American Exploration &
Mining Association
EST. 1895

16201 E. Indiana Ave., Suite 32801
Spokane Valley, WA 99216
(509)624-1158 - www.miningamerica.org

Mining Law Fifth Amendment Takings Analysis

Prepared by

Carolyn L. McIntosh, Esq.
Joshua B. Cook, Esq.

Reviewed and edited by

Stephen Alfers, Esq.

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MINING LAW FIFTH AMENDMENT TAKINGS ANALYSIS

I. INTRODUCTION[1]

During January of 2021, the Biden Administration issued two executive orders that are likely to shape policies, infrastructure development, and American jobs. First, Executive Order 14005: "Ensuring the Future is Made in All of America by All American Workers" to "maximize the use of goods, products, and materials produced in, and services offered in, the United States" and, second, Executive Order 14008: "Tackling the Climate Crisis at Home and Abroad" to focus on initiatives to advance a clean energy transition and development of clean energy technologies. Among their many implications, these orders should be the basis for promoting the production of minerals in the United States, especially those needed to support renewable energy technologies and infrastructure, including copper, nickel, manganese, graphite, lithium, cobalt, and rare earths, among others. To support this point, the International Energy Agency recently reported that "a concerted effort to reach the goals of the Paris Agreement . . . would mean a quadrupling of mineral requirements for clean energy technologies by 2040."[2]

The United States is blessed with rich mineral reserves enabling the Administration's Buy America focus to include the U.S. mining sector to source the renewable energy sector's mineral needs. In recent years, however, the United States Congress has proposed legislation that would disincentivize mineral investment in the U.S., increasing costs and reducing mineral ownership rights.

For example, in the 116th Congress, Congressman Raúl Grijalva introduced a bill to replace the General Mining Law of 1872 ("General Mining Law") with a leasing system.[3] Senator Tom Udall similarly proposed legislation to reduce the revenue interests of mining claim owners and impose burdensome royalties on existing unpatented mining claims.[4] These proposed laws would have restricted the use of public lands for mineral development purposes, taken possessory and unpatented mining claim interests in federal public lands, diminished the economic value of unpatented mining claims, and imposed unintended burdens on private inholdings and checkerboard lands through other regulatory burdens. These were not the first attempts to amend the General Mining Law,[5] and they likely will not be the last.

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[1] The principal authors express their appreciation for the substantial assistance with initial research, drafting, review, and editing by Alexander M. Arensberg, Esq., and Jacob M. Dillon, Esq.

[2] INTERNATIONAL ENERGY AGENCY, THE ROLE OF CRITICAL MINERALS IN CLEAN ENERGY TRANSITIONS 8 (2021), https://iea.blob.core.windows.net/assets/24d5dfbb-a77a-4647-abcc-667867207f74/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf.

[3] H.R. 2579, 116th Cong. (2019).

[4] S. 1386, 116th Cong. (2019).

[5] *See, e.g.*, *Effect of the President's FY 2016 Budget and Legislative Proposals for the Bureau of Land Management and the U.S. Forest Service's Energy and Minerals Programs on Private Sector Job Creation, Domestic Energy and Minerals Production and Deficit Reduction: Hearing Before the Subcomm. on Energy and Mineral Resources of the H. Committee on Natural Resources*, 114th Cong. (2015) (statement of Neil Kornze, Director, Bureau of Land Management) (describing President Obama's legislative proposal of instituting a leasing process for some minerals governed by the Mining Law); Press Release, Bureau of Land Management, President Proposes $1.13 Billion for BLM in Fiscal Year 2012 to Protect Resources and Manage Uses of Public Lands (Feb. 14, 2011) (describing attempts to convert some minerals covered by the General

Future legislators, however, must reconcile their attempts to regulate or eliminate unpatented mining claim rights with the Fifth Amendment's unconstitutional "takings" prohibition absent just compensation. Congress has successfully navigated such takings issues in the past, when it instituted the Mineral Leasing Act of 1920 ("MLA") and the Federal Land Policy and Management Act of 1976 ("FLPMA"), and it has addressed takings concerns on multiple occasions with regard to other proposed legislation to modify mining and mineral laws. Going forward, lawmakers should consider legislative and judicial precedent when considering mining law revisions. Otherwise, their actions could cost the federal government incalculable resources and taxpayer dollars.

