

Testimony of  
**Formation Capital Corporation, U.S.**

**&**

**The Northwest Mining Association**

presented by

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before the

**United States House of Representatives**

**Subcommittee on Environment and the Economy**

**February 15, 2011**

**“EPA Development of Hardrock Mine Reclamation Financial  
Assurances would duplicate US Forest Service and US Bureau  
of Land Management Programs & Rules”**

## EXECUTIVE SUMMARY

Formation Capital Corporation (“Formation”) is developing the Idaho Cobalt Project (“Cobalt Project”) which will produce about 185 direct, good-paying jobs, \$8.2 Million in payroll, \$8.8 Million in taxes annually over a minimum ten-year period, and provide the only US source of super-alloy grade cobalt. Super-alloy grade cobalt is a critical component of all jet engines and many applications in the Green economy. Currently, all US needs are met by importation, primarily from a single foreign company.

For decades, mines on Federal lands have been, and continue to be, subject to the strict, site-specific, reclamation financial assurance requirements of the US Forest Service (“Forest Service”) or US Bureau of Land Management (“BLM”). The Cobalt Project is on Forest Service land. The US EPA is developing financial assurance requirements for all “hardrock mines,” including those already subject to existing Forest Service or BLM financial assurance requirements. 74 Fed. Reg. 37213, July 28, 2009. If the EPA requirements proceed, it would presumably double or triple reclamation financial assurance requirements beyond what the Forest Service or BLM determines is needed to protect the environment. This “dead capital” requirement would unnecessarily force termination of many existing mines, jobs, public/private revenue streams, and hamper creation of new mines supplying strategic and base metals, and materials necessary to sustain U.S. manufacturing jobs.

Implicit in EPA’s position is that the Forest Service/BLM programs are managed so incompetently that, as a class, mines on Forest Service or BLM lands constitute such a “degree and duration of risk” that EPA must create a duplicative financial assurance program parallel to, and independent of, long-established Forest Service and BLM “bonding” programs. Yet, in 1999, the National Research Council (NRC) of the National Academy of Sciences, responding to Congress, found that the existing Forest Service/BLM framework to be “generally effective” in protecting the environment, and that “improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . .” EPA is developing a program that is not

required to protect the environment or taxpayers. We hope EPA will decide not to create this “unnecessary burden” that threatens existing mining jobs and future mineral investment in the U.S.

## **1.0 Formation Capital Corporation, U.S. and Northwest Mining Association:**

### **Who we are.**

My name is Joe Baird. I am a partner in Baird Hanson Williams LLP (“BHW”), which is a mining and mineral resource law firm based in Boise, Idaho. I am President of the Northwest Mining Association (“NWMA”). Today, I am representing the Idaho Cobalt Project of Formation Capital Corporation, U.S. (“Formation”). However, the problem we now seek to address is certainly not unique to Formation. Formation is only presented as a case study to try to alert the Congress and Executive Branch to a developing duplication of environmental regulatory burdens that are already managed by long-standing, strictly enforced programs covering EXACTLY the same subject matter and EXACTLY same technical issues such that the regulatory and cost burdens would at least double, without benefit to the public.

Formation is the owner and proponent of the Idaho Cobalt Project in Lemhi County, Idaho. The Idaho Cobalt Project will provide the United States with its sole source of high purity super-alloy cobalt, an alloy metal essential to military and civilian jet engine construction and widely used in the high tech computer and electronics industries. Cobalt is also an essential element used in a variety of environmental applications such as the rechargeable lithium-ion batteries used in electric and hybrid electric vehicles, wind turbine generators, solar panels, fuel cell technologies, oil de-sulfurization processes and in coal and gas to liquids technologies that produce clean burning synthetic fuels. Currently, the US consumes about 60% of worldwide consumption of super-alloy cobalt. Formation will be able to supply about 25% of U.S. requirements for super-alloy cobalt. Currently, all U.S. needs are met by importation, primarily from a single company.

