PUBLIC LANDS FOUNDATION

For America's Heritage

Position Statement

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1872 Mining Law Amendments Needed

Executive Summary

The world has changed a lot since the Mining Law was enacted in 1872. The West has been settled and the Nation is no longer looking to dispose of the public lands. Technology has made great advances since the earlier days of mineral exploration and mining. However, there is still a need to explore for and develop minerals from the public lands. Many of the minerals critically needed for modern technological advancement are located on public lands and new uses are continually emerging, for example, lithium for electric vehicle batteries. Despite advances in technology, finding mineral resources, developing a working mine, and reclaiming the land after mining still takes considerable financial resources and commitment. The Public Lands Foundation supports collaborative efforts to modernize the 1872 Mining Law, but still provide for the location of mining claims on the public lands to explore for metallic and critical minerals. However, the PLF recommends that any amendments to the mining law provide for a royalty on production of minerals and also eliminate the issuance of patents for claims under the mining law. Any amendments to the mining law would need to recognize the economic and national security value of mineral resources to the citizens of the United States and to the states where the mining takes place.

Hycroft gold mine, NV, photo credit Bob Wick

Background

The 1872 Mining Law was one of a number of public land laws passed by Congress in the late 1800s to encourage settlement, development, and private ownership of the public domain in the western United States. These laws enabled United States citizens to claim, settle on, and ultimately acquire title to the Federal lands. The Secretary of the Interior is responsible for the laws and regulations for the implementation of the 1872 Mining Law in the 11 western states and Alaska. Mineral development is also recognized as an appropriate multiple use under Section 103(c) of the Federal Land Policy and Management Act of 1976 (FLPMA). Through a Memorandum of Understanding with the Department of the Interior, the Forest Service is responsible for permitting, exploration, and extraction of 1872 Mining Law minerals on National Forests. The Department of the Interior on February 22, 2022 announced the establishment of an Interagency Working Group on reforming the hard rock mining laws, regulations, and permitting policies. The Department also released a paper outlining "Administration Fundamental Principles for Domestic Mining Reform" with recommendations for mining standards, critical minerals

supply, recycling, royalties, reclamation, land-use planning, permitting, protection of special places, tribal consultation, best available science, and agency mining expertise.

The Secretary of Interior is required by the Energy Act of 2020 to prepare and update every three years a list of critical minerals. The U.S. Geological Survey, on behalf of the Secretary, on February 22, 2022 published an updated list of 50 mineral commodities deemed critical under the definition provided in the Act. These are aluminum (bauxite), antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum group metals, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc and zirconium. Of these 50 mineral commodities, only barite, beryllium, fluorspar, lithium, magnesium, palladium, platinum group minerals, and zinc are produced in any significant amount in the U.S. The public lands contain geologic environments now being explored for the rare earth elements. Additional geologic environments for nickel, tin and tungsten also exist on the public lands.

Mining Claim Monument, stock photo

Sporadic attempts have been made to amend or repeal the 1872 Mining Law. Since the amendment in 1955 that made sand and gravel and other common stone salable under the Materials Act, there have been only two amendments to the mining law, as follows:

1. Section 302(b) of FLPMA provides that "the Secretary shall…take any action necessary to prevent unnecessary or undue degradation of the lands." This section effectively made 1872 Mining Law exploration and development subject to the National Environmental Policy Act (NEPA) and other provisions of law designed to protect the multiple use values of public lands.
2. The Omnibus Budget Reconciliation Act of August 10, 1993, required mining claimants, for the first time, to pay a fee to hold their claims from year to year. That fee is now $165 per lode claim and for each 20 acres in a placer claim. It is adjusted every five years in accordance with the Consumer Price Index. This act also provided the Secretary of the Interior the discretion to waive the annual assessment fee for small miners (those holding ten or fewer claims) if the small miner meets the Assessment Work Requirements found at 30 U.S.C. 28–28e.

Regarding the fee waiver program, a BLM analysis a few years ago indicated that upwards of 85 percent of small miners are in non-compliance with the requirements of the program. However, BLM and the Forest Service do not have the field staff or the legal resources to pursue these non-compliance cases and to take the legal action necessary to bring them into compliance. This program costs about $3,000,000 annually to manage the paperwork and upwards of $5,000,000 is lost annually to the United States Treasury for forgone Maintenance Fees. Furthermore, it adds very little value to producing minerals on Federal land.

PUBLIC LANDS FOUNDATION POSITION

The PLF supports the establishment of the Department Interagency Working Group on Mining Reform and encourages the Department to provide opportunities for all stakeholders, including state and local governments, tribes, environmental groups, mining interests, recreation and other public land users, scientists, legal experts, and other interested parties to participate in the process of developing workable solutions. The PLF is interested in being engaged and involved in those discussions. The following specific recommendations on amendments to the mining law are provided by the PLF.

