THE MINING SUBTITLE OF THE DEFICIT REDUCTION ACT OF 2005, S. 1932, AS PASSED BY THE U.S. HOUSE OF REPRESENTATIVES, 11/25/05: A CRITIQUE BY MINING LAW AND PUBLIC LAND LAW PROFESSORS

I. Introduction

The Mining Subtitle of the House-passed version of the Deficit Reduction Act of 2005 ("Act") would effect major revisions to the General Mining Law of 1872. These changes were passed with little discussion or debate, either within the House Resources Committee or on the floor of the House of Representatives itself. In the past, proposed changes to the Mining Law have been vigorously examined and thoroughly debated in an open legislative process, ensuring a full airing of competing legal and policy concerns. Almost none of that has occurred in this instance, nor do these revisions reflect any of the insights gained from the earlier discussions. Yet Congress now stands on the precipice of reforms that would transform how the 133-year-old mining law is interpreted and applied.

The Act would fundamentally alter the mechanics of the General Mining Law in ways detrimental to other public land values, while failing to address the law's most obsolete provisions. Specifically:

- The Act would end the moratorium on the patenting of mining claims, and introduce a new and ill-defined contiguous claim patenting option, potentially leading to the privatization of millions of acres of public land.

- It would eliminate the bedrock "discovery" requirement, allowing claimants to establish property rights against the United States without demonstrating any likelihood of developing a profitable mine.

- It would allow mining on existing unpatented claims in protected areas without proof of a discovery of valuable mineral deposits.

- It would prevent the federal government from recovering the mineral value of patented lands.

- It would preclude the imposition of a royalty on mineral production from unpatented claims.

Indeed, rather than promoting minerals development, the Act appears designed to transfer federal public lands into private hands for other development purposes. The Federal Land

Policy and Management Act (FLPMA) already establishes a rational, public, planning process for making such decisions. *See* 43 U.S.C. §§ 1713, 1716. The Mining Subtitle of the Deficit Reduction Act would effectively place these decisions in private hands, dependent solely on the fortuity of claim locations and past mineral development activity.

How these revisions would operate, their potential impact on the public lands, and the management issues they raise are examined in more detail below, in Part III and in the appendix ("Fallacies and Facts").

Mining Law Background

Understanding the mechanics of the General Mining Law (codified as amended at 30 U.S.C. §§ 21-42) is essential to understanding the far-reaching implications of the Deficit Reduction Act's Mining Subtitle. The 1872 law today is little changed from its original form. Reflecting the values of its time, it promotes the development of minerals on federal land by opening federal lands for private parties to stake claims, explore for and develop minerals found on the claims, and upon application to the United States gain full fee title to the land and the minerals.

Specifically, the law opened "all ***valuable mineral deposits*** in lands belonging to the United States" to exploration and purchase. (Emphasis added.) The law applies to gold, silver, copper, uranium, zinc, molybdenum, and certain other so-called "hardrock" minerals. Today, about 350 million acres of federal lands, most managed by the U.S. Forest Service and Bureau of Land Management, remain subject to the General Mining Law. The law allows a person to enter any federal land (or privately owned surface underlain by federally owned minerals) that has not been "withdrawn" by Congress or the Executive from the operation of the mining law (see below) and to "locate" a claim where he or she believes a valuable mineral deposit exists. Once a person stakes the claim, complies with all procedural requirements, and makes a discovery of a valuable mineral deposit, that person has a ***valid*** "unpatented claim" and acquires valuable property rights exclusive of other miners and against the United States.

It is a fundamental principle of the 1872 law that the holder of an unpatented mining claim acquires a continuing right to mine on the claim ***only by*** actually discovering valuable minerals. If a miner stakes and files a claim and pays the applicable fees, but has not actually discovered

valuable minerals, that miner has a temporary privilege to continue looking for minerals, but no vested property right. Thus, the discovery requirement protects the ability of the United States to ensure multiple uses of federal land. The United States may void such claims without compensating the claimant if it decides to devote the land to some use inconsistent with mining, such as reservoirs, campgrounds, or wildlife habitat. Holders of ***valid*** unpatented mining claims, on the other hand, enjoy property rights that can substantially limit the government's ability to use, manage, and protect the overlying land. The surface of these valid claims remains the property of the United States, however, and the federal government regulates the environmental impacts of mining on unpatented claims.