This white paper discusses the protected rights and interests held by U.S. citizens who invest their time, effort, and capital to explore for, identify, and develop our country's much-needed minerals under the General Mining Law. It addresses whether these rights and interests are protected by the Fifth Amendment of the United States Constitution and evaluates past Congressional amendments and attempted changes to the General Mining Law which successfully avoided an unconstitutional taking. Lastly, this paper closes with a brief look at the potential litigation risks and damages the United States government would face if it were to extinguish mining claim rights from the nearly 400,000 active unpatented mining claims[6] currently held by its private citizens.

II. PROPERTY RIGHTS UNDER THE GENERAL MINING LAW OF 1872

The General Mining Law states as follows:

> That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Mining Law of 1872 § 1, 17 Stat. 91 (codified at 30 U.S.C. § 22) ("Section 22"). Section 22 provides a "free and open" invitation to all U.S. citizens (and those who intend to become U.S. citizens) to enter federal lands to explore for and produce minerals, and engage in activities reasonably incident to mining. This statutory grant allows the attainment of property rights to be self-executing and creates a right of self-initiation for U.S. citizens to enter, occupy and acquire privately owned interests in the public domain. Property interests acquired under this law include the right to explore, possess, profit from and exercise mineral and mineral-related surface rights, and these property interests in federal lands evolve incrementally through the entry, location and maintenance process. Certain rights and protections are acquired early, before the unpatented claim is even documented in the public records, and before the

Mining Law to a leasing system); *see also* H.R. 2262, 110th Cong. (2007) (seeking to impose gross royalties of 4 percent on existing mines and 8 percent on new mines); *United States v. Shumway*, 199 F.3d 1093, 1098 (9th Cir. 1999).

[6] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2019 128 tbl. 3-22, 130 tbl. 3-23 (2020), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf, (Tables 3-22 and 3-23 showing fiscal year claims managed by the United States Bureau of Land Management ("BLM")).

discovery of any valuable mineral deposit.[7] From their initial location, unpatented mining claim rights are considered "real property in the fullest sense" enforceable by law.[8] As such, Constitutional protections extend "to every sort of interest the citizen may possess."[9]

Through the General Mining Law, and its process of conferring property rights, Congress sought to encourage citizens to invest (and risk) their own resources to develop America's domestic mineral resources — a goal that is still very applicable and even more important today.[10] To achieve this goal, Congress offered miners security of tenure, protecting their possessory rights and protecting any "mining claims" or "mining locations" staked or located "according to the local customs or rules of miners."[11] Though Congress has amended and attempted to change the General Mining Law numerous times since its original passage, it has continuously recognized the existence of property rights vested in its citizens under this law, and has taken specific measures to protect valid existing rights. In this regard, "[i]t is a matter beyond dispute that mining claims are 'private property' enjoying the protection of the fifth amendment."[12]

III. UNPATENTED MINING CLAIMS ARE PROTECTED BY THE FIFTH AMENDMENT

The Fifth Amendment prohibits governmental "takings" of private property for public use without "just compensation."[13] A taking occurs if there is: (1) an "actual" taking (*i.e.*, the government physically (or

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[7] *See, e.g.*, *Earthworks v. United States DOI*, 496 F. Supp. 3d 472, 479, 491–92 (D.D.C. 2020) (specifically recognizing pre-discovery rights vested in unpatented mining claim owners, including exploration rights and *pedis possessio* rights, as well as their protections); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) ("[I]t is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location . . . ."); *see also Union Oil Co. of Cal. v. Smith*, 249 U.S. 337 (1919) ("[T]he order of time in which these acts [discovery, marking and recording a claim] occur is not essential in the acquisition from the United States of the exclusive right of possession . . ."); *Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964) ("[O]ccupation and working of the claim . . . gives the locator a limited defendable right of possession . . . .").

