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July 14, 2009

The Honorable Jeff Bingaman
Chairman, Committee on Energy & Natural Resources
United States Senate
Washington, D.C. 20510

The Honorable Lisa Murkowski
Ranking Member, Committee on Energy & Natural Resources
United States Senate
Washington, D.C. 20510

Re: Legislative Hearing on S. 796 – Hard Rock Mining and Reclamation Act of 2009 and S. 140 – Abandoned Mine Reclamation Act of 2009

Dear Chairman Bingaman and Ranking Member Murkowski:

The Northwest Mining Association (NWMA) appreciates the opportunity to provide the following statement to the committee for the hearing record. The timing of this hearing on these two bills, following committee passage of the “*American Clean Energy Leadership Act of 2009*,” is appropriate because how you choose to amend the Mining Law will determine whether the vision and goals of the *American Clean Energy Leadership Act of 2009* will be achieved.

Building America’s clean, renewable energy infrastructure and achieving energy independence will require minerals and lots of them - minerals we have in America.

If you choose to modernize the Mining Law in a way that provides a fair return to the public while preserving certainty and land tenure rights, and encourages private investment in finding, developing and producing domestic mineral resources, you will take an important step toward energy independence and a clean energy future. **However, if you enact the changes proposed in S. 796 and S. 140, you will create uncertainty, discourage private investment in U.S. minerals, impede the development of America’s renewable energy infrastructure, export tens of thousands of high paying mining jobs and trade an unhealthy dependence on foreign oil for an increased, unhealthy reliance on foreign sources of minerals.**

This statement will address these issues in detail and provide recommendations for modernizing the Mining Law in a way that will help America achieve a renewable energy future, preserve and create high paying jobs, stimulate economic recovery and decrease America’s reliance on foreign sources of minerals.

NORTHWEST MINING ASSOCIATION – WHO WE ARE

NWMA is a 114 year-old non-profit mining industry trade association with offices in Spokane, Washington, and 1,650 members residing in 40 states. Our members are actively involved in exploration, mining, and reclamation operations on BLM and USFS administered land in every western state, in addition to private, land grants and tribal lands. Our membership represents every facet of the mining industry including geology, exploration, mining, reclamation, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. Our broad-base membership includes many small miners and exploration geologists as well junior and large mining companies. More than 90% of our members are small businesses or work for small businesses.

Our members have extensive first-hand experience with locating mining claims, exploring for mineral deposits, finding and developing mineral deposits, permitting exploration and mining projects, operating mines, reclaiming mine sites, and ensuring that exploration and mining projects comply with all applicable federal and state environmental laws and regulations.

NWMA's members have extensive knowledge of the Mining Law of 1872, The Federal Land Policy and Management Act (FLPMA), The Surface Resources Act of 1955, administrative and judicial decisions interpreting those laws, and the USFS and BLM Surface Management Regulations governing hardrock mining operations on federal public land (the 228 and 3809 Regulations respectively), as well as the multitude of laws, rules and regulations of the various States that are applied to mineral activities on public lands.

INDISPENSABLE TO ENERGY INDEPENDENCE & ECONOMIC RECOVERY

Hardrock mining is essential to America's clean energy future. A plain and simple fact is that American renewables need American metals and minerals – unless, of course, we are willing to trade our unhealthy dependence on foreign oil for a dangerous dependence on foreign sources of critical minerals. Plans to aggressively expand our renewable energy production will require significant amounts of copper, steel, molybdenum, zinc, gold, silver, cobalt, lead, uranium and rare earth minerals. For example, wind turbines such as the Vestas V90 – 3.0 MW require approximately 335 tons of steel; 4.7 tons of copper; 3 tons of aluminum; 13 tons of glass fiber; 1,200 tons of reinforced concrete; and 2 tons of rare earth minerals. Also, hybrid vehicles require at least 50% more copper than the average car, and the motor requires rare earth minerals.

No renewable energy project, including wind turbines, solar panels, or fuel efficient cars can move forward without metals and minerals that are produced, or could be produced, from mines in the United States. This point is clearly made in the attached peer-reviewed article, *You Say Alternatives Are The Answer ...Let's talk: Resource Constraints on Alternative Energy Development*, by James R. Burnell, Minerals Geologist with the Colorado Geological Survey. The article discusses 18 "Hot List Commodities" needed for alternative energy development and states that although the U.S. has deposits of many of these minerals; our country relies on imports for nearly all of the minerals required for building our renewable energy infrastructure.