In sum, merely staking a mining claim on federal land does not create a property interest good against the United States. Only when the claimant makes a "discovery" of a "valuable mineral deposit" on the claim does the claim ripen into a property interest. *See* 30 U.S.C. § 23. Courts have interpreted this provision to allow the staking and filing of a claim prior to discovery, but only claims on which valuable minerals have actually been discovered are considered valid under the law. *See, e.g., Cole v. Ralph*, 252 U.S. 286, 296 (1920).

Furthermore, the Interior Department and the courts have long required mining claimants to show that they can ***profitably market*** minerals produced from a claim in order to show a discovery. This "marketability" test for discovery helps prevent abuse of the mining law, e.g., privatization of lands for residential, recreational, or other uses not incident to mining. *See United States v. Coleman*, 390 U.S. 599, 603 (1968).

As noted above, the discovery requirement is also important when land has been "withdrawn" by Congress or the Executive from entry under the Mining Law. Lands may be withdrawn when they are included in national parks, national monuments, wilderness areas, or other reserves, or to protect sensitive resources, such as cultural resources or important wildlife habitat. Still other lands are withdrawn from the operation of the Mining Law because they are needed by the federal government for special purposes, such as reservoirs, energy developments, campgrounds, or administrative sites. New claims may not be staked on land that has been withdrawn from the operation of the Mining Law. However, many areas, including many national parks, monuments, and wilderness areas, contain old mining claims that were staked and filed before the

land was withdrawn. Under current law, the holders of pre-withdrawal unpatented claims have a right to mine *only if* they had discovered valuable minerals on the claim *before* the land was withdrawn. For this reason, current regulations (43 C.F.R. § 3809.100) require that, before the BLM will approve a plan of operations for mining on a claim on withdrawn land, it must prepare a mineral examination report to determine whether valuable minerals were discovered on the claim before the date of the withdrawal.

The 1872 law also offers the mining claimant the possibility of securing full fee title to both the land and the minerals in the claim by applying for and obtaining a Apatent,@ or deed, from the United States. Until 1994, a patent could be secured by paying claim maintenance fees, demonstrating that a valuable mineral deposit had actually been discovered, and paying a maximum of $5.00 per acre (an amount fixed by Congress in 1872 and never since changed). 30 U.S.C. § 29. Following the embarrassing Barrick patent incident (when the United States was forced to relinquish over ten billion dollars worth of gold reserves by deeding 1,000 acres of public land to a mining company for a mere ten thousand dollars), Congress has annually included a patent moratorium in its budget legislation. The Barrick incident was preceded by long history of abuse and deceit, with many acres of patented mineral lands ending up ski areas, resort developments, and vacation homes. *See General Accounting Office, The Mining Law of 1872 Needs Revision* (1989). It is well established that mining companies do not need a patent to conduct mining operations on public lands. The patent moratorium has had no apparent impact on hardrock mining activity. A number of mines have been opened and new claims staked since Congress imposed the moratorium on patenting. *See* Statement of James Hughes, Deputy Director, BLM, Before House Resources Committee, Subcommittee on Energy and Mineral Resources, March 10, 2005 (reporting 44,350 new mining claims filed during FY 2004).

II. The Act's Patent Provisions: Section 6102

The Mining Subtitle not only reopens the door for privatizing federal public lands, it relaxes the standards for obtaining patents.