[8] *Wilbur v. United States* ex rel. *Krushnic,* 280 U.S. 306, 316 (1930) (holding the perfected location of mining claim "is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States"); *Best*, 371 U.S. at 335–36; Shumway, 199 F.3d at 1100 & n.26 (defining a mining claim as "real property in every sense, and not merely an assertion of a right to property" and citing *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892)); *Independence Min. Co. v. Babbitt*, 885 F. Supp. 1356, 1366 (D. Nev. 1995) (citing *Swanson v. Babbit,* 3 F.3d 1348, 1350 (9th Cir. 1993)); *see also Saltzman v. United States*, No. 13-1014L, 2014 WL 4050181 at *3 (Fed. Cl. Aug. 15, 2014) (finding plaintiff alleged valid property interests in an unpatented mining claim); *see also Belk v. Meagher*, 104 U.S. 279, 283 (1881) ("There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States.").

[9] *Freese v. United States*, 639 F.2d 754, 757 n.3 (Ct. Cl. 1981) (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 377–78 (1945)).

[10] OFFICE OF THE SOLICITOR, UNITED STATES DEPARTMENT OF INTERIOR, OPINION NO. 37057, AUTHORIZATION OF REASONABLY INCIDENT MINING USES ON LANDS OPEN TO THE OPERATION OF THE MINING LAW OF 1872 3, 4 (Aug. 17, 2020) ("Opinion M-37057"); *United States v. Cal. Midway Oil Co.,* 259 F. 343, 351–52 (S.D. Cal. 1919) *aff'd*, 279 F. 516 (9th Cir. 1922) *aff'd mem.*, 263 U.S. 682 (1923).

[11] 30 U.S.C. §§ 23, 26, 35, 36, 38; *Shumway*, 199 F.3d at 1098.

[12] *Freese v. United States,* 639 F.2d at 757 (describing "property" as "composed of the rights of use, enjoyment and disposition. . . to the exclusion of all others" (citation omitted)); Shumway, 199 F.3d at 1100–01 (discussing *United States v. North American Transportation & Trading Co.,* 253 U.S. 330 (1920) and *Swanson v. Babbitt,* 3 F.3d 1348 (9th Cir. 1993)).

[13] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

legislatively) confiscates or occupies property)[14]; or (2) a "regulatory" taking (*i.e.*, government action, by legislation or regulation deprives the owner of economically reasonable use of the property).[15] Whenever the government's action constitutes a taking, it is required to pay the property owner "just compensation" (*i.e.*, fair market value).[16]

In the context of an "actual" taking, any seizure from the bundle of privately held rights is considered a categorical or *per se* taking, requiring appropriate compensation.[17] This means the constitutional protection is triggered whether the government takes or limits only a portion of the privately held interests, or takes the entirety of rights held by the private party.[18] This point has been emphasized by the United States Supreme Court as recently as its latest term, where it struck down a California access regulation that limited the rights of farm owners to exclude others from their property.[19] "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[20]

Courts have consistently held that appropriations of patented mining claim interests constitute an "actual taking" under the Fifth Amendment.[21] It follows that the conversion of unpatented mining claims into

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[14] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

[15] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

[16] *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 319 (1987); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510–12 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893); *see also Freese,* 226 Ct. Cl. at 255–56 ([G]overnmental seizure of private property for public use -- is unconstitutional unless followed by payment . . . of the fair market value of what was taken" and holding that "federal mining claims are 'private property' enjoying the protection of the fifth amendment." (quotation marks omitted, citation omitted)).

[17] *See, e.g.*, *Vulcan Materials Company v. City of Tehuacana*, 369 F.3d 882, 888–89 & n.5 (5th Cir. 2004) (discussing a "partial taking" (where the government action triggers the Fifth Amendment in destroying or taking one or more strands from the bundle of sticks)).