The Idaho Cobalt Project will provide approximately 185 direct, good-paying jobs, \$8.2 Million in payroll, \$8.8 Million in taxes annually over a minimum ten year period, and provide the only US source of super-alloy grade cobalt. The Project’s direct employments benefits will be primarily in

Lemhi and Shoshone Counties, Idaho, which have unemployment rates of 12.6% and 14.8%, respectively. Thus, it is not surprising that a poll conducted in 2008, indicated that 68% of Lemhi County residents were aware of the Idaho Cobalt Project and of those aware of it, the Project was favored by a margin of 77% to 7%. Formation's sister company, Essential Metals Corporation, has already refurbished part of the former Sunshine Hydrometallurgical Plant in Shoshone County so the Plant could resume production of high purity gold and silver from precious metals dore produced by other mining companies, initially restoring a dozen jobs to Shoshone County. The primary part of this Hydrometallurgical Plant will be refurbished to take cobalt concentrates from the Idaho Cobalt Project and produce high purity super-alloy cobalt and copper and provide approximately another 40 jobs. Well-paid, full-time employment is very hard to come by in rural Idaho. Formation is very proud to provide those jobs. Formation also looks forward to being the only U.S. source of super-alloy cobalt.

Importantly, today Formation is discussed as a representative the mining industry as whole, but most particularly the Northwest Mining Association ("NWMA"), whose members produce many vital mineral commodities and provide tens of thousands of direct employment jobs. NWMA is a 116 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 42 states and are actively involved in exploration and mining operations on Federal and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. *More than 90% of our members are small businesses or work for small businesses.* Most of our members are individual citizens.

## **2.0 The Idaho Cobalt Project**

The Idaho Cobalt Project (sometimes "Project") will consist of an underground mine and flotation mill that uses simple physical separation of ore from country rock, eliminating the need to use aggressive

chemicals for milling. The Project “footprint” is about 135 acres and located within a traditional cobalt mining district. The Project will backfill with cement tailings (paste) and development rock to the extent possible and use dry-stack tailings for surface storage to eliminate the need for a tailings pond. Although ground water modeling predictions indicate that neither surface nor ground water standards will be impaired during operations, a ground water remedial pump back system will be installed during mine construction, just in case the modeling is incorrect. Comprehensive and extensive reclamation plans and water quality modeling have been developed and performed to ensure environmental quality is restored and maintained in perpetuity. There will be significant financial assurances posted with the Forest Service to ensure all reclamation work is performed regardless of whether Formation or the Project is successful financially.

This favorable view of the Project is not Formation’s alone. Many State of Idaho and Federal agencies spent years evaluating, studying and questioning the Idaho Cobalt Project, including conducting an extensive multi-year Environmental Impact Statement, and then granted the Project the relevant approvals and permits. The Idaho Conservation League, Boulder White Clouds Council, Earthworks, and Western Mining Action Project (collectively, "Environmental Groups") had originally commented unfavorably upon the Project’s Environmental Impact Statement; however, NONE of the Environmental Groups challenged the Forest Service approval or the Final Environmental Impact Statement. Similarly, the Shoshone-Bannock Tribes and the Nez Perce Tribe were actively engaged with the Project permitting process, but none of the Tribes chose to challenge the Project. In other words, those persons and entities, governmental and private, most typically associated with environmental stewardship in central Idaho were sufficiently satisfied with Formation’s responses to their concerns that NONE of them chose to challenge the Forest Service approval of the Final Environmental Impact Statement. Of course, achieving this positive state of affairs was neither easy, nor inexpensive.

Formation forwarded the Project Plan of Operation to the Forest Service in January 2001. The final Forest Service Record of Decision was issued January 2009, but negotiations on the Forest Service financial assurances continue. Thus, it has taken approximately ten (10) years from start to finish, but even after one factors out non-regulatory delays (such as the collapse of the capital funding markets after 9/11), the Project permitting process took approximately seven (7) years. This is far too long for a project with only 135 acres of impact from an underground mine in a traditional mining district, particularly when such a critical national prize as high purity cobalt production was at stake. However, most of the permitting issues that Formation faced were not unique to the Idaho Cobalt Project, but symptomatic of the difficulties and delays faced by every mining project.

It has been said that “politics is the art of the possible.” Unfortunately, regardless of what we say and do today, this Hearing cannot meaningfully even begin to tackle the layers of unnecessary regulatory delays that hamper the production of U.S. minerals and hamper the creation of the jobs and tax revenue associated with mining. However, we hope that by focusing on one developing issue, EPA’s proposal to impose unnecessary financial assurances on the hardrock mining, we can prevent the creation of a program that is duplicative of existing, long-established environmental programs managed effectively by Federal land management agencies. We believe that with the Committee’s help, correcting this specific and narrow problem is indeed possible.

