Public Lands Foundation Position Statement
1872 Mining Law - Amendments Needed

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 world has changed a lot, however, since the mining law was enacted in 1872. The West has been settled and the Nation is no longer looking to settle and 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 critical minerals are located on public lands and new uses are emerging; for example, lithium for electric vehicle batteries. Despite advances in technology, finding mineral resources, developing a working mine, and reclaiming the land post-mining still takes considerable financial resources and commitment. Any amendments to the mining law will need to recognize the economic and national security value of the mineral resources to the citizens of the United States and to the states where the mining takes place.

Several 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 the FLPMA provides that “the Secretary shall…take any action necessary to prevent unnecessary or undue degradation of the lands.” FLPMA effectively made 1872 Mining Law exploration and development subject to the National Environmental Policy Act (NEPA).
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 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 at 30 U.S.C. 28–28e.

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 Public Lands Foundation (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, as long as there is no or negligible disturbance to the land. However, the PLF has identified changes that need to 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.

PLF Proposed Amendments to the 1872 Mining Law

A. **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 an amendment to the mining law. The current Critical Mineral List is pursuant to Executive Order 13817 issued on December 20, 2017. The Secretary of the Interior identified 35 mineral commodities deemed critical under the definition provided in the Executive Order. These are aluminum (bauxite), antimony, arsenic, barite, beryllium, bismuth, borax, cesium, chromium, cobalt, fluorspar, gallium, germanium, graphite (natural), hafnium, indium, lithium, magnesium, manganese, niobium, platinum group metals, rare earth elements group, rhenium, rubidium, scandium, strontium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium, and zirconium. Also included are natural precious gemstones of intrinsic value originally formed, or embedded, in igneous or metamorphic rock, which are not altered or enhanced in any way except for cutting and polishing.

B. **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.

C. **Environmental:** Any amendment to the 1872 Mining Law should incorporate the environmental elements of permitting and final reclamation that are already required in regulation by reference. All mining exploration and mining projects must meet all federal environmental laws including NEPA. Permitting under the 1872 Mining Law must also meet the requirements of regulations from the Forest Service and the Bureau of Land Management. 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. 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.

D. **Small Miner Waiver:** The small miner annual assessment fee waiver program should be eliminated. This program was authorized by Congress in 1993, but the discretion to implement the program was given to the Secretary of the Interior. An analysis made by a PLF member indicates that upwards of 85% of small miners are in non-compliance with the requirements of the program, but the 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. 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.

E. **Patenting of Mining Claims:** Patents under the mining law should be eliminated, subject to valid existing rights.

F. **Royalty:** The PLF recommends that any amendment to the 1872 Mining Law include a 3% 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) 2% would go to the US Treasury, and
   b) 1% would go to the State from whence mined.

G. **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.

H. **Valid Existing Rights for the Government:** Any amendment to the 1872 Mining Law should ensure that the United States can 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.

I. **Cost Recovery:** Any amendment to the 1872 Mining Law should include provisions to allow for the collection of cost recovery fees by the BLM or the Forest Service for processing mining law related activities and for environmental reviews under NEPA or compliance requirements under other federal laws. Cost recovery provisions should be based on policy guidance from the Office of Management and Budget (OMB) and the Department of the Interior.

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