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April 2, 2003

TESTIMONY OF TOM MAHONEY
NEWMONT MINING CORPORATION

ON ASSEMBLY BILL 321

BEFORE THE COMMITTEE ON NATURAL RESOURCES, AGRICULTURE, AND MINING

My name is Tom Mahoney. I am Vice President and Treasurer of Newmont Mining Corporation. I appreciate this opportunity to testify today in support of maintenance of the current State regulations as they relate to mining reclamation. The current law and regulations, as administered by the Nevada Division of Environmental Protection ("NDEP"), fully protect the State and the public.

Newmont is the largest mining company operating in the State of Nevada and the largest gold producer in the world, with a capitalized value of over $10 billion. Newmont is a U.S.-based company that has been mining continuously throughout Nevada since 1965.

Hardrock mining operations provide thousands of high-paying jobs in predominantly rural areas of the State, are an integral component of rural economies, and provide important revenues to the State. Over the years, Newmont has tried to work diligently with the legislature, State regulators, and citizens groups to ensure that mining operations are undertaken in an environmentally sound manner.

Ongoing reclamation is a critical part of Newmont's operations in Nevada. Newmont incorporates reclamation planning and budgeting into all of its Nevada business plans, and it engages in concurrent reclamation so that there will be no overwhelming reclamation obligation at the end of the mine life. In 2002, Newmont spent approximately $6 million in Nevada on reclamation work, and it expects to expend similar amounts annually for the next twenty-five years. Newmont has received numerous federal and State awards for its excellent reclamation practices, including awards from the State of Nevada.

Under the existing Nevada laws and regulations, Newmont and other mining companies operating in this State cannot begin exploration or mining projects until they provide reasonable and adequate financial assurance that sufficient funds will be available to reclaim the mine site. The requirement that mining companies provide financial assurance for reclamation is a sound concept that Newmont has long supported. In fact, Newmont participated, along with Dr. Miller of the Sierra Club and the NDEP in the formulation of the current financial assurance regulations contained in the Nevada Administrative Code. Dr. Miller and NDEP concluded in 1990 that corporate guarantees were appropriate as a financial assurance mechanism for reclamation, provided that the mining company satisfies certain very stringent financial tests. And that conclusion has stood the test of time.

While we do not quarrel with the concept that financial assurance should be required, we do dispute the concept, which underlies AB 321, that a "corporate guarantee" can never provide adequate and reasonable financial assurance for reclamation obligations. A "corporate guarantee" is a guarantee by the mining company or its parent corporation that sufficient funds will be available for reclamation. Since the enactment of Nevada's reclamation statutes in 1989, the legislature and NDEP have specifically allowed the corporate guarantee to be used to satisfy the financial assurance requirement. To protect the public purse, however, such guarantees are allowed only if the company can satisfy very stringent financial tests relating to its assets, net worth, and other pertinent financial criteria. The rationale underlying the corporate guarantee is that there is no need to require a strong company to incur the costs of other financial assurance mechanisms (such as a third-party surety or letter of credit) or to tie up funds unproductively (such as by setting aside cash in a trust fund or tying up its borrowing capacity through a letter of credit), where there is adequate and reasonable assurance that the company and its parent, due to their strong financial condition, will in fact be able to complete reclamation.

AB 321 would change current law by precluding the use of corporate guarantees in Nevada for new projects after October 1, 2003. Moreover, corporate guarantees for existing projects would be ratcheted down to progressively diminishing percentages of a mine's total reclamation obligation, and, by October 1, 2008, would be precluded altogether. AB 321 would preclude use of a corporate guarantee regardless of the size, track record, financial rating, assets, working capital, or net worth of the operator or its parent. AB 321 would preclude use of corporate guarantees of major, financially-sound companies even if the use of a corporate guarantee would provide ample assurance of the availability of funds for future reclamation, and even if the company's financial condition were stronger than that of a third party surety company.