### **3.0 EPA’s CERCLA 108(b) Program Issues**

#### **3.1 CERCLA 108(b) Program**

On July 28, 2009, 74 Fed. Reg. 37213, the US Environmental Protection Agency (EPA) noticed that it was planning to develop a financial assurance program for hardrock mines pursuant to Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA,” a/k/a “Superfund”). EPA has started its CERCLA 108(b) initiative more than twenty five (25) years after Congress expected it to have been completed. The world has changed. Environmental laws and regulations have mushroomed during this period to the point that most of the activities that placed most

of the mining sites on the EPA CERCLA National Priorities List (“NPL”) are not merely prohibited but they are often criminal activities today.

Under current law, a mineral exploration or mining operation on Federal lands is subject to a comprehensive framework of Federal and State environmental laws and regulations including: the Clean Water Act; the Safe Drinking Water Act; the Clean Air Act; the National Environmental Policy Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Endangered Species Act; and the BLM and Forest Service surface management regulations for mining. These laws and regulations are “cradle to grave,” covering virtually every aspect of mining from exploration through mine reclamation and closure. All of the significant regulations under which mining is regulated by the above cited laws were promulgated after the passage of CERCLA.

Importantly, current law, current mining techniques and current reclamation practices have not given rise to many new, if any, orphan mining CERCLA sites that arise from activities permitted in the last twenty-five years. Thus, current mining is so tightly regulated by Federal and State environmental laws that the chances of newly permitted mines being placed on the CERCLA NPL as orphans is substantially reduced, even without providing financial assurances. However, the adequacy or burdens of these laws is a topic for a different forum at a different time. Today, we only seek to put a spotlight on the development of EPA’s CERCLA 108(b) program where it is wholly and completely redundant; that is, on Federal lands managed by the Forest Service or the BLM.

### **3.2 EPA CERCLA 108(b) Regulatory Duplication on Federal Lands**

When Congress passed CERCLA 108(b) in 1980, neither the BLM or the States had *any* significant hardrock mining regulations, let alone financial assurances programs, and the Forest Service regulatory program was in its infancy. However, over the last 30 years, the BLM and the Forest Service have developed sophisticated and empirically derived hardrock mining regulatory programs, including financial assurance requirements. The long-term development and implementation of these programs has provided experience to the BLM and Forest Service that EPA does not have.

We believe the financial assurance programs administered by the BLM and the USFS have been successful, particularly in the last 20 years. In 1999, the National Research Council (NRC) of the National Academy of Sciences, in response to a request from Congress, found that the existing environmental regulatory framework for mining on Federal land is “generally effective” in protecting the environment. *Hardrock Mining on Federal Lands*, National Research Council, National Academy Press, 1999, p. 89. These existing regulatory programs already substantially limit the degree and duration of environmental risk associated with the current hardrock mining industry. The NRC Report demonstrates that current environmental laws, regulations and practices work together with current financial assurance requirements to ensure today’s hardrock mines do not become tomorrow’s Superfund sites.

**Most importantly, we agree with the NRC that “improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . .”** *Id. at 90.* Rather than propose a new, duplicative, burdensome and cost-prohibitive program, EPA should work with the Federal land management and State regulatory agencies to improve implementation of existing regulations and financial assurance requirements. Instead, EPA is developing a program that will be redundant with Forest Service and BLM programs.

CERCLA 108(b)’s statutory charge for development of financial assurance requirements is directed at facilities managing hazardous substances, but directs the agency to do so only for “classes of facilities . . . consistent with the degree and duration of risk.” Mining and beneficiation facilities that have been approved by the Forest Service or the BLM, subject to an Environmental Impact Statement (“EIS”), and subject to Federal financial requirements are a distinct class of facility. A major part of this approval process is a determination that the project will comply with all Federal and State laws, during operation and in perpetuity. Indeed, typically EPA is actively involved on mine facility EISs, so the agency has a say in the type of analysis that is conducted and the type of mitigation that is required.