A. *Ending the Patenting Moratorium*: *Sections 6102 and 6104*

Section 6102 expressly repeals the current moratorium on patenting, thus making patents available both for existing

mining claims and for new claims located in the future. A substantial amount of federal acreage could be affected. According to the BLM, 250,000 to 300,000 active mining claims exist on federal lands. As noted above, more than 40,000 new mining claims were staked during the past fiscal year. All of these claims could potentially be taken to patent. Most claims are about 20 acres in size. Thus, the Act puts roughly 6 million acres at risk of being transferred to private hands. The bill's proponents assert that only some of the 360,000 acres of federal mining claims that are presently being explored or developed under an approved or pending plan of operations will be subject to patenting. But the Act does ***not*** limit patenting to those lands. Moreover, the lure of a patent under the relaxed standards of Sections 6102 and 6104 (see below) virtually ensures that some (perhaps many) mining claims would be patented. Mining claimants could meet the new patenting standards without developing a working mine.

Although Section 6107 proposes to exclude some protected areas, including national parks and congressionally designated wilderness areas from patenting, this exclusion is made "subject to valid existing rights." Holders of ***all*** unpatented mining claims, even in the specified reserves, can reasonably be expected to argue that their claims now entitle them to a patent. (Whether they would succeed depends on the continuing vitality of the Ninth Circuit's ruling in *Swanson v. Babbitt*, 3 F.3d 1348 (9th Cir. 1993).) In any event, renewed patenting will create new private inholdings, along with their attendant resource conflicts and management problems, for agencies already struggling to reconcile an ever-growing number of competing uses. Where patent applications and development proposals would create unacceptable resource conflicts, the federal government will frequently choose not to litigate the matter, but rather to buy-out or exchange-out these claims—neither of which will help to reduce the federal deficit.

B. *Alternative Valuable Mineral Deposit Criteria and Contiguous Claims:*
Sections 6102 and 6104

Section 6102 exacerbates these problems by establishing two wholly new "alternative" standards for obtaining a patent: (1) by conducting mining activities that meet the definition of a "mine" under the Federal Mine Safety and Health Act of 1972 (30 U.S.C. § 801(h)); or (2) by publicly disclosing proven or unproven reserves in accordance the Securities Act of 1933 (55 U.S.C. § 77a) or the Securities Exchange Act of 1934 (55 U.S.C. § 78a). Section 6102((e). These federal laws have little to do with the General Mining Law. Neither of them requires geologic

proof that a valuable mineral deposit has been located. The securities acts do not mention mining at all. To allow patenting under these unrelated laws, even subject to an appraiser's review, would be a radical departure from existing mining law, could invite speculative patent claims, and would require the Interior Department to expend limited resources devising and implementing a new patent review process.

Still other lands that would not qualify for claim location or patenting under current law or Section 6102 could be patented under Section 6104, which requires only that the claim be "contiguous to patented or unpatented mining claims or mill sites where mineral development activities … have been conducted." Section 6104(c). (*See infra* Part IV.) Although no one can be sure how much acreage might ultimately be affected by Sections 6102 and 6104, it is a safe bet based on past experience with mineral patents that substantially more federal lands will pass into private ownership than the maximum 360,000 acres suggested by the Act's proponents. Once reestablished in law, the patent provision will continue indefinitely as an open invitation to make money on federal real estate, whether for mining or other purposes.

Proponents of these revisions have suggested that, if patents are issued and the land is not mined, the government could go to court to reclaim the patented land. Because Section 6104 authorizes privatization for "economic development" purposes that may not include mining, however, no such challenge could be brought against conveyances under that section. As for conveyances under Section 6102, there is little reason to expect that hard-strapped federal land management agencies will be able to police patents once issued, let alone recover illegally obtained patented lands. First, the law sets a high standard for the government to establish fraud or misrepresentation in procuring a patent. *United States v. Iron Silver Mining Co*., 128 U.S. 673, 677-78 (1883). Second, as reflected in the 1989 GAO report, the agencies generally have been unable or unwilling to challenge fraudulent patent conveyances. Given the unrelenting demands—energy development, wildfire management, recreational conflicts, and the like—that the agencies face today, they are not likely to devote scarce resources to monitoring and challenging patented land uses.

