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Senate Environment and Public Works Committee, Subcommittees on Chemical Safety, Waste Management, Environmental Justice, and Regulatory Oversight and on Fisheries, Water, and Wildlife.
Legislative Hearing on S.3571 - Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022

Chairman Merkley, Ranking Member Lummis, and Members of the Subcommittees:

My name is Chris Wood. I am the President and CEO of Trout Unlimited (TU). Thank you for inviting me to testify on the *Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022* (S. 3571). TU strongly supports the bill and has worked very hard on it for several years with a wide variety of stakeholders. We deeply appreciate the excellent leadership of Senators Heinrich and Risch on the bill, as well as the other 17 cosponsors representing both parties. We thank the subcommittees, as well as Chairman Carper and Ranking Member Capito for holding this hearing and focusing on an overlooked water quality problem with national implications.

TU's mission is to bring together diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. In pursuit of this mission, TU works to restore streams and rivers damaged by pollution from abandoned mine lands (AML) from the coalfields of Appalachia to hardrock mines of the Rocky Mountain states, to historical placer mines in Alaska. My testimony will focus on this work and how S. 3571 is essential to help tackle one of the greatest water quality problems facing our country: abandoned hardrock mines.

Trout Unlimited stands ready to work alongside state and federal agencies, landowners, the mining industry, and other environmental groups to implement low-risk pilot projects that S.3571 would authorize. I offer the following testimony on behalf of TU and its more than 340,000 members and supporters nationwide.

Abandoned mines are a nationwide water quality crisis.

The scale and scope of pollution from abandoned hardrock mines is staggering. The Environmental Protection Agency (EPA), for example, estimates that 40 percent of western headwaters are polluted by abandoned mines. These headwater systems are the sources of our coldest and cleanest water. They also provide a refuge for many species of native trout and salmon. TU found that approximately 110,000 miles of streams – enough to circle the Earth four times – are listed as impaired for heavy metals or acidity. Pollution from abandoned mines is a major source of these impairments.

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Of these impaired stream miles, 20 percent are in areas that contain native trout and more than half are in areas that are important drinking water sources. The Government Accountability Office (GAO) estimates that 33,000 abandoned hardrock mines are polluting the environment[1]. These impacts affect all land ownerships, including public lands, state, tribal and private lands. From the copper belt in Orange County, Vermont, to the Red Boy Mine in Oregon's John Day Basin, and tens of thousands of places in between, our rivers, streams and communities have long suffered from the scourge of abandoned hardrock mines.

Scope and scale of the problem.

A 2020 GAO report estimates that there could be as many as 533,000 abandoned hardrock mines on lands under the jurisdiction of the Forest Service, Bureau of Land Management, National Park Service, and Environmental Protection Agency (EPA) [2]. On average, these agencies spend approximately $287 million annually to address physical safety and environmental hazards at abandoned hardrock mines, equating to approximately $2.9 billion in spending between 2008 through 2017. And yet, we've barely made a dent in the problem. By some estimates the costs to clean up abandoned mines could exceed $50 billion – at the current rate of federal spending, it would take nearly two centuries to clean up all the abandoned mines polluting our lands, waters, and communities.

Two primary challenges limit abandoned mine restoration. The first is a lack of funding. Unlike every other commodity that is developed off our public lands, mining companies do not pay a royalty or tax on the production of minerals. Coal mining companies, by contrast, have contributed over $11.6 billion into an Abandoned Mine Land Reclamation Fund, which states and tribes have tapped to clean up legacy coal mines across Appalachia and parts of the western United States.

Section 40704 of the Bipartisan Infrastructure Bill authorized $3 billion to clean up abandoned hardrock mines. Unfortunately, the bill did not appropriate the money. We are grateful for and see much promise in this program, but the Senate's proposed FY 2023 appropriation is only $20 million in funding for this program, split among federal agencies, states, and tribes. Significant and dedicated funding for the section 40704 program is crucial, but this funding needs be coupled with policy levers that allow would-be Good Samaritans to clean up abandoned mines.

The second major challenge to abandoned mine cleanup is liability.