Mr. Burnell concludes that:

1. Most alternative energy technologies require scarce strategic metal for their fabrication and operation.
2. Increasing use of these technologies will be constrained by global supply and price issues with the metals.
3. Policy makers in the U.S. should consider a constructive attitude toward exploration and development of strategic commodities necessary for “green” energy. The move toward some degree of self-sufficiency for these commodities would not only help the U.S. balance of trade, but provide good jobs in mining and a stronger possibility for jobs manufacturing renewable energy hardware domestically rather than importing it.
4. Discussions about increasing “green” energy are generally inconsistent with anti-mining policies.

In addition, a healthy and vibrant domestic mining industry is indispensable to our economic recovery. Mining creates new wealth and provides the high-paying family wage level jobs with good benefits our country desperately needs. Moreover, the indirect employment multiplier for the mining industry is twice the national average. In 2007 (the latest year for which statistics are available), the U.S. mining industry provided:

- Direct jobs – **376,310**
- Indirect jobs – **1,079,400**
- Total mining payroll - **\$22.1 billion**, generating **\$64.6 billion** throughout the economy
- **\$98.4 billion** of finished mineral, metal and fuel products; building block materials that were further transformed into consumer and industrial goods creating an additional **\$1.8 trillion** in value added products.

Mining supports the very foundation of our economy. The \$787 billion stimulus package passed by Congress and signed by President Obama includes a public works initiative to upgrade our nation’s infrastructure that will require metals and minerals. Indispensable components of our infrastructure include steel, copper, industrial minerals, molybdenum and iron ore. No infrastructure project, including bridges, buildings or transportation, in fact, no society can move forward without metals and minerals.

Unfortunately, S. 796 and S. 140 will frustrate or prevent the domestic mining industry from providing metals, minerals and jobs necessary for energy independence and economic recovery. Any claims that renewable energy development will lessen our reliance on foreign oil ring hollow if the Nation becomes more reliant on foreign sources of the metals and minerals necessary to build our renewable energy infrastructure, including but not limited to, wind turbines, solar panels, hybrid vehicles and transmission lines. Regrettably, as drafted, S. 796 and S. 140 are guaranteed to increase our reliance on foreign sources of the critically important metals and minerals. Therefore, in considering these bills, Congress must ask and answer questions such as the following:

Do we want to get the rare earth minerals needed for wind turbines and hybrids from California?

OR

Do we want to import the rare earths from China?

Do we want to get the copper needed to build wind turbines and hybrid vehicles from Arizona and Utah?

OR

Do we want to import the copper from Peru, Chile, and Mexico?

Do we want to get the gold and silver we need for electronic and medical equipment from Nevada, Idaho, Colorado, and Alaska?

OR

Do we want to import the gold and silver from China, South Africa, and Australia?

The U.S. can and should be more self-reliant for the minerals we need. Despite reserves of 78 important mined minerals, the United States currently attracts only seven percent of worldwide exploration dollars. As a result, our nation is becoming more dependent upon foreign sources to meet our metal and minerals requirements, even for minerals with adequate domestic sources.

Currently, America is 100 percent dependent on foreign sources for 18 minerals commodities and more than 50 percent import reliant on another 45 commodities. Increased import dependency causes a multitude of negative consequences, including aggravation of the U.S. balance of payments, unpredictable price fluctuations, loss of high paying jobs and vulnerability to possible supply disruptions.

Our over-reliance on foreign supplies is exacerbated by competition from the surging economies of countries such as China and India. As these countries continue to evolve and emerge into the global economy, their consumption rates for mineral resources are ever-increasing; they are growing their economies by employing the same mineral resources that we used to build and maintain our economy. As a result, there exists a much more competitive market for global mineral resources.

Furthermore, S. 796 fails to recognize the evolution of the mining industry from its pick and shovel days to the highly regulated, technologically advanced and environmentally responsible industry that it is today. Much has changed since 1969 (when NEPA was enacted as our first modern federal environmental law), with regard to federal and state environmental regulations governing hardrock mining and financial assurance requirements. The USFS adopted their 36 CFR 228A regulations in 1974, updated them in 2005, and issued financial assurance guidelines in 2004. The BLM promulgated its 43 CFR 3809 regulations in 1980 and updated them in 2000 and 2001. Congress has enacted a plethora of environmental laws applicable to hardrock mining beginning with NEPA in 1969, and every public land state has enacted comprehensive environmental laws and regulations for hardrock mining, including requirements for mined land reclamation secured by financial assurance. One state alone, Nevada, currently holds more than \$1 billion in financial assurance.