When one compares EPA's CERCLA 108(b) charge to the facts surrounding the class of facilities regulated by the Forest Service and the BLM, one realizes that implicit in EPA's position is that the Forest Service and BLM programs are managed so incompetently that, as a class, mines on Forest Service or BLM lands constitute such a "degree and duration of risk" that EPA must create a duplicative financial assurance program parallel to, and independent of, long-established Forest Service and BLM financial programs. We disagree. There is ample objective evidence this is not true. For example, in 1999, the National Research Council (NRC) of the National Academy of Sciences, responding to Congress, found that the existing Forest Service/BLM framework to be "generally effective" in protecting the environment, and that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." Nevertheless, EPA is developing a program to cover these programs. This would be duplicative, wasteful, and unnecessary economic burden that would threaten existing and future jobs in mining.

#### **4.0 President Obama's Initiative to Eliminate Unnecessary Regulatory Burdens**

President Obama "is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." Executive Order 13563, January 18, 2011. Formation is a small business, and will remain a small business, even after construction of the Idaho Cobalt Project and the rebuild of the Hydrometallurgical Plant. In fact, 90% of the membership of the NWMA is composed of small businesses or individuals working for small businesses. Importantly, in President Obama's State of the Union address the President committed to eliminating "unnecessary burdens" on business. We believe that a duplicative regulation born more of inter-agency rivalry, than from a demonstrated need, would seem to be exactly the type of "unnecessary burden" that the President seeks to prevent from destroying jobs and reducing tax revenue.

## **5.0 Current EPA Authority to Regulate and Effect Financial Assurances**

For many hardrock mines, including, at a minimum, *all* hardrock mines on BLM or Forest Service lands, the agencies (and, necessarily, the mines) must implement the evaluation requirements and applicable mitigation measures of the National Environmental Policy Act, most typically, as described in an Environmental Impact Statement (“EIS”). The environmental impacts and the uncertainties associated with project mitigation identified in an EIS provide the factual basis for setting the nature and type of financial assurances for a hardrock mine. EPA already has the authority to participate in the preparation of an EIS as a cooperating agency. EPA evaluates and comments upon every EIS, as mandated by 42 USC 7609. Moreover, EPA has the authority to take any EIS that EPA deems inadequate to the Council on Environmental Quality in the Office of the President for final decision-making and disposition.

Accordingly, EPA already has ample existing authorities to participate in and affect the nature and amount of financial assurances. The only major difference between these existing authorities and EPA’s CERCLA 108(b) initiative is that EPA’s CERCLA 108(b) initiative would allow EPA to effectively eliminate the decision-making of the Federal land management agencies to whom Congress delegated surface management and financial assurance authority. These two agencies have the decades of experience that EPA cannot claim to possess. When asked about duplication of existing BLM and Forest Service financial assurances, EPA Headquarters’ response was that it will be up to the Federal land management agencies to reduce the amount of the financial assurance they receive in order to avoid duplication. Congress delegated surface management authority for regulating and permitting hardrock mines on Federal lands to the land management agencies working cooperatively with the States. EPA should not be allowed to arrogantly usurp the time-tested programs developed by the BLM and the Forest Service over the past thirty (30+) years.

## **6.0 Conclusion**

Formation's Idaho Cobalt Project will produce about 185 direct, good-paying jobs, \$8.2 Million in payroll, \$8.8 Million in taxes annually over a minimum ten-year period, and provide the only US source of super-alloy grade cobalt. This Project and many others, existing and future, are critical to the survival and revival the U.S. manufacturing sector, which depends on mine products as feedstock. Mining and manufacturing produce some of the best paid jobs and best tax revenue streams in the entire economy, and permitting of hardrock mines in the U.S. is already a long and costly process, particularly when compared to our competitors in the rest of the world.

Unfortunately, regardless of what we say and do today, this single Hearing cannot meaningfully even begin to tackle the layers of unnecessary regulatory delays that hamper domestic production minerals. However, today we hope that by focusing attention on just one aspect of EPA's misguided CERCLA 108(b) initiative that the Committee can assist in preventing the creation of a program that is duplicative of existing, long-established environmental programs managed effectively by Federal land management agencies. EPA should follow the 1999 advice, sought by Congress from the National Research Council of the National Academy of Sciences that indicated "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." Otherwise, duplicative financial assurances mandated by EPA's misguided CERCLA 108(b) initiative will create an unnecessary "dead capital" requirement that would force termination of many existing mines, jobs, public/private revenue streams, and hamper creation of new mines supplying strategic and base metals, and materials necessary to sustain U.S. manufacturing jobs.