Consider that Good Samaritans could spend a few hundred thousand dollars making waters more swimmable and fishable and get to 95 percent of Clean Water Act standards. But it may cost a few million dollars to achieve that final five percent. The organization that materially improved water quality could then be labeled by the government as a "potentially responsible party" or could be sued in a citizen suit and compelled to get to 100 percent.

[1] GAO-08-574T, Information on Abandoned Mines and Value and Coverage of Financial Assurances on BLM Land https://www.gao.gov/assets/gao-08-574t.pdf

[2] GAO-20-238, Information on Number of Mines, Expenditures, and Factors That Limit Efforts to Address Hazards https://www.gao.gov/products/GAO-20-238

We have had success in engaging public/private partnerships to clean up some abandoned mines, but funding and liability hurdles remain an impediment to tackling the problem at scale. Liability issues are of concern across all land ownerships but are especially problematic on private lands.

Low-risk Good Samaritan cleanups can make a big difference for communities and the environment.

Abandoned mines are a pervasive problem but the solutions are often straightforward. In 2004, TU established our abandoned mine reclamation program, which has since completed more than 40 separate projects across six western states. Just this year, TU expanded our efforts into Alaska, and we aspire to do even more in the coming years.

Our first project was on lands owned by Snowbird Ski and Summer Resort in Utah. Snowbird had a few piles of abandoned mine tailings on their lands but was leery of trying to clean them up for fear of becoming a potentially responsible party. The limited scope of the problem made it exceedingly unlikely the EPA would use an enforcement action to make them clean up the piles. So, they remained, leaching out their toxic brew of zinc, cadmium, arsenic, and lead into American Fork Canyon—a creek that harbored imperiled Bonneville cutthroat trout.

We negotiated with the EPA and the Justice Department for about two years before we came up with a Good Samaritan policy that we could use to clean up those piles of tailings. It took about two weeks to clean up the problem.

The restoration was simple. We dug a few repositories and lined them with an impermeable barrier. Then, we bulldozed the tailings into the holes. We then placed another barrier over the top, covered it with soil, and then reseeded the area with native vegetation. Finally, we dug a French drain around the site, and placed a Jersey barrier around the piles to discourage local kids from riding their dirt bikes over the area.

To date, our abandoned mine clean ups have restored more than 200 stream miles and reclaimed 155 acres of mine-impacted lands. Many of those projects would not be possible without the financial and technical support from our private industry partners. Foundations such as the Tiffany & Company Foundation have provided the core seed funding that makes much of this work possible. Companies such as Freeport McMoRan, Kinross Gold Corporation, Newmont Mining, and Integra Resources provide valuable financial support that allows TU to leverage matching funds to accomplish meaningful reclamation, with measurable environmental improvements.

These restorations are also highly dependent on our ability to cobble together public funding from agencies such as the Forest Service and the Bureau of Land Management (BLM).

In 2014, for example, TU's Colorado AML program cleaned up Evans Gulch outside of Leadville, Colorado. Evans Gulch is a tributary to the Arkansas River, one of Colorado's Gold Medal trout fisheries, as well as the drinking water source for the town of Leadville and Lake County. The project reduced heavy metal loads impairing aquatic life by identifying non-point sources of contamination and eliminating sources of toxic runoff.

One of TU's strong suits when it comes to mine cleanups is utilizing local economies, labor, and community assets. Across the country, we are seeing rural communities rally around the idea of recovering the lands and waters that sustain them. At Evans Gulch, TU hired a firm from Colorado that utilized local material suppliers and employed local workers throughout the project. In the end, approximately $200,000 went to the

Colorado contractor and material suppliers while the remaining balance of the project costs, approximately $118,000, were used to pay various local labs, legal fees, management costs, and local businesses.

In total, 325 cubic yards of contaminated mine wastes were graded, over an acre of mine wastes were treated and revegetated, 100 feet of channel was constructed to manage surface flows, 50 feet of streambanks were stabilized, 280 feet of buck and rail fence was installed to ensure safe public access to the site.

The goal of our AML work is to recover impaired rivers and streams to the point they support wild and native trout and salmon. Consider the case of Kerber Creek outside Villa Grove, Colorado. Through decades of industry, community, and agency partnership, along with twelve years of work by TU, a previously dead watershed that conveyed contaminated orange water, now sustains a wild trout fishery.