It is also worth noting that the Act's relaxed patenting standards might induce some claim holders to patent their claims simply to avoid certain federal environmental requirements, for instance, compliance with the National

Environmental Policy Act (NEPA), the land management agency's operating plan regulations, and federal bonding or financial assurance requirements. Mining activities conducted on patented land would be subject to state environmental requirements, however, as well as to any local regulations, such as zoning.

C. *The Price of Patents and Conflicts of Interests: Sections 6102(b) and 6104*

Section 6102 increases the amount that miners must pay to receive a patent to "$1,000 per acre or fair market value of the land, whichever is greater." Sections 6102(b), 6104. But Section 6104 defines "fair market value" as being "exclusive of, and without regard to, the mineral deposits in the land or the use of such land for mineral activities." Thus, although the Act improves upon the existing meager requirement of $5 or $2.50 per acre, it fails to ensure that the federal government will receive a fair return for its mineral resources. Patent applicants could receive a patent for only $1,000 per acre even if the minerals on the land are worth many times that amount, as in the Barrick case. Even when "fair market value" exceeds $1,000 per acre, the patent transaction will not capture the value of the minerals. In other words, the new patenting provisions will operate more like a general real estate law than a mining law, contrary to the statute's fundamental purpose. See *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 611 (1978); *Cole v. Ralph*, 252 U.S. 286, 307 (1920).

Finally, Section 6102 would enable patent applicants to fund third-party examiners to conduct mineral examinations to determine whether lands are eligible for patenting. This could create a potential conflict of interest for examiners who are being paid (and apparently selected) by patent applicants. As a practical matter, it seems likely that third-party examiners paid by claim holders would be inclined (if they hope to do such work again) to find the requisite mineral discovery for patenting purposes. Secretary of the Interior Bruce Babbitt eliminated a similar experimental, third-party patent examination system shortly after taking office, convinced that such an accelerated patent review system ill-served the public interest. The courts found that he was fully authorized to do so and that the BLM was not obligated to allow mineral examinations by private parties. *See Independence Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1362 n.13 (D. Nev. 1995), *affirmed*, 105 F.3d 502 (9th Cir. 1997). Notably, Section 6102 does not provide for Interior Department oversight or review of a third-party examiner's conclusions.

III. The Act's Provisions for Unpatented Mining Claims: Sections 6101, 6103, 6107

While most public attention has focused on the Mining Subtitle's provisions concerning patenting of mining claims and other sales of public lands, the Act contains equally far-reaching provisions concerning ***unpatented*** mining claims on public lands. As noted, there are currently about 300,000 unpatented mining claims, embracing 6 million acres or more of federal public lands, and thousands of new claims are filed every year. The Act would drastically liberalize the requirements for establishing a valid unpatented claim, thus encouraging the filing of even more claims.

A. *Elimination of the Discovery Requirement for Unpatented Claims: Sections 6101(a) and 6101(b)*

Section 6101(a) would drastically alter the Mining Law by ***deleting*** the requirement in 30 U.S.C. § 23 that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The Act inserts a reference to the "law of discovery" in its provisions on patenting (*see* Section 6101(c), amending 30 U.S.C. § 29), but it eliminates the discovery requirement for unpatented claims. If there were any doubt that the Act has this effect, such doubt is removed by section 6101(b), which states that payment of the revised annual claim maintenance fee "secures the rights of the holder . . . both ***prior to*** and after discovery of valuable mineral deposits, to use and occupy public lands." (Emphasis added.) In other words, the holder of a speculative (or even worthless) unpatented claim, merely by paying the revised annual fee ($35 - $200 per year for a 20-acre claim, depending on the age of the claim), would obtain property rights in public lands even though he or she has not yet discovered, and may never discover, minerals within the claim.