1. Proposed Amendments to the 1872 Mining Law – Some of the proposed amendments to the 1872 Mining Law over the years have included eliminating mining claims in favor of a mineral leasing system, giving Federal land managers more discretion in approving exploration and mining activities, and imposing a royalty payment system. The PLF supports a more realistic approach to mining law reform. We do not agree that eliminating the basic mining claim location process is prudent. This concept provides the right for any citizen of the United States to continue to explore for and locate mining claims on Forest Service and BLM public lands without a permit, provided there is no or negligible disturbance to the land. However, the PLF has identified changes that should be made to modernize the 1872 Mining Law, and to address significant issues that have persisted over the years. These amendments would still provide the incentives to explore for these minerals that are so difficult to discover and develop.

2. Locatable Minerals – Only metallic minerals of any kind (native metallic or those minerals that result in metallic products) and minerals that have been determined by the Secretary of the Interior as critical should be locatable under any amendment to the mining law. Uranium is not currently on the critical minerals list, but because of its inherent value for future energy production, it should remain a locatable mineral under the mining law. Any amendments to the mining law should also include natural precious gemstones of intrinsic value originally formed, or embedded, in igneous or metamorphic rocks. There should be only one form of mining claim under any amendment to the mining law, instead of three forms of mining claims that exist under the current law. The claim would cover any mineral(s) subject to the mining law, be in rectangular form, and conform to the Public Land Survey System,

3. Rocks or Minerals that would not be Locatable – Those rocks or minerals in layered (by water or by wind) sedimentary deposits should not be locatable. These include rocks and minerals such as bentonite, gypsum, pumicite, limestone; or building stone of any composition whether it be igneous, sedimentary, or metamorphic; and except for any mineral listed herein that is already covered under the Mineral Leasing Act of 1920 or the Materials Act of 1955. Meteorites are objects of antiquity and are not locatable.

4. Environmental Safeguards – The National Environmental Policy Act is an over arching statute that covers all discretionary Federal actions of any nature and under any statute. The same applies to EPA health standards under the Clean Air Act, Clean Water Act, and other related acts. All mining exploration and mining projects, whether under the existing 1872 Mining Law or any amendments to the law, must therefore continue to be required to comply with and meet all Federal environmental laws. Permitting under any amendments to the law should also meet the requirements of regulations from the Forest Service and BLM. An amendment to this law should address financial guarantees to ensure meaningful mitigating measures are identified, and appropriate reclamation is completed during exploration, construction, development, and closure of a mine. However, the conditions, terms and amounts of financial guarantees should be left to the Secretary to implement by rulemaking. Notwithstanding the provisions of the

Defend Trade Secrets Act of 2016, 130 Stat. 376; enacted May 11, 2016, provisions for any environmental documents pertaining to mitigating measures or bonding amounts should not be treated as trade secrets, and redactions resulting therefrom should be prohibited.

5. Small Miner Waiver – The small miner annual assessment fee waiver program should be eliminated. This program was authorized by Congress in 1993, and the discretion to implement the program was given to the Secretary of the Interior. As discussed in the background above, the program costs are quite high, it appears to have a significant non-compliance problem and does not appear to serve as an incentive to the production of minerals on Federal land. Further, adding more BLM staff and Mining Law Attorneys to review assessment affidavits and appeals made from these reviews would not be a wise business decision

6. Patenting of Mining Claims – Patents under the mining law should be eliminated, subject to valid existing rights. Since 1994, Congress through the annual Appropriations process, has prohibited BLM from accepting patent applications under the mining law.

7. Royalty – The PLF recommends that any amendment to the 1872 Mining Law include a three percent gross royalty on production, based on the value of the mineral at its first point of sale. No allowances would be allowed for any kind of expense. Of this amount:

a. two percent would go to the US Treasury, and
b. one percent would go to the State from whence mined.

8. Reclamation and Abandoned Mines Program – The PLF recommends that any amendment to the 1872 Mining Law include a Reclamation and Abandoned Mines Program, funded by fees collected through the BLM Mining Law Program. These fees in 2018 amounted to some $73,000,000 (BLM Public Lands Statistics 2018). One third of this money collected during each calendar year should go towards reclaiming abandoned mined land, abandoned mine hazards, and dangerous situations created by abandoned operations on BLM and Forest Service lands. These funds could also be used to pursue past mining operators or companies who have abandoned exploration and mining projects.

9. Valid Existing Rights for the Government – Any amendment to the 1872 Mining Law should ensure that the United States is able to assert valid existing rights on mining claims if there is an approved government project of any kind, in any approved annual budget for that agency, unless:

a. The mining claimant has received an approved Plan of Operation for the claims that the government wishes to encumber by the time the project was approved, or unless…
b. The mining claimant can demonstrate a discovery of a valuable mineral, as of the date of the approved government project, on the same land encumbered by the approved government project.

10. Cost Recovery – The BLM has implemented regulatory requirements, under existing authorities, for the collection of cost recovery fees for processing mining law related activities including environmental reviews under NEPA or compliance requirements under other Federal laws. These existing cost recovery requirements should be supported by any amendments to the mining law.

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