S. 796 assumes a state and federal regulatory vacuum that simply does not exist. S. 796 ignores the fact that the U.S. has the highest environmental standards and the most stringent regulations in the world. It ignores the fact that existing environmental laws, regulations, and financial assurance requirements protect the environment, ensure public participation in the process and ensure that modern mines are reclaimed and do not become tomorrow's abandoned mines.

Congress should not enact laws like S. 796 and S. 140 that discourage private investment in mineral development or unduly burden existing production with royalties, taxes and fees. S. 796 and S. 140 will result in premature mine closures, job losses and economic devastation of rural communities. In addition, these bills will increase our reliance on foreign sources of minerals from countries that may be hostile to our economic and national security interests, such as China, Russia, and Venezuela, and do not require the environmental protections we demand in America.

The efforts to build a renewable energy infrastructure, rebuild and expand our nation's infrastructure, energy production and transmission grid shine a spotlight on the need to develop the Nation's mineral and energy resources on both public and private lands and to streamline our permitting and regulatory processes. In order to get Americans working, the Administration and Congress must streamline the regulatory burden and prioritize funding for permitting functions of federal regulatory agencies so that mineral development projects are reviewed and permitted in a timely manner without sacrificing important environmental protections. Unnecessary delays jeopardize projects and inhibit investment, economic expansion and job growth. Over-burdensome bureaucratic processes frustrate job creation and are detrimental to economic recovery.

It is more important than ever for the United States to responsibly utilize our own mineral and energy resources. In fact, our economic and energy security depends on it. The U.S. mining industry stands ready to provide the jobs and materials needed to build our renewable energy infrastructure and lead this nation out of recession and into mineral and energy independence. However, S. 796 and S. 140 are counterproductive to a healthy and vibrant domestic mining industry, economic and energy security, and will not only frustrate job creation but eliminate current high-paying jobs, often exporting them to foreign countries.

AMERICA'S REQUIREMENTS FOR AN AMENDED MINING LAW

America continues to need a Mining Law that promotes responsible development of the Nation's mineral resources by private investors to ensure our energy, economic, and national security, contribute to economic recovery and improve the balance of trade while preserving and increasing family-wage mining jobs; a Mining Law that reduces uncertainty, creates a fair, simple to administer royalty and ensures the right to enter and use and occupy public lands open to location for the entire life cycle of a mining project and a Mining Law that takes advantage of the comprehensive and effective state and federal regulatory framework for environmental protection. For reasons already discussed and outlined further below, S. 796 and S. 140 fall woefully short in meeting these objectives and the needs of our country.

However, as demonstrated by the attached table, with four exceptions that need to be addressed in an amended Mining Law, the 1872 Mining Law, though 137 years old, still meets the key requirements for a successful mining law. Objectives like providing a stable business climate, reducing uncertainty, promoting private investment in finding and developing mineral resources on public lands, preserving and increasing family wage level jobs and guaranteeing land tenure rights from entry through closure and reclamation. Objectives that were reaffirmed by Congress when it passed the *Mining and Minerals Policy Act of 1970* and the *Federal Land Policy and Management Act (FLPMA)* of 1976 and are met with existing law.

The 1872 Mining Law provided the legal framework and incentive for private investors to search for, find, and develop the minerals that built America – our railroads, highways and buildings; the metals that electrified the nation; and the metals and minerals that helped win two world wars. And, as mentioned above, twice in the past 40 years, Congress has reaffirmed the purpose of the Mining Law and a primary purpose of our public lands – to meet the mineral needs of our Nation through private enterprise. That need is as great today as it was 137 years ago. Our highly technological society and desire to develop a renewable energy infrastructure requires minerals, and lots of them.

Notwithstanding the success of the current law, NWMA strongly supports surgical, common-sense amendments to the Mining Law that address the well recognized short comings in the current law -- the lack of an appropriate royalty to provide a fair return to the people; the need for a tenure security provision to replace patenting; a funding mechanism to reclaim historic abandoned mines; and Good Samaritan protection to encourage reclamation of historic abandoned mined lands (AMLs). An amended Mining Law also must ensure a miner's rights to enter upon, use, and occupy public lands to explore for, find and develop mineral deposits. And, an amended Mining Law should recognize and use the existing environmental regulatory framework for mineral activities that the National Research Council in 1999 found to be generally effective in protecting the environment.