[18] *Id.*; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *United States v. Causby*, 328 U.S. 256, 262 (1946) (government use of airspace above property adjacent to its runways constituted a taking in the form of an easement which triggers the Fifth Amendment "as directly and completely as if it were used for the runways themselves"); *Jacobs v. United States*, 290 U.S. 13 (1933); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991); *Florida Rock Indus. v. U.S.*, 18 F.3d 1560, 1568 (Fed. Cir. 1994) ("Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." (emphasis omitted)); *Freese,* 226 Ct. Cl. at 256 n. 3 (noting that the Constitutional protection extends to "every sort of interest the citizen may possess" (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

[19] *Cedar Point Nursery v. Hassid*, 594 U.S. ____, 141 S. Ct. 2063, 2021 U.S. Lexis 3394 at *24 (2021) (Even when "the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold . . . . [W]e recognize a physical taking all the same."); *see also United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

[20] *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 ("[C]ompensation is mandated when [even] a leasehold is taken . . . ."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); *United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) ("[T]he government cannot reserve its own land from an unpatented mining claim without paying the owner the value of the claim, because an unpatented mining claim is property."); *Freese,* 226 Ct. Cl. at 256.

[21] *See, e.g.*, *Horne v. Dep't of Agriculture*, 576 U.S. 350, 357-358 (2015); *Ark. Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) ("'When the government physically takes possession of an interest in property for some public purpose,

mineral leases likewise constitutes an actual "taking" under this provision.[22] Though not originally rising to the level of "full fee property," from their initial location, unpatented mining claims are considered real property "in the fullest sense" enforceable by law.[23] Notably, the General Mining Law establishes property interests in mining claimants at various stages throughout the location process, creating specific exploration and possessory rights even prior to the discovery of a valuable mineral deposit.[24] In this regard, courts have established that "unpatented mining claims are themselves property protected by the Fifth Amendment against uncompensated takings."[25] To the extent a claimant complies with statutory requirements, his or her mineral and other associated rights in unpatented mining claims can continue without term limits.[26] Mining law legislation that would terminate or even partially take these possessory rights, replacing unpatented claims with something less (*i.e.*, lease term limitations or lower net revenue interests[27]), amounts to an unconstitutional taking and would require compensation.[28] This principle has

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it has a categorical duty to compensate the former owner.'" (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302, 322 (2002)); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 529–31 (1906); *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 427 (1982); *Shumway*, 199 F.3d at 1103.

[22] *Clawson v. United States*, 24 Cl. Ct. 366, 369 (1991) ("Clearly, compliance with the [Mining Law] and its implementing regulations may give a mineral claimant a possessory interest in property the extinguishment of which can support a Fifth Amendment taking claim."); *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335–38 (1963); *Forbes v. Gracey,* 94 U.S. 762, 766 (1876); *Skaw v. United States*, 740 F.2d 932, 936 (Fed. Cir. 1984) (holding that an unpatented mining claim is a property right which is within the protection of the Fifth Amendment's prohibition against the taking of private property without just compensation) (citing *Freese*); *see also* Department of Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, § 120 (acknowledgement by Congress that its taking of both patented and unpatented mining claims is subject to limitations under the Fifth Amendment as it enacted legislation to acquire title to mining claims located within the Denali National Park and Preserve).

[23] *Wilbur v. United States* ex rel. *Krushnic*, 280 U.S. 306, 316 (1930); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333–35 (1920); *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1366 (D. Nev. 1995) (citing *Swanson v. Babbit,* 3 F.3d 1348, 1350 (9th Cir. 1993)); *see also United States v. Locke*, 471 U.S. 84, 104 (1984); *Belk v. Meagher*, 104 U.S. 279, 283 (1881); *Saltzman v. United States*, No. 13-1014L, 2014 WL 4050181 at *1 (Fed. Cl. Aug. 15, 2014) (finding plaintiff alleged valid property interests in an unpatented mining claim).

[24] *See, e.g.*, *Best*, 371 U.S. at 336 (citing with approval *United States v. Houston*, 66 I.D. 161 (1959)) ("A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of a patent."); *see also Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 347 (1919) ("[T]he order of time in which these acts [discovery, marking and recording a claim] occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals . . . ."); *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) ("[I]t is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location . . . ."); Houston, 66 I.D. at 165 ("[Even] if the locator elects not to carry his claim to patent . . . his rights to the minerals in the claim are not diminished."); *see also Earthworks v. United States DOI*, 496 F. Supp. 3d 472, 479, 491–92 (D.D.C. 2020) (specifically recognizing pre-discovery rights vested in unpatented mining claim owners, including exploration rights and *pedis possessio* rights, as well as their protections).

