H.R. 2952

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND
MINERAL RESOURCES

OF THE

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U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

LEGISLATIVE HEARING ON H.R. 2952, (CUBIN), TO ENSURE THE ORDERLY DEVELOPMENT OF COAL, COALBED METHANE, NATURAL GAS, AND OIL WITHIN A DESIGNATED DISPUTE RESOLUTION AREA IN THE POWER RIVER BASIN, WYOMING, AND FOR OTHER PURPOSES.

Thursday, October 11, 2001
U.S. House of Representatives
Subcommittee on Energy and Mineral Resources
Committee on Resources
Washington, DC

The Subcommittee met, pursuant to call, at 2 p.m., in Room 1334, Longworth House Office Building, Hon. Barbara Cubin [Chairman of the Subcommittee] presiding.

STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mrs. CUBIN. The oversight hearing by the Committee on Energy and Mineral Resources will come to order.

The Subcommittee is meeting today to hear testimony on H.R. 2952, to ensure the orderly development of coal, coalbed methane, natural gas and oil within a designated dispute resolution area in the Powder River Basin of Wyoming and for other purposes.

Under Committee Rule 4(g), the Chairman and Ranking Minority Member can make opening statements. If other Members have statements, they can be included in the record. I ask unanimous consent—since I am unanimous—all right, now I have to really ask unanimous consent—to insert in the record the opening remarks of Representative Rahall and any other Members that would like to offer opening remarks.

Hearing no objection, so ordered.

[The prepared statement of Mr. Rahall follows:]

Remarks of U.S. Rep. Nick J. Rahall, II, a Representative in Congress from the State of West Virginia

The legislation pending before the subcommittee purports to solve disputes between holders of federal oil and gas leases, and holders of federal coal leases, within the Powder River Basin of Wyoming.

I can certainly understand the types of conflict that arise in these situations. Indeed, in 1992 Congress enacted legislation I sponsored as part of the Energy Policy Act that established a dispute resolution process for the development of coalbed methane in the Eastern States. For years the coal industry in places like West Virginia had effectively blocked the development of coalbed methane resources. And due to the split estate ownership nature of much of the land in the Appalachian Region, there were uncertainties over who actually owned the methane. At the time I had originally offered this proposal as applying nationwide. However, western interests balked stating that the matter was well settled in the West.

History has proven them wrong. Litigation followed-relating to a specific subset of federal lands-all the way to the Supreme Court and legislation in this area was enacted by the Congress in 1998.

Yet, disputes within the Powder River Basin continue. And to be clear, these disputes are not restricted to development rights; the issue of primacy in developing coalbed methane versus the coal itself. They also involve the impact a rapidly developed coalbed methane industry is having on rangeland and water resources.

In light of the fact there are considerable federally owned resources in the Powder River Basin, in my view it is appropriate for the federal government to be involved in this matter. The question is, to what extent. I would assume that federal coal lessees in the region purchased the leases with their eyes open, knowledgeable of the fact that mining the coal could not interfere with any senior rights associated with oil and gas leases in the same area. Perhaps they did not envision the advent of what was then a non-traditional type of gas development, coalbed methane. But the fact remains that the lease stipulations are what they are.

As I noted, dispute resolution in this area appears to be partially a federal responsibility. The Bureau of Land Management has some authority to address the issues being raised by the pending legislation. The purpose of this hearing then is to determine whether that authority is adequate, and whether the pending legislation offers a more practical approach that ultimately is in the public interests and provides for the proper stewardship of the lands in question.

Mrs. CUBIN. The Subcommittee on Energy and Minerals meets today to take testimony on H.R. 2952, the Powder River Basin Resources Development Act, a bill I recently introduced to further efforts to resolve conflicts occurring in my State between coal miners and coalbed methane developers operating in certain limited common areas along a trend of surface coal mines.

Within the last decade, petroleum interests have discovered that the Wyodak seam of sub-bituminous coal in the Powder River Basin, which is the situs of several large surface mines, is also valuable for natural gas found in the fractures of the coal, which is commonly known as coalbed methane, or CBM.

Previous encounters between owners of deep oil and gas wells and coal mine operators were handled relatively easily through compensation agreements when the oil or gas production had to cease for a period while a mine moved through the common tract, but, with CBM, mining of the coal vents the gas resource, of course, unless it is extracted in advance.

In the best of all possible worlds, the CBM would be developed, produced and sold before the coal extraction begins, and there would be no conflict. Indeed, the CBM operator would have performed a service for the miner by dewatering the coal seam ahead of its dragline. However, conflicts in timing of resource development do occur, and there is plenty of money at stake in mine plans predicated upon timely receipt of permits from Federal and State regulators. Inordinate delays mean shut-down mines and lost wages, lost royalties, lost severance taxes. No one wants that, so agreements to buy out impediments to mining are negotiated so that their business can continue uninterrupted.

The CBM operator is often holding an assignment from an oil and gas lease which is senior to the coal lease. In other words, the original lease has been held for many years by production of deep oil or gas, but within the last few years the shallow CBM has become the focus of interest. What should a miner pay to the CBM owner if all or a portion of the shallow gas is wasted because wells could not be permitted, drilled and produced before the coal is stripped, blasted and hauled to market?

A ton of Powder River Basin coal contains about 16 million BTUs of energy versus a CBM content that may yield only 30- to 40,000 BTUs.

That is a factor of over 500 times more energy in the coal to be sent to market than from the coalbed methane trapped within the same volume, and this is for coal seams with original pressures of CBM still high. As CBM is produced in the area and the pressures fall, the energy ratio of the unmined ton of coal versus the remaining CBM gets even more tilted in coal's favor, of course. In other words, the CBM's energy value is less than 1/2 of 1 percent of the coal's value. For a Nation which needs to become for more self-sufficient in energy than we are, this fact cannot be forgotten. Yes, the CBM ought to be produced, but, no, the CBM operator ought not be able to prevent the far more valuable coal resource to go unmined just because there remains some gas in a seam that may take a few more years to extract.

So how does the government juggle the responsibility to maximize energy production from common areas? Should the principle that the CBM operators rights emanate from the oil and gas lease which predate the coal lease be the sole criterion, or should we enact a process whereby in very limited instances a Federal judge will condemn CBM operations which threaten the ultimate mining of common—of the common block of coal and order fair and just compensation for the terminated oil and gas rights? Now, of course, what is fair and just compensation is the problem, but I do think the latter approach, if done correctly, has merit.

H.R. 2952 presents a deliberative process to make such calculations, reach a settlement and direct payment. It is the "lite" version of last year's efforts which followed negotiations between the Independent Petroleum Association of America and the National Mining Association. H.R. 2952 shrinks the size of the dispute resolution areas where the bill would allow a coal royalty credit against the sums paid to the condemned CBM operator, including limiting its application to Wyoming alone. Furthermore, this version makes clear that such credits may only be applied against payments to Federal oil and gas leases, not private mineral interest owners, which basinwide make up over half of the oil and gas ownership. I fully understand that some CBM operators do not agree that the bill will result in fair compensation for their rights should a conflict occur. Two such folks are here today to testify.

Let me close my remarks by saying that my strong wish is for both of these resources to be developed sequentially. America needs the energy bound up in both the coalbed methane and in the coal. I believe the regulators involved must get moving on approving drilling permits and directing that CBM wells be drilled and produced where drainage is likely to occur. The BLM has begun to do

so, and that is good. The entire Wyoming delegation, all three of us, has pushed and cajoled the administration to put resources into solving this problem with as little opportunity for future conflict as possible. That means we need to get the CBMs drilled—the CBM wells drilled and connected to pipelines, and we need the North Jacobs Ranch coal lease sale to go forward early next year to keep Powder River Basin Coal development on track to meet the Nation's electricity needs. This bill should advance both of those agendas.

[The prepared statement of Mrs. Cubin follows:]

Statement of Hon. Barbara Cubin, a Representative in Congress from the State of Wyoming

The Subcommittee on Energy and Minerals meets today to take testimony on HR 2952, the Powder River Basin Resources Development Act, a bill I recently introduced to further efforts to resolve conflicts occurring in my State between coal miners and coalbed methane developers operating in certain limited common areas along a trend of surface coal mines.

Within the last decade petroleum interests have discovered that the Wyodak seam of sub-bituminous coal in the Powder River Basin, which is the situs of several large surface mines, is also valuable for natural gas found in the fractures of the coal, which is known as coalbed methane or CBM. Previous encounters between owners of deep oil & gas wells and coal mine operators were handled relatively easily through compensation agreements when the oil or gas production had to cease for a period while a mine moved through the common tract. But, with CBM, mining of the coal vents the gas resource, of course, unless it is extracted in advance.

In the best of all possible worlds, all the CBM would be developed, produced and sold before coal extraction begins - and there would be no conflict. Indeed, the CBM operator would have performed a service for the miner by dewatering the coal seam ahead of his dragline. However, conflicts in timing of resource development do occur. And, there is plenty of money at stake in mine plans predicated upon timely receipt of permits from federal and state regulators. Inordinate delays can mean shut down mines and lost wages, lost royalties and lost severance taxes. No one wants that, so agreements to buy out impediments to mining are negotiated so that their business can continue uninterrupted.

The CBM operator is often holding an assignment from an oil & gas lease which is senior to the coal lease. In other words, the original lease has been held for many years by production of deep oil or gas, but within the last few years the shallow CBM has become the focus of interest. But, what should a miner pay to the CBM owner if all or a portion of the shallow gas is to be wasted because wells could not be permitted, drilled and produced before the coal is stripped, blasted and hauled to market?

A ton of Powder River Basin coal contains about 16 million BTUs of energy versus a CBM content that may yield only 30 to 40 thousand BTUs. That is a factor of over 500 times more energy in the coal to be sent to market than from the coalbed methane trapped within the same volume, and this is for coal seams with original pressures of CBM still high. As CBM is produced in the area, and gas pressures fall, the energy ratio of the unmined ton of coal versus the remaining CBM gets even more tilted in coal's favor, of course.

In other words, the CBM's energy value is less than one-half of one percent of the coal's value. For a Nation which needs to become far more energy self-sufficient than we are, this fact cannot be forgotten. Yes, the CBM ought to be produced. But, no, the CBM operator ought not to be able to prevent the far more valuable coal resource to go unmined just because there remains some gas in the seam that may take a few years more to extract.

So, how does the government juggle the responsibility to maximize energy production from the common areas? Should the principle that the CBM operators rights emanate from an oil and gas lease which predates the coal lease be the sole criterion? Or, should we enact a process whereby in very limited instances a federal judge will condemn CBM operations which threaten the ultimate mining of the common block of coal? And order fair and just compensation, of course, for the terminated oil and gas rights. I think the later approach, if done correctly, has merit.

H.R. 2952 presents a deliberative process to make such calculations, reach a settlement and direct payment. It is the "Lite" version of last year's efforts which followed negotiations between the Independent Petroleum Association of America and

the National Mining Association. H.R. 2952 shrinks the size of the "dispute resolution areas" where the bill would allow a coal royalty credit against the sums paid to the condemned CBM operator, including limiting its application to Wyoming, alone. Furthermore, this version makes clear that such credits may only be applied against payments to federal oil and gas lessees, not private mineral interest owners, which basin-wide make up over half of the oil and gas ownership. I fully understand that some CBM operators do not agree that the bill will result in fair compensation for their rights should a conflict occur. Two of such folks are testifying today.

Let me close my remarks by saying that my strong wish is for both these resources to be developed sequentially. America needs the energy bound up in both the CBM and the coal. I believe the regulators involved must get moving on approving drilling permits and directing that CBM wells be drilled and produced where drainage is likely to occur. The Bureau of Land Management has begun to do so and that's good. The entire Wyoming delegation (all three of us) has pushed and cajoled the Administration to put resources into solving this problem with as little opportunity for future conflict as possible. That means we need to get CBM wells drilled and connected to pipelines. And, we need the North Jacobs Ranch coal lease sale to go forward early next year to keep Powder River Basin coal development on track to meet the Nation's electricity needs. This bill should advance both such agendas.

Mrs. CUBIN. The Chair now recognizes Mr. Otter for an opening statement.

STATEMENT OF HON. C.L. "BUTCH" OTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. OTTER. Thank you very much, Madam Chairman. I do not have an opening statement, but I would like to commend the Chairwoman for drawing attention to a problem that has existed for quite some time, but more importantly providing a solution which includes an abundance of input from the stakeholders from the State and also the Federal agencies. I hope that this will be a prototype to solve many other problems that we have in the West, particularly between Federal agencies and State stakeholders, because we have many of the same problems in Idaho, not affecting coal obviously, but we do have many of the same problems.

And I am very excited about this going through and providing for us an example of how we can work together and how the agencies can work together and still get the State stakeholders both from the private sector and the State as well in providing a solution to what could otherwise be a continuing problem.

Thank you very much, Madam Chairman.

Mrs. CUBIN. Thank you, Mr. Otter.

Now I would like to recognize the panel of witnesses. Panel number one is Mr. Tom Fulton, Deputy Assistant Secretary for Land and Minerals with the Department of Interior; and Mr. Shawn Taylor, Program Manager, Energy Policy Development, on behalf of the Governor of the State of Wyoming. Welcome to both of you.

The Chairwoman now recognizes Mr. Fulton to testify for 5 minutes. The timing lights on the table will indicate when your time has concluded. While we limit—while the Committee rules limit the oral testimony to 5 minutes, your entire statement will be entered into the record.

STATEMENT OF TOM FULTON, DEPUTY ASSISTANT SECRETARY FOR LAND AND MINERALS, U.S. DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ERICK KAARLELA, SENIOR PETROLEUM ENGINEER, BUREAU OF LAND MANAGEMENT

Mr. FULTON. Thank you, Madam Chairman.

Members of the Subcommittee, thank you for the opportunity to appear here today to discuss H.R. 2952, the Powder River Basin Development Act of 2001. I am accompanied by Erick Kaarlela, Senior Petroleum Engineer of the Bureau of Land Management.

The Department of the Interior appreciates the Subcommittee's desire and its hard work in an effort to resolve the conflicts between oil and gas, coal, and coalbed methane interests through H.R. 2952. The Department supports the intent of this legislation; however, we are concerned about certain provisions of the bill for reasons we will discuss later.

The President's national energy policy specifically calls for the Department to remove or reduce impediments to domestic energy production and to provide for reliable energy supply. H.R. 2952 does provide a timely conflict resolution mechanism where the inability to reach a settlement agreement could result in bypassing vast amounts of valuable coal or even the premature closing of major mining operations. Together with the administrative measures the BLM has initiated already, H.R. 2952 will optimize the recovery of both the coalbed methane and the coal resources in the Powder River Basin.

Escalating interest in coalbed methane exploration and development as a result of new technology, a better understanding of the resource, and increasing energy demand has created a unique mineral conflict situation for the BLM. CBM development adjacent to active coal mines raises a number of questions about the simultaneous development of both the methane resource and the coal.

BLM leases provide that the BLM may lease the same tract for the development of more than one mineral resource provided that it does not unreasonably interfere with the operations of the senior lessee and is subject to the departmental regulations regarding conservation. Consistent with the principles embodied in the Minerals Leasing Act to conserve the natural resources and with the Federal Land Policy and Management Acts multiple use mandate, the BLM supports multiple mineral development and optimization of the recovery of both resources and has worked to encourage settlement agreements between developers.

In dealing with disputes, the Bureau has three goals in mind. The first is to protect the rights of the lessee under the terms of its lease and the Mineral Leasing Act, including implementing regulations and those concerning conservation of natural resources; secondly, to optimize the recovery of both resources, maximizing the return to the public; and third, to protect public safety and the environment while minimizing impacts on local communities.

The BLM policy provides that the initial course of action is to attempt to facilitate an agreement between the lessees. However, absent a settlement, the BLM can utilize existing law and regulations in conjunction with the lease provisions to optimize the recovery of resources.

BLM is in the process of clarifying and strengthening its existing conflict resolution policy which will work in concert with the conflict resolution provisions of H.R. 2952 to facilitate a more timely resolution and greater degree of certainty to industry.

Many of the provisions of H.R. 2952 help facilitate the orderly resolution of the resource development conflicts in the Powder River Basin. The legislation will provide procedures for timely resolution of the conflict in circumstances where the BLM has little or no authority to regulate non-Federal oil and gas operation, which constitute 55 percent of the oil and gas estate in the dispute resolution area.

The bill mandates a specific schedule for the Secretary of Interior and the courts to resolve any development conflicts between the two resources and provides for the appointment of experts to appraise the value of potential resource losses. These steps will ensure a timely and firm resolution to the conflicts between coal and CBM development.

In resolving these conflicts, time is of the essence. The potential that coal operations could be suspended while the conflicting development plans are resolved through traditional administrative and judicial proceedings has created uneven bargaining power among the parties in such disputes. The bill provides for expedited judicial review of orders to suspend operations and production or the Secretary's decision not to order such suspension.

H.R. 2952 provides not only for compensation of the oil and gas lessees for its losses, but also assures that the bill's compensation provisions are the exclusive remedy.

We are concerned that the bill allows certain credits against future royalties to compensate for payments made to Federal CBM developers. The Department is concerned that the burden of resolving disputes between private oil and gas and coal companies may result in a reduction of proceeds received by the taxpayer. Nevertheless, we recognize that there are financial burdens associated with resolving disputes. H.R. 2952 provides a judicial process for resolving these resource development conflicts.

Finally, the Department does oppose section 16(b) of the bill, which would require the Secretary make payments to States for coal royalties that would have paid were it not for the royalty credits created by the legislation. This would require the Secretary to disburse funds received from other leases to replace royalties not collected. The Department believes it is reasonable to ask the States which benefit from the production of the more valuable coal resource through other tax collections to share in the financial implications associated with conflict resolution. The Department is very interested in working with the Committee and others to address the provisions of the bill.