Unfortunately, there is nothing surgical or common-sense about S. 796 and its approach to amending the Mining Law. It fails to accomplish the key requirements for a well functioning Mining Law, will create uncertainty, and by repealing the current Mining Law, throws the baby out with the bath water. The Mining Law does not require a major overhaul. It only needs a minor tune-up. Set forth below are NWMA's recommendations for amending the Mining Law and a discussion of some of the major problems with S. 796 and S. 140.

NWMA RECOMMENDATIONS FOR AMENDING THE MINING LAW

NWMA urges Congress to enact Mining Law amendments that will reduce America's reliance on foreign minerals; provide domestic sources of the minerals needed for America's renewable energy infrastructure and its national and economic security; create thousands of high paying family-wage jobs; and strengthen the economy in rural communities throughout the West. Specifically, NWMA believes responsible Mining Law legislation should accomplish the four objectives outlined below:

PROVIDE SECURITY OF LAND TENURE:

If Mining Law amendments are going to eliminate the rights of mining claimants to patent mining claims with a discovery of a valuable mineral deposit, then the legislation must provide secure rights to enter public lands and to use and occupy those lands for the purpose of making a mineral discovery and developing a mine. Security of land tenure is needed throughout the entire mineral life cycle of entry, location, prospecting, exploration, development, mining, and reclamation in order to attract investment capital for exploration and mine development and to support business investment decisions to build a mine.

The only way the country will benefit from a continuous and robust future stream of royalty payments will be to maintain a pipeline of new discoveries that eventually become future mines. To achieve this important objective, public lands must remain open to exploration and development. This means that the Mining Law must provide a right of entry and access on lands open to the operation of the Mining Law and the right to use and occupy public lands for mineral purposes throughout the mineral lifecycle of exploration, development, mining and reclamation. Of course, these mineral activities must be conducted in compliance with laws and regulations to protect the environment and to reclaim the land.

Thus, NWMA believes that an amended Mining Law must preserve the Mining Law rights of self initiation and entry at 30 U.S.C. §22 to enter and occupy public lands open to location to prospect and explore for locatable minerals and to locate mining claims. Once a mining claim has been located, security of tenure and all rights to use and occupy federal lands for mineral purposes should be tied to the payment of the initial claim location fee and the annual claims maintenance fee. There should be no other fees or fair market value assessment for mineral activities on federal lands.

ROYALTY:

Congress should enact a royalty that provides the public fair compensation for minerals produced from future discoveries while allowing reasonable deductions to produce a marketable product

- The royalty must be structured to consider the entire cost burden of state and federal income taxes, sales taxes, and other taxes, and not be so high that it becomes impossible for companies to recover the significant capital cost and upfront investment in exploration and mine development. Attached hereto and incorporated by reference is the 2009 Country Ranking Study by Behre Dolbear. This study indicates that countries with a greater than 50% government take are unfavorable to mining, expresses concern about the 35% U.S. corporate tax rate and gives the U.S. a ranking of 5 out of 10 on the basis of an unfavorable existing tax regime and concerns that it will get worse due to the enactment of a federal royalty.
- The royalty must also consider that underlying private royalties burden most mining claims. The combination of federal plus private royalties must not make mines unprofitable because unprofitable mines will close prematurely or never be built in the first place. Royalties will

not be realized at closed mines or mines that are not built. In addition, the royalty must not diminish the revenue from state mineral taxes and severance taxes on which state and local governments depend.

- The royalty must be prospective. Assessing the royalty on existing mining claims on which there has been substantial investment in reliance on existing law may subject the United States to substantial takings litigation. The courts, including the U.S. Supreme Court, have recognized that valid unpatented mining claims are exclusive possessory interests in federal land for mining purposes which entitle claim holders to extract and sell minerals “without paying any royalty to the United States as owner.” *Union Oil Company v Smith*, 249 U.S. 337, 348-49 (1919). “Even though title to the fee estate remains in the United States, these unpatented mining claims are themselves property protected by the Fifth Amendment against uncompensated takings.” *Kunkes v United States*, 78 F.3d 1549, 1551 (Fed.Cir.1996). This position is more fully explained in the attached legal memorandum prepared by Beveridge & Diamond pc, attorneys at law. This memorandum is incorporated by reference as though fully set out herein.
- Mine operators and not owners, co-owners, or underlying royalty owners should be liable for paying the royalty. This is analogous to the collection of federal royalties on coal and oil and natural gas. The Minerals Management Service (MMS) has significant experience collecting royalties from coal operators and oil and gas operators. Thus, placing the royalty liability on mine operators will simplify administration of hardrock royalties by MMS.