[25] *Kunkes v. United States,* 78 F.3d 1549, 1551 (Fed. Cir. 1996) (citing *Best*, 371 U.S. at 334); *see also Chittenden v. United States*, 126 Fed. Cl. 251, 262 (2016) (holding that a valid unpatented mining claim constitutes property fully protected by the Fifth Amendment); *see also Forbes v. Gracey*, 94 U.S. 762, 766 (1876); Skaw, 740 F.2d at 936; *Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964); *Clawson v. United States*, 24 Cl. Ct. 366, 369 (1991); *Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981).

[26] *See*, *e.g.*, 30 U.S.C. §§ 26–28; Shumway, 199 F.3d at 1100 (holding owner of a mining claim 'is not required . . . to secure patent from the United States; so long as he complies with all provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.'" (quoting *Wilbur v. United States*, 280 U.S. 306, 316 (1930)).

[27] *See, e.g.*, H.R. 2579, 116th Cong. §§ 101(b)(1), 107(a) (2019); *see also* S. 1386, 116th Cong. § 201(a) (2019).

[28] *See generally Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2021 U.S. Lexis 3394 *14 (2021); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–22 (2002); *United States v. Causby*, 328 U.S. 256 (1946);

been demonstrated on multiple occasions, not only in federal actions,[29] but cases where the government's power of eminent domain has been exercised by various parties to condemn right of ways through unpatented mining claims[30] or simply appropriate mining claims for a public purpose.[31]

As for "regulatory" takings, U.S. courts have ruled that a categorical or *per se* taking occurs whenever the government, through regulatory or legislative restrictions, completely destroys the property's economic value.[32] Regulatory takings often appear in the form of overburdensome restrictions placed on activities or uses of the privately held interests.[33] Even in situations where the economic value of a property is not entirely depleted, a "regulatory taking" can still be found based on three factors set forth in the seminal Supreme Court case, *Penn Central Transportation Co. v. New York City*[34] – namely (1) the overall economic impact on the owner, (2) the degree of interference with the owner's reasonable investment-backed expectations, and (3) the character of the government action. In the absence of a categorical or *per se* regulatory taking, U.S. courts will analyze these factors carefully to decide whether restrictions on property use go too far under the Fifth Amendment.[35]

Mining legislation that would regulate or restrict activities on unpatented mining claims (whether for environmental purposes or otherwise), to the point of denying owners the economically viable use of their property for mining purposes, amounts to an unconstitutional taking.[36] Restrictions that wholly destroy a mining claim's economic value amount to a *per se* or categorical taking of the privately held interest.[37] Restrictions that do not completely extinguish economic value may still trigger the Fifth Amendment if (1) the overall economic impact is significant, (2) the restrictions interfere with the reasonable investment-backed expectations of the claimant from when it acquired the unpatented mining claim, and (3) the restrictions are atypical when compared to those historically imposed by U.S. governmental bodies.[38] In these circumstances, the factual analysis required to defend or analyze regulatory takings issues in this context can be exhaustive, and each case is uniquely complex.[39]

Jacobs v. United States, 290 U.S. 13 (1933); Kunkes, 78 F.3d at 1551; *Fla. Rock Indus. v. United States*, 18 F.3d 1560, 1568–69 (Fed. Cir. 1994); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991); *Shumway*, 199 F.3d at 1101.

[29] Federal suits are frequently filed in the Federal Court of Claims pursuant to the Tucker Act. Enacted in 1887, the Tucker Act expressly waives the United States' sovereign immunity in certain kinds of claims – including takings claims under the Fifth Amendment. 28 U.S.C. §§ 1346(a), 1491 (2021); *see also, e.g.*, *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984).

[30] *See, e.g.*, *Las Vegas & Tonopah R.R. Co. v. Summerfield*, 129. P. 303, 305 (Nev. 1912) (acknowledging a mining company's right to just compensation based on its original certificate of location and filings – not the existence or proof of a valuable mineral deposit); *accord Jacobson v. Memmott*, 354 P.2d 569 (Utah 1960).

[31] *United States v. N. Am. Transp. & Trading Co.,* 253 U.S. 330, 333 (1920).