The elimination of the discovery requirement for unpatented mining claims would create at least two major sets of problems for federal land management and use. First, it would greatly increase the number of claims on which a holder would be permitted to conduct mining operations, even on lands within national parks, national monuments, wilderness areas, or other withdrawn areas. So long as the claim was staked and filed before the withdrawal and the applicable fees have been paid, the holder will have a right to mine. This contrasts with the situation under current law, where the right to conduct operations is secured, not by the relatively simple act of staking a claim, but by an actual discovery of minerals

Second, where pre-withdrawal claims exist on land that has been withdrawn and reserved for a special purpose, such as water or energy development, the government may have to either forego that purpose or buy out the claim holders' interests, even if the holders have made no capital investment or discovered no minerals. The fiscal impact of this scenario is difficult to estimate, but it could be very large, since claim holders will have an incentive to hold out for the highest possible price, regardless of whether their claims have any real mineral value.

B. *Elimination of Mineral Examinations on Certain Withdrawn Lands: Section 6103*

Section 6103 clarifies and expands the effects of section 6101 by providing that no mineral examination report will be required for mining on withdrawn land on "mining claims, mill sites, and blocks of such mining claims or mill sites [that] are contiguous to patented or unpatented claims or mill sites where mineral development activities, including mining, have been conducted as authorized by law or regulation." Under this provision (which abrogates 43 C.F.R. § 3809.100), a miner who had staked and filed a claim on land that was later withdrawn—including land that is now in a national park, monument, or wilderness area—would have the right to conduct mining operations on the claim *even if he or she had not discovered any minerals or conducted any work on the claim before the land was withdrawn*, so long as the claim is "contiguous to" another claim (which may be outside the boundary of the withdrawn area) on which authorized "mineral development activities" have been conducted.

Furthermore, Section 6103 refers to "blocks" of mining claims as well as individual claims. Therefore, where a string of contiguous claims extends into withdrawn lands, a miner could conduct mining on claims far from the claim on which mining activities have previously been conducted. Moreover, because Section 6101 eliminates the discovery requirement for the validity of an unpatented claim, the miner seeking to mine in a national park, monument, or wilderness area under this provision need not even show that valuable minerals have been discovered on the *other* claim to which his or her withdrawn claim is contiguous.

Finally, another section of the Act, Section 6104, amends 30 U.S.C. § 22 by broadly defining "mineral development work" to include ***non***-mining activities, such as "environmental

baseline studies," "land surveys," and "economic feasibility studies." (*See infra* Part IV.) The combination of this expansive definition of "mineral development work," elimination of the discovery requirement, and the "blocks" provision of section 6103 potentially creates many opportunities for mining activities within national parks, national monuments, wilderness areas, and other withdrawn lands.

C. *Lack of Real Protection for National Parks, Wilderness, and Other Reserves: Section 6107*

Section 6107 purports to protect national parks, national monuments, wilderness areas, and certain other specified federal reserves, but the protection is illusory because it is qualified by the phrase "[s]ubject to valid existing rights" and it leaves these reserves subject to Section 6101. Under Section 6101(a) and (b), the holders of existing mining claims even in national parks, monuments, and wilderness areas can secure "valid existing rights" simply by paying the annual claim maintenance fee. (See the discussion of Section 6101, *supra.*) Claimants will no longer be required to demonstrate a discovery of valuable minerals. Furthermore, Section 6107 provides no protection at all to many important reserves, including national forests, wilderness study areas (WSAs), research natural areas, and areas of critical environmental concern (ACECs). Nor does Section 6107 protect lands outside of designated reserves that have been withdrawn to protect sensitive resources, such as key big game habitat, riparian areas, or Native American sacred sites, or for recreational purposes, such as campgrounds, trails, or prime fishing areas. These areas would be subject to all provisions of the Act.

D. *Preclusion of Royalties: Section 6101(b)*

One of the most persistent and trenchant criticisms of the General Mining Law of 1872 has been its lack of a royalty provision. Those who produce minerals from mining claims, whether patented or unpatented, ***pay no royalties*** to the United States. This is a glaring exception, not only to the U.S. practice with respect to other minerals, such as oil, gas, coal, trona, and potash, but also to the practice followed around the world with respect to metallic minerals. To put it bluntly, the public's hardrock minerals, including billions of dollars worth of gold, silver, copper, and other valuable metals, are given away to private companies with no recompense to the public treasury. Miners operating on private or state land or in foreign countries routinely pay the owner of the

land a royalty, i.e., a percentage of the mineral production value. In order to correct this inequity, virtually every recent proposal for reforming the Mining Law has included a provision for payment of royalties on minerals extracted from unpatented mining claims. Although there has been substantial disagreement over the amount and the details, even the mining industry has supported some sort of royalty provision.