ABANDONED MINE LAND RECLAMATION:

All royalties collected from hardrock mineral production should be used to reclaim historic abandoned mine lands. There is no need for a new federal AML program. Existing state, BLM, USFS, and Army Corps of Engineers (RAMS) AML programs have proven track records of successfully reclaiming AML sites. Rather, the legislation should create a hardrock AML fund, and all monies should be distributed to existing federal and state AML programs without the requirement of an annual appropriation. The fund also should allow for donations by persons, corporations, associations and foundations, and other monies that are appropriated by the Congress of the United States.

It is important to recognize that the AML problem is a finite and historical problem and not one that will grow in the future. Most AMLs predate the passage of NEPA, federal and state environmental laws and the establishment of federal and state hardrock mining regulatory programs. The few exceptions occurred during a time when federal and state hardrock mining regulatory programs were in their infancy and reclamation and financial assurance requirements consisted primarily of re-grading and re-vegetation. In those early years, closure and reclamation requirements were not based on detailed modeling of likely long-term water quality impacts, and did not include comprehensive financial assurance requirements based on those models. Today, they do.

Since 1974, federal and state financial assurance requirements for hardrock exploration and mining projects have evolved to ensure that today's reclamation bonds are comprehensive and conservative. In addition, over the last 25-35 years, the BLM, the USFS and every western state with hardrock mining activities have enacted environmental laws and regulatory programs for hardrock mineral activities. These regulatory programs work together with today's reclamation bonding and financial assurance requirements to ensure that today's mines will not become future AML sites.

The attached NWMA White Paper entitled "*The Evolution of Federal and Nevada State Reclamation Bonding Requirements for Hardrock Exploration and Mining Projects*" documents how federal and state regulators have used existing regulatory authorities to respond to and eliminate short comings in the reclamation bonding program. This paper demonstrates that federal and Nevada regulators, with the mining industry's full participation and concurrence, have significantly improved and expanded reclamation bonding requirements in the last 5 years based on the lessons learned at mine bankruptcy sites in the 90's. This paper further documents that current reclamation bond requirements are comprehensive and conservative and consider all likely contingencies based on agency costs to implement, manage, and complete reclamation of sites requiring government intervention. This White Paper is incorporated by reference as though fully set forth herein.

It also is important to understand that the vast majority of hardrock AML sites are not problematic. A 1998 Western Governors Association (WGA) report estimated that more than 80% of AML sites create neither environmental nor immediate safety hazards. Where problems do exist, safety hazards are the primary problem although some AML sites have both environmental and safety issues.

The Center of the American West released a study in 2005 entitled "Cleanup of Abandoned Hardrock Mines in the West." The Center, which is affiliated with the University of Colorado, states at page 31 of its report that "only a small fraction of the 500,000 abandoned mines [identified by the Mineral Policy Center] are causing significant problems for water quality."

In 2007, the USFS and BLM published a report entitled *Abandoned Mine Lands: A Decade of Progress Reclaiming Hardrock Mines*. This report estimates that there are approximately 47,000 abandoned mine sites on more than 450 million acres of federal land managed by those two agencies. This report estimates that as many as 10% of the AML sites on USFS- or BLM-managed land *may* include environmental hazards and that the balance, or approximately 90%, are landscape disturbances or safety hazards. The finding that landscape disturbance and safety hazards comprise the bulk of the AML problem is consistent with other reports.

Although much of the public debate about the AML problems typically focuses on environmental issues, it is really safety hazards that deserve our immediate attention. Nearly every year, the country experiences one or more tragic accident or fatality at an AML site where somebody has fallen into or become trapped in an unreclaimed historic mine opening. AML safety hazards pose a far greater risk to the public than AML environmental problems. Therefore,

we should focus first-priority AML funds on eliminating safety hazards at abandoned mine sites located near population centers and frequently used recreation areas.