[32] *Tahoe-Sierra Pres. Council*, 535 U.S. at 322; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

[33] *See supra* note 31; *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[34] 438 U.S. 104 (1978).

[35] *Id.*; *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017)*; Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986).

[36] *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978).

[37] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Tahoe-Sierra Pres. Council*, 535 U.S. at 322.

[38] *See generally Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (1986).

[39] *See*, *e.g.*, *Skaw v. U.S.*, 740 F.2d 932 (Fed. Cir. 1984).

Congress should avoid both *actual* and *regulatory* takings when considering proposed mining law revisions. As discussed in the following sections, history provides several instructive examples of how Fifth Amendment takings issues can be avoided.

IV. CONGRESS AVOIDED "UNCONSTITUTIONAL TAKINGS" THROUGH THE MINERAL LEASING ACT OF 1920 AND THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

A. Legislative History for the Enactment of the Mineral Leasing Act of 1920

The MLA established a leasing and royalty system for the development of oil, gas, and other non-metalliferous minerals, thereby removing those minerals from the scope of the General Mining Law. Section 37 of the MLA, however, alleviated Fifth Amendment takings concerns by exempting preexisting unpatented mining claims from the new leasing and royalty system. On the date of its enactment, Section 37 of the MLA read as follows:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Section 37 of the Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (emphasis added).[40] The language in this savings clause clearly evinces a desire to avoid the extermination of existing rights, and legislative history confirms that Congress intended to preserve such existing rights of owners of claims, including those claims without a discovery. First, it is notable that the language of Section 37 was itself not subject to considerable debate and amendment – indicating the savings clause was not a controversial subject.[41]

Second, savings clauses like that in Section 37 had long been fixtures in the proposed legislation which preceded the MLA's enactment.[42] These previous clauses, like that contained in Section 37 of the MLA, were not subject to considerable debate and amendment – once again indicating that there was no significant dispute regarding whether savings clauses were necessary.[43]

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[40] Section 37's reference to coal entries number 18 to 49 in Lander, Wyoming is the result of the Act of August 1, 1912, 62nd Cong., Priv. Res. 4, 37 Stat. 1346 (formerly S.J. Res. 100, 62nd Cong.).

[41] *See, e.g.*, 58 Cong. Rec. 4578–81, 7781 (containing a debate in which the only facet of the savings clause being discussed was whether it should apply to "valid claims" as compared to "valid locations"; a discussion regarding the clause's necessity was notably absent).

[42] *See, e.g.*, H.R. 3232, 65th Cong.; S. 2812, 65th Cong.; H.R. 406, 64th Cong.; H.R. 16186, 63rd Cong.

[43] *See* Senate Debates, 58 Cong. Rec. 4054-57, 4111-17, 4160-76, 4247-4258, 4267-4290, 4415-4418, 4443-45, 4446-51, 4502, 4577-92, 4610, 4619-4623, 4731-89 (1919); House Debates, 58 Cong. Rec. 7509-38, 7596-7605, 7642-54 and 7767-91 (1919); House Conference Report, H. Rep. No. 600, 66th Cong., 2nd Sess. (1920); *see also* House Approval of Conference Report, 59 Cong. Rec. 2702-2714 (1920); Conf. Report Submission to Senate, 59 Conf. Rec. 2737-2742 (1920).

Finally, on the few occasions that these savings clauses were discussed in historical debates, it is clear that members of Congress believed "justice, fairness, and common decency" required their inclusion to ensure that pre-existing laws were applied "for the benefit of those who [had] acted" in accordance therewith.[44] Taken together, this history demonstrates that savings clauses have been a germane fixture of mineral leasing legislation for well over a century – with their inclusion being compelled by fundamental principles of "justice, fairness, and common decency."[45]

B. Legislative History for the Federal Land Policy and Management Act of 1976

Congress enacted the Federal Land Policy and Management Act[46] in 1976 to provide the Secretary of the Interior with authority to manage the federal public lands, including those lands containing mining claims located under the General Mining Law of 1872. FLPMA explicitly acknowledged the continued vitality of the General Mining Law, but amended it in two primary ways.