While my members love the positive impact these projects have on trout populations, it is important to remember that the work that we do to eliminate toxins from entering our waterways has significant water filtration benefits for downstream communities. Gravity works cheap, and it never takes a day off.

The Leavenworth Creek project in Colorado represents a decade of partner-based efforts to improve water quality and environmental conditions. Since 2015, Trout Unlimited, the Forest Service and other project partners have developed drainage solutions, expanded wetland habitat, closed open adits, reclaimed waste piles, restored a historic mill building and preserved key sites for historic and cultural interpretation. This work was supported by approximately $1 million in federal, State and private funding, helping to enhance habitat for wild trout and other species such as the endangered boreal toad (see, it's not just about trout!), improving drinking water quality for the town of Georgetown, and reducing exposure and safety concerns for site visitors.

In Montana, TU recently completed the sixth phase of a long running western mine reclamation project on Ninemile Creek. The Ninemile is a major tributary to the Clark Fork River in western Montana. It was turned upside down by placer mining during the last century, resulting in long sections of channelized, dysfunctional stream. Since 2005, we have been systematically repairing Ninemile Creek, and – importantly – supporting rural Montana economies while we do it.

Recent phases of work totaling $1.7 million have been completed by a construction firm from Eureka, Montana, a historically timber-reliant community in Lincoln County. Lincoln County has one of the highest rates of unemployment in the State, and this project created multiple family-wage jobs for former loggers from the community. At the same time, the project has restored habitat and increased flows for native Westslope cutthroat trout and bull trout, a species that is listed for protection under the Endangered Species Act.

To date, we have restored 13 abandoned mines sites and over four miles of Ninemile Creek, and estimate that for every mile restored, an additional 0.5 cubic feet of groundwater entered the stream every second, providing cold, clean water throughout the summer. Again, recovering the health of these rivers does not only benefit trout and salmon. The benefits extend to everyone living downstream.

Liability risks are a barrier that Congress must address.

My point in describing these projects is to demonstrate that Good Samaritans know how to implement low risk mine cleanups to improve watershed and community health. Most of our work, however, is on public lands where the relevant agency can accept the liability.

Two of our nation's most important environmental laws, the Clean Water Act and CERCLA, stymie our progress on private lands. As a nation, we ought to incentivize true Good Samaritans—organizations such as TU that had nothing to do with the creation of the pollution but volunteer to be part of the solution in making things better. Instead, we are often prevented from fully deploying our expertise and resources by the liability risks associated with the Clean Water Act and CERCLA. This is because these environmental laws, vital as they are, treat those who want to clean up pollution as if they are polluters themselves.

Consider: Due to liability under the Clean Water Act, the most viable mechanism to tackle draining abandoned mines with a "point source" of pollution—such as a draining mine adit—is a federal Superfund cleanup. However, the Superfund program only addresses sites on the National Priorities List, which typically include the largest, most complex, and most expensive clean ups. Superfund was not designed to address the vast majority of abandoned mine pollution discharges across the country. Thousands of these abandoned mines that fall outside the Superfund program bleed toxic lead, arsenic, zinc and mercury every single day, but we lack a sufficient legal mechanism authorizing state agencies, private organizations and other willing parties to complement limited federal cleanup capacity by taking on smaller, low-risk remediation projects.

This legal conundrum stands in the way of cleanups such as the Lily Orphan Boy mine near Helena, Montana. Under a partnership between the Montana Department of Environmental Quality and Trout Unlimited, a cleanup removed toxic mine waste and restored the floodplain. However, partners could not legally treat the acid mine drainage without taking on substantial liability risk.

Again, unless remediation results in discharges meeting 100 percent of water quality standards, Good Samaritans could be held liable for the remaining pollution and sued under the Clean Water Act, even if substantial improvements in water quality have been made. This situation is not unique. The perfect stands in the way of the good at most abandoned mine sites throughout the country.

Good Samaritans such as Trout Unlimited are already making a difference remediating a smaller subset of "non-point source" mines that do not possess the same degree of liability that is present with discharging "point source" abandoned hardrock mines. This work is being done via time-consuming and costly settlement agreements with the federal government through the CERCLA process.