THE NEED FOR GOOD SAMARITAN PROTECTION

While some progress has been made by industry and existing State and federal AML programs in reducing safety hazards and remediating and reclaiming hardrock AMLs, the number one impediment to voluntarily cleanup of hardrock abandoned mine lands is the potential liability imposed by existing federal and state environmental laws, in particular the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (commonly known as Superfund), the Resource Conservation & Recovery Act (RCRA), and the Toxic Substances Control Act. Under these laws, a mining company, state or federal agency, NGOs, individuals or other entities that begin to voluntarily remediate an abandoned mine site could potentially incur “cradle-to-grave” liability under the CWA, CERCLA, and other environmental laws, even though they did not cause or contribute to the environmental condition at the abandoned mine land site.

Furthermore, they could be required under the CWA to prevent discharges to surface waters from the AML in perpetuity, unless those discharges meet strict effluent limitations and do not result in exceedences of stringent water quality standards, something that may not be possible; and in any event, may be so expensive that no company, individual, or other entity would undertake a voluntary cleanup.

Virtually everyone who has looked at the AML issue in the west has recognized and documented the legal impediments to voluntary cleanup of AMLs and has urged that those impediments be eliminated. These groups include the Western Governors Association, the National Academy of Sciences, and the Center for the American West.

In order to improve the effectiveness of any AML reclamation effort, the legislation should include effective Good Samaritan language that will create a framework, with incentives and liability protection for numerous entities, including mining companies, local, state and federal agencies, NGOs, and tribes, to voluntarily remediate historical environmental problems caused by others at abandoned hardrock mine sites in the United States. Several Good Samaritan bills have been introduced in the past, but only S. 1848, introduced in 2006 by Senators Salazar and Allard, passed out of committee. We strongly supported, and continue to support the Salazar/Allard approach to Good Samaritan legislation and believe that approach should be included in Mining Law Reform legislation.

NWMA provided testimony on AML issues at the October 2, 2007 House Energy and Mineral Resources subcommittee legislative hearing on H.R. 2262 and the March 12, 2008 Senate Energy and Natural Resources oversight hearing. A copy of both testimonies is included with this statement and incorporated by reference as though fully set forth herein.

At the March 12, 2008 Senate Energy & Natural Resources Committee oversight hearing, NWMA presented a chart which demonstrates that there were more than 120 years of hardrock

mining in the U.S. before the first environmental law was enacted. The subcommittee should carefully study this chart. It will demonstrate clearly that the AML problem is historic.

ENVIRONMENTAL STANDARDS AND REGULATIONS:

Mining Law amendments must recognize that existing federal Surface Management Regulations (BLM 43 CFR 3809 and USFS 36 CFR 228) – coupled with the country’s framework of federal and state environmental statutes and regulations that apply to all industries, including mining - effectively protect the environment. Operations under the Mining Law are subject to all applicable federal and state environmental laws and regulations. Mining does not get an “olly, olly, oxen free” under the *Clean Water Act*, the *Endangered Species Act* or any other applicable environmental law and regulation. Federal land managers have an absolute right and duty to say “no” if a mining proposal will not comply with all applicable state and federal environmental laws and regulations. If a mining proposal cannot meet *Clean Water Act* standards, the mine does not get a permit to operate. Federal land managers and regulators tell mining companies “no” all of the time. They require changes in the Plan of Operation, and they require significant efforts to ensure there will be no water quality violations. The current regulatory framework is working to protect the environment.

Furthermore, the current National Environmental Policy Act (NEPA) review and public participation process provides an effective tool for gathering public comments that influence regulators’ decisions about project proposals. The existing federal and state environmental laws, regulations, environmental protection standards and the NEPA process work together to provide federal and state regulators with stringent and comprehensive regulatory authority to effectively regulate all aspects of mineral projects and to comply with land management goals.

In 1999, the National Academies of Science, National Research Council, published a report entitled *Hardrock Mining on Federal Land*. This report was prepared at the direction of Congress to determine if federal and state environmental laws and regulations were effective in protecting the environment. The report concluded that “[t]he overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective.” The report identified five regulatory gaps which were filled when BLM updated their 3809 regulations in 2001. S. 796 treats these “gaps” as if they remain unfilled. No new or different regulations, environmental performance standards or financial assurance requirements are needed.

S.796 AND S. 140 FAIL TO MEET INDUSTRY OBJECTIVES AND THE NATION’S REQUIREMENTS FOR AN AMENDED MINING LAW

“The Hardrock Mining and Reclamation Act of 2009” (S.796) has many fatal flaws that will create uncertainty for the mining industry, discourage investment in U.S. mining, impede economic recovery, lead to the loss of high-paying mining jobs bringing severe economic hardship to countless mining-dependent communities, and result in an increased reliance on foreign sources of minerals and metals.