First, Section 314 imposed new claim filing and recordation requirements to give the BLM a mechanism to rid the federal lands of stale mining claims.[47] The Section 314 filing and recording requirement was applied to all mining claims and did not consider whether a claim had a discovery of a valuable mineral deposit (i.e., had been "perfected"). Congress required mining claim owners to make their initial Section 314 filing within three years of FLPMA's enactment for any claim that the owner intended to maintain as an active claim and to submit annual filings thereafter.[48]

Second, Section 302(b) directed the Secretary of the Interior, by regulation or otherwise, to take any action necessary to prevent unnecessary or undue degradation of the public lands.[49] The Section 302(b) mandate to "prevent unnecessary or undue degradation," however, included a savings clause providing that "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress."[50]

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[44] 64 Cong. Rec. 1048-49; *see also* 58 Cong. Rec. Part 5, Leasing of Oil Lands 4,577-78 (daily ed. Aug. 30, 1919) (Sen. Jones reading 13 pieces of correspondence received from constituent claimholders in New Mexico, and reading correspondence from E.L. Medler stating that unpatented claimholders have vested property rights and prolonged litigation will ensue if the MLA strips them of these rights.); *see also* 58 Cong. Rec. Part 5, Leasing of Oil Lands 4,580-81 (Sen. Lenroot providing an example of a claimholder who falls under the protection of the MLA savings clause); 4,582 (Sen. Jones stating that, considering the congressional record, the Interior Department would not be justified in turning down a patent application for a claim that had been maintained under the Mining Law after the MLA is in effect).

[45] *Id.*

[46] Pub. L. No. 95-554, 92 Stat. 2073 (codified at 43 U.S.C. § 1701 *et seq*.)

[47] *Id.* § 1744.

[48] In FLPMA Section 314(d), Congress established that claim filings must be made for claims that did not have a discovery of a valuable mineral deposit and were thus not "valid" claims. *See* 43 U.S.C. § 1744(d) ("Such recordation or application by itself shall not render valid any claim which would not be otherwise valid under applicable law."). By requiring claim filings for all claims regardless of their discovery/validity status, FLPMA treats all claims equitably and does not create a different hierarchy or status for valid claims versus pre-discovery claims (i.e. claims of unknown validity and claims without a discovery); *see United States v. Locke*, 471 U.S. 84, 87, (1985)

[49] 43 U.S.C. § 1732(b).

[50] *Id.*

Third, Congress specifically preserved the savings clause from Section 37 of the MLA when it enacted FLPMA, confirming that the protections from that savings clause remain in effect.[51] Notably, the post-FLPMA amendment to Section 37 of the Mineral Leasing Act explicitly provided that the General Mining Law, not the MLA, would be applied to mining claims established prior to the MLA and that owners could continue working their claims for purposes of perfection and discovering a valuable mineral deposit.[52]

While analysis of the legislative history for FLPMA does not reflect a thorough debate in Congress over Fifth Amendment takings concerns, the application of this Act, and its inclusion of savings clauses, confirms Congress' goal to avoid triggering the Fifth Amendment, and shows the steps Congress took to avoid reducing unpatented mining claim interests or otherwise affecting the economic viability of unpatented mining claim ownership.[53]

V. CONGRESS HAS RECOGNIZED ON MULTIPLE OCCASIONS THAT MODIFICATIONS TO MINING AND MINERAL LAWS COULD RESULT IN UNCONSTITUTIONAL TAKINGS

Takings concerns have been discussed during congressional debates and hearings for various bills to amend the MLA of 1920 and the General Mining Law of 1872. The following sections discuss a number of these bills and their associated debates. While none of the bills discussed below were enacted into law, they evidence lawmakers' concerns that these proposed amendments would constitute a taking. Furthermore, as cited below, in considering each of these bills Congress heard comprehensive analysis from legal experts regarding potential takings issues. The testimony from those experts, including their written materials, provide a useful resource in evaluating future amendments to the General Mining Law.