These settlement agreements partially address liability but have shortcomings. Those include: 1) considerable costs and resources that go to lawyers instead of on-the-ground restoration; 2) liability protections that apply to Good Samaritans but not landowners, leaving many landowners unwilling to participate; and 3) liability protections that are insufficient for any remaining point sources of pollution (i.e., acid mine drainage), leaving Good Samaritans subject to permitting requirements of the National Pollution Discharge Elimination System and enforcement actions unless projects fully attain water quality standards. In most cases this simply is not possible for Good Samarian projects even though significant improvements in water quality would be realized.

The result is that cost-effective, low-risk projects to treat acid mine drainage are shelved while pollution continues. We can and must do better.

The *Good Samaritan Remediation of Abandoned Hardrock Mines Act* is a solution to this vexing problem.

S. 3571 would establish a new seven-year pilot program administered by the EPA to permit up to 15 Good Samaritan abandoned mine cleanups. The bill requires these remediation projects to pose a low risk to the environment while producing measurable improvements in environmental conditions. The bill stipulates requirements for National Environmental Policy Act (NEPA) review and a rigorous, transparent public process that includes public hearings if requested.

The EPA is under no obligation to approve a permit, but if approved, qualified Good Samaritans would be provided with conditional liability relief, assuming they do what they told the EPA they would. Liability protection only extends to volunteers conducting approved remediation activities identified in permits. Any other current or future activities not identified in permits are subject to applicable environmental laws, including full compliance with the Clean Water Act.

If a permit violation causes an uncorrected worsening of environmental conditions, all liability protections would be voided, and parties could be subject to citizen suits and enforcement actions. Liability protections only apply to persons identified in approved permits and would not apply to future owners or operators. The bill expressly prohibits mining activities from being covered by any liability waivers. There are no mining "loopholes" and the legislation is unambiguous on this point. Lastly, only sites that are truly abandoned are eligible – nobody who has caused pollution will get off the hook.

The scope of S. 3571 is to implement 15 low-risk pilot projects over seven years, after which EPA will report back to Congress on the results, so that lawmakers can determine whether to allow more similar projects to go forward. In this way, the bill is narrowly tailored to test the Good Samaritan cleanup concept with minimal risk and without significant revisions to the Clean Water Act or CERCLA.

Taken together, these pilot projects will allow for Good Samaritans to demonstrate the interest, capacity, and knowledge of how to make our water more drinkable, fishable, and swimmable.

At a time when many Americans are confounded by what they can do to pass on a healthier land legacy to their kids, these pilots provide an opportunity to demonstrate tangible steps to make our rivers healthier for our families. There is no constituency for orange rivers. We should be able to work together to pass this tailored pilot program, learn from it, and then get to work at scale to recover the lands and waters upon which we all depend.

We fully recognize that this legislation can only begin to address the scope and scale of the abandoned mine problem. However, Trout Unlimited and our partners in communities where such cleanups take place have proven that considerable progress can be made to transform dead, toxic streams into a living resource. The objective of the Clean Water Act is to restore and maintain the integrity of our nation's waters and S. 3571 is a much-needed tool that will move us closer to that objective.

Conclusion

In 1999, Democratic U.S. Sen. Max Baucus introduced the first Good Samaritan bill alongside Republican U.S. Sen. Ben Nighthorse Campbell. In his introductory remarks on the Senate floor, Senator Baucus said, "But my hope is that we can proceed quickly, through a hearing and mark-up, so that, before long, this important bill can be enacted into law. If so, we soon will see success stories, all across the west."

In the 23 years since, Congress has yet to provide Good Samaritans with the tools necessary to create those success stories. At the same time, abandoned mines that otherwise could have been cleaned up sit like ticking time bombs on the landscape releasing their toxic brew of cadmium, arsenic, lead, and zinc. It is communities across rural America that are on the front line, continuing to bear the burden of this pollution. We ask for your help cleaning up abandoned mines and urge the Committee to advance the *Good Samaritan Remediation of Abandoned Hardrock Mines Act.*

Thank you for the opportunity to testify today.