Thank you for the opportunity to testify, and I look forward to answering any questions the Committee might have.

Mr. OTTER. [Presiding.] Thank you very much, Mr. Fulton.

[The prepared statement of Mr. Fulton follows:]

Statement of Tom Fulton, Deputy Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior

Madame Chairman and Members of the Subcommittee, thank you for the opportunity to appear here today to discuss HR 2952, the Powder River Basin Develop-

ment Act of 2001, which would establish a process for resolving disputes between developers of coal and developers of coalbed methane (CBM) in certain areas of the Wyoming portion of the Powder River Basin. I am accompanied by Erick Kaarlela, Senior Petroleum Engineer with the Bureau of Land Management (BLM).

The Department of the Interior (Department) appreciates the Subcommittee's interest and efforts in attempting to resolve the conflicts between oil and gas, coal, and coalbed methane interests through HR 2952. The Department supports the intent of this legislation. However, we are concerned about certain provisions of the bill for reasons discussed below.

The environmentally-responsible development of all these resources in the energy-rich Powder River Basin is an important element in meeting our national energy needs. The President's National Energy Policy specifically calls for the Department to remove or reduce impediments to domestic energy production, and to provide for a reliable energy supply. The bill provides for timely conflict resolution where the inability to reach a settlement agreement could result in bypassing vast amounts of valuable coal or possibly even the premature closing of major mining operations. Together with the administrative measures the BLM has initiated under existing law, HR 2952 will optimize the recovery of both the CBM and coal resources in the Basin.

CBM Development in the Powder River Basin in Wyoming

The Powder River Basin has experienced a particularly dramatic increase in coalbed methane exploration and development. It contains the largest coal reserves of any basin in the United States. Over 90% of the Basin's coal estate is in Federal ownership and accounts for one-third of all U.S. coal production. About 45% of the oil and gas estate (including coalbed methane) in the "dispute resolution area" identified by the bill is under Federal ownership. The remainder of the oil and gas estate in that area under state or private ownership.

Conflicts Between Developers

Extensive CBM development activity was not anticipated at the time most of the overlapping Federal coal leases were issued on these lands. In the past, traditional oil and gas and coal conflicts generally involved oil and gas resources contained in reservoirs much deeper than the coal, thereby allowing for development of coal without loss of the oil and gas. Since CBM is trapped within the coal seams and was considered a valueless gas which escaped from coal, rather than part of the valuable coal fuel itself, coal companies routinely vented the gas to the atmosphere. However, escalating interest in CBM exploration and development as a result of new technology, a better understanding of the resource, and increasing energy demand has created a unique mineral conflict situation for the BLM. CBM development adjacent to active coal mines raises a number of questions about the simultaneous development of both the methane and coal resources. Coal mining will eliminate the methane resource, yet waiting for methane development may delay coal mining operations such that production of the coal may no longer be economical.

BLM leases provide that the BLM may lease the same tract for the development of more than one mineral resource, provided that it does not unreasonably interfere with the operations of the senior lessee and subject to Departmental regulations regarding conservation. Most of the oil and gas leases in the coal/CBM dispute resolution area are senior in time to the coal leases. The coal lessees were aware of the existing senior leases at the time of the issuance of the coal lease, and the leases specifically provide that coal mining cannot unreasonably interfere with oil and gas development under the senior leases. It was thought that deep oil and gas wells could be shut in, then reopened following the completion of the surface mining operations. However, it was not envisioned at the time most of the leases were issued that CBM would become economically valuable or that the resulting conflict would occur. Consistent with the principles embodied in the Mineral Leasing Act to conserve the natural resources and with the Federal Land Policy and Management Act's multiple-use mandate, the BLM supports multiple mineral development and optimization of the recovery of both resources, and has worked to encourage settlement agreements between developers.

Conflicts & Agreements in Powder River Basin in Wyoming

The sale of the Thundercloud coal tract in 1998 was the catalyst of the coal/CBM conflict issue in the Powder River Basin in Wyoming. Four distinct conflicts arose concerning this coal lease. To address some of these conflicts, the BLM sponsored Federal mediation among Arch Minerals Inc., Jacobs Ranch Coal Co. (Kennecott Energy Co.), M&K Oil Co., and RIM Operating Co. A number of other conflicts still exist between operators and others are anticipated to develop in the future.

BLM Policy

The BLM has some existing authority under the Mineral Leasing Act, Federal regulations, and lease provisions to address conflicting development schemes when the rights to develop both resources are held by Federal lessees. In dealing with these disputes, the Bureau has three goals in mind—1) to protect the rights of the lessee under the terms of its lease and the Mineral Leasing Act, including implementing regulations and those concerning conservation of natural resources; 2) to optimize the recovery of both resources (thereby maximizing the return to the public); and 3) to protect public safety and the environment and minimizing impacts on local communities. The BLM policy provides that the initial course of action is to attempt to facilitate an agreement between the lessees. However, absent a settlement, the BLM can utilize existing law and regulations, in conjunction with the lease provisions, to optimize the recovery of both resources.

The BLM is in the process of clarifying and strengthening its existing conflict resolution policy—which would work in concert with the conflict resolution provisions of HR 2952—in order to facilitate more timely resolution and a greater degree of certainty to industry. Where it is economical to drill to produce methane that might otherwise be vented during mining, the BLM is prepared to order such drilling sooner to avoid the waste of this resource. This approach would encourage conservation of the CBM and coal resources and facilitate conflict resolution.

The BLM policy will take into consideration the conservation of the coal resources, while still optimizing CBM recovery, and provide for high priority processing of CBM applications for permit to drill (or APDs) in certain conflict zones.

HR 2952

Many of the provisions of HR 2952 will help facilitate the orderly resolution of the resource development conflicts in the Powder River Basin in Wyoming. The conflict resolution procedures set forth in the bill will work in conjunction with the BLM conflict resolution policies outlined above. Furthermore, the legislation will provide procedures for timely resolution of conflicts between oil and gas and coal lessees in those circumstances where the BLM has little or no authority to regulate non–Federal oil and gas operations (constituting 55% of the oil and gas estate in the dispute resolution area). H.R. 2952 encourages the conservation of the CBM and the coal resource. The Department supports the objective of conserving both resources.

The bill mandates a specific schedule for the Secretary of the Interior and the courts to resolve any development conflicts between the two resources and provides for the appointment of experts to appraise the value of potential resource losses. These steps will ensure a timely and firm resolution of the conflicts between coal and CBM development. HR 2952 permits the suspension of CBM operations in order to allow coal production to continue while providing a means for the oil and gas lessee to be paid equitable compensation. The bill also provides a means for the termination of producible oil and gas leases, with compensation for the opportunities foregone, when continued operation could lead to the bypass of the coal resource.

In resolving these conflicts, time is of the essence. The potential that coal operations could be suspended while the conflicting development plans are resolved through traditional administrative and judicial proceedings has created uneven bargaining power among the parties in such disputes. The bill provides for expedited judicial review of orders to suspend operations and production or the Secretary's decision not to order such suspension. HR 2952 provides not only for compensation of the oil and gas lessee for its losses, but also assures that the bill's compensation provisions are the exclusive remedy.

We are concerned that the bill allows certain credits against future royalties to compensate for payments made to Federal CBM developers. The Department is concerned that the burden of resolving disputes between private oil and gas and coal companies may result in a reduction of proceeds being received by the American taxpayer. Nevertheless, we recognize that there are financial burdens associated with resolving these disputes. HR 2952 provides a judicial process for resolving these resource development conflicts. In addition, the Department is considering alternative dispute resolution or other means to constructively allow the lessees to move forward, while keeping any adverse impacts to the American taxpayer at a minimum. Overall, we believe that long term benefits will result by facilitating the planned development of these resources in the future.

The Department also opposes Section 16(b) of the bill, which would require that the Secretary make payments to States for coal royalties that would have been paid, were it not for the royalty credits created by the legislation. This would require the Secretary to disburse funds received from other leases to replace the royalties not collected on these leases. The Department believes it is reasonable to ask the States,

which benefit from the production of the more valuable Federal coal resource through other tax collections as well as through coal royalties, to share in the financial implications associated with conflict resolution. The Department is interested in working with the Committee to address our concerns with this provision of the bill.

Conclusion

The Department is firmly committed to optimizing timely, environmentally-sound development of coal, CBM, and conventional oil and gas in the Powder River Basin. If amended to address the concerns raised above, HR 2952, coupled with the aggressive use of administrative measures, can promote timely and equitable production of these valuable resources. In so doing, it will contribute positively in our efforts to strengthen our Nation's domestic energy security.

Thank you for the opportunity to testify before you today. I welcome any questions the Subcommittee may have.

Mr. OTTER. Mr. Taylor.

STATEMENT OF SHAWN TAYLOR, PROGRAM MANAGER, ENERGY POLICY DEVELOPMENT, ON BEHALF OF THE GOVERNOR OF THE STATE OF WYOMING

Mr. TAYLOR. Thank you, Congressman. I appreciate the time to be here today. It is a privilege for me to be here today on behalf of Governor Geringer and the State of Wyoming to discuss legislation that addresses a problem that is very significant not only to the West, but more specifically to Wyoming and the Powder River Basin.

The coal and coalbed methane industries have created thousands of jobs in the State of Wyoming. They provide millions of dollars to our State's school structure and were major factors in our State's budget going from a projected $200 million shortfall to almost a $700 million surplus in the past fiscal year. So I think we are rather fortunate as a State to be here today to talk about how we can resolve conflicts between these two industries to continue to develop these resources that will not only bring continued resources and revenue into this State, but also contribute to our Nation's energy security.

As you know, coal currently is used to produce over half the Nation's electricity. Seventeen percent of that comes from Wyoming, and more specifically from the Powder River Basin. However, the national trend is moving toward using natural gas to produce your electricity. Wyoming and the Powder River Basin has an abundance of both of these resources, and that is one of the reasons Governor Geringer and the State legislature created the Wyoming Energy Commission earlier this year in order to find ways to capitalize or take advantage of the fact that Wyoming has these resources, an abundance of these resources, and the Nation's demand for these.

In Wyoming, where nearly all of the coal and nearly half of the oil is owned by the Federal Government and managed by the Bureau of Land Management, I think it is imperative that we have a Director in place to provide management and to enforce the BLM's policy on conflicts between coalbed methane and coal development which was issued in February of last year.

I understand Mr. Fulton and Chad Calvert has promised that Mrs. Clark's name is going to go to the Hill next week, so I urge

our Senators in the other Chamber to do what they can to make sure that her confirmation process is expedited.

In closing, in an age where people are all too eager to head to the courtroom to settle disputes, it is encouraging to have legislation such as H.R. 2952 that will establish rules, timelines and procedures to resolve conflicts between two very critical industries in our State. This legislation is a good start. I realize it doesn't include the entire Powder River Basin, and there has been legislation in the past that has included the Montana portion of the basin. However, once we prove that we can do it right in Wyoming, I think other States will follow suit.

The State and Governor Geringer supports this legislation, and we thank you, Madam Chairman and our Senators Mr. Enzi and Mr. Thomas for giving this issue the proper attention that it deserves. Thank you.

Mrs. CUBIN. Thank you.

[The prepared statement of Mr. Taylor follows:]

Shawn West Taylor, Energy Policy Development Program Manager, Wyoming Energy Commission, on behalf of Governor Jim Geringer and the State of Wyoming

Madam Chairman and distinguished members of the Subcommittee my name is Shawn Taylor and I am the Energy Policy Program Manager for the Wyoming Energy Commission. It is a privilege for me to be here today to testify on behalf of Governor Geringer and the State of Wyoming and to discuss legislation that addresses a problem that is very significant to the West and more specifically to Wyoming.

The coal and coalbed methane industries have created thousands of jobs in the state of Wyoming; they provide millions of dollars to our schools and were major factors in our states budget going from a projected $200 million shortfall to a surplus of almost $700 million over the past fiscal year. So I think we are rather fortunate as a state to be here today to talk about how we can resolve conflicts between these two industries and continue to develop these resources that will not only bring continued revenue to the state but also contribute to our nations energy security.

As you know coal currently is used to produce over half the nation's electricity, 17% of that comes from Wyoming and the Powder River Basin. However the national trend is moving towards natural gas produced electricity. Wyoming, and more importantly the Powder River Basin, has an abundance of both of these resources and that is one of the reasons Governor Geringer and the state legislature created the Wyoming Energy Commission, to find ways to capitalize on our supply and the nations demand.

In Wyoming where nearly all the coal and over half of the oil and gas is owned by the federal government and managed by the BLM, I think it is imperative to have a director in place to provide guidance for this management and to enforce the BLM's "Policy on Conflicts between Coal Bed Methane and Coal Development", which was issued in February of last year. Having said that, I urge our Senator's to do what they can in the other chamber to get Mrs. Clark's confirmation process expedited.

In an age when people are all too eager to head to the courtroom to settle disputes it is encouraging to have legislation such as H.R. 2952 that will establish rules, timelines and procedures to resolve conflicts between these two critical industries. This legislation is a good start, it doesn't include the entire Power River Basin, however once we prove that we can do it right in Wyoming I think other states will follow suit. The State and Governor Geringer supports this legislation and thanks you Madam Chairman and Senators Enzi and Thomas for giving this issue the proper attention it deserves. Thank you.

Mrs. CUBIN. I will go ahead and start the questioning, and forgive me for stepping away. We don't eat around here, you just have to grab something on the fly. That is what I had to do today.

Question for Mr. Fulton. You state that the Interior Department objects to section 16(b) that bars the State sharing in the coal royalty credit burden. Can you tell the Subcommittee whether the administration would support the slimmed-down royalty credit provision if the State were to fully share in that burden?

Mr. FULTON. I think that is the concern here, that the State benefits from the royalty and the bonuses, and this is a problem inside Wyoming that it is—the two resources are an extraordinary gift that Wyoming has for the people of the Nation.

And I think these issues can be resolved equitably if all parties sit down and honestly look at resolving them, and we would consider the State to be an important part of that. This would be one of those ways.

Mrs. CUBIN. For the you, too, Mr. Fulton. For the North Jacobs Ranch coal lease that is scheduled for this winter, is it true—which I believe it to be, but I would like your opinion—that the BLM can expect significantly higher bonuses to be proffered if the bidders know that any CBM which is for some reason unable to be extracted before the mining will be brought out under the provisions of this bill? Do you think that that will help increase the bids if we get this bill passed, in other words?

Mr. FULTON. Yes. I think that is entirely correct.

Mrs. CUBIN. Mr. Taylor, I don't really need to ask you this question, but I will.

Mr. TAYLOR. Okay.

Mrs. CUBIN. It is the same question that I just asked Mr. Fulton about section 16(b) of the bill. Can you tell the Subcommittee whether the State would support the slimmed-down royalty credit provision if the State had to share in part of that burden?

Mr. TAYLOR. At this time, Madam Chairman, the State would oppose any changes to the current legislation. I know I am preaching to the choir when I talk about how dependent our school structure is on the energy and the minerals that we have from our State, and to—to take that away would be a big blow to our school system.

Mrs. CUBIN. Well, another thing that comes to my mind is that—the fact that our coal pays 40 percent of the entire AML fund, and we don't get it back. We don't get what we are supposed to get. So I don't like for the State to have to pay more either, but I do hope that we can get a resolution so that these agreements can move forward and so that the minerals can be produced in a timely manner.

So I hope that we will be able to find some compromise, or I hope that somebody will yield. I don't know exactly how that will go yet.

Again, Mr. Taylor, I understand that Wyoming passed legislation that was designed to resolve these kind of mineral conflicts. Could you describe how that process works and if it has been very successful so far?

Mr. TAYLOR. I know it has been successful, but I couldn't tell you how it works. I can definitely get back to you and give you move detail on how it works.

Mrs. CUBIN. Do you know when that was passed or how long it has been in effect?

Mr. TAYLOR. A couple of years, I believe.

Mrs. CUBIN. Okay. You have heard the administration witness state that the Feds have a problem—never mind. I just did ask you that.

Back to Mr. Fulton. On February 22nd, 2000, just prior to the Senate hearing on S. 1950, the BLM issued its policy on conflicts between coalbed methane and coal development, a report, I think. Could you bring us up to date on whether the policy has been applied and an assessment of its effectiveness?

Mr. FULTON. Yes. It is my understanding from the Bureau that the instructional memorandum of February of 2000 has, in fact, been applied in several instances in the Powder River Basin, and that in their view it has successfully resolved some of the conflict on this issue.

Mrs. CUBIN. You stated that under BLM's policy that BLM is prepared to order CBM drilling to produce the CBM that would otherwise be vented by coal mining. Has BLM ordered any of those things to be done?

Mr. FULTON. It is my understanding that BLM has directed one company to do exactly that, and it is also my understanding that the company complied.

Mrs. CUBIN. As you know, we have talked before, but as you know, part of the—the reason this bill is here is because I—at a point in time we—I felt, actually still do, that BLM could have handled this without this legislation. But it was the State director's feeling that it couldn't, and therefore the legislation.

What is BLM doing to expedite the timely permitting and drilling of CBM wells within that conflict resolution area?

Mr. FULTON. Well, there are a number of things. We have done an environmental—BLM has done an environmental assessment to get a handle on the drainage problem. We are prioritizing the approval of the APDs where—that are within the conflict area. We have conducted reservoir studies to get a feel for the size of the problem, and we have sent letters to operators telling them that we need to get this work done not to lose both of those resources.

Mrs. CUBIN. One last question. We have been told by several different people from the BLM that they don't feel that they need more personnel, which is always, you know, a happy song in my ears. However, we have—I can't remember if it is 3,500 or 2,500 APDs pending in the Powder River Basin. So how long—how long before those are processed?