The proposed legislation is unnecessary and could not come at a worse time. The corporate guarantee is widely accepted as a reasonable and legitimate financial assurance mechanism by regulators under various mining and environmental programs in this State, at the federal level, and in other States. Nevada has long allowed the use of corporate guarantees for other, non-mining, regulated industries, and the federal government and many States have utilized corporate guarantees for many years for both mining and non-mining operations. Nevada's corporate guarantee requirements are generally more stringent and protective than those allowed in other State or federal programs, and the measures taken by NDEP before allowing a corporate guarantee to be used fully protect the public. Corporate guarantees have an excellent track record in Nevada, and there is no credible evidence that the use of a corporate guarantee, as allowed under the current Nevada regulations, will create problems down the road with respect to reclamation obligations. Certainly there is no reason to believe that, given its strength and track record, Newmont will not fulfill its reclamation obligations. Bill 321 is simply unnecessary.

Elimination of the corporate guarantee at this time would be especially problematic, given the current crisis facing the surety bonding market. Although the existing Nevada statutes and regulations provide a variety of mechanisms for financial assurance for reclamation in addition to the corporate guarantee, mining companies have historically utilized either surety bonds or corporate guarantees to satisfy financial assurance requirements. The reason is that the other allowable mechanisms are either unavailable or tie up cash and capital of the mining company that could otherwise be put to productive use for the conduct of exploration and mining activities. Therefore, for all practical purposes, absent use of a corporate guarantee, mining companies must look to third-party surety bonds to satisfy their financial assurance requirements. Unfortunately, for the past two years, there has been a growing national crisis in the availability of third-party surety bonds to both mining and non-mining companies – a crisis that has not been caused at all by the mining industry. The result is that surety bonds are nearly impossible to obtain. Therefore, with no environmental justification, AB 321 could drive up the costs of new and existing mining projects, or even (given the surety bonding crisis) drive companies to undertake projects outside of this State (or outside of the United States) rather than in this State because they do not have available a reasonable method of providing financial assurance. Newmont does not believe that is in the public's interest.

1. **Corporate guarantees are widely used by the federal and state governments.**

Corporate guarantees are an effective and widely accepted form of financial assurance, utilized by the federal government, the State of Nevada, and many other states to assure a variety of corporate obligations. Corporate guarantees are accepted to assure that funds will be available for closure and reclamation-type obligations in several mining and non-mining programs administered by federal agencies, including:

- the U.S. Environmental Protection Agency, which has long allowed use of corporate guarantees to assure that funds will be available for closure and post-closure care for hazardous waste management facilities regulated under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 40 C.F.R. §§ 264.143(f), 264.145(f), 265.147(a)(1)(ii)(6); for closure and post-closure care and corrective action for municipal solid waste landfills regulated under Subtitle D of RCRA, 40 C.F.R. § 258.74(e)-(g); for corrective action for, and compensation to third parties who suffer bodily injury and property damage as a result of a release from, underground storage tanks regulated under Subtitle I of RCRA, 40 C.F.R. § 280.95, and for plugging and abandonment of Class I hazardous waste injection wells regulated under the Safe Drinking Water Act, 40 C.F.R. § 144.63(f);

- the U.S. Nuclear Regulatory Commission, which has long allowed corporate guarantees as an acceptable mechanism to assure that funds will be available for the expensive decommissioning of facilities handling radioactive materials, 10 C.F.R. § 30.35(f)(2);

- and the U.S. Interior Department's Office of Surface Mining ("OSM"), which has long allowed corporate guarantees to be used to assure that the reclamation of surface coal mines will be completed when the need arises, 30 C.F.R. §§ 800.5(c), 800.23.

Many States also allow corporate guarantees to assure reclamation of exploration and mining operations. In the case of hardrock mines, the mining programs of five Western States in addition to Nevada allow financial assurance for expected reclamation costs through corporate guarantees: Arizona,[1], Colorado,[2] South Dakota,[3] Utah,[4] and Wyoming.[5] Moreover, States throughout the country with coal mining operations generally allow the use of corporate guarantees to assure the reclamation of surface coal mining sites. In fact, 14 of the 17 coal mining states allow corporate guarantees to be used as financial assurance for reclamation.[6] The above federal agencies and states recognize that there is no need to impose the unnecessary financial burdens entailed in obtaining a third party surety or tying up funds unproductively of companies that satisfy stringent financial tests.

