

Testimony of Professor Sam Kalen
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Before the Subcommittee on Energy and Mineral Resources
of the House Natural Resources Committee
On H.R. 7580
May 12, 2022

The Honorable Alan S. Lowenthal
Chair, Subcommittee on Energy and Mineral Resources
1324 Longworth House Office Building
Washington, D.C. 20515-6201

Dear Chairman Lowenthal:

Thank you for the opportunity to appear today to offer my views on *Reforming the Mining Law of 1872*, as it relates to H.R. 7580, the *Clean Energy Minerals Reform Act of 2022*. I also appreciate the opportunity to appear before you today remotely. My name is Sam Kalen, and I am the William T. Schwartz Distinguished Professor of law and Associate Dean at the Wyoming College of Law. I teach primarily in the field of environmental, natural resources, and energy law and have written extensively on these subjects.¹ I also have worked on mining law issues for a considerable part of my professional career. My remarks today are my own and do not necessarily reflect the views of the Wyoming College of Law or its employees.

As one of the nation's premier public land scholars, Charles Wilkinson, so aptly noted, the 1872 Mining Law is one of the last remnants of what he called a *Lord of Yesterday*, an anachronistic law that remains despite dramatic changes in policy since President Grant signed the Act into law 150 years ago.² With the law's sesquicentennial upon us, this is surely a propitious occasion to reflect on the urgency of reform—as the nation confronts how to address its need for clean energy minerals. And perhaps one starting point for reflection is how the need for Mining Law reform has been appreciated for well over a century, the principal subject of my testimony.

To begin with, it's worth noting that John Leshy, the expert on the Mining Law, explained roughly 35 years ago that the law has remained in perpetual motion for decades, evading reform and yet universally acknowledged to be ill-suited to modern times.³ Historian Gordon Bakken, while explaining how the Mining Law was designed in the post-Civil War era to regularize and confirm mining practices, echoes an assessment by Jared Diamond that suggests that, “this federal statute . . . [is] among the greatest failures of judgement in world history.”⁴ That may sound a bit too hyperbolic, but as former Secretary of the Interior Ken Salazar testified in 2009 the law

¹ See, e.g., Sam Kalen, *An 1872 Mining law for the New Millennium*, 71 COLO. L. REV. 343 (2000); Sam Kalen, *Mining our Future Critical Minerals: Does Darkness Await Us?*, 51 ENVTL. L. REP. 11006 (Dec. 2021).

² CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

³ JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987).

⁴ GORDON MORRIS BAKKEN, *THE MINING LAW OF 1872: PAST, POLITICS AND PROSPECTS 2* (2008). For another historical account, see DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT, 1800-1980* (1987).

unfortunately, “[d]espite decade after decade of fights about how it is that we should reform the Mining Law all of those efforts have failed.”⁵

These failed efforts, however, should not dissuade Congress from crafting a mining law reform package that corresponds to modern challenges: recognizing that a green economy may require producing some domestic critical minerals, yet only allowing such production to occur if we—

(a) abandon the location system that returns no value to the American taxpayers for the use of the Nation’s public lands—rather likely costs the American taxpayer—and, instead, replace it with a leasing system that, through market-based royalties and rental fees, ensures a fair return for the use of the Nation’s public lands;

(b) protect our natural resources and ensure that activities will not result in unnecessary or undue degradation of the public lands—and through a leasing system by only allowing leasing where and when the government can be assured that those values will be protected;

(c) engage in meaningful consultations with Tribal Nations and Indigenous peoples to ensure that *no* activities will be allowed in areas of historic, cultural, or religious significance, or allowed in any area that is otherwise protected or secured by a treaty or other arrangement; and finally

(d) address the clean-up of the Nation’s public lands from historic mining operations by imposing a fee on mining operations to defray the cost of reclaiming thousands of abandoned mines scattered across the public lands.⁶

My attached December 2021 article, *Mining our Future Critical Minerals: Does Darkness Await Us?*⁷ (<https://www.eli.org/sites/default/files/files-pdf/51.11006.pdf>), goes into some of these issues in a bit more detail and I will not repeat that detail here, but one salient point is worth emphasizing.

The need for mining law reform has been apparent for well over a century. As early as 1880, the Public Land Commission suggested the need for reform as it identified abuses surrounding the use of the 1872 Mining Law during just the law’s first decade.⁸ Indeed, an initial economic justification for allowing the free exploitation of the Nation’s resources was dubious from the outset.⁹ Then, as Congress from the turn of the century on began to develop policies for other

⁵ *Mining Law Reform, Hearing Before the Committee on Energy and Natural Resources, Receive Testimony on S. 796, Hardrock Mining and Reclamation Act of 2009 and S. 140, Abandoned Mine Reclamation Act of 2009, U.S. Senate, 111th Cong. (2009)* (statement of Ken Salazar, Secretary, Department of the Interior).