Mr. FULTON. Madam Chair, it is certainly my hope that we can get that backlog taken care of with the additional resources that the Committee and the Congress have provided, and I think we can, as I said earlier when we visited about this issue last. And I am going to hold to that. It will—it will be our effort within the administration of the Department of Interior to get those applications processed.

Mrs. CUBIN. Do you have any idea what length of time will be involved?

Mr. FULTON. I recall—2 years we would have them—no longer a backlog.

Mrs. CUBIN. Thank you, very much.

Mr. OTTER. Thank you, Madam Chairman.

Mr. Fulton, you stated in your opening comments that you had three goals in mind, that there were basically three missions in mind. Number one was to protect the rights of the lessee, number two was to provide the maximum return from the resource, and number three was for safety, and I can see where safety is important. Do you ever find that number one and number two are in conflict?

Mr. FULTON. Well, yes. But it is—it is a matter of trying to get the highest possible benefit both to the public and while trying not to override the lesser one, so it is a balancing act. I mean, it is a matter of trying to get the best possible situation in each individual case.

Mr. OTTER. Have you ever had those two in conflict? Do you know of a resolution of a result of having the leaseholder rights and then the maximum return be in conflict with each other? If so, what was the resolution?

Mr. FULTON. Well, it is my understanding that when those conflicts arise, that we are looking for an optimal result not to maximize any one piece of that, but rather to balance, to try to achieve a result that doesn't tilt it too far in either direction.

I am not aware of a specific instance, but we can certainly get that for you if you are interested.

Mr. OTTER. I see.

Mr. Taylor, in the legislation that was passed in Wyoming to provide for a resolution of those sort of problems, have you employed that legislative solution?

Mr. TAYLOR. Yes, we have.

Mr. OTTER. Successfully?

Mr. TAYLOR. Very successfully.

Mr. OTTER. Can you give me an example?

Mr. TAYLOR. No, I can't. But I have heard from a number of people that it has been used, and it has been successful. But I can get you examples.

Mr. OTTER. Maybe I should ask the question in a different way. Would it be a shortcut to solution if the Congress were to adopt the legislative process and the resolution process that the State of Wyoming has adopted?

Mr. TAYLOR. I think that might be a good idea.

Mr. OTTER. That was—the big $64 question is what is the formula, isn't it? I would like to ask, Madam Chairman—I would ask without objection that you provide us with that legislation and what that solution is, and that that become, without objection, part of the record for this meeting.

Mr. TAYLOR. I will get that to you right away.

Mr. FULTON. Mr. Chair, if I could ask that the administration get a copy of that as well. We would be interested in taking a look.

Mr. OTTER. They may have already answered the question.

Mr. FULTON. They may have.

Mr. OTTER. There is hope yet. I would note that Mr. Rehberg has joined us.

Mr. Rehberg, the floor is yours for 5 minutes.

Mr. REHBERG. I do not need that.

Mr. OTTER. If there is no further questions—.

Mr. REHBERG. Unless I can just ask Mr. Fulton a question that I haven't asked him this week. Where are we with the Otter Creek?

Mr. FULTON. We are certainly working on that, sir.

Mr. REHBERG. I will ask you again next week.

Mr. OTTER. If there is no further questions, power is fleeting even in this organization, so I will relinquish the Chair to the Chairwoman.

Mrs. CUBIN. [Presiding.] Thank you. I don't have any more questions, and I thank the panel for their testimony and their answers. I would like to point out that Mr. Taylor is pretty new on the job that he is here to testify before us about, and so that is one of the reasons that he might not have some examples for the Committee today. But he is very capable, and I know will get the information we asked for. So thank you very much.

I would now like to call the next second panel: Mr. Ryan Tew, who is the senior counsel of Peabody Energy Corporation, on behalf of the National Mining Association; Mark Sexton, president of Evergreen Resources, on behalf of the Independent Petroleum Association of the Mountain States; and Mr. V.A. (Bud) Isaacs, president of Rim Operating Companies.

Thank you. Thank you, all three of you, for being here.

The Chair now recognizes Mr. Ryan Tew to testify for 5 minutes. And once again, the timing lights are on the table in front of you, and they will indicate when your time has concluded. While the oral testimony is limited to 5 minutes, your entire statement will be entered in the record.

Mr. Tew.

STATEMENT OF RYAN TEW, SENIOR COUNSEL, PEABODY ENERGY CORPORATION, ON BEHALF OF NATIONAL MINING ASSOCIATION

Mr. TEW. Thank you, Madam Chairman, members of the Committee. Thank you. I am delighted to be here today representing not only Peabody Energy Corporation, but also the National Mining Association. I am here today because H.R. 2952 is important not only to my company, but to the American coal industry. Although the bill has effect on only a relatively small part of the northeastern corridor of Wyoming, that small area measuring approximately 400 square miles produces about one-third of the Nation's coal, and coal produces over one-half of America's electricity.

America's coal companies invested hundreds of millions of dollars each in the Powder River Basin infrastructure and produced hundreds of millions of tons of coal in the 15- to 20-year period before anyone seriously contemplated producing coalbed methane from the area. However, as those before me have indicated, the area is now covered not only by coal leases, but also by oil and gas leases, so that there are conflicts in some cases.

The fundamental law of physics is that two people cannot occupy the same location at the same time, and that has been the source of our problem here in the Powder River Basin. There has been a lease for coal and for coalbed methane for the same area, hence the conflict.

The maps that are displayed here in the room show the area of the conflict. There are really three subareas of pods that we refer to from time to time, the northern pod, central pod and southern pod that are shown in the map that is closest to the wall. And the larger-scale map that is closer to me shows the area in general.

Although there are conflicts in the area—.

Mrs. CUBIN. Can we have staff bring that closer so that we can see that better, even if it is up here in between the two levels, please?

Thank you.

Mr. TEW. Although there are conflicts in some of the areas that are depicted in these maps, we believe that the legislation, H.R. 2952, provides an excellent vehicle to resolve the conflict for at least three fundamental reasons. The first is that the methodology that is provided by the legislation is fair. It provides for full participation of all of the parties that have an interest in the conflict, it provides for a fair market value to be paid to those interests who may have to step back and allow another interest to produce first, it allows for experts to determine the valuation, and it provides no extraordinary leverage to one party over another in negotiations, all of which are improvements over the current system of resolving difficulties.

Secondly, the methodology that is proposed by this legislation does not compromise the Nation's energy security or its energy supply. It does not leave us with the possibility that we may have a significant portion of the energy supply be compromised by delay or being ultimately being unable to be produced. It allows for a quick and orderly method for these disputes to be resolved, for them not to drag on with uncertainty for the parties until such time as there is necessarily a difficulty not only for the Nation, but also for the parties themselves.

And finally, the methodology as set forth in legislation is relatively simple. Although there are some provisions that require—that set forth procedures that will be followed in the dispute resolution policy, overall this policy—this procedure will be much more brief, no longer than 14 months in duration, than the procedure that is used presently, and certainly much more brief than would be the case if these disputes needed to be resolved through the courts, in which case we would anticipate a period of several years before final resolution could be reached.

We believe that this legislation takes into account not only these three factors that I have referred to, but also takes into account other factors that are important in determining which mineral interest owner has the opportunity to exercise its rights first. Those include factors such as which has made the greater investment, which has been there longer, which is permitted more, which has the greatest impact on employment, which has the greatest impact on the Nation's energy security system.

And for these reasons we, not only with the Peabody Energy Corporation, but also the National Mining Association, fully support this bill and ask the Committee to favorably consider it.

That is the end of my prepared remarks. I would be happy to attempt to answer any questions that the Committee may have.

Mrs. CUBIN. Thank you, Mr. Tew.

[The prepared statement of Mr. Tew follows:]

Statement of Ryan Tew, Senior Counsel, Peabody Energy Corporation on behalf of Peabody Energy Corporation and The National Mining Association

Good Afternoon, Madam Chairman:

My name is Ryan Tew. I am Senior Counsel for Peabody Energy Corporation. I am appearing here, not just on behalf of my company, but also on behalf of the National Mining Association ("NMA"), to testify in favor of H.R. 2952, The Powder River Basin Resource Development Act, which has been introduced by Chairman Cubin.

General Introduction

Peabody Energy Corporation, headquartered in St. Louis, is the largest coal producer in the United States. In 2000, our operating subsidiaries mined 181.6 million tons of coal - approximately 16.9% of the nation's production—from surface and underground mines in Wyoming, Arizona, Indiana, Montana, Colorado, Illinois, West Virginia, Kentucky and New Mexico. This coal fuels more than 9% of the electricity generated in the United States.

In 2001, we expect to mine more than 100 million tons of low-sulfur, sub-bituminous coal from our three surface mines in the Powder River Basin ("PRB") of Wyoming - North Antelope/Rochelle, Caballo and Rawhide. Some of you have been to North Antelope/Rochelle, the Nation's largest surface mine and have seen the quality of work and environmental reclamation we conduct. For those of you who have not, I would like to extend an invitation to you.

The National Mining Association (NMA) represents producers of over 80 percent of America's coal, a reliable, affordable, domestic fuel that is the source for over fifty percent (50%) of the electricity that America uses today. NMA also represents companies that produce metals and non-metals, companies that are among the nation's larger industrial energy consumers. Members also include manufacturers of processing equipment, machinery and supplies, transporters, and engineering, consulting and financial institutions serving the mining industry.

Powder River Basin Discussion

The Powder River Basin (PRB) coal field, located in Wyoming and Montana, includes over one trillion tons of coal reserves—in place". Over 60 billion tons of these reserves are known to be economically recoverable with today's technology. The PRB contains a truly extraordinary seam of coal, the Wyodak. The seam ranges from 60—90 feet in thickness and geologically resembles an enormous, elongated bowl that is roughly 80 miles across and 120 miles long. The first map indicates its size and location. There are 14 large surface mines in the PRB of Wyoming, all producing coal from the eastern edge (or the outcrop) of the Wyodak seam. These mines are all located at a point where the coal seam is most shallow—where it virtually intercepts the surface. As the seam moves west, it gets progressively deeper and actually thicker, as it quickly reaches depths that are not economically recoverable with either today's surface or underground mining techniques. PRB coal represents 32% of the coal produced in the United States.

This enormous coal reserve contains coal that is low in sulfur and is also low in inherent NOX when burned in power plants. As a result, coal production in the PRB has increased dramatically over the past two decades rising from just under 95 million tons per year in 1980 to nearly 350 million tons in 2000. PRB coal, delivered to 124 U.S. power plants in 26 states offers a primary source for low cost electricity generated from coal.

Whether viewed as an economic or as a domestic energy security and reliability issue, continued coal production from the PRB is critically important to the United States. It is equally important to the people of Wyoming. In 1999, PRB coal production generated nearly $202 million in state and local property taxes; $193.5 million in federal royalties (shared equally by the United States and Wyoming); almost $116 million in abandoned mine land fees and $72.9 million in black lung taxes;and tens of millions of dollars in payroll taxes, income taxes, etc. In total, coal produced from Wyoming represented over $3.2 billion to the total economy of that state. Although the precise data is not yet completed, the economic impact of the coal produced in the year 2000 from the PRB will mean even more revenue for Wyoming than in 1999.

Conflicts Background

A brief history of mineral leasing demonstrates the need for H.R. 2952.

Virtually all of the coal and approximately 50% of the oil and gas in the PRB is owned by the federal government and managed by the Bureau of Land Management (BLM), Department of Interior under the Mineral Leasing Act of 1920. The remaining oil and gas is owned either by private landowners, conveyed under homestead laws enacted in 1920 and 1916, or by the States, conveyed under the statehood acts. Mineral developers have leased vast tracts of these minerals from their federal, State, or private owners.

The conflicts exist because BLM has issued both federal coal leases and federal oil and gas leases for the same locations in the PRB. It also has leased federal coal in areas that have already been leased by private landowners or the State for oil and gas development. In those areas leased both for coal and for oil and gas ("common areas"), disputes over timing of mineral development have arisen. For safety and operational reasons the resources typically cannot be developed concurrently. The sequence of development in the common areas frequently becomes a critical issue, because production of any one of the minerals can result in the loss of another. For example, the CBM will be vented if the coal is mined first; the coal may be bypassed if the CBM is produced first. Even if a mineral is not lost, major costs can be incurred due to the delay or interruption in that mineral's development to accommodate another mineral's earlier production (*e.g.,* the costs of plugging a deep gas or oil well below the coal seam and removal of gathering lines until mining is completed, or of delaying the progression of the coal mine until production of the oil or gas ceases).

No clear statutory direction exists to resolve disputes over the sequence of mineral development in the PRB's common areas. The BLM provided no guidance to its lessees, and set no conditions in its leases, for the resolution of these disputes. Even after the BLM issued its official "Policy on Conflicts between Coal Bed Methane and Coal Development" on February 22, 2000, the agency's officials in the field have continued to inform federal lessees in the common areas that they must work out mineral development disputes on their own, without BLM's assistance or direction. In addition, the BLM continues to issue both coal leases and oil and gas leases—and to approve both mine plans and applications to drill—in the same locations in the PRB. In short, the de facto policy of BLM merely to direct the companies to work out the issues among themselves continues as it has for the last 25 years.

As a result of the absence of dispositive federal law or policy, coal developers and oil and gas developers in the PRB's common areas have attempted to negotiate private mineral development agreements. The few agreements reached to date require the coal developers to pay the oil and gas developers to ensure that mines on federal leases can continue to operate. The coal developers believe these agreements are inequitable, because the coal operators have made major capital investments and do not have the flexibility to alter their mining plans to accommodate oil and gas wells. The oil and gas developers seek unreasonable compensation, because the coal developers simply cannot afford extended negotiations or prolonged litigation in the face of the economic consequences of idling drag lines, paying royalties on unmined bypassed federal coal, and dealing with breached contractual obligations. Another representative of the coal industry from the PRB testified before this Subcommittee in the last Congress that his company estimated that past agreements have called for payments to the oil and gas developers of 3 to 5 times the fair market value of the unproduced oil and gas. This situation is not isolated.

Lengthy Negotiations or Extended Litigation are not Viable Alternatives

Generally we agree that the best parties to resolve issues of conflict are those who know the most about their own businesses—the coal company which wishes to exercise the rights granted it to extract coal under its federal coal lease, and the oil and gas producer which has drilled a well or wells into oil and gas bearing horizons. But, unfortunately, sometimes these issues cannot be worked out reasonably. Sometimes, people are not reasonable. Companies which operate coal mines in the PRB have frequently learned that the price of mining through an existing oil and gas well is the payment of excessive payments. The federal lessor frequently is not paid its full share of the royalty on the payment made by the coal developer to oil and gas developer nor is the State of Wyoming rendered its statutory share. BLM indirectly promotes this behavior, nevertheless, by the absence of any policy governing conflicts in multiple mine development.

Some representatives in the oil and gas industry contend that the principle of "first in time, first in right" governs matters of conflict in multiple mineral development. This principle means to them that the first entity which was issued a lease, whether it be to a coal or oil & gas company, must be given the complete and unfettered right to develop its reserve without interference from the junior holder. While "first in time, first in right" is certainly a well established principle of oil and gas

law, it has not been applied to coal conflict situations, as some in the oil and gas industry suggest. Historically, it is a rule of law that has applied to conflicts in title to disputed property. It is not a rule that governs the priority of development of different mineral estates.

The common law has resolved conflicts between oil and gas versus coal or other solid mineral lessees by relying on other principles. We would suggest that the rule of accommodation is more appropriately applicable. Furthermore with regard to lands covered under the 1909 and 1910 Coal Lands Act, in which the U.S. reserved the coal when issuing land grants, the U.S. Supreme Court has suggested in at least one case, that "first in time, first in right" actually may have been established at the time the U.S. originally reserved its coal rights, not when the coal was leased.

Federal coal leasing statutes and regulations require that federal coal lessees meet diligent development, maximum economic recovery, and continuous operations requirements or pay penalties in the form of royalties on bypassed coal, advance royalties, or even lease forfeiture. These constraints restrict coal developers" ability to undertake prolonged litigation to resolve the legal questions raised above. Business considerations including contractual obligations to utility customers exacerbate the predicament. Operational factors involving the movement or idling of massive and expensive machinery, as well as the economic plight of thousands of mine workers in PRB, play into the resolution of resource conflicts the coal operator never contemplated when it made the decision to pay millions of dollars in bonus bids for the right to mine the federal coal resource.

All of these considerations weigh on the coal lessee when it must decide whether to endure extended litigation. These same concerns enter into the decision to undertake lengthy negotiations in a market skewed by the fact that the value is not determined between a willing seller and a willing buyer, but rather between a coal lessee and an oil and gas developer who is not confronted by similar statutory or economic constraints. In short, our business enterprise is being held for ransom.

The cards are further stacked against a coal producer by an intentionally transparent process of providing information and public participation. Under the terms of the Surface Mining Control Reclamation Act of 1977 ("SMCRA"), before we are able to obtain a permit to mine, we must submit a very detailed mining and reclamation plan to both the state and federal government regulators covering the life of the mine. As an initial part of that process, we usually must go through the NEPA process of EIS preparation, which involves extensive public participation. Additionally, we are required by both federal and state statutes to go through another, very extensive, round of public participation, in that we must submit a written notice to every owner of any interest whatsoever within the life of mine permit area as well within one half mile outside the permit area, advising each of them of our pending operations and giving each of them an opportunity to object. In fact, we must explain to each of them how they can object if they choose.

Over the years oil and gas interests have come keenly to appreciate their leveraging position in the mine permitting process. In fact, it is typical for the Wyoming Department of Environmental Quality to receive protest notices from some individual oil producers in or around a coal mine permit area who demand that the operations not continue unless the oil and gas owner is somehow satisfied (usually financially). As a coal industry, despite the inequity, we have come to terms with this process, and we deal with it.