A. H.R. 1039, 100th Cong. (1987)

In 1987, the House of Representatives passed H.R. 1039, entitled "[a] bill to amend section 37 of the Mineral Lands Leasing Act of 1920 relating to oil shale claims, and for other purposes."[54] H.R. 1039 would have converted unpatented mining claims for oil shale into a leasing system. Specifically, it would have amended the MLA to prohibit the issuance of patents for oil shale claims after February 5, 1987. It also would have required the owner of each unpatented oil shale claim to elect, within 90 days after enactment of the Act, to either: (1) apply to the Secretary for a lease; or (2) maintain its claim by complying with all laws pertaining to the maintenance of mining claims, including regulations regarding annual expenditures which represent diligent efforts towards shale oil production and substantial work on the claims.[55]

The legislative history for H.R. 1039 shows that the House considered whether the bill would constitute a taking under the Fifth Amendment, but it ultimately concluded that so long as the mining claimant's

[51] *Id.*

[52] 95 Pub. L. 554, 92 Stat. 2073 (1978).

[53] *See generally* Committee on Energy and Natural Resources, Compilation of the Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579).

[54] H.R. 1039, 100th Cong. (1987).

[55] *See* H.R. 1039, § 2(b)(2).

"possessory interest" was not ***forcibly*** canceled, the provision would not amount to a constitutional taking.[56]

> One of the most widely debated issues during the Committee's deliberations on H.R. 1039 involved whether the legislation preserves the rights of the holders of the oil shale claims . . . . The Committee has taken great pains in this regard and finds the bill, as amended, fully protects the existing rights of the claim holders and represents a fair and just resolution of an issue which has plagued the administration of these public lands for more than 66 years.
>
> While holders of valid claims under the mining law have certain rights and interests in the property, the Congress, in the public interest, retains the right to regulate mining claims on federal lands. H.R. 1039 does not extinguish the existing rights and interests of claim holders by requiring them to elect either to continue holding the claims under certain new maintenance standards or to convert them to leases.
>
> H.R. 1039 will prohibit the patenting of most existing oil shale claims. This is consistent with other actions Congress has taken in the past placing limitations on the issuance of mining claim patents.[57]

Ultimately, the House Report for H.R. 1039 asserted that "the bill fully preserves the possessory right of the claim holders by providing them with the ***opportunity*** to either convert valid claims to oil shale leases or retain valid claims in compliance with the current law and a new, prospective, expenditure requirement."[58] The House Report, however, also included concerns and testimony that the Act would result in a taking under the Fifth Amendment if it were passed into law.[59] Specifically, numerous legislators argued that the prohibition on patenting amounted to a constitutional taking:

> H.R. 1039 changes the vested rights of the oil shale claimant. Section 2(b) prohibits the patenting of oil shale claims forevermore.
>
> * * * * *
>
> In our view, denial of a patent may well be a taking under the Fifth Amendment. Furthermore, the election provisions are unworkable and in conflict with established precedent governing the maintenance and patenting of oil shale claims under the 1872 General Mining Laws.
>
> * * * * *
>
> We seriously question whether the denial of patents to oil shale mining claimants is constitutional in these circumstances. United States Supreme Court decisions contemporaneous with the times these claims were located characterize the possessory

[56] *See* H.R. Rep. No. 100-43 (1987).

[57] H.R. Rep. No. 100-43, at 12 (1987).

[58] *Id.* at 13 (emphasis added).

[59] *Id.* at 21.

> rights of entrymen as "a substantial inceptive title" and that the owner of a valid claim has the right "to demand and receive a patent at a small sum per acre after he has put in" $500 worth of labor and improvements. It is under these kinds of rules that Congress passed the savings clause in the 1920 Mineral Leasing Act. If the miner had a valid oil shale claim, Congress recognized his right to receive a patent. To deny that recognition and expectation today may well be a taking. *Cf., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-7 (1974).
>
> * * * * *
>
> If the Secretary determines under established practice and precedent, that the claims are valid, then the owner of the oil shale mining claim has a vested right to apply for a patent. The denial of that right appears to us to be a taking.
>
> We think there is serious doubt and little wisdom in denying the owner of a valid oil shale mining claim the right to the fee title. It seems peculiar public legislative policy to deny the owner of a valid oil shale claim a patent while the courts are at the same time recognizing, the mining claimant's rights "to prevent third parties from interfering with their possessory interest," and who have a "property right to possess and mine to extinction the minerals located on their unpatented claims." *Skaw v. United States*