While Senator Bingaman's bill may appear to be a more moderate approach to updating the Mining Law than H.R. 699, a careful reading reveals that it is a "Trojan horse" that will create serious problems for the Nation if it becomes law. Also, several of these flaws apply to S. 140. Here's why:

- **Both S. 796 and S. 140 decimate security of land tenure by eliminating the rights to use and occupy public land for mineral purposes which will thwart exploration and development.**
 - Eliminating pre-discovery rights to enter, use and occupy public lands open to mineral entry creates intolerable uncertainty because exploration becomes a discretionary use of public land where permission to explore can be revoked at any stage. This loss of pre-discovery rights significantly increases the risks associated with mineral exploration and will lead to a substantial decline in mineral discoveries and future mineral production.
 - Eliminating the right to use and occupy non-mineral public lands for ancillary facilities such as processing facilities, unmineralized rock storage areas, roads, etc., and making these uses discretionary, also creates intolerable uncertainties which will thwart mine development.
 - Before substantial investments will be made to explore and develop mineral deposits, miners must know that their rights to enter, use and occupy public lands open to mineral entry are secure from entry through mine closure.

- **S. 796 eliminates notices for exploration, failing to recognize exploration's limited, short-duration surface disturbance and replaces notices with a burdensome exploration permitting process (§302).**
 - The resulting downturn in exploration will lead to a dramatic decline in discoveries of new mineral deposits and will significantly reduce future domestic mineral production.
 - The language conflicts with the recommendations of the National Research Council.

- **S. 796 contains vague and uncertain royalty provisions that leave the most critical details to a long and uncertain rulemaking process, including the exact amount of the royalty; the precise nature of deductions that are reasonably associated with beneficiation, processing and transportation; the standard to be used to determine the royalty rate; and who is responsible for payment of the royalty (§201-§203).**
 - The resulting economic uncertainty will inhibit or freeze investment until the rulemaking is complete and damage U.S. mining industry competitiveness in the global marketplace.
 - Assessing the royalty on existing mining claims on which there has been substantial investment in reliance on existing law may subject the United States to substantial takings litigation.

- Under the expanded royalty obligations, each person liable for royalty payments is to be jointly and severally liable for royalty on all locatable minerals lost or wasted, inviting the government to make economic decisions concerning mineral deposits that only a miner is capable of making.
- **Similarly, S. 140's 4% gross royalty on mines with current commercial production and 8% gross on new mines will result in premature closure of existing mines and make future mines uneconomic, resulting in an unhealthy increased reliance on foreign sources of minerals, a loss of high paying family wage jobs and bring severe economic hardship on mining-dependent rural communities. Furthermore, assessing the royalty on existing mining claims on which there has been substantial investment in reliance on existing law may subject the United States to substantial takings litigation.**
- **S. 796 prohibits any person or related party from relocating a mining claim, millsite or tunnel site for 10 years after a claim or site is dropped or becomes null and void regardless of the reason and provides no right to cure an oversight or error on the payment of the claim maintenance fee (§ 102(a)(4)(B)).**
 - Fails to recognize the cyclical nature of mineral prices and the economic and geological reasons for dropping and relocating claims.
 - Unnecessarily penalizes companies wanting to invest in domestic mineral exploration and production without any policy or on-the-ground justification.
 - Increases risks and costs associated with grassroots exploration and mining resulting in fewer new mineral discoveries and an increased reliance on foreign sources of minerals.
- **The unsuitability withdrawal provisions in S. 796 give federal land management agencies unprecedented broad authority to subjectively withdraw lands from mineral development. Incredibly, it leaves that decision to the discretion of the local land manager without considering the mineral potential of the lands or providing guidelines and standards to follow (§ 307).**
 - Putting potentially mineralized lands off-limits to mining will increase the Nation's reliance on foreign minerals.
 - FLPMA and the Antiquities Act of 1906 provide more than adequate statutory authority for any withdrawal of lands deemed necessary by the agencies to protect lands too sensitive for mining-related activities.
 - The substantial land withdrawals of the past 4 decades demonstrate that no new additional withdrawal authority is necessary.
- **S. 796 mandates the Secretaries of Interior and Agriculture to jointly promulgate regulations to carry out the Act without guidelines or standards, potentially creating duplicative environmental regulations while ignoring the existing comprehensive**

framework of federal and state environmental laws that the National Research Council (NRC) found effective in protecting the environment from impacts of mining (§ 306(d)).