In one fell swoop, however, the Mining Subtitle of the Deficit Reduction Act would end the dialogue over royalties without benefit of hearings, fiscal analysis, or public discussion or debate. Buried in Section 6101(b) of the Act is a clause that would bar any "fair market assessment" on unpatented mining claims other than the filing and claim maintenance fees. This provision would ***preclude*** the institution of a reasonable royalty that would do far more to reduce the federal deficit than would any of the minimal revenue-raising provisions elsewhere in the Act. Moreover, depending on how it is interpreted by the courts, this clause could even have the effect of preempting state severance taxes on minerals extracted from federal lands. Such a result would be fiscally catastrophic for western states that depend on mineral severance taxes as an important component of their revenues.

IV. The New Federal Land Rush: Section 6104

The Deficit Reduction Act would amend the General Mining Law by creating an entirely new public land privatization program that is, at best, only tangentially related to mining. This section does not merely amend the long-standing patenting option; it is an entirely ***new purchasing*** scheme. Section 6104 would require the Secretary of the Interior to issue a patent for federal lands where the most minimal requirements are met. It does not require a discovery of a valuable mineral deposit—a fundamental tenet of the Mining Law since it was enacted in 1872. Nor does it require that any mineral exploration or development activities actually take place on the ground before privatization can occur. Furthermore, Section 6104 contains no meaningful acreage limits. In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 611 (1978), a unanimous Supreme Court ruled that the federal mining law "surely was not intended to be a general real estate law." If Section 6104 is approved, the Mining Law may well become just that.

Section 6104 would amend 30 U.S.C. § 22 by adding new subsections (b) through (g). Subsection (b) states:

Notwithstanding any other provision of law . . . the

> Secretary of the Interior ***shall*** make mineral deposits and the lands that contain them, ***including lands in which the valuable mineral deposit has been depleted***, available for purchase to facilitate sustainable economic development. This subsection shall not apply with respect to any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, or National Trails System, or to any National Conservation Area, any National Recreation Area, any National Monument, or any unit of the National Wilderness Preservation System.

(Emphasis added.) While the phrasing may be awkward, there is no doubt as to the effect of this language. Lands ***must*** be made available regardless of the value of the minerals and, indeed, even if the minerals are gone, and they must be made available "to facilitate sustainable economic development." While this last phrase is not defined, it presumably includes non-mineral development such as condominiums, ski areas, second homes, or off-road vehicle (ORV) playgrounds. Indeed, the kinds of development activities encouraged by this section are limited only by the imagination and wherewithal of developers. The only exceptions are for those public lands in the designated categories of reserves.

Subsection (c) goes on to describe the process for acquiring these lands:

> The holder of mining claims, mill sites, and blocks of such mining claims and mill sites ***contiguous to patented or unpatented mining claims or mill sites where mineral development activities, including mining, have been conducted*** as authorized by law or regulation and on which mineral development work has been performed ***may apply to purchase Federal lands that are subject to the claims . . . .***

(Emphasis added.) In other words, a person could go out onto the public lands and stake hundreds of mining claims or mill sites contiguous to old claims—even patented claims or claims that have been fully mined out—and then apply to purchase those lands.

This language will surely precipitate a land rush. Anyone who has hunted or fished on the public lands has come across old mining claims where "mineral development activities" have occurred. Furthermore, the phrase "mineral development activities ***including mining***" plainly would permit activities

other than mining, such as road building or land clearing, to qualify as "mineral development activities." If this legislation passes, anyone will be able to go out on the public lands, stake any number of claims contiguous to these properties, and then demand the right to purchase the lands. Any doubt that this provision, as applied, could privatize non-mineral land is quickly dispelled by the fact that a person can locate "blocks" of "millsites." Under current law, millsites must be located on ***non***-mineral land. 30 U.S.C. § 42.

