this even more troublesome is that the so-called "problem" H.R. 2959 purports to address—the *Rosemont* court decision[6]—in fact does not shackle the legitimate mining industry.[7] Hudbay Minerals, the foreign company seeking to develop Rosemont, made a deliberate decision to try to use regular mining claims (which it located on 2700 acres of national forest land) as the site for the huge waste dumps and tailings piles its mine would produce. Its decision left it vulnerable to the challenge that these claims did not support a valuable mineral deposit. In fact, both the geological evidence and Hudbay's intent to bury the claimed land under hundreds of millions of tons of waste rock and tailings convincingly demonstrated that the claims contained no valuable mineral deposits. Upon reaching that conclusion, the federal courts set aside the Forest Service's decision to allow Hudbay to use the public lands it claimed that way.

In fact, Hudbay had several other options to secure land for its waste/tailings dumps. It could have located "millsite" claims on the public land, something the Mining Law has permitted since 1872. (Millsite claims have long been routinely used by hardrock miners for such purposes.) Hudbay initially chose not to do that because millsites are smaller (maximum five acres, compared to twenty acres for a regular mining claim) and involve more red tape.[8]

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[5] See, e.g., *Cameron v. United States*, 252 U.S. 450 (1920); see also *United States v. Zweifel*, 508 F.2d 1150 (10th Cir.), cert. denied *sub nom Roberts v. United States*, 423 U.S. 829 (1975).

[6] *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022).

[7] The industry and supporters of the Clarity Act have argued that the Ninth Circuit's ruling in the *Rosemont* case "clashes with numerous Supreme Court decisions over a century" (NMA witness, Dec. 12 Senate hearing). We have taught and written about the Mining Law for many decades and are aware of no such Supreme Court decisions. Had they existed, surely the Ninth Circuit would have had to grapple with them.

[8] Around the time the federal district court issued its initial ruling, the company located mill sites as a kind of hedge against an adverse ruling.

Or, it could have sought to exchange lands it owned or acquired for more conveniently-located public lands, as several large mines found on public lands have done.

Or, it could have acquired non-federal lands in the vicinity to use for waste/tailings dumps. The availability of this option was made abundantly clear by Hudbay's revelation when the Ninth Circuit Court of Appeals turned down its appeal. *On the very same day* the court decision was released, it announced that it had acquired approximately 4,500 acres of private land in the vicinity precisely for such use.[9]

Or, it could have applied for special use permits to use public lands under various laws. A recent Opinion by the Interior Department's Solicitor addressed these and still other ways the hardrock mining industry could pursue large mining operations on federal land without the need for legislative "reform."[10]

Although all those alternatives were *and still are* available to the hardrock mining industry, it and its allies have chosen instead to seek to have Congress intervene. But characterizing H.R. 2925 as simply a clarification in the law grossly understates the mischief it would cause. It would, we believe, likely prove to be nothing short of a public land policy disaster. Once that became clear, Congress would have to revisit the matter. In the meantime, the executive branch would likely be forced to limit the opportunity for abuse and extortion we have described by withdrawing all federal lands from the location of new mining claims.

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[9] See May 12, 2022 Press Release of Hudbay Minerals, The U.S. Department of Justice and Hudbay Receive Rosemont 9th Circuit Court Ruling; Hudbay Continues to Advance Copper World (May 12, 2022), found at https://hudbayminerals.com/investors/press-releases/press-release-details/2022/The-U.S.-Department-of-Justice-and-Hudbay-Receive-Rosemont-9th-Circuit-Court-Ruling-Hudbay-Continues-to-Advance-Copper-World/default.aspx.

[10] Solicitor's Opinion M-37077, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057 (May 16, 2023), https://www.doi.gov/media/document/m-37077-use-mining-claims-mine-waste-deposition-and-rescission-m-37012-and-m-37057-5.

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Finally, it is remarkable that, in addition to wreaking havoc, H.R. 2925 makes no effort to correct obvious problems with the antiquated Mining Law. Most glaring is the fact that it gives mining companies a free ride, as they pay no royalty for the privilege of extracting valuable minerals from the public lands. Every other mineral owner in the nation—whether on state, tribal or private land—receives some value-based payment when it allows minerals to be extracted. (Congress itself, in legislation it adopted nearly a century ago, insisted that states must receive fair market value for minerals extracted from lands the U.S. gave them at statehood![11])

Congress has required the U.S. to receive fair market value when fossil fuels or fertilizer minerals are extracted from public lands. But not when so-called hardrock minerals are extracted from public lands, including national forests, under the Mining Law of 1872.[12] Indeed, those lands may be the only ones on the entire planet where the landowner receives no such payment for such mining.

Even the National Mining Association recognizes that the free ride the industry enjoys is a defect requiring correction.[13] Yet H.R. 2925 does nothing to redress

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[11] See 44 Stat. 1026 (1927), codified at 43 U.S.C. §870; see also *The Mining Law*, supra n. 3, at 328-39.

[12] It is also worth noting that the Mining Law covers not only metals like gold, silver, and copper, but also so-called "uncommon varieties" of common substances like sand, gravel, and building stone. 69 Stat. 368 (1955), codified at 30 U.S.C. §611. If not an "uncommon variety," such substances must be purchased from the government for fair market value. According to a recent GAO study, well over a hundred currently approved operations, covering tens of thousands of acres of public lands, produce "uncommon varieties" of common substances. https://www.gao.gov/products/gao-20-461r. The "uncommon variety" issue has given rise to a number of controversies, such as a recent one involving the vast expansion of a limestone quarry on public lands on the outskirts of Glenwood Springs, Colorado, triggering opposition from local governments and their allies. https://loveglenwood.org/legal-action/glenwood-springs-citizens-alliance-v-u-s-bureau-of-land-management/.

[13] See http://www.nma.org/pdf/041508_mining_law.pdf. To be sure, the NMA favors a net royalty that would apply only prospectively, to new mining claims; that is, they would continue to exempt from any royalty payment the hundreds of thousands of existing mining claims currently found on millions of acres of public land.

it. Instead, it would exacerbate the Mining Law's serious defects by giving claimants effective control of vast tracts of public lands for the price of modest claim filing and maintenance fees.

For these reasons, we strongly urge the committee not to advance H.R. 2925. We appreciate your consideration of our views.

Sincerely,

s/
John Leshy[14]

s/
Sam Kalen[15]

s/
Mark Squillace[16]

s/
Bret Birdsong[17]

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[14] Emeritus Professor, University of California College of the Law San Francisco, and former Associate Solicitor (1977-1980) and Solicitor (1993-2001), U.S. Department of the Interior.

[15] Visiting McKinney Family Chair in Environmental Law (2023-2024), IU Robert H. McKinney School of Law; William T. Schwartz Distinguished Professor of Law, University of Wyoming College of Law (for identification only).

[16] Raphael J. Moses Professor of Natural Resources Law, University of Colorado Law School (for identification only).

[17] Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas (for identification only).