THE ENERGY PERMITTING REFORM ACT: MINING PROVISIONS

Background

Senators Joe Manchin and John Barrasso introduced the Energy Permitting Reform Act of 2024. The bill would increase oil and gas extraction on public lands, undo the Biden administration's Liquified Natural Gas (LNG) pause, and facilitate the construction of more fossil fuel infrastructure that would lock us into decades of fossil fuels use. Additionally, it would reverse long-standing precedent on how mining operations are conducted on public lands and limit the ability of local communities to seek justice in the courts.

This bill represents a giveaway of our public lands to mining companies, worsening the already outdated 1872 mining law, disrupting balanced public land management, and expanding the mining industry's ability to override other uses of public lands, including the siting of clean energy projects, without possessing a valid mining claim, and having no meaningful limitations on an indefinite number of millsites.

Sec. 210: Expands Mining Industry Access to Public Lands

Section 210 represents an unprecedented rollback of limits to the mining industry's use of public lands. It would take the already outdated 1872 mining law even further backward, disrupt public land management, and expand the mining industry's ability to override other uses of public lands, including clean energy projects.

This section removes the requirement for a valid mining claim and allows companies to claim indefinite numbers of millsites, without meaningful limitations, where multinational mining companies can permanently dump toxic waste and construct infrastructure like pipelines and roads- even if those locations are better suited for other values or uses like renewable energy projects, watershed protection, cultural resources and recreation.

Mining and Claim Validity

This section overturns more than a century of precedent that has required operators to discover valuable minerals to gain possessory rights under the mining law, and that these rights are limited to the boundaries of a valid claim. Section 210 accomplishes this in several ways:

- Codifying 43 C.F.R. 3809.5: Section 210(a)(c)(1)(B) codifies a regulation that defines mining-related "operations" to include "all other reasonably incident uses, whether on a mining claim or not." This regulation has been argued by both the government and the mining industry to eliminate the requirement for claim validity, a position rejected by federal courts in the Rosemont mine decisions. By treating "all" uses as part of an "operation" under the Mining Law, this provision eliminates the need for the mining company to apply for and obtain a FLPMA Title V right-of-way for electrical lines, water pipelines, and similar infrastructure. Under current law, these require discretionary approval by agencies like the BLM and USFS, which can provide protections for environmental and cultural values.

- **Possessory Rights:** Section 210(a)(c)(2)(B) grants operators possessory rights to all public land within an approved plan of operations, rather than tying those rights to claim validity.
- **The Savings Clause:** Section 210(a)(c)(8)(D) states that validity examinations are still required to establish the discovery of valuable mineral deposits on withdrawn lands. However, by implication, this eliminates the validity requirement for existing and new claims in unwithdrawn areas, which constitute the vast majority of public lands. Moreover, it creates an implication that the application of federal public land laws governing mining are to only withdrawn lands, effectively nullifying over a century of laws that apply to non-withdrawn lands

Unlimited Waste Dumping, Roads & Pipelines

Section 210(a)(c)(2)(A) would allow mining companies to claim indefinite numbers of millsites without any meaningful limitations on the amount of public lands available for mining waste and infrastructure. These millsites could block the land from being used for other purposes, such as renewable energy projects. This provision would remove any effective limits on millsites and eliminate the requirement that such claims must be located only on non-mineral land, a key feature that prevents mineralized lands from being buried under waste or made inaccessible.

Conclusion

Section 210 would shift the balance of power away from communities, the environment, and the clean energy future, giving the mining industry even greater control over public lands than they already enjoy under the regressive 1872 Mining Law. Instead of this shift, Congress should be enacting legislation that would, as identified by the Interagency Working Group, close loopholes for foreign companies, improve environmental standards, and create competitive leasing to balance the nation's clean energy mineral needs with other public land uses, such as renewable energy projects, cultural and historical resources, ranching, recreation, water resources, and wildlife.