Proponents of the proposal will likely point to language in subsection (c) that requires that "mineral development work" be performed on the claims subject to purchase. But subsection (g) defines such work to encompass virtually any work related to land development, including "environmental baseline studies; . . . environmental reclamation; construction of power and water distribution facilities; . . . and economic feasibility studies." Thus, a claimant could satisfy this requirement by paying a development consultant for a modest study of the land.

Subsection (d) requires the applicant to arrange for the preparation of a land survey. Subsection (e) then provides:

> ***Notwithstanding any other provision of law,*** and not later than one year after the date of the approval of any survey required under subsection (d), the Secretary of the Interior ***shall convey to the applicant, in return for a payment of $1,000 per acre or fair market value, whichever is greater, all right, title, and interest in and to the Federal land***, subject to valid existing rights and the terms and conditions of the Act of August 30, 1890 (26 Stat. 391). . . . ***Fair market value for the interest in the land owned by the United States shall be exclusive of, and without regard to, the mineral deposits in the land or the use of such land for mineral activities.***

The effect of this language is that the applicant can demand a patent to the land for what in most cases will be $1,000 per acre within one year from approval of the survey. Forbidding consideration of the land's mineral value in "fair market value" appraisals ensures that desert sagebrush land containing minerals worth millions of dollars will be available for purchase at the bargain price of $1,000 per acre.

Proponents may argue that this language shows that the focus of this section is on the sale of mineral lands because lands valuable for other development must be purchased at their

actual market value. But the history of our public lands demonstrates that developers will find ways to pay a fraction of what the lands are worth. Moreover, this argument overlooks the devastating consequences that the provision could have on the public lands base. Everyone's favorite public land fishing hole, hunting ground, campsite, vista, contemplative site, etc., will be subject to claims under this provision, and proving significant economic value for many of these lands will be difficult given their remote location and lack of access. Public lands will become riddled with private parcels, making rational management impossible. Private landowners will be free to block access to public hiking trails, fishing holes, and hunting camps. No one should underestimate the grave threat posed by this proposal to the prized right of public access.

If this were not enough, subsection (e) raises another significant problem by requiring the sale of lands that previously were withdrawn from new claims under the mining law. While subsection (b) provides that Section 6104 does not apply to national parks, wilderness areas, wildlife refuges, and certain other protected lands, the section apparently ***does*** apply to the millions of acres that have been withdrawn from location under the mining laws for myriad ***other*** purposes. This is so because subsections (b) and (e) both apply "notwithstanding any other provision of law." Thus, wilderness study areas, areas of critical environmental concern, and numerous other lands that are not in the protected classes noted in subsection (b), but which have been withdrawn from location, would be subject to sale. So, for example, federal lands withdrawn around the site of the proposed New World Mine just outside Yellowstone National Park, which are contiguous to old mining claims where "mineral development activities" have occurred, would be open to the location of new claims or millsites. This reading is supported by the second sentence of subsection (b), which specifically excludes national parks, wilderness areas, refuges, etc., that are currently withdrawn from mineral location. There would have been no need to mention these areas if other withdrawn lands were not intended to be opened.

V. Conclusion

The Deficit Reduction Act fails to advance either the public interest in federal public lands or the national interest in mineral production. The Act would allow miners and others to establish property rights against the United States without demonstrating any likelihood of developing a profitable mine; permit development on withdrawn lands, which existing law

would disallow; and open millions of acres of public land to privatization.

Far from being a deficit reduction measure, the Act would prevent the federal government from recovering the mineral value of patented lands and from imposing a royalty on mineral production from unpatented claims. Revenues from land sales and the new fees imposed by the Act would be swamped by increased implementation and land management costs. In sum, the Act's legacy would be the creation of new private inholdings and private-public land management conflicts, a proliferation of access problems, and a permanent erosion of the public lands base.

Attachment:

Fallacies and Facts: The Mining Subtitle of the Deficit Reduction Act