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[1] AAC § R 11-2-809.

[2] CRS § 34-32-117(3), 2 CCR 407-2 Rule 3.02.4.

[3] S.D. Codified Laws §§ 34A-10-2.2, 45-6B-22.

[4] Utah, UAC R647-4-114.16.

[5] Wyo. Stat. 35-11-417.

[6] These states are Alabama, Colorado, Illinois, Indiana, Missouri, New Mexico, North Dakota, Ohio, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wyoming.

Nevada itself has regulatory programs for other industries that allow corporate guarantees as a form of financial assurance. These include Nevada's programs for regulation of hazardous waste management facilities and used oil facilities, NAC 444.8455, .84553, .8632, .86325, and the decommissioning of radioactive facilities, NAC 459.1955.

The federal Bureau of Land Management ("BLM"), until 2001, had also long allowed the use of corporate guarantees as an acceptable financial assurance mechanism for reclamation costs for hardrock mining operations on BLM lands, so long as the state in which a facility was located allowed a corporate guarantee. In 2001, regulations promulgated during the Clinton Administration became effective which preclude the use of corporate guarantees for new projects or expansions of existing projects on BLM lands. At the time those regulations were promulgated, the crisis in the surety bond market described below was not anticipated; as a result, affected parties had no reason to oppose the preclusion of corporate guarantees for new projects or expansions of existing projects, even though the mining industry was, and remains, of the view that corporate guarantees are a perfectly safe and cost-effective mechanism of providing financial assurance, provided that the financial tests that must be satisfied are fair, reasonable, and stringent. It is important to note, however, that even the new BLM regulations do not require a phase-out of existing corporate guarantees. Moreover, in the light of the recent surety bonding crisis, the Department of the Interior is now rethinking whether corporate guarantees should be reinstated as an allowable form of financial assurance. We are confident that the Bureau of Land Management will conclude that use of corporate guarantees should be reinstated because, assuming the financial tests are sufficiently stringent, they are as safe and effective as any other form of financial assurance.

2. Nevada's Reclamation Regulations Impose Conservative and Stringent Tests That Must be Satisfied Before A Corporate Guarantee Can Be Utilized.

Nevada has allowed the use corporate guarantees for reclamation obligations for over a decade. The original regulations, Nevada Administrative Code 519A, were the result of a regulatory negotiation that included the Sierra Club, Newmont and NDEP, both of which ultimately agreed that corporate guarantees were appropriate as forms of financial assurance for reclamation obligations, provided that the stringent financial tests set forth in the regulations could be satisfied by the mining company or its parent. That conclusion has stood the test of time. In 2001, for instance, the NDEP concluded that "the corporate guarantee system [established by the regulations] has been tested under rigorous conditions, and has proven to be a viable means of establishing financial assurance." BMRR Corporate Guarantee Policy, May 23, 2001 ("Corporate Guarantee Policy").

The success of the Nevada corporate guarantee system is due in large part to the fact that the financial tests required by NDEP are extremely conservative, and are in fact generally more stringent than the financial tests used under any of the federal or State programs for mining and non-mining industries referred to above. They require, among other things, that the mining company and its parent satisfy detailed tests relating to net worth, liabilities, overall assets, and assets within the United States, and allow NDEP to review the Company's and its parent's SEC filings, bond ratings and historical financial information. Even the strongest company can only utilize corporate guarantees for 75% of its reclamation financial assurance obligations.

And, even if a company satisfies the financial tests, NDEP can still decide not to allow use of the corporate guarantee or can allow the company to use it for less than 75% of its reclamation obligations.