- New regulations in addition to requirements already applicable under the Federal Land Policy and Management Act or the National Forest Management Act will create confusion, uncertainty, and cause further permitting delays, making the U.S. less attractive to investors.
 - This is a solution in search of a problem.
- **S. 796 includes a very restrictive definition of “casual use.” The definition “ordinarily result in no or negligible disturbance of federal land or resources” is very narrow and imprecisely defined, leaving the door open to a more restrictive definition by regulation (§ 2(4)).**
 - Allows the agencies to require a permit for virtually every activity adding tens of thousands of permit applications. There is no way the BLM or USFS could process the thousands of permits that would be required, causing greater permitting delays for all projects;
 - In spite of evidence to the contrary, this implies that *all* prospecting and exploration activities are significant and will require an EA or EIS, adding delays, burdening the agencies’ workload and increasing permitting costs without any corresponding environmental benefit.
 - **S. 796 requires public notice and comment prior to the release of any financial assurance (§ 304).**
 - Release should be based strictly on technical criteria, financial analysis and the reclamation plan as set forth in the mining permit;
 - If the reclamation work has been accepted by the agency, there is no legitimate matter on which public opinion should be considered.
 - **S. 796 removes bentonite, high grade calcium carbonate deposits and other locatable industrial minerals from operation of the Mining Law, and potentially could remove uranium (§ 504 and § 505).**
 - Overrules several IBLA cases and the McClarty test for verifying distinct and special value.
 - Subjecting these minerals to agency discretion, highly restricted permits, and competitive sales under the Material Sales Act of 1947 will make it more difficult to attract investment and meet America’s demand for these important minerals from domestic sources.

- **S. 796 repeals the General Mining Laws except for the provisions relating to location of mining claims not specifically modified by the Act (§ 506(c)).**
 - Repealing 137 years of interpretation and precedent is bad public policy, creating uncertainty and increasing the likelihood of unnecessary and costly litigation. The Mining Law needs surgical amendments to address recognized shortcomings, not a complete overhaul.
 - Throws the baby out with the bath water.
- **As currently drafted, the reclamation fee in S. 796 (§403) and S. 140 (§103), when combined with the royalty in S. 796 (§201) and S. 140 (§101), would render most mines uneconomic resulting in premature closure of existing mines and fewer mines being built, increasing the Nation's reliance on foreign sources of minerals.**

CONCLUSION

S. 796 and S. 140 are disastrously bad bills for the U.S. mining industry and, more importantly, for the country, its economy and the American workforce. S. 796 eliminates security of land tenure, creates insurmountable regulatory hurdles, empowers third-parties to petition to withdraw lands from mining – even after valuable minerals have been discovered, and creates new unrealistic and impractical standards for mining. S. 140 imposes a gross royalty scheme that would cause premature mine closures, wasting of public minerals, depriving the public of a longer royalty stream, and causing greater global environmental impacts. S. 796 and S. 140 create many uncertainties for the mining industry. But one thing is certain – these bills will create the following serious problems for the Nation if they become law:

- America's renewable energy future will be jeopardized;
- America's national and economic security will be severely weakened as well paying, family-wage level jobs are exported overseas and our Nation becomes more reliant on foreign sources of strategic and critical minerals;
- Mineral production on America's public lands will be abruptly curtailed;
- America's already extensive reliance on foreign sources of minerals will dramatically increase due to the significant reduction in domestic mineral production;
- Mining-dependent rural communities will experience devastating economic hardships;
- The federal government will be subject to substantial takings litigation.

NWMA urges Congress to enact Mining Law amendments that will reduce America's reliance on foreign minerals; encourage production of domestic sources of the minerals needed for America's national and economic security; promote the creation of thousands of high-paying family-wage jobs; and strengthen the economy in rural communities throughout the West. However, S. 796 and S. 140 are not the answer. In fact, if S. 796 or S. 140 is enacted it will have the exact opposite result.

NWMA appreciates the opportunity to provide this testimony and looks forward to working with the Committee to develop common-sense, appropriately balanced amendments to modernize and reform the Mining Law of 1872 consistent with this testimony.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Laura Skaer".

Laura Skaer
Executive Director