H.R. 2952 will provide a predictable and fair resource development dispute resolution mechanism where negotiations are unsuccessful and extended litigation will prejudice coal lessees and needlessly add to already crowded federal court dockets.

CBM Development

The issues described thus far concern the conflict in developing two different minerals, each of which occupy a different physical space (deep oil and gas) as well as CBM. As difficult as this situation has been since the 1970s, it became infinitely more complicated in 1998 with the increased potential for coal bed methane development. Unlike the traditional conflict, Coal and CBM conflicts pit two owners, one seeking to extract gas from the very coal seam leased by the other.

It is important to recognize that coal operators that bid on federal coal leases in the conflict area prior to the potential for CBM development did not take into economic consideration in preparing their respective bid packages the potential of conflicting coal bed methane development. How could they? BLM itself has acknowledged that they did not take such conflicting development into account in their economic equation. The BLM did not even believe that coal bed methane existed in economically recoverable quantities when these leases were made available.

If coal companies bidding for the leases in the conflict area had known of the potential for conflicts with other coal bed methane developers, they likely would have

discounted their bids significantly. It is fundamentally important to recognize that, unless a provision such as that which is contained in H.R. 2952 to allow a royalty credit for such coal bed methane conflict resolution payments is enacted, Peabody and other producers of coal from federal leases will suffer considerable damages. Coal lessees in the conflict area have paid hundreds of millions of dollars for leases which contain significantly diminished rights and economic benefits compared to those that BLM represented they would receive as the successful bidder. If H.R. 2952 is not enacted, future coal bids will likely be significantly discounted, thus resulting in diminished revenues to both the Federal and Wyoming governments.

BLM's February 22, 2000 Conflicts Policy

On February 22, 2000, BLM released a new policy that purportedly deals with issues of conflict. In some limited respects, the contents of the policy are a step in the right direction; in other areas, it is a major step in the wrong direction. However, this policy fails to deal in any manner whatsoever with the questions before us today: What happens if conflicting parties with existing leases cannot reach agreement? Without legislation, an agency policy cannot adequately address existing coal and oil and gas leases, (particularly where wells already exist or coal bed methane wells now scheduled are drilled in the PRB) and where there is imminent conflict.

Without legislation, coal producers will be exposed to paying an ever increasing ransom, far in excess of fair market value to mine coal that the federal government leases with an implicit promise of development. The coal industry must have a mechanism to resolve conflicts if agreements cannot be reached. We believe that the provisions embodied in the H.R. 2952 represent that solution.

Concerns Raised by Opponents of H.R. 2952

The attached maps depict the vastness of the Power River Basin coal field and the coal bed methane that is contained therein, indicates that less than 2% of the PRB area has conflicts between coal and coal bed methane development. 98% of coal in the PRB is not economically recoverable now or in the foreseeable future, so we are dealing with an area of potential conflicts that represent a very, very small portion of the total Basin area.

Some opponents of the bill argue that the bill will establish an adverse precedent in other areas. This clearly is not the case. By its very terms, it is applicable only to a limited and defined portion of PRB and will not change existing law with regard to other areas of the country or other minerals. Section 17 at the bottom of page 26 of H.R. 2952 provides expressly that:

> SEC. 17. DENIAL OF USE AS PRECEDENT. "Nothing in this Act shall be applicable to any lease under the Mineral Leasing Act or the Mineral Leasing Act for Acquired Lands for any mineral, or shall be applicable to, or supersede any statutory or common law otherwise applicable in, any preceding in any Federal or State court involving development of any mineral outside of the common area and within or outside the Powder river Basin.

Simply put: H.R. 2952 is not a precedent for wider application.

Industry Position on H.R. 2952

NMA and Peabody Energy favor private resolution of conflict issues, wherever and whenever possible. The conflict resolution proceedings established by H.R. 2952 would only be implemented on those occasions when disagreements persist and a third party must enter and resolve the dispute. H.R. 2952 would provide the missing statutory direction to resolve these mineral development disputes. It would establish a formal dispute resolution proceeding to be used only in the common areas within the maps designated "Dispute Resolution Area" in the Wyoming portion of the Powder River Basin and only as a last resort if private negotiations and the February 22, 2000 BLM administrative policy fail.

Nothing in this bill prevents BLM from adopting policies or promulgating regulations as to how conflicts can and should be resolved in the longer term to avoid the "last resort" mechanism specified in H.R. 2952. And, as a practical matter, the H.R. 2952 mechanism likely will only be employed a few times in the court, because the parties will quickly realize the fair market value methodologies which are utilized by the panel of three experts and will thereafter resolve their differences through private negotiations, without the need for seeking judicial intervention.

This dispute resolution proceeding would (i) determine whether the suspension of an oil and gas lease or development right in a common area within the Dispute Resolution Area is necessary in order to allow coal development to continue in accordance with the mine plan, and (ii) calculate, and provide for the payment of the lost

net income and fixed costs to the owners of the suspended oil and gas lease or right to develop.

It must be re-emphasized that the bill requires the mineral developers to negotiate a possible resolution of each dispute first. If both negotiations and BLM's conflict policy fail, either the coal developer or the oil and gas developer can invoke the formal resolution proceeding established by filing a petition with the local federal court. Without these resolution mechanisms, if negotiations collapse, coal development in the PRB and the many of the benefits derived by the State of Wyoming and the federal treasury could be significantly reduced. As a result, the Nation's largest source of its most abundant, affordable and reliable energy resource could be compromised.

In short, Peabody Energy Corporation and NMA maintain that the passage of H.R. 2952 is very important to the orderly development of energy resources in the designated Wyoming portion of the Powder River Basin.

Conclusion:

The provisions of the Powder River Resource Development Act will reduce uncertainties, promote expeditious resource recovery, and establish a fair and predictable procedure for resolving resource development conflicts in the area representing approximately 2% of the PRB coal region where conflicting leases and existing mines already exist.

In summary, H.R. 2952 would merely establish that, if an oil or gas well is in conflict with imminent coal production, the oil and gas developer will receive full and fair market value for the well, even if the lease is junior in time to the coal operator's. In addition, the legislation will actually reduce confusion and conflict (and thus the potential for litigation between the parties - including the United States) and will strengthen BLM's ability to require diligent development of coal bed methane operations. Very significantly, H.R. 2952 will increase revenue to both the federal and Wyoming treasuries by establishing an economic foundation which results in full, undiscounted federal coal bonus bidding rather than the present situation, which will likely result in coal companies discounting significantly their bids in anticipation of payments (usually 3–5 times fair market value) to oil and gas operators that are in conflict.

We particularly appreciate the valuable guidance, direction and leadership of Chairman Cubin on this legislation. We all thank you for your leadership, Madam Chairman. We, as Wyoming Powder River Basin coal producers, and the National Mining Association, believe that H.R. 2952 represents a fair piece of legislation which requires urgent and favorable consideration.

Thank you very much for your time. I will be happy to answer any questions you might have.

Mrs. CUBIN. The Chairman now recognizes Mr. Sexton.

STATEMENT OF MARK SEXTON, PRESIDENT, EVERGREEN RESOURCES, ON BEHALF OF INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES

Mr. SEXTON. Thank you, Madam Chairman and members of the Subcommittee. I am Mark Sexton, president and CEO of Evergreen Resources, Inc., a Denver-based exploration and production company specializing in coalbed methane production in the Raton Basin in southern Colorado, in addition to coal-methane projects we have throughout the world including United Kingdom, Alaska and other areas.

I serve on the board of directors of the Independent Petroleum Association of Mountain States, known as IPAMS. I am also a member of the coalbed methane Subcommittee of IPAMS and the legislation, legal and regulatory Committee. I am the president-elect of the Colorado Oil and Gas Association, as well as a member of IPAA's board of governors. These are all nonprofit, nonpartisan trade associations that represent independent oil and gas producers, surface and supply companies, banking and financial institutions.

IPAMS, operating in the 13-State Rocky Maintain region, including the State of Wyoming, represents substantially all of these companies producing coalbed methane in Powder River Basin. I am representing IPAMS at this hearing today. IPAMS welcomes the opportunity to provide you with our testimony concerning H.R. 2952.

IPAMS has been an active participant in the negotiations to develop solutions to the resource conflicts in the Powder River Basin as well as efforts to draft acceptable legislation since the association first became aware of these conflicts. IPAMS appreciates Representative Cubin's and the Wyoming Senators regarding these conflicts and appreciates your continued support for domestic energy production.

H.R. 2952 has been introduced in an attempt to resolve conflicts between coal producers and producers of coalbed methane, or CBM, in portions of the Powder River Basin. Although well-intentioned, 2952 effectively grants coal producers the right to condemn, vent and waste coalbed methane and to deduct the cost of condemnation from payments of their Federal coal royalties. Where these conflicts exist in the Powder River Basin, the oil and gas producers hold senior lease rights, having executed their leases before the coal companies sought leases in the area.

IPAMS is opposed to H.R. 2952 because it is simply not needed. 2952 is not a consensus bill, it is a special interest legislation that favors one resource over another at the expense of taxpayers. It sets a poor precedent for resolving resource conflicts. It encourages waste of the valuable CBM resource. It fails to fully and fairly compensate CBM producers for the loss of their resource. It is constitutionally flawed.

The so-called conflicts are extremely localized, encompassing a very minute portion of the Powder River Basin. Those are local issues that have been and are being resolved locally through private negotiations allowing the development of both valuable resources. Rather than promote the cooperative production and recovery of all valuable energy resources, 2952 encourages the condemnation, venting and waste of CBM at taxpayer expense.

2952 delegates the power of condemnation to private coal companies and allows Federal funds to be used to condemn senior property rights held by domestic oil and gas companies. It amounts to a taking of private property rights not only on Federal oil and gas leases, but also on State and private leases. It also sets un unwarranted and dangerous precedent for management of public lands and resources.

We are fooling ourselves if we do not acknowledge that this bill will set a political, if not a legal precedent, and precedents were cited here in a lot of testimony already. If this bill is passed each time a resource industry feels that it needs to help in private negotiations with a competing industry, it will come to Congress for a similar fix.

I am familiar with potential conflicts between coal producers and CBM producers in the Raton Basin in Colorado. I have come to successful business resolutions between Evergreen and prospective coal producers in the Raton Basin that will provide for cooperative development of both resources. It can be done. It is being done.

IPAMS supports the process by which all of the resources in the Powder River Basin can be developed to the fullest extent possible while protecting the health and safety of the citizens of Wyoming and the quality of the environment.

IPAMS also supports private business negotiations in lieu of government intervention. Policies and procedures are in place, along with a number of privately negotiated agreements, that have successfully resolved conflicts between coalbed methane and coal producers in the PRB. IPAMS strongly supports the Bureau of Land Management's formal written policy for resolving this type of conflict, IM No. 2000. We believe this policy has worked and is working; therefore, there is no need for Congress to intervene and enact sweeping legislation.

May I have another 30 seconds?

If, despite the serious policy issues raised by IPAMS, Congress is still intent on enacting condemnation legislation, IPAMS supports legislation that provides for condemnation by the Federal Government, not by private business entities. IPAMS supports legislation that provides for fair and adequate compensation for the loss of investment in its leases, including the loss of future oil, gas and coalbed methane production from the lease, the loss of coalbed methane created by nearby mining, and the loss of investment in facilities and equipment, such as gathering systems, compression facilities and pipelines.

Thus summarizing, H.R. 2952 is not needed. We already have the policies in place that are needed. H.R. 2952 sets a poor precedent for resolving resource conflicts. It encourages waste of the coalbed methane resource. It fails to fully and fairly compensate CBM producers for the loss of their resource. It provides the taxpayers bear the cost of condemnation awards and forgo important tax and royalty revenues, and it is constitutionally flawed.

Madam Chairman, thank you very much for the opportunity to appear before the Subcommittee to provide this testimony and to answer any questions.

Mrs. CUBIN. Thank you.

[The prepared statement of Mr. Sexton follows:]

Statement of Mark S. Sexton on behalf of The Independent Petroleum Association of Mountain States (IPAMS)

Thank you, Madam Chairman and Members of the Subcommittee. I am Mark Sexton, President of Evergreen Resources, Inc., a Denver-based exploration and production company with coalbed methane production in the Raton Basin in southern Colorado, in addition to CBM projects in the United Kingdom and exploratory interests in Alaska, Chile, and northwestern Colorado. I serve on the Board of Directors of the Independent Petroleum Association of Mountain States, known as IPAMS. I am a member of the coalbed methane subcommittee of IPAMS Legislative, Legal and Regulatory Committee. IPAMS is a non-profit, non-partisan trade association that represents independent oil and gas producers, service and supply companies, banking and financial institutions, and consultants in a thirteen state Rocky Mountain region, including the State of Wyoming. IPAMS represents substantially all of those companies producing CBM in the Powder River Basin. I am representing IPAMS at this hearing.

IPAMS welcomes the opportunity to provide you with our testimony concerning H.R. 2952, The Powder River Basin Resource Development Act. IPAMS has been an active participant in the negotiations to develop solutions to the resource conflicts in the Powder River Basin (PRB), as well as efforts to draft acceptable legislation, since the Association first became aware of the conflicts. IPAMS applauds the efforts of Representative Cubin and the Wyoming Senators to resolve these conflicts and appreciates your continued support for domestic energy production.

H.R. 2952 has been introduced in an attempt to resolve conflicts between coal producers and producers of coalbed methane (CBM) in portions of the Powder River Basin. Although well-intentioned, H.R. 2952 effectively grants coal producers the right to condemn, vent and waste CBM and to deduct the costs of condemnation from payments of their federal coal royalties. The reason the conflicts exist is because the same areas have been leased by the federal government to developers of both oil and gas and coal. In general, where these conflicts exist, the oil and gas producers hold senior lease rights, having executed their leases before the coal companies sought leases in the area.

IPAMS is opposed to H.R. 2952 because it is not needed. It sets a poor precedent for resolving resource conflicts. It encourages waste of the valuable CBM resource. It fails to fully and fairly compensate CBM producers for the loss of their resource. It is constitutionally flawed. And, certainly not the least of the problems, the cost of condemnation will be borne by the taxpayers.

Rather than promote the cooperative production and recovery of all valuable energy resources, H.R. 2952 encourages the condemnation, venting and waste of CBM at taxpayer expense. H.R. 2952 delegates the power of condemnation to private coal companies, and allows federal funds to be used to condemn senior property rights held by domestic oil and gas companies. The bill erodes private property rights and the certainty of rights that has allowed parties to invest with security in the development of our nation's natural resources. It also sets an unwarranted and dangerous precedent for management of public lands and resources.

IPAMS supports a process by which all of the resources in the Powder River Basin can be developed to the fullest extent possible while protecting the health and safety of the citizens of Wyoming and the quality of the environment. IPAMS alsosupports private business negotiations in lieu of government intervention.

H.R. 2952 is Not Needed

In situations where a junior lessee cannot operate without interfering with the resources or operations of a senior lessee, the parties have customarily entered into agreements whereby the junior lessees buy out the senior lessee or the parties otherwise agree upon mutually satisfactory arrangements for the joint development of their respective resources. This system has worked well over the years in several different locations and in connection with conflicts between various resources. In fact, this system has already worked effectively to resolve conflicts between coal and oil and gas operators in the PRB. Indeed, in no instance have negotiations reached an impasse.

Policies and procedures are in place, along with a number of privately negotiated agreements, that have successfully resolved conflicts between coalbed methane and coal producers in the PRB. IPAMS strongly supports the Bureau of Land Management's formal, written policy for resolving this type of conflict, IM No. 2000. We believe the policy has worked and is working; therefore, there is no need for Congress to intervene and enact sweeping legislation.

Background

The potential conflict between CBM and coal was anticipated by the BLM when it issued the Thundercloud coal lease in an area of existing oil and gas production in the PRB. Both the EIS and the Record of Decision (ROD) authorizing the Thundercloud lease explained that this conflict would be handled by a lease stipulation (the "Senior Rights Stipulation") which expressly prohibits the approval of coal mining operations that unreasonably interfere with orderly development and production under senior oil and gas leases. The ROD also explained that conflicts between senior oil and gas lessees and junior coal lessees would be resolved in favor of the senior lessees in accordance with the "first in time, first in right" principle. Accordingly, the coal lessees clearly understood that they would take their rights under the Thundercloud lease subject to the senior oil and gas leases.

The BLM assured the oil and gas companies that "these stipulations are all that is necessary to ensure that the 'first in time, first in right' policy can be implemented if conflicts arise between oil and gas and coal on the Thundercloud tract".

However, BLM urged the parties to negotiate cooperative agreements that would: (1) allow surface coal mining operations to proceed; (2) encourage the cooperative and contemporaneous production of both coal and oil and gas; and (3) fairly compensate the senior oil and gas lessees for resources unavoidably lost due to the advancing coal mines. Meanwhile, the coal companies began drafting legislation to supercede the BLM's authority.

The BLM issued its Instruction Memorandum, IM No. 2000, and began implementing its authority and the tools at its disposal to resolve the conflicts. BLM required oil and gas producers that hold leases located in an area where coal will be

mined within the next ten years to submit their plans to develop and produce CBM prior to the time overburden is removed for coal mining operations. Where plans have been submitted, BLM has prioritized the drilling sequence so that those wells closest to the mine face will be drilled first. BLM has given precedence to processing APDs for wells in these areas. Moreover, BLM has been a participant, along with the State of Wyoming, in the cooperative development agreements that have been executed that promote the development of both resources.