Strong as the Nevada regulations governing corporate guarantees were in the years prior to 2001, those regulations were strengthened and made even more stringent in 2001. NDEP made procedural and regulatory reforms, initially through the Corporate Guarantee Policy and subsequently by revisions to the actual regulations in October 2001. Among the reforms adopted in 2001 were the following:

- NDEP confirmed that not more than 75 percent of a company's reclamation obligation can be backed by a corporate guarantee, subject to periodic review and approval by NDEP, with the remainder required to be backed by another form of surety. NAC 519A.350(7)(a). The regulations currently allow NDEP on a case-by-case basis to limit the use of corporate guarantees to less than 75% of the reclamation obligations where the circumstances warrant, unlike AB 321, which imposes the ban across-the-board regardless of the facts.

- The regulations now require that all financial information provided to NDEP be prepared in accordance with U.S. Generally Accepted Accounting Principles ("US GAAP"). NAC 519A.350(8). The insistence on adherence to US GAAP ensures that accounting for assets and liabilities is performed in the manner accepted as appropriate in the United States, thereby avoiding unacceptable accounting practices or practices that may be accepted elsewhere but not in the United States.

- In reviewing financial information, NDEP considers not only current financial information about the operator and its parent but also historical information for the preceding five years, and may consider bond ratings as well. Thus, the information reviewed by NDEP gives the agency a long-term view of the financial health of the company rather than a snapshot of current performance.

- NDEP review and oversight does not stop after the guarantee is accepted. Corporate guarantees are reviewed by NDEP at least annually, NAC 519A.382, and more frequently if appropriate, with expert review funded through fees paid by companies using the corporate guarantees. Operators are required to submit annual and quarterly reports, copies of all submittals to the Securities and Exchange Commission, and any other information that may help demonstrate the financial health of the company. Therefore, if a company's financial condition begins to worsen after the guarantee is posted initially, NDEP can take steps to reduce or have the company replace the guarantee before any reasonable chance of a default.

- NDEP has now established a Corporate Guarantee Review Panel consisting of representatives of the NDEP, the Nevada Division of Minerals, and the Risk Management Division. The panel reviews new applications for corporate guarantees to ensure their adequacy, advises on the adjustment of existing guarantees, and reviews existing guarantees to ensure that the guarantees remain adequate in light of any changing circumstances.

The actual financial tests utilized since 1990, when combined with all of the innovations adopted by NDEP in 2001, make NDEP's criteria for obtaining a corporate guarantee among the most stringent, conservative and protective in the nation.

3. Corporate guarantees have an excellent track record.

It appears that AB 321 is motivated by a concern that mining companies can and do fail. But AB 321 fails to recognize that mining company failures do not involve companies using corporate guarantees. Companies able to use corporate guarantees are the strong companies, not the marginal ones. With one exception, the mining company failures have involved companies that could never meet the financial tests for corporate guarantees in Nevada, and, in some cases, failures of surety bonding companies themselves. It is a testament to NDEP's regulatory system that, as far as we have been able to ascertain, only once has a company using a corporate guarantee to assure reclamation failed. In light of that single failure, NDEP has since substantially revised its regulations, as described above, to ensure that such a failure never recurs.

Newmont is a perfect illustration of the strength and security provided by this means of financial assurance. Newmont is a strong company with over a $10 billion capitalized value. It is now the largest gold mining company in the world, with operations in five continents. Newmont has consistently received awards for its outstanding mine reclamation activities. The company incorporates reclamation planning and budgeting into all of its business plans, reviews its plans and budgets at least annually, and engages in concurrent reclamation as it mines so that there is no overwhelming reclamation task at the end of the mine life. It spends, and anticipates continuing to spend for years to come, millions of dollars annually on reclamation. Certainly, Newmont has never defaulted on any reclamation obligation, and cannot envision any situation that might cause it to do so. Although Newmont has $164 million in outstanding corporate guarantees for reclamation obligations in this State (along with $99 million in surety bonds), those guarantees amount to less than two percent of the company's capitalized value. There is simply no reasonable possibility that Newmont will default on its reclamation obligations.