⁶ For one report on the issue of cleaning up abandoned mines, see U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *ABANDONED HARDROCK MINES: INFORMATION ON NUMBER OF MINES, EXPENDITURES, AND FACTORS THAT LIMIT EFFORTS TO ADDRESS HAZARDS* (March 2020).

⁷ See *supra* note 1.

⁸ REPORT OF THE PUBLIC LANDS COMMISSION, CREATED BY THE ACT OF MARCH 3, 1879, RELATING TO THE PUBLIC LANDS IN THE WESTERN PORTION OF THE UNITED STATES AND THE OPERATION OF EXISTING LAND LAWS xix, H. Exec. Doc. No. 46, 46th Cong., 2d Sess. (1880).

⁹ See PAUL W. GATES, WITH A CHAPTER BY ROBERT W. SWENSON, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 717 (1968) (Written for the Public Land Law Review Commission). Quite possibly, “the basic problem with the 1866 Act [the precursor to the 1872 Act] was that no revenue was reserved for the government. It is entirely possible that the

resources on the public lands, it routinely rejected the 1872 Mining Law's approach of affording miners of hardrock minerals the ability to discover valuable mineral deposits on available public lands and mine those minerals *without paying any value back to the U.S. and the American people*. Today, consequently, the Mining Law stands alone amid the host of other natural resource programs that provide at least some measure of economic return to the public from the use of the nation's public lands. Indeed, as far as I am aware, the Mining Law remains unique worldwide in its failure to employ some form of valuation method for lands owned and administered by a federal, state, or provincial government.

Not surprisingly, therefore, Interior Secretary Harold Ickes in the 1930's promoted leasing hardrock minerals.¹⁰ So too, the highly-regarded 1950's Paley Commission recommended establishing a leasing system.¹¹ And Interior Secretary Stewart Udall, in 1969, similarly recommended abandoning the location system in favor of leasing. "After eight years in office," the Secretary lamented, "I have come to the conclusion that the most important piece of unfinished business on the nation's natural resource agenda is the complete replacement of the Mining Law of 1872" because its "deficiencies . . . cannot be remedied by tinkering."¹² Reforming the old law surfaced as a recommendation of the 1960's Public Land Law Review Commission. In its 1970 report, *One Third of the Nation's Land*, it observed how "[t]he General Mining Law of 1872 has been abused, but even without that abuse, it has many deficiencies," and recommended a combination of elements of the leasing system and ensuring a fair return to the United States.¹³ When digesting the Commission's work, the *New York Times* reported how "all mineral interests known to be of value should be reserved with exploration and development discretionary in the Federal government and a uniform policy adopted relative to all reserved mineral interests."¹⁴ Reform conversations continued throughout the 1970s;¹⁵ and even the U.S. Government Accountability Office (GAO), for example, carried forward a recommendation for reform in 1979,¹⁶ just to name one. And mining law reform surfaced as a principal concern of Secretary Babbitt, as well, during the 1990s.¹⁷

Today's hearing, with the law's sesquicentennial upon us, is part of a conversation that began back in the 1880s, and one that has continued almost unabated since. Reform is undeniably now part of the law's heritage—hopefully approaching a historic moment toward resolution. I want to thank the Committee again for providing me with this opportunity to share my thoughts on *Mining Law Reform*.

mistake which the eastern bloc . . . really made was in their conclusion that leasing, which had never really been studied by Congress or the government, was not workable." *Id.* at 719, 723.

¹⁰ WILKINSON, *supra* note 2, at 318.

¹¹ LESHY, *supra* note 3, at 301.

¹² *Id.* at 302.

¹³ PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* 121-138 (1970).

¹⁴ *Digest of the Commission's Report and Recommendations on Public Land Use*, N. Y. TIMES, June 24, 1970, <https://www.nytimes.com/1970/06/24/archives/digest-of-the-commissions-report-and-recommendations-on-public-land.html>.

¹⁵ LESHY, *supra* note 3, at 304-05.

¹⁶ GAO, *MINING LAW REFORM AND BALANCED RESOURCE MANAGEMENT* (1979) (EMD-78-93).

¹⁷ See Kalen, *An 1872 Mining law for the New Millennium*, *supra* note 1.