Clearly, coal companies in the PRB do not need the right of condemnation. Cooperative agreements have provided far superior resolution of the conflicts than Congressional legislation of private business disputes. While the cooperative joint development agreements may not represent an ideal outcome for either the coal producer or the oil and gas producer, they are essentially fair and equitable agreements that have resulted in the production of both coal and oil and gas.

Under the cooperative agreements, the coal companies are allowed to pursue their surface coal mining operations without interference, restriction or delay, and the oil and gas companies are encouraged to drill and operate CBM wells in advance of the coal mine.

Under the cooperative agreements, the state and federal governments receive prompt and full payment of royalties and taxes on the expedited production of the entire coal resource, on the portion of the CBM resource that is actually produced, and on payments made by the coal company to the oil and gas company for CBM that cannot be recovered from wells that must be abandoned.

However, while an approach such as the cooperative agreements has obvious benefits, there is little incentive for coal companies to negotiate when they can institute condemnation proceedings and recoup any condemnation award at the expense of the taxpayers. Once the disincentive of H.R. 2952 is removed, there is every reason to believe that the few remaining conflicts will also be resolved cooperatively. There is simply no need for intervention by Congress or the enactment of federal condemnation legislation.

H.R. 2952 Establishes and Dangerous and Unwarranted Precedent for Resolving Resource Conflicts

H.R. 2952 establishes an unwise and illogical precedent for resolving resource conflicts. Despite language to the contrary in the bill, common sense and experience tell us once a law is enacted, its potential for use (or misuse) in other instances is possible, if not probable. In fact, Thomas A. Dugan, president of Dugan Production Corp., an independent oil and gas company located in Farmington, New Mexico, testified at a hearing on S. 1950 (the predecessor legislation to H.R. 2952) before the Senate Energy Committee Subcommittee on Forests and Public Land Management last year that he was already engaged in a similar conflict situation with a coal lessee in the San Juan Basin who was using the potential passage of this legislation as a stalling technique to avoid negotiating an agreement with Dugan. Dugan asserted very strongly that the terms and conditions of this kind of legislation can affect - and are already affecting - conflicts outside the PRB. Wherever coal exists, the potential for conflicts with CBM producers also exists.

If coal companies are granted the right of condemnation in the PRB, a strong argument can be made that other conflicts between mineral developers or land uses and values should be resolved in the same way. A system that relies on condemnation to resolve conflicts, rather than the priority of property rights, will promote uncertainty and discourage investment in the development of our natural resources. Our traditional system, based on the sanctity and priority of property rights, has worked well and does not need to be replaced by a condemnation system.

H.R. 2952 Encourages the Waste of CBM

When captured and put to beneficial use, CBM is one of the cleanest burning fuel resources. However, H.R. 2952 encourages that large volumes of this nonrenewable energy resource be wasted. In its December 1999 study, the National Petroleum Council estimated that, while the United States currently produces only 22 Tcf of natural gas annually, by the year 2015 the anticipated demand for natural gas will reach 31 Tcf. In order to meet this growing demand, production of natural gas - including CBM - must be dramatically increased.

CBM resources in the Rocky Mountain region represent a significant portion of our nation's known and potential gas resources. The Gas Technology Institute estimates that the amount of CBM gas in place in the PRB is 39 Tcf, of which 9.4 Tcf is recoverable. GTI further estimates that, if properly developed, this resource could yield $5.3 billion in production taxes and royalties alone. However, the realization of these benefits is dependent upon the implementation of policies and practices that encourage and allow production of the CBM resource.

The Costs of H.R. 2952 Will Be Borne by the Taxpayers

H.R. 2952 is a bad bill for the taxpayers. H.R. 2952 provides that amounts paid by coal companies as condemnation awards to CBM lessees may be recovered through deductions from their federal coal royalties. In other words, the taxpayers will be paying for condemnation on behalf of the coal companies. Additionally, no royalties or taxes will be paid on the CBM that is condemned and vented rather than produced. According to the Wyoming Oil and Gas Conservation Commission, in 2000, revenues from natural gas production in Wyoming ($4.15 billion) exceeded revenues from oil ($1.53 billion) and coal ($1.25 billion) combined. Moreover, that will be the case again in 2001, based on six month totals. This revenue is attributed largely to the increase in coalbed methane production.

In contrast, under the existing cooperative agreements in the PRB, the state and federal governments will receive prompt and full payment of royalties and taxes on production of the entire coal resource, on the portion of the CBM resource that is actually produced in advance of the coal mine, and on payments made to the CBM operator for CBM that cannot be recovered from wells that must be abandoned.

H.R. 2952 Does Not Provide Full or Fair Compensation to CBM Lessees for Loss of Their Resources

While H.R. 2952 requires coal companies to compensate oil and gas lessees for CBM originally underlying and lost from the specific acreage to be mined, as discussed above, surface coal mining causes the loss of CBM from a much larger area. In fact, a study in the PRB demonstrated that CBM can flow several miles to the exposed face of a coal highwall and be vented and lost. CBM lessees must be compensated for all CBM that will be lost and wasted as a result of coal mining on their property, not just the portion of the resource that was originally situated beneath the acreage actually mined. Any legislation that contemplates condemnation of CBM must account for the huge volume of CBM that will be lost through drainage and venting.

Making matters worse, H.R. 2952 allows coal developers to condemn oil and gas leases in sequential steps, as needed for their operations. As the coal mine approaches the oil and gas lease, CBM will be drained and vented from the surrounding area. By the time the coal mine reaches the oil and gas lease, the CBM will be gone, significantly reducing the amount of any condemnation award that would otherwise have to be paid by the coal company.

Moreover, the bill ignores the developers of other facilities incidental to the production of CBM. No compensation is contemplated for an oil and gas producer's investment in the lease or operations, including rental and bonus payments and costs incurred in connection with exploration and development, despite the fact that this procedure would result in a taking and the loss of all of the producer's investment. There is no compensation provided for the owners of compression facilities, gathering systems, pipelines, monitoring equipment, electrical power and transmission lines and similar facilities, nor roads or rights-of-way to and from such leases.

H.R. 2952 is Constitutionally Flawed

H.R. 2952 delegates the power of condemnation to private entities for the first time in our nation's history, and allows federal funds to be used to terminate vested senior property rights held by domestic oil and gas companies.

In addition to considerations of equity and fairness, the U.S. Constitution requires payment of just compensation for private property taken through condemnation. As drafted, H.R. 2952 would be subject to formidable constitutional challenge because it fails to compensate senior oil and gas lessees for a substantial portion of the CBM that would be lost as a result of surface coal mining.

Oil and gas lessees are required by H. R. 2952 to initiate actions no later than 210 days prior to a commencement of operations under a coal mining plan to protect their interests and receive compensation for lost CBM. This is an unreasonable burden on oil and gas lessees to know of the existence and timing of every mining plan, especially given that H.R. 2952 says a mining plan does not have to be approved in order to toll the time limits set forth in the legislation.

H.R. 2952 contains other provisions and procedures that violate due process, including limitations on the rights of appeal, and the use of experts paid by interested parties both to establish the condemnation award and to testify in court. The panel of experts may not be disinterested parties to the development. These experts would also be. privy to certain information about which they may later be called to testify. The experts cannot be both adjudicators and witnesses. Moreover, H.R. 2952 contains complex and unclear terms, tests and standards that would likely result in significant litigation which, in turn, will result in further delay in the resolution of conflicts between resource producers in the PRB.

Conclusion

H.R. 2952 does not meet the statutory or administrative goals for conservation of our nation's valuable nonrenewable natural resources. The bill would permit large volumes of CBM to be lost and wasted, rather than captured and put to beneficial use as a clean burning fuel. In order to meet the dramatically increasing demand for natural gas in the United States and elsewhere, this country needs to develop policies that encourage the recovery of this valuable nonrenewable resource, not enact legislation that results in its waste or loss.

If, despite the serious policy issues raised by IPAMS, Congress is still intent on enacting condemnation legislation, IPAMS supports legislation that provides for condemnation by the federal government, not private business entities. IPAMS supports legislation that provides for fair and adequate compensation for the loss of investment in a federal lease, including the loss of future oil, gas or CBM production from the lease, the loss of CBM created by nearby mining, and the loss of investment in facilities and equipment, such as gathering systems, compression facilities and pipelines.

H.R. 2952 is not needed. H.R. 2952 sets a poor precedent for resolving resource conflicts. It encourages waste of the CBM resource. It fails to fully and fairly compensate CBM producers for the loss of their resource. H.R. 2952 is constitutionally flawed. H.R. 2952 provides that taxpayers bear the cost of condemnation awards and forego important tax and royalty revenues.

Thank you for the opportunity to appear before the Subcommittee and to provide this testimony.

Mrs. CUBIN. The Chair now recognizes Mr. Isaacs.

STATEMENT OF V.A. (BUD) ISAACS, JR., PRESIDENT, RIM OPERATING COMPANIES

Mr. ISAACS. Good afternoon. My name is Bud Isaacs. I am chairman of Rim Operating, Inc., and I am a member of IPAMS and the IPAA. I appreciate the opportunity to testify here today. This testimony is offered in behalf of Rim Operating, Inc., and its affiliates which hold leasehold and operating rights of CBM covering approximately 30,000 acres in the Powder River Basin.

Rim recognizes and greatly appreciates Chairman Cubin's longstanding support of the energy industry, but this bill itself is ill-conceived and counterproductive. Rim has spent the last 2 years resolving its conflicts with coal companies in the Powder River Basin, but I am testifying today against this bill because it is bad law and bad policy. It is legislation that inappropriately favors one industry over the other, creates dangerous precedent by delegating Federal powers of condemnation to private companies for the first time, is costly to the taxpayer and totally unnecessary. It is special interest legislation that benefits only coal companies at the expense of small oil and gas operators, the taxpayers and the environment.

When the predecessors of this bill were introduced, several legislators, including the Chairman of this Subcommittee, urged Rim to resolve its conflicts with the coal mines to show that takings legislation is not needed. They also suggested that Rim should develop and produce its CBM to demonstrate the legitimacy of its concerns and positions. We have done everything that has been asked of us, and it should now be time to end the debate regarding the need for takings legislation.

When similar legislation was first introduced almost 2 years, the coal companies argued that the legislation was needed in order to resolve conflicts with Rim. They argued that there was no commercial value of CBM in the conflict area and that Rim had no intention of actually developing and producing the coalbed methane.

They argued that Rim was motivated solely by a desire to reap a windfall profit from the coal companies. In short, the coal companies made the same arguments that they are making today.

But all of coal's assertions and predictions have been proven false. Rim has entered into three joint development agreements. Just recently with Kennecott on the North Jacobs LBA within the last month with two major coal mines covering more than 10,000 Federal acres and resolved its conflicts. Pursuant to these agreements, both coal mining and CBM production are proceeding in the conflict area. Rim has drilled 95 coalbed methane wells in the conflict area itself and has 28 additional wells on the immediate adjacent acreage.

Rim is drilling eight new CBM wells in the Hilight Field every month. In the past 9 months, Rim has produced and sold 2.3 billion cubic feet of gas from South Hilight Unit. Rim and its partners have spent $6-1/2 million in developing the conflict acreage, and present estimates of CBM reserves are in the area of 25- to 30 billion cubic feet of gas.

This is a substantial amount of CBM that is being produced to meet our country's energy needs and on which severance taxes and production royalties are being paid. Moreover, pursuant to these agreements, coal mining has not and will not be delayed even 1 day.

Rim supports the BLM's policy for resolving this type of conflict as set forth in IM 2000. This policy emphasizes the BLM's use of regulatory tools to encourage the consensual resolution of conflicts and to optimize the recovery of both coal and coalbed methane. This policy was introduced in February of last year and is working well.

All conflicts have that have emerged to date have been resolved by joint development agreements. Pursuant to those agreements, CBM is being produced in advance of the coal mines, and coal mining is proceeding without any delays whatsoever. The parties are cooperating and coordinating their operations, and the production of both coal and CBM is being optimized. This has all been accomplished by agreement without the need for Federal legislation, without the suspension or termination of oil and gas leases, without the takings of vested senior property rights, without the use of Federal subsidies and tax credits, and without administrative and judicial condemnation proceedings, all of which are contemplated in this bill.

In the process we have learned a few things. Coal and CBM can be produced concurrently from the same tract if the parties work together. Rim meets frequently with coal companies and works with them closely to coordinate operations. This type of cooperation cannot be mandated by Federal legislation. In fact, if this bill had been enacted last year, we would still probably be fighting with the coal companies instead of working closely with them. CBM would have been wasted instead of produced, and coal operations may have been delayed as well.

The coal companies argue that they need this bill to avoid protracted litigation and the closing down of mines, but they cannot point to one example of any such harm actually occurring. Over the past few years there have been only cooperative agreements be-

tween coal and CBM producers. There has been no litigation. This is a record that should be applauded and continued, not changed by contentious and one-sided legislation that can only lead to problems.

This is a bad bill for the environment and for the prudent stewardship of our nonrenewable natural resources. This is also a bad bill for the Federal budget. Not only will Federal royalties on coal be reduced to reimburse coal companies for the amounts paid to condemn coalbed methane, but no royalties or taxes will be paid on CBM that is condemned and vented rather than produced.

The bill has constitutional problems. It does not provide full and fair compensation to CBM lessees. The bill requires that compensation be paid for only a small portion of the CBM that will actual be lost as a result of coal mining. The grant of powers of condemnation to private coal companies, coupled with their ability to exercise that right by payment of less than full and fair compensation, raises serious constitutional questions.

Our opposition can best be summarized by Senator Bingaman in the markup of Senate bill 1950, the predecessor of this bill. And I quote Senator Bingaman: "1950 turns over the Federal Government's power of eminent domain to private mining companies so that they make take the private property rights of other mining companies. To the best of my knowledge, this measure is unprecedented." Still quoting. "To make matters worse, the bill abandons the traditional constitutional 'public interest' test for when the United States may take private property, yet passes the entire expense on to the Federal Treasury, and ultimately the taxpayers. And instead of relying on traditional condemnation law and procedures, it erects a complex and cumbersome new system." End quote.

Mrs. CUBIN. Can you summarize your testimony, Mr. Isaacs?

Mr. ISAACS. I am right there. Thank you.

And I submit Senator Bingaman's comments for the record.

H.R. 2952 and its predecessors could not pass muster when they were first introduced. During the past 2 years developments in the Powder River Basin have only proven that the bill is not needed and would, in fact, be counterproductive.

Simply put, this is an unneeded and unconstitutional takings bill. Our system isn't broke, and certainly won't be fixed by this bill. It is time to end this debate and send us all back home to work together and play by the rules.

Thank you for the opportunity to testify today. I would be pleased to answer any questions you may have.

Mrs. CUBIN. Thank you.

[The prepared statement of Mr. Isaacs follows:]

Statement of Vernon A. Isaacs, Jr., Rim Operating, Inc.

I. INTRODUCTION

HR 2952 has been introduced to attempt to resolve conflicts between coal producers and producers of coalbed methane ("CBM") in portions of the Powder River Basin ("PRB"). Effectively, HR 2952 grants coal producers the right to condemn, vent and waste CBM and to deduct the costs of condemnation from payments of their federal coal royalties. Certain oil and gas associations, including the Independent Petroleum Association of Mountain States ("IPAMS"), oppose HR 2952 as drafted. This testimony is offered on behalf of RIM Operating, Inc. and its affiliates

("RIM"), which hold leasehold and operating rights to CBM covering more than 30,000 acres in the PRB.

RIM recognizes and greatly appreciates Representative Cubin's longstanding support of the energy industry. But, as promoted by certain interested parties, HR 2952 itself is ill conceived and counterproductive.

RIM supports the BLM's formal policy for resolving this type of conflict, as set forth in Instruction Memorandum No. 2000. This policy emphasizes the BLM's use of various regulatory tools at its disposal in order to encourage the consensual resolution of conflicts between coal and CBM producers and to optimize the recovery of both resources. This policy was introduced in February of last year and is working well. RIM and its partners have entered into three separate joint development agreements ("JDAs") with two major coal mines, resolving conflicts on more than 10,000 acres of federal land. Pursuant to these JDAs, RIM is rapidly producing CBM in advance of the coal mines and coal mining is proceeding without any delays whatsoever. The parties are cooperating and coordinating their operations and the production of both coal and CBM is being optimized. This has all been accomplished by consensual agreement, without the need for federal legislation, the suspension or termination of oil and gas leases, the taking of vested senior property rights, the use of federal subsidies and tax credits or administrative and judicial condemnation proceedings, all of which are contemplated under HR 2952.

RIM has now resolved all of its conflicts with the coal companies in the PRB and should not itself be affected, one way or the other, by HR 2952. But I am testifying today against HR 2952 because I strongly believe that it is bad law and bad policy. It is legislation that inappropriately favors one industry over another, creates dangerous precedent, is costly to the taxpayer and, perhaps most importantly, is totally unnecessary.

HR 2952 encourages the condemnation, venting and waste of CBM into our atmosphere at taxpayer expense, rather than promoting the cooperative production and recovery of all valuable energy resources. HR 2952 delegates the sovereign's power of condemnation to private coal companies and allows that power and federal funds to be used to terminate vested senior property rights held by smaller oil and gas companies. The bill erodes the sanctity of private property and the certainty of rights that have allowed parties to invest with security in the development of our country's natural resources and sets a dangerous precedent for management of our public lands and resources.

HR 2952 unnecessarily involves the Federal government, Federal legislation and Federal subsidies in what is essentially a private and local dispute that can readily and equitably be resolved through private agreement, as such conflicts have routinely been resolved in the past. Without the inducement of the "better deal" that certain coal companies hope to obtain through HR 2952 at taxpayer expense, conflicts in the PRB can quickly be resolved through private negotiation and agreement, with no delays whatsoever to coal operations. Such agreements can provide for the cooperative recovery of coal and CBM and have already been successfully negotiated and implemented in the PRB.

HR 2952 is a bad bill for the environment and for the prudent stewardship of our non-renewable natural resources. The bill encourages the condemnation and venting into the atmosphere of substantial amounts of methane, one of the most potent greenhouse gases. The detrimental effects of this venting on the environment are not fully understood. At the same time, the bill allows large volumes of CBM to be lost and wasted forever, rather than captured and put to beneficial use as a clean burning fuel. In order to meet the dramatically increasing demand for natural gas in the United States, we need to develop policies that encourage the recovery of this valuable non-renewable resource, not enact legislation that results in its irrevocable loss for all generations.

HR 2952 is also a bad bill for the Federal budget. Not only will Federal royalties on coal be reduced to reimburse coal companies for amounts paid to condemn CBM, but no royalties or taxes will be paid on the CBM that is condemned and vented rather than produced.

If, notwithstanding the serious policy issues outlined above, Congress is intent on enacting condemnation legislation, HR 2952 nevertheless contains serious flaws and inequities. HR 2952 does not provide full or fair compensation to CBM lessees for the loss of their resource. The bill requires that compensation be paid for only a small portion of the CBM that will actually be lost and wasted as a result of coal mining. HR 2952 is convoluted, difficult to understand and embodies certain other procedural and constitutional shortcomings. In particular, the grant of powers of condemnation to private coal companies, coupled with their ability to exercise that right by payment of less than full and fair compensation, raises serious constitutional questions. Even more disturbingly, HR 2952 has been promoted based upon

certain distortions and misrepresentations, particularly regarding the purported need for condemnation legislation.

When similar legislation was first introduced two years ago, the coal companies argued that the legislation was needed in order to resolve conflicts with RIM and its CBM partners, that there was no commercially valuable CBM in the conflict area and that RIM had no intention of actually developing and producing the CBM, but was instead motivated solely by a desire to reap a supposed windfall from the coal companies. All of these assertions have been proven false. As noted above, RIM has entered into three joint development agreements, with two major coal mines, covering more than 10,000 federal acres and resolved all of its conflicts. Pursuant to these agreements, both coal mining and CBM production are proceeding in the conflict area. RIM has already drilled 95 CBM wells in the conflict area itself and 28 additional wells on immediately adjacent acreage. RIM is drilling eight new CBM wells in the Hilight Field every month. CBM production from the South Hilight Unit has recently been averaging 11,000 MCF per day and in the past nine months a total of 2.336 billion cubic feet of CBM has been sold. Installed compression capacity on the conflict acreage presently totals 13,500 MCF per day and requests are pending for an additional 4,500 MCF per day. RIM and its partners have spent approximately $6.5 million in developing the conflict acreage and present estimates of the CBM reserves in this area are 25 to 30 billion cubic feet. This is a substantial amount of CBM that is being produced to meet our country's energy needs and on which severance taxes and production royalties are being paid to state and federal governments. Moreover, pursuant to these joint development agreements, coal mining has not and will not be delayed even one day.

When the predecessors of HR 2952 were introduced, several legislators strongly encouraged RIM to resolve its conflicts with the coal mines consensually to show that condemnation legislation is not needed. They also suggested that RIM should develop and produce its CBM as a means of demonstrating the legitimacy of its concerns and positions. We have done everything that has been asked of us and it should now be time to end the debate regarding the need for condemnation legislation.

II. BACKGROUND

The conflict between coal and CBM operators in the PRB has focused upon an area of Campbell County, Wyoming covered by the Hilight oil and gas field (the "Hilight Field").[1] In order to understand the present conflict, it is essential to understand recent events relating to the Hilight Field and the manner in which conflicts have been successfully resolved to date.

The Hilight Field has been producing oil and gas, primarily from deep formations, for several decades. In the past seven years, production of gas from the Hilight Field has increased dramatically and numerous wells that were previously shut-in have been returned to production. This increase in product is attributable partially to secondary recovery of deep gas and partially to the development of CBM, which has become highly attractive and valuable due to the recent construction and commissioning of pipelines and gas gathering facilities.

The oil and gas unit at the southern end of the Hilight Field is known as the South Hilight Unit (the "SHU"). RIM holds leasehold land operating rights to CBM in the SHU, primarily under senior Federal oil and gas leases dating back to the 1960s. M&K Oil Company ("M&K") holds leasehold and operating rights to the deep oil and gas within the SHU under the same leases.

Two major coal companies, Arch Coal Company and its affiliates ("Arch") and Kennecott Energy Company and its affiliates ("Kennecott") have surface coal mines in the area. Arch's Black Thunder mine has been approaching the SHU from the south and Kennecott's Jacobs Ranch Mine has been approaching the SHU from the southeast.

The potential conflict between the oil and gas operators and the coal operators came to a head in connection with the issuance of the Thundercloud Federal Coal Lease (WYW 136458, referred to hereinafter as the "Thundercloud Coal Lease") effective as of January 1, 1999. The Thundercloud Coal Lease covers lands within and immediately adjacent to the SHU, including substantial acreage covered by RIM's and M&K's senior oil and gas leases. The Thundercloud Coal Lease itself was issued

[1] The Hilight Field is comprised of four oil and gas units: the Grady Unit, the Jayson Unit, the Central Hilight Unit and the South Hilight Unit.

to Arch, but on April 29, 1999, the Bureau of Land Management ("BLM") approved an assignment of a portion of the Thundercloud Coal Lease to Kennecott.[2]

RIM was understandably quite concerned about the issuance of the Thundercloud Coal Lease. Surface coal mining within the SHU would cause the irretrievable venting and waste of the CBM resource. Coal mining destroys the reservoir in which the CBM resides and directly vents CBM into the atmosphere. Moreover, the exposure of the coal seam causes a drop in reservoir pressure. This acts like a hole in a tire, and CBM from throughout the area will flow through the porous coal structure to the mine face and be lost through venting. RIM has provided to the BLM a rigorous study which establishes that, even prior to the initiation of mining on the Thundercloud Coal Lease, the Jacobs Ranch and Black Thunder Mines were causing the drainage, venting and losses in excess of 500 million cubic feet of CBM from the SHU per year.[3] This study was accepted and approved by the BLM.[4]

Following the issuance of the Thundercloud Coal Lease, the BLM and the State of Wyoming encouraged negotiations to resolve operational conflicts on the Thundercloud Tract. In April 1999, at the suggestion of the Powder River Basin Regional Coal Team, the BLM convened a federally supervised mediation involving coal companies (including Arch and Kennecott), oil and gas producers (including RIM and M&K), the State of Wyoming and Federal agencies (including the BLM and the Minerals Management Service). At the Federal mediation, the BLM re-emphasized that intractable conflicts would be resolved by the BLM on the basis of the "first in time, first in right" doctrine, but urged the parties to negotiate consensual agreements that would: (i) allow surface coal mine operations to proceed; (ii) encourage the cooperative and contemporaneous production of both coal and oil and gas; and (iii) fairly compensate the senior oil and gas lessees for resources unavoidably lost due to the advancing coal mines. While productive discussions were held between certain parties, the mediation did not immediately result in any agreements.

On May 21, 1999, the BLM sent representatives of Arch, Kennecott, RIM and M&K a letter indicating that the BLM would not, at least for the time being, approve any APD permits (for CBM or oil and gas drilling) or R2P2 permits (for surface coal mining operations) on the Thundercloud Tract.[5] Confronted with this obstacle to their respective operations on the Thundercloud Tract, Arch and RIM entered into focused negotiations and, three months later, entered into a Joint Development Agreement dated September 1, 1999 (the "Arch JDA").

The Arch JDA demonstrates clearly both that coal companies in the PRB do not need the right of condemnation and that consensual agreements can provide a vastly superior resolution. The Arch JDA was accomplished through creative and good faith negotiations between Arch and RIM, with significant support, involvement and encouragement from the State of Wyoming and the BLM. While the Arch JDA may not represent an ideal outcome for either Arch or RIM, and while some degree of necessity and urgency may have been required to bring the parties together and get the deal done, it is nevertheless an essentially fair and equitable compromise and results in the cooperative production of both coal and oil and gas.

Following the execution of the JDA, each of Arch, RIM, the State of Wyoming and the BLM entered into a Memorandum of Understanding (the "MOU") which formally acknowledges, supports and blesses the JDA. In the MOU, the State and the BLM acknowledged and confirmed the "appropriateness of the arrangements and agreements between Arch and RIM." In cover letters, the BLM acknowledged its participation in the mediation process and stated its belief that "this agreement is a reasonable attempt to optimize production of both resources from the Thundercloud lease"[6] and the State of Wyoming commented that it "has supported the proc-

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[2] The portion of the Thundercloud Coal Lease assigned to Kennecott was given a new serial number (WYW 148123). Pursuant to applicable Federal regulations, at 43 CFR §3453.2–5, the Assigned Thundercloud Lease constitutes a separate and distinct Federal coal lease on the same terms and conditions as the original Thundercloud Lease.

[3] J. Craig Creel, "Drainage of Coalbed Methane Resources, South Hilight Unit–Hilight Field, Campbell County, Wyoming" (March 18, 1999). This study also concludes that the Jacobs Ranch and Black Thunder Mines are venting in excess of 2.3 million cubic feet of CBM per day.

[4] Letter from Asghar Shariff, Chief of Wyoming Reservoir Management Group, BLM, to Mr. Stephen Rector of RIM, received May 4, 1999.

[5] Letters dated May 21, 1999 from Alan R. Pierson, Wyoming State Director, BLM, to James Aronstein (representing RIM), Morris W. Kegley and Jacobs Ranch Mining Company (all representing Kennecott), Blair M. Gardner and Thunder Basin Coal Company (representing Arch) and Peter A. Bjork and M&K Oil Co., Inc. (representing M&K).

[6] Letter dated September 28, 1999 from Alan R. Pierson, Wyoming State Director, BLM, to representatives of Arch, RIM and the State of Wyoming.

ess, believes that the agreement is a rational solution to the conflict and is willing to be a signatory to the agreement."[7]

In contrast to HR 2952, which encourages the condemnation, venting and waste of CBM so that coal can be produced, the Arch JDA encourages the cooperative production of both of these non-renewable energy resources. Under the Arch JDA, Arch (which is the junior lessee) is allowed to pursue its surface coal mining operations without interference, restriction or delay and RIM is encouraged to drill and operate CBM wells in advance of the coal mine. The parties work closely together to coordinate their respective operations and use of surface facilities (which cooperation cannot effectively be mandated by Federal legislation). When the face of Arch's coal mine comes within a critical distance of a CBM well, RIM is required to curtail production and abandon the well. In consideration, Arch compensates RIM for the loss of remaining production.

Both Arch and RIM recognized that the value of RIM's CBM wells would be dramatically impacted by the approach of Arch's surface coal mine. As a surface coal mine approaches a CBM well, reservoir pressure is reduced and CBM throughout the area is drawn to the mine face and vented into the atmosphere. By the time that the coal mine arrives, a CBM well will be rendered virtually worthless. Accordingly, the Arch JDA values lost production by reference to a model CBM well for the area, with stated characteristics of quantity and life of production. This model reflects an estimate of the producing characteristics of a local CBM well unaffected by surface coal mining operations. Under the Arch JDA, the amount of production lost from a CBM well at the end of its fourth year, for example, is established by determining the amount of production remaining in the model well after year four. The value of that lost production is then reduced to present value by application of a discount rate.

The Arch JDA has obvious benefits for all parties concerned. Although it is the junior lessee that took its coal lease subject to the obligation not to interfere with the operations or resources of the senior oil and gas lessees, Arch obtained the right to advance its surface coal mine without restriction, delay or limitation. RIM is allowed to drill CBM wells and to produce as much CBM as possible in advance of the coal mine and is compensated for CBM resources that are unavoidably lost. The State and Federal governments receive prompt and full payment of royalties and taxes on the expedited production of the entire coal resource, on the portion of the CBM resource that is actually produced by RIM and on payments made by Arch to RIM for CBM that cannot be recovered from wells that must be abandoned. The government and its resources are not tied up in a cumbersome and inappropriate condemnation scheme and the coal and oil and gas operators work together in a cooperative, rather than an adversarial, relationship. Most importantly, the Arch JDA encourages the production and recovery of both coal and CBM and minimizes the waste and venting into the atmosphere of non-renewable energy resources.

While a consensual approach such as the Arch JDA has myriad and obvious benefits, coal companies will not be motivated to enter into such arrangements if they are afforded the right of condemnation at taxpayer expense. As profit motivated businesses, coal companies would certainly prefer to condemn the CBM resource at taxpayer expense than to make payments under a joint development agreement.

On July 7, 2000, RIM entered into a Joint Development Agreement with Kennecott covering the portion of the Thundercloud Coal Lease that Arch had assigned to Kennecott. This Joint Development Agreement allows both companies to conduct their respective operations on the lands at issue. RIM holds rights to develop coalbed methane (CBM) in the area pursuant to senior federal oil and gas leases dating from the 1960s. The Joint Development Agreement will allow coal mining operations to proceed throughout the conflict acreage without interference or delay and, at the same time, will allow existing CBM wells to produce up until the last possible date.

Most recently, RIM and Kennecott entered into a Joint Development Agreement dated August 23, 2001. This Joint Development Agreement covers almost 5,000 acres known as the North Jacobs Ranch Tract, which Kennecott hopes to lease for future coal mine expansion, as well as thousands of adjacent acres where Kennecott already holds coal leases. As with the other Joint Development Agreements, this agreement will allow coal mining operations to proceed throughout the conflict acreage without interference or delay. RIM will also be able to operate CBM wells until the coal mine arrives. The BLM approved and blessed this Joint Development Agreement by the execution of a Memorandum of Understanding, in which all parties concerned have confirmed that the Joint Development Agreement will provide

[7] Letter dated September 27, 1999 from Stephen A. Reynolds, Director of Office of State Lands and Investments, State of Wyoming, to representatives of Arch, RIM and the BLM.

a viable framework for the development of coal and CBM and that the amounts to be paid to the CBM parties for their unavoidable losses constitute "appropriate compensation.

RIM has now resolved all of its conflicts with the coal companies. RIM has entered into three JDAs, with two major coal mines, covering more than 10,000 acres of federal land. Pursuant to these JDAs, both coal mining and CBM production are proceeding as fast as possible in the conflict area. RIM has already drilled 95 CBM wells in the conflict area itself and 28 additional wells on immediately adjacent acreage. RIM is drilling eight new CBM wells in the Hilight Field every month. CBM production from the South Hilight Unit has recently been averaging 11,000 MCF per day and in the past nine months a total of 2.336 billion cubic feet of CBM has been sold. Installed compression capacity on the conflict acreage presently totals 13,500 MCF per day and requests are pending for an additional 4,500 MCF per day. RIM and its partners have spent approximately $6.5 million in developing the conflict acreage and present estimates of the CBM reserves in this area are 25 to 30 billion cubic feet. This is a substantial amount of CBM that is being produced to meet our country's energy needs and on which production royalties and severance taxes are being paid to the federal and state governments. Moreover, pursuant to these JDAs, coal mining has not and will not be delayed even one day.

Under the existing JDAs, the coal and CBM operators are cooperating and coordinating their respective operations and the production of both coal and CBM is being optimized. This has all been accomplished by consensual agreement, without the need for federal legislation, the suspension or termination of oil and gas leases, the taking of vested senior property rights, the use of federal subsidies and tax credits or administrative and judicial condemnation proceedings, all of which are contemplated under HR 2952.

In order to try to establish a need for condemnation legislation, where none exists, the proponents of HR 2952 have resorted to attacking and misrepresenting the Arch JDA. They allege that Arch was forced to enter into the Arch JDA under duress and that it must pay RIM a "multiplier" of the fair market value of the CBM resource. These are quite simply fabrications and distortions. Consider, in particular, the following facts:

1. In entering into the Arch JDA, Arch was no more under duress than was RIM. Both parties needed to enter into the Arch JDA in order to obtain permits to operate within the Thundercloud Tract. RIM would have preferred to produce the CBM resource without interference or to receive more adequate compensation for its losses. Neither Arch nor RIM was entirely pleased with the result, but the compromise that was ultimately struck was fair and appropriate;
2. Under the Arch JDA, Arch does not pay for the full value of the existing CBM resource, as would be required in connection with condemnation. Once Arch's coal highwall comes within a critical distance of a CBM well and the well is shut-in, Arch is obligated to compensate RIM only for the loss of remaining production. Arch pays nothing for the value of CBM that can be recovered by RIM in advance of the surface coal mining operation;
3. The amount and value of lost CBM production is determined by reference to a model well for the area. This model well was proposed by Arch, not by RIM, and was based on a BLM study of actual production from 85 CBM wells operating nearby in the PRB;
4. The value of lost production from a CBM well is reduced to present value prior to payment to RIM at an extremely high discount rate. The applicable discount rate is defined as nine percentage points above the "Ask Yield" for U.S. treasury notes with a maturity of ten years;
5. In order for any compensation to be payable to RIM for the loss of a CBM well, the well must be drilled prior to January 1, 2002. Otherwise, Arch pays RIM nothing at all for the loss of a CBM well; and
6. The BLM and the State of Wyoming encouraged and supported the Arch JDA and executed the MOU which affirmatively blesses it.

Based upon these facts and provisions, as well as others, it should be clear that the Arch JDA does not require Arch to pay more than the fair market value of the CBM resource. As the actions and concurrence of Arch, the BLM and the State of Wyoming suggest, the JDA presents a viable, balanced and equitable mechanism to resolve disputes between coal and CBM operators in the PRB.

The coal companies have sometimes argued that they have overpaid for CBM in conflict areas by noting that they can purchase oil and gas leases elsewhere in the PRB for a significantly lower price per acre. But all acres are not the same. Under JDAs, CBM lessees are being compensated for lost gas reserves, not lost acres. It stands to reason that coalbed methane reserves are often greatest in areas where the coal is also the thickest and most valuable. Comparisons to the average price

of oil and gas leases throughout the PRB are patently misleading. CBM lessees have been fairly, but not overly compensated for their leases under the JDA

Virtually all of the conflicts that have arisen to date between coal and oil and gas producers in the PRB have been resolved by consensual agreement. In September 1999, Arch and RIM entered into the Arch JDA covering thousands of acres in the Thundercloud Tract. Arch and RIM also reached a contractual settlement in the Jayson Unit, at the northern end of the Hilight Field. In July 2000, RIM reached agreement with Kennecott on the Assigned Lands in the South Hilight Unit. In August of this year, RIM and Kennecott entered into a Joint Development Agreement covering the North Jacobs Ranch Tract and thousands of adjoining acres. Kennecott and M&K also entered into a settlement regarding their conflict over deep oil and gas in the South Hilight Unit. Contractual solutions have worked and are working in the PRB. Once the disincentive of HR 2952 is removed, there is every reason to believe that any additional conflicts that might arise in the future will also be resolved contractually. There is simply no need for intervention by Congress or the enactment of Federal condemnation legislation.

III. MAJOR PROBLEMS WITH HR 2952

A. Federal Condemnation Legislation Is Unnecessary and Inappropriate, It Discourages Both the Resolution of Conflicts by Private Agreements and the Cooperative Development of Coal and CBM.

Federal condemnation legislation is not needed in order to resolve conflicts between coal and oil and gas operators in the PRB. The BLM and the State of Wyoming have policies to address these conflicts. These policies have been carefully developed over a number of years and give appropriate and constitutionally required consideration to issues such as the protection of vested property rights. Under the system that has evolved, junior lessees take their leases subject to the express obligation not to interfere unreasonably with orderly development and production under senior leases for other resources.

In situations where the junior lessee controls the more valuable resource and cannot effectively operate without unduly interfering with the resources or operations of a vested senior lessee, the parties have customarily and routinely entered into agreements whereby the junior lessee buys-out the senior lessee or the parties otherwise agree upon mutually satisfactory arrangements for joint development of their respective resources. This system, in which conflicts are ultimately resolved by private agreement, has worked well over the years in several different locations and in connection with conflicts between various resources. In fact, this system has already worked effectively to resolve conflicts between coal and oil and gas operators in the PRB.

HR 2952 discourages both the resolution of conflicts by private agreement and the cooperative development of coal and CBM. Private agreements, such as the JDAs between RIM and each of Arch and Kennecott, allow surface coal mining operations to proceed without delay or interference, encourage the production and recovery of CBM in advance of coal mining and provide for the payment of appropriate compensation for resources that are unavoidably lost. There are obvious benefits for all parties involved. However, if coal companies are afforded the right to condemn the CBM resource at tax payer expense, they will not be motivated to enter into such arrangements.

HR 2952 unnecessarily involves the Federal government, Federal legislation and Federal subsidies in what is essentially a private and local dispute that can readily and equitably be resolved through private agreement, as many similar conflicts have routinely been resolved in the past. Without the inducement of the "better deal" that certain coal companies hope to obtain through HR 2952 at taxpayer expense, future conflicts in the PRB can quickly be resolved through private negotiation and agreement, with no delays whatsoever to coal operations and without the use of Federal funds. Such agreements can provide for the cooperative recovery of coal and CBM.

B. Granting Coal Companies the Right of Condemnation Is Inconsistent With the Sanctity and Priority of Private Property Rights on Which Our System is Based and Sets a Dangerous and Inappropriate Precedent

HR 2952 delegates the sovereign's power of condemnation to private coal companies and allows that power and Federal funds to be used to terminate vested senior property rights held by smaller domestic oil and gas companies. The bill erodes the sanctity of private property and the certainty of rights that have allowed parties to invest with security in the development of our country's natural resources.

HR 2952 also sets a dangerous precedent for the manner in which we manage our public lands and resources. If coal companies are granted the right of condemnation

in the PRB, a strong argument can and will be made that other conflicts between competing mineral developers (and, for that matter, conflicts between other competing land uses and values) should be resolved in the same way. In a system that relies on condemnation to resolve conflicts, rather than the priority of property rights, the big and politically powerful will always prevail over smaller interests. Moreover, because of the insecurity and uncertainty inherent in such a system, few will be willing to invest in the development of our natural resources. Our traditional system, based on the sanctity and priority of property rights, has worked well and does not need to be replaced by a condemnation system.

Implementation of a condemnation solution is a radical and global fix to what is essentially a local problem. The right of condemnation must only be granted to private companies in exceedingly rare and unique circumstances and where absolutely required by a compelling public interest. As discussed throughout this testimony, coal companies simply do not need the right to condemn CBM in the PRB.

C. HR 2952 Will Encourage the Venting of Methane, a Potent Greenhouse Gas, Into the Environment.

HR 2952 encourages coal producers to condemn and vent CBM into the atmosphere at taxpayer expense. There will be no incentive for coal companies to enter into joint development agreements for the cooperative development and recovery of CBM in advance of coal mining. Coalbed methane is one of the most potent greenhouse gases and contributes significantly to global warming when released into the atmosphere. It has been estimated, on behalf of the United States Department of Energy, that methane is 56 times more detrimental to the environment (in terms of global warming potential) than C02.[8] It has also been estimated, in a study approved by the BLM, that the Jacobs Ranch and Black Thunder Mines alone are venting 2.3 million cubic feet of CBM per day.[9] While the environmental effects of this venting are not yet fully understood, it is clearly unwise to encourage such emissions through the enactment of Federal legislation.

D. HR 2952 Will Encourage the Waste of CBM, A Clean-burning and Non–Renewable Energy Resource.

When captured and put to beneficial use, CBM is one of the cleanest burning fuel resources. HR 2952 encourages large volumes of this non-renewable energy resource to be condemned, lost and wasted forever.

In a recent study entitled "Meeting the Challenges of the Nation's Growing Natural Gas Demand," dated December 25, 1999, the National Petroleum Council estimated that, while the United States currently produces only 22 trillion cubic feet of natural gas annually, by the year 2015 the anticipated demand will reach 31 trillion cubic feet. In order to meet this growing demand, production of natural gas must be dramatically increased.

CBM resources, especially in the Rocky Mountain region, represent a significant portion of our nation's known and potential gas resources. The Gas Research Institute estimates that the amount of CBM gas in place in the PRB is 39 trillion cubic feet, of which 9.4 trillion cubic feet is recoverable. The Gas Research Institute further estimates that, if properly developed, this resource could yield $5.3 billion in production taxes and royalties alone. A substantial investment has already been made in the development of CBM in the PRB. The Wyoming Independent Producers Association estimates that, as of 1999, Wyoming CBM developers had invested approximately $290 million in drilling and completion costs and another $400 million in lease acquisitions (60% Federal, 35% fee and 5% State). Within the next year, another $295 million was to have been invested in pipelines and compression stations. When the Fort Union and Thunder Creek Pipelines are operating at their maximum capacity of I billion cubic feet per day, which is five times greater than the rate at which they are currently operating, the State of Wyoming and producing counties can expect approximately $300,000 per day in tax revenues and royalties at today's natural gas price. But the realization of these benefits is dependent upon the implementation of policies and practices that encourage and allow the production of the CBM resource.

In keeping with fundamental notions of good stewardship of our country's nonrenewable natural resources, and in order to meet the dramatically increasing demand for natural gas in the United States, we need to develop policies that encour-

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[8] M. Q. Wang, "GREET (Greenhouse Gases, Regulated Emissions and Energy Use in Transportation) 1.5 - Transportation Fuel Cycle Model" Volume 1, Center for Transportation Research, Energy Systems Division, Argon National Laboratory (August 1999) - work sponsored by the United States Department of Energy, Assistant Secretary for Energy Efficiency and Renewable Energy, Office of Transportation Technologies.

[9] See footnotes 3 and 4, sup

age the recovery of this valuable and clean-burning energy resource, not enact legislation that results in its irrevocable loss for all generations.

E. Pursuant to HR 2952, Federal Funds Are Used to Condemn CBM On Behalf of Coal Producers; Royalties and Taxes on CBM Are Also Lost.

HR 2952 provides that amounts paid by coal companies to condemn CBM may be recovered by deductions from their Federal coal production royalties. Effectively, the taxpayers will be paying condemnation awards on behalf of the coal companies. Additionally, both the State and Federal governments are forced to forego the collection of production royalties and taxes on CBM that is condemned rather than produced. RIM estimates that, for the 5,200 acres covered by the JDA between Arch and RIM, the cumulative cost to the Federal government of HR 2952 would have been $22.6 million. This area is less than one fifth of one percent of the total acreage covered by HR 2952.

In contrast, pursuant to cooperative development agreements such as the JDAs, the State and Federal governments receive prompt and full payment of royalties and taxes on the production of the entire coal resource, on the portion of the CBM resource that is actually produced in advance of the coal mine and on payments made to the CBM operator for CBM that cannot be recovered from wells that must be abandoned.

It defies understanding as to why the Federal government should incur these significant fiscal costs in order to assist coal companies to condemn senior oil and gas resources, which would otherwise have been produced and generated significant royalty and tax income to the United States.

F. HR 2952 Does Not Provide Full or Fair Compensation to CBM Lessees for the Loss of Their Resource; The Bill Requires That Compensation Be Paid For Only a Small Portion of the CBM That Will Actually Be Lost and Wasted As a Result of Coal Mining.

HR 2952 requires coal companies only to compensate oil and gas lessees for CBM that is lost from the specific oil and gas lease to be mined. However, as discussed previously, surface coal mining will cause the loss of CBM from a much larger area. RIM has conducted a drainage study which establishes that CBM in the Hilight Field will flow several miles to the exposed face of a coal highwall and be vented into the atmosphere.[10] This study has been approved by the BLM.[11] CBM lessees must be compensated for all CBM that will be lost and wasted as a result of coal mining, not just from the specific oil and gas lease that will actually be mined. When dealing with a gas in a porous structure, there is no rational basis for distinguishing between lost gas that was originally situated beneath the lease actually mined and lost gas originally situated beneath adjacent leases. This would be akin to putting a hole in a tire and then disclaiming responsibility for the loss of air from portions of the tire that are not directly beneath the hole. HR 2952 needs to account for the huge volume of CBM from surrounding oil and gas leases that will be lost through drainage and venting.

This problem is compounded by the fact that HR 2952 allows coal operators to condemn oil and gas leases in sequential steps, and as needed for their operations, rather than requiring the condemnation of an entire area in one proceeding. This will dramatically reduce the compensation payable for lost CBM. As the coal operator mines on one oil and gas lease, CBM will be drained and vented from surrounding oil and gas leases. Then, when the coal operator condemns the next oil and gas lease, the CBM resource will be valued at a significantly lower level due to losses of CBM already caused by coal mining. In this manner, coal operators will pay for lost production from a specific CBM lease only when their coal mine has come close to the lease and destroyed its remaining value. Oil and gas lessees will receive cents on the dollar for the loss of their CBM resource.

HR 2952 allows coal companies to commence mining in conflict areas long before the amount of compensation payable to the displaced oil and gas lessees is determined. Even more incredibly, the bill provides that the CBM lessees will not be compensated for CBM that is lost as a result of such mining during the months preceding the award determination.

Pursuant to HR 2952, CBM lessees will bear an intolerable burden to establish the quantity and value of CBM lost from lands that have not yet been drilled. This is particularly unfair in view of the fact that CBM operators have often been materially delayed or precluded from drilling by regulatory authorities and/or by coal companies that control the surface of the lands at issue. The ownership of CBM and

[10] See footnote 3, supr
[11] See footnote 4, supra.

CBM leases constitute private property subject to the full protections of the United States Constitution, regardless of whether or not yet drilled and producing. HR 2952 needs to provide appropriate mechanisms to test and value the CBM resource in undrilled areas in order to insure that full and fair compensation is paid for the lost resource.

In addition to considerations of equity and fairness, the United States Constitution requires payment of just compensation for private property taken through condemnation. As currently drafted, HR 2952 would be subject to formidable constitutional challenge because it fails to compensate senior oil and gas lessees for a substantial portion of the CBM that would be lost as a result of surface coal mining.

G. HR 2952 Totally Disregards Seniority.

HR 2952 totally disregards the seniority of the condemning and condemned parties. Junior coal lessees, as well as junior oil and gas lessees, took their interests with full knowledge of the existence of a prior lease and of the need to avoid interference. Under HR 2952, not only will junior lessees be allowed to condemn senior leases, but senior lessees may be required to condemn and pay for junior leases. This would be a totally inappropriate and unjustified windfall for the junior lessees and would impose an additional and unnecessary expense upon the United States, which funds the payment of condemnation awards through deductions from Federal royalties.

H. HR 2952 Allows Coal Lessees to Condemn Oil and Gas Leases Without Regard to the Relative Values of the Resources and With No Public Interest Determination.

HR 2952 allows coal lessees to condemn conflicting oil and gas leases without regard to, or consideration of, the relative values of the subject coal and oil and gas resources. Accordingly, a coal lessee could compel the condemnation and termination of oil and gas leases that far exceed the value of the coal in the subject conflict area. Such condemnation would clearly not be in the public interest. This point underscores certain of the constitutional shortcomings of HR 2952. Essentially, the bill delegates the power of eminent domain to private parties, allows private condemnation to proceed with no determination of public benefit and does not require full and fair payment for lost property rights.

I. HR 2952 Is Convoluted, Difficult to Understand and Embodies Certain Other Procedural and Constitutional Shortcomings.

HR 2952 contains numerous provisions and procedures that violate due process, including limitations on rights of appeal, the use of experts paid by interested parties both to establish the condemnation award and to testify in court, and the right of coal operators to commence mining operations prior to the conclusion of proceedings and the payment of a condemnation award.

In addition to containing constitutionally questionable provisions, including the delegation of condemnation rights to private parties, HR 2952 contains complex and unclear terms, tests and standards. This would likely result in significant litigation which, in turn, will delay the resolution of conflicts between resource users in the PRB.

IV. CONCLUSIONS

HR 2952 unnecessarily involves the Federal government, Federal legislation and Federal subsidies in what is essentially a private and local dispute that can readily and equitably be resolved through private agreement. The bill encourages the condemnation, venting and waste of CBM into our atmosphere at taxpayer expense, rather than promoting the cooperative production and recovery of all valuable energy resources. In establishing condemnation as a means to resolve conflicts between resource users, HR 2952 erodes the sanctity of private property rights and sets a dangerous precedent for the management of our public lands. HR 2952 is a bad bill for the environment and for the prudent stewardship of our non-renewable natural resources. It is also a bad bill for the Federal budget. By entering into JDAs with Arch and Kennecott, RIM has now resolved, in a positive manner, all of the significant conflicts between coal and CBM in the PRB. If and when future conflicts develop, we are confident that they can be resolved by agreement in the same way that the existing conflicts have all been resolved. Joint development agreements have successfully resolved and will continue to successfully and appropriately resolve all conflicts. Condemnation legislation, Federal intervention and taxpayer subsidies are simply not appropriate and not needed.

Thank you for the opportunity to appear before the Committee and to provide this testimony.

[The statement of Senator Bingaman follows:]

Statement of Hon. Jeff Bingaman, a United States Senator from New Mexico on S. 1950

S. 1950 turns over the Federal Government's power of eminent domain to private mining companies so that they might take the private property rights of other mining companies. To the best of my knowledge, this measure is unprecedented. While some of the states have extended state eminent domain authority to mining companies, I am not aware of any instance in which Congress has farmed out the federal eminent domain power to private mining company to use for its economic advantage.

To make matters worse, the bill abandons the traditional, constitutional "public interest" test for when the United States may take private property in favor of a new economic test that simply measures which source is more valuable. It replaces the traditional fair market value measure of just compensation with a new loss of income plus consequential damages standard and passes the entire expense on to the Federal Treasure and, ultimately, the taxpayers. And, instead of relying on traditional condemnation law and procedures, it erects a complex and cumbersome new system.

Although I strongly disagree with the approach taken in S. 1950, I recognize that the bill is a well intended effort to resolve a serious conflict between the owners of coal beds in the Powder River Basin and the owners of the coalbed methane imbedded with in the coal. Ownership of the two resources often lies in separate hands and one resource cannot be extracted without loss of interference with the other.

The Supreme Court recognized the possibility of this conflict when it ruled little more than a year ago that coalbed methane was not part of the coal estate. "Were a case arise in which there are two commercially valuable estates and one is to be damaged in the course of extracting the other," the Court said, "a dispute might result, but it could be resolved in the ordinary course of negotiation or adjudication." Time has proved the Court correct. The two major conflicts between coal and coalbed methane producers in the Powder River Basin have been resolved by the parties without legislation, without the use of eminent domain, and without taxpayer subsidies.

Even so, I was willing in Committee to agree to a reasonable legislation solution to the problem. I offered a substitute to Senator Thomas's substitute, which would have allowed the Secretary of the Interior to begin eminent domain proceedings to acquire the rights to coalbed methane deposits on behalf of the coal owner where the Secretary determined that the public interest in the timely and orderly development of the coal outweighed the public interest in the development of the coalbed methane. Unlike S. 1950 and Senator Thomas's substitute, my proposal would have made use of existing condemnation law and procedures. Regrettably, the Committee voted down my substitute on a party-line vote and adopted Senator Thomas's substitute, which retains the serious problems inherent in S. 1950 as originally introduced.

Mrs. CUBIN. I will begin the questioning.

Mr. Tew, you heard the testimony of Mr. Isaacs and Mr. Sexton, and it is their mutual opinion that the—that cooperative agreements are working out, that things are moving ahead in a timely manner, and that there is no need for this legislation, that BLM's policy is working, and that they have been proactive in resolving the conflicts.

Mrs. CUBIN. And at this point, RIM has resolved all of its conflicts, actually. Could you give me your response to that, and then I would like to also ask you if you can anticipate how many other conflicts there might be that could be resolved by this legislation. And you obviously think there is a need for the legislation.

Mr. TEW. Yes, ma'am. I believe that there have been settlement agreements that have been reached. But as you well stated in your introductory remarks, these were negotiated on an uneven playing field. I am not surprised that a coalbed methane interest would be

interested in continuing to negotiate those settlements with an uneven playing field. As long as the playing fields is as uneven as you stated, agreements will be less than arm's-length agreements and the threat of delay will continue to be a problem for the development of energy in the Powder River Basin.

Mrs. CUBIN. For the record, would you just—would you describe to me how you think the playing field is uneven or uneven? What makes it so uneven and slanted toward the coalbed methane companies? Just real simple.

Mr. TEW. There are a number of different factors, but one of the factors is that the coal companies have made such a large investment and when a coalbed methane well is placed immediately in front of the coal fields, the threat of protracted litigation that would delay the process of acquiring new permits or acquiring new coal leases can be a threat that makes the playing field uneven.

Some of the same coalbed interests that have been referred to here today have been very active in protesting and demanding that permits not be issued to the coal companies and demanding that new leases not be issued to the coal companies. This is the kind of cooperation that they are referring to.

Mrs. CUBIN. Okay.

Mr. Isaacs, I would like to ask you this then. As a demand for coalbed methane and coal from the Powder River Basin continues to rise, I think we can expect more of these kinds of conflicts. Sooner or later someone is going to hold out for a higher settlement than anyone else is getting. And it certainly is bad policy to bypass a block of coal that won't be reserved because—won't be produced because the dispute can't be settled.

You obviously don't like H.R. 2952, and I would argue with you that it isn't the same bill as S. 1950. But what procedure would you recommend we use to prevent stalled negotiations from causing the loss of those coal reserves?

Mr. ISAACS. Well, so far, we are talking about a hypothetical situation because that hasn't happened yet. And to date, even though there are some wild numbers bandied about by both sides—and I can go back to when Jacob Schantz testified at the regional coal team meeting that we had no commercial reserves in the South Hilight area.

And Lord knows, I have been fighting that misrepresentation for a number of years and in a number of confrontations or discussions with you all. And it turns out that every one of these disputes that have actually come up—and there have been lots of places where we have those situations, where we have a producing well and the coal mines coming and we don't want to sell it. We want to keep producing it and they want to mine the coal.

In the real world, in the business world, it gets worked out, as it has always gotten worked out. We have been doing this for, I don't know, I don't want to say hundreds of years, maybe 50 years, where we have had producing oil wells and deep formations. We have had situations like we have with the coalbed methane where we are competing for the same resource. They always get worked out. And what is uneven for one person is normally just as uneven for the other person.

I mean, when we were in the negotiations with Arch, neither of us, we couldn't drill our wells, they couldn't get their mining permit. So we were both stymied; neither party could do what they wanted to do. So the harm goes both ways.

I mean, we have been at risk in the Hilight area for 15, 20 years. I mean, we have had our oil and gas investments working, while we have only recently had the coalbed methane; because we are now able to produce that resource, we have been there, we are doing everything that is physically possible to get the gas out front so that we don't delay.

Mrs. CUBIN. Okay.

Mr. ISAACS. We haven't delayed.

Mrs. CUBIN. I guess I could accept that you haven't delayed today. But the mining companies have to make plans and investments years out. And so while maybe, as for today that hasn't happened, I can certainly envision that years out these conflicts could cause smaller bids to be, bonus bids to be made which certainly isn't beneficial to the State.

But what I asked you, and let me state it again; it wasn't very clear.

Picture in your mind the coal company that has hundreds of millions of dollars invested in their mine. And then a coalbed methane producer with, quote, unquote, "senior rights," so the coal company cannot proceed forward on the vein of coal.

Now, the coalbed methane producer has a property right there and the value. Now, should that value be enhanced because it is in the way of a coal mine moving forward? Or should it be worth the value of the coalbed methane if it is sold per BTU like other energy is sold?

What is the value? Is it the value of the BTUs produced or is it more valuable because you can, in the words of some—well, I won't use somebody else's words, but because you can demand it from the coal company because they have invested hundreds of millions of dollars and you can get more than its worth in terms of energy.

So which value would you say is correct?

Mr. ISAACS. Well, the problem that we have had--.

Mrs. CUBIN. No. No. Just tell me which one you think is right. What is the value? Is it the value of the coalbed methane, based on market price per BTU or whatever, or is it more valuable because the coalbed methane is in the way of the path that the coal was going to be produced.

Mr. ISAACS. I can only speak for myself.

Mrs. CUBIN. Okay.

Mr. ISAACS. And in speaking for my company in our negotiations, it was solely done on what we felt was the drainage area, the amount of reserves that would be drained.

You are talking about a relatively new resource, so it is very early in its productive life. Being early in its productive life, it is very hard to determine exactly what will happen with time.

But we have found that wells up next to the coal face are much better than people previously thought. We have exceeded the production that we thought when we first came to this astute body to tell them what they are. So as far as determining, is there a value for being in front of the mine, well, sometimes that value is en-

hanced because the mine, by mining the coal, has lowered the pressure, and we get more production.

We don't know how long that will go.

Mrs. CUBIN. I understand that.

Mr. Sexton, what is your opinion of this same question?

Mr. SEXTON. I think I understand the question, and may I paraphrase the question to make sure I understand this.

Mrs. CUBIN. Sure.

Mr. SEXTON. What you are really saying is, the value of the coalbed methane resource to be determined, the value of the BTU, value of the gas in place, or the gas to be drained in and around the coal mine, versus some sort of obstructionist value for having a resource if that happens to be in the way of a coal mine operation and some added value because of that?

Mrs. CUBIN. I wouldn't use it—I didn't use the word "obstructionist," but I can see why you would; and, yes, I think you understand the question.

Mr. SEXTON. I did say "paraphrase," and I am trying to understand the concept.

Mrs. CUBIN. That is okay.

Mr. SEXTON. You are right. You did not use that word; that was my word.

Clearly, the value is the value of all of the gas that would be drained in that area. I certainly—I don't believe producers are trying to hold up coal mines. They are simply trying to get proper valuation for the resource, and they are trying to get that resource properly quantified and valued. And reasonable people can come up with different answers, but unreasonable people can come up with very different answers; and I think where some of the conflicts have come up has to do with the perception that the coal producer is saying, well, the value of the gas is zero and the gas producer is saying well, no the value of the gas is a gazillion dollars, if you don't mind my using such an improperly precise term.

Mrs. CUBIN. I love that term.

Mr. SEXTON. And the real value can be determined fairly carefully by economic analysis and by reservoir modeling and by economic engineering, and this is done all the time in the buying and selling of properties. Evergreen Resources does quite a bit of coalbed methane development acquisitions and operations, and we think we are pretty good at determining the value of coalbed methane gas in place to be extracted. We think a lot of other companies are, too, and we don't think this is what I would call a great deal of rocket science. It is something that can be determined and would be determined in reasonable—in a reasonable conflict resolution; and I believe that IM 2000 already has the administrative procedures in place and is already encouraging just this sort of compromise.

Mrs. CUBIN. I absolutely agree with you. The only problem is that if we haven't already had a situation where we had an unreasonable entity trying to resolve this conflict, then—without a doubt we will. Someone will be unreasonable and stop, as you stated, either the production of the coalbed methane or the coal.

Mr. Tew, did you want to respond to that?

Mr. TEW. I would like to, if you don't mind, Madam Chairman. The bill that has been proposed has been criticized for not providing for full and adequate compensation for the coalbed methane interests. And yet the interest—the language in the bill that provides for that compensation is precisely the language that was sought by the IPAA representatives when the language of the bill was being negotiated.

I appreciate what Mr. Sexton said about those damages and those amounts being capable of being precisely determined by those that are experts. And that is precisely what the bill provides for.

Mr. SEXTON. May I respond to that comment?

Mrs. CUBIN. Sure.

Mr. SEXTON. While Mr. Tew's comments sound as if there is some sort of collaborative effort going on here, the fact is IPAMS is here today because we feel that we were shut out of negotiations that did go and that the comments we provided, that would have made it acceptable—made this bill acceptable, were largely ignored.

So we are here today because we think we agree. We think there is an unlevel playing field, and we think the—giving private condemnation rights to coal companies is much too big a hammer for entities that are already quite a bit larger than the independent producers they are dealing with.

Mrs. CUBIN. Although there is a process to challenge, to make sure you get fair market value in the bill?

Mr. SEXTON. Fair market value is a concept that we can all understand, and I believe the administrative procedures that are already set forth in IM 2000, you know, encourage exactly that sort of determination. It seems unnecessary to have a bill to do what is already in practice, and is also set forth in the—by the BLM as their, you know, preferred method of doing things in their own instruction memorandum.

Mr. TEW. May I provide one final restatement?

The bill provides a method for both parties to share their modeling procedures with each other, to make sure that they are accurately valuing the property; and we would be delighted for such a procedure to be put in place that isn't in place today.

Mrs. CUBIN. Well, I get the last word.

Mr. TEW. Sure.

Mr. ISAACS. And, Madam Chairman, may I respond to the IPAA?

Mrs. CUBIN. You bet.

Mr. ISAACS. During the duration of which IPAMS was not allowed, but we did have some input, the IPAA wanted no artificial limit on actual drainage when they were talking about that formula; and in this current bill, as in the last bill, the mining companies, because of how they do their business, they work within fixed boundaries. In other words, their lease goes to a lease line. They can mine coal up to that lease line, and that is how they conceive the world, which I appreciate.

I don't—I am not a mining engineer, even though I went to a mining university. But in the oil and gas business our drainage reaches out much further than that. It goes beyond lease boundaries; it is what it is. And we are finding in the Powder River Basin that that drainage, because of fracturing systems within the coal, can branch out way beyond, and the mining actually affects

areas beyond what would be called the "common area" between the coal companies and the oil and gas companies. And that is precisely our problem in that portion of this bill.

Again, it is limited to the boundaries by the coal lease, not what the drainage of a well is. And just as Mr. Sexton says, there are ways of calculating this, but it involves different techniques than just taking a fixed volume or the volumetric approach to determine what the reserves are under a fixed volume of coal. And we have not been able to get that idea through in the evaluation of, the determination of what the values of these leases are. That is part of the reason we have this big difference of, they are saying it is worth X and we are saying it is worth Y.

Mr. TEW. I believe that Mr. Isaacs misrepresents the language of the bill with regard to taking into account drainage, because it does take into account drainage outside of the area being mined.

Mrs. CUBIN. Yes, it does.

I will make the last point, and that point is that when you look at the overall—first of all, I want you to know—everyone here knows this—that I have been very reluctant, I have been very reluctant to come on board and support this bill or any bill like it because I do believe in private property rights and I do believe in seniority rights.

But as I evaluated the situation, I came to believe and understand that there really is not a level playing field in negotiations because of what I just said. The coal companies have, you know, hundreds of millions of dollars invested, and I do believe that if it hasn't already happened, it will happen that an unreasonable party will become involved and it will be damaging to the energy production, which damages the companies, the country, the State and all of us. So that is why I finally decided to move forward with this legislation.

I thank the witnesses for their valuable—oh, excuse me. I didn't realize you were here Mr. Rehberg. You are so loud.

Mr. REHBERG. Thank you, Madam Chairman. And I apologize for being late; I had a preexisting conflict.

But I want to thank you, as well, for introducing this legislation and calling this hearing. It always gives us a precursor of what we may anticipate in the northern regions of the Powder River Basin and that is the State of Montana. And I always hate it when our friends are fighting, and in this case, it seems as if they are. But, hopefully, we can come to some kind of a successful conclusion and resolution.

Mr. Tew, are you an attorney?

Mr. TEW. Yes, sir.

Mr. REHBERG. Okay. I guess I would like to ask then, as an absolute legal or factual matter, are all coalbed methane leases and subleases senior to Federal coal leases in the Powder River Basin?

Mr. TEW. Not all.

Mr. REHBERG. They are not? Okay. Then I guess Mr. Isaacs, do you have other leases within this area, other than the disputed area?

Mr. ISAACS. No, all our coalbed methane leases are in the disputed area.

Mr. REHBERG. Okay.

Mr. Tew, let me go back to you then. Constitutionality has been thrown around a lot among the three of you—maybe not as much you. But I always worry when that is thrown out and there is no factual or case law to make a determination that this is constitutional or unconstitutional.

In your view, is it unconstitutional and can it be written so that it is not unconstitutional?

Mr. TEW. I believe that it not only can be so written, but it has been so written.

Mr. REHBERG. Okay, so you would disagree.

Mr. Sexton, are you an attorney?

Mr. SEXTON. No, I am not. I am an engineer by background and a financial analyst and coalbed methane operator off and on for 20 years.

Mr. REHBERG. I guess I would like to know then, how do you base your argument? I am not an attorney either, but I always get real sensitive when—that is one of the reasons I don't want to serve on the Judiciary Committee, because there are a lot of lawyers sitting around arguing, and all I can bring is common sense to the table, which oftentimes outweighs anything they say.

So—excuse me, Mr. Tew. But you must have legal counsel. On what basis do you determine that this is unconstitutional? I understand the condemnation argument, and I am trying to determine in my own mind the value between coalbed methane and coal. Just exactly how can it be interpreted, other than going to the United States Supreme Court to make that determination this is unconstitutional.

Mr. SEXTON. Well, this is not a legal answer, but hopefully it is a common-sense answer. I believe that we have determined that gas is gas and rock is rock, or that coal is considered a rock, and that coal resource is not—does not include coalbed methane resource. And that has already been handled as a matter of legislation by Senator Enzi.

However, the reason I say it is constitutionally flawed is, I see, on a common-sense approach, three problems. One is—I believe it is—it does delegate condemnation authority to private interests which, is my understanding. Is that the first time that the government is giving that sort of condemnation authority? It is a taking without just compensation to the coalbed methane producer, and I don't see any right of appeal here. And I—those three things trouble me.

Mr. REHBERG. Well, in looking at your testimony, you stated that IPAMS supports private business negotiations in lieu of government intervention; and similar to the Chairman, I agree with that, referring to the coalbed methane and coal disputes. And while in nearly every case that probably is better, how can you justify the fact that in the past agreements, then, you have called for payments to the coalbed methane developers in the amount of up to five times the fair market value of the unproduced oil and gas?

I mean, it seems like a conflict in theory or philosophy then.

Mr. SEXTON. Well, I will note that my representation here today is as a non-Powder River Basin producer, as someone that would hate to see this used as a precedent in resolving other conflicts between coalbed methane operators and coal operators; and in the

Raton Basin, I would hate to see this type of precedent set. While I know that there is language in this bill that it does not, it only affects this limited area and is not intended to set precedence, we all know that legal and legislative precedents are set all the time. And I heard that word twice Mr. Otter's testimony. I heard Mr. Taylor, Mr. Fulton, refer to precedents and that really troubles me.

And it turns out that, you know, Senator Bingaman's minority views on Senate 1950 articulate the issue better than I can and do so with some measure of legal consideration than I have given. I have simply given you my common-sense approach.

As far as, you know, the rights of it being five times the value of the oil and gas, you are citing an example I am personally not familiar with. But I also know that I know the answer is not a gazillion dollars, and I know the answer is not zero; and I can't believe the parties can't sit down and, in private negotiations, come to a conclusion of what it is.

Mr. REHBERG. From—Mr. Tew and Mr. Sexton, from your associations' perspective then, is this a concern that we are going to be confronted with within the State of Montana as well? Can you give me examples of maybe a conflict that also exists that hasn't come to a head yet?

Mr. TEW. Peabody Energy Corporation has operations also in Montana. I am not aware of any such conflicts having arisen thus far. I can't say that there isn't one out there that I don't know anything about.

But in further response to your questions about constitutionality, I would like to add that this legislation, like all legislation, is reviewed before testimony, before—by the Department of Justice to determine whether there are constitutionality issues. The Department of Justice, the last session—in the previous administration and the Department of Justice in this session, in this administration, both reviewed this legislation and neither found any constitutionality problems with it.

Mr. SEXTON. May I just make one comment?

Mr. REHBERG. Certainly.

Mr. SEXTON. If this bill is passed, I see this going into court on exactly those issues.

Mrs. CUBIN. I didn't hear your answer, your remark.

Mr. SEXTON. I was just saying I disagree with Mr. Tew's conclusion, and that if this bill is passed, I see it having—of necessity, going to court on exactly those sorts of constitutional issues, particularly takings without just compensation and the delegation of condemnation rights effectively to a private interest.

Mr. TEW. May I add one other comment in response?

The State of Wyoming currently has a statute on the books that allows the oil and gas industry to go in and condemn rights-of-way to place pipelines across the private property of other parties. To my knowledge, no one has ever thought to contest it on the basis of constitutionality. And my company was the defendant in such a lawsuit within the last month. We certainly did not think to contest it on the basis of constitutionality, because we saw no constitutional argument.

Mr. REHBERG. Thank you, Madam Chairman.

Mrs. CUBIN. Thank you. I thank the witnesses for their valuable testimony and the answers to the questions.

Members of the Subcommittee may still have—in fact, I know we do—some additional questions for the witnesses, and we will ask you to respond to those in writing. The hearing record will be held open for 10 days for those responses.

[All information submitted for the record has been retained in the Committee's official files.]

If there is no other business, the Subcommittee adjourns.

[Whereupon, at 3:22 p.m., the Subcommittee was adjourned.]

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