4. <u>**The ability to rely on corporate guarantees is more critical now than ever.**</u>

Now more than ever, the ability to use corporate guarantees is critical to the mining industry and the Nevada economy. Historically, the two most common forms of financial assurance used for reclamation have been the surety bond and the corporate guarantee. In the last two years, however, a crisis has developed within the surety bond market generally. In fact, due to this crisis, NDEP convened a Nevada Bonding Task Force that has met on several occasions over the past year to try to determine the causes of the bonding crisis and whether any actions can be taken to ameliorate its effects on the State's mining companies. The task force included members of the State government, the federal BLM, the mining industry, surety industry, and citizens' groups. The task force's recent report describes the crisis now confronting the surety bond market. As the report discusses, due to the prolonged economic recession that has plagued the national economy since the spring of 2001, as well as bankruptcies outside of the mining industry and the September 11 tragedy, surety company and insurer losses have increased tremendously, and the capital on hand that is required for sureties to commit to obligations has dwindled. Major surety losses have resulted from several high-profile bankruptcies such as those of Enron, Kmart, and Global Crossing. The market for surety reinsurance has suffered commensurately with the primary surety bonding market.

As a result, surety bond companies are significantly reducing their issuance of new reclamation surety bonds, even to strong companies with significant resources, and are seeking to cancel existing surety bonds where possible. At least two surety bonding companies, Frontier and Amwest Surety, have been liquidated, and a large number of the more significant surety bonding companies are exiting the business entirely. Where bonds are still available, surety bonding companies increasingly are requiring that the bonds be backed by full collateralization, i.e., the deposit of assets sufficient to back the entire surety bond. These collateral requirements tie up an operator's assets that would otherwise be put to productive use. The cost of obtaining surety bonds has skyrocketed. As a consequence of the shrinking surety bond market, mining companies are increasingly unable to obtain surety bonds at any cost, and certainly not at a reasonable cost.

Newmont's experience is instructive. Newmont currently has posted approximately $99 million in surety bonds in Nevada. Four different companies have underwritten these bonds. Three of the four have made it clear to Newmont that they no longer wish to bond reclamation obligations, due to no fault of Newmont's or the mining industry in general, and that they will no longer provide bonds for new projects or increased bonding capacity for expansions of existing projects. These three companies have advised that as their current bonds are released, the existing bond capacity will not be extended to Newmont for new projects or expansions of existing projects. Two of the companies have asked Newmont to find a replacement for the existing bonds, and, in the interim, have raised the premiums to the maximum rate allowable in each state -- a rate six times the expiring rate. The fourth bonding company has recently required Newmont to put up almost one hundred percent collateralization for a bond expansion. Newmont anticipates that its existing available capacity from this bonding company should be fully exhausted within the next few months, leaving the company with no available surety bonding whatsoever.

Newmont currently projects the need for over $40 million in additional financial assurance over the next six to twelve months. Therefore, if AB 321 became law, Newmont could expand its projects in the State of Nevada or initiate new projects in the State only by setting aside cash or other assets in trust funds, or securing letters of credit from a bank or other financial institution, in the amount of the required financial assurance. This would be very expensive, and would further tie up funds that could be put to productive use or erode Newmont's borrowing capacity for on-going projects. The ultimate result, of course, would be that, by increasing significantly the cost of doing business, less business would be done in the State, to the detriment of the State's economy in general and to the economics of rural areas in particular.

5. **<u>The legislation is not necessary because the State already has the authority to limit the use of corporate guarantees on a case-by-case basis.</u>**

The restrictions embodied in AB 321 are unnecessary because the existing regulatory system already allows NDEP to impose similar restrictions on a case-by-case basis when the circumstances warrant. The proposed legislation bans corporate guarantees, which NDEP already can decline to accept where appropriate on a case-by-case basis. More importantly, existing law and policy allows the State to examine the facts and circumstances of particular companies and their track records and financial strength rather than imposing blanket prohibitions that may not be necessary in individual situations.

For all of these reasons, Newmont respectfully submits that AB 321 is damaging to the citizens of the State of Nevada and its mining industry. It is also unnecessary in light of the existing safeguards that have been in place in Nevada for many years, as well as new safeguards recently imposed by NDEP. AB 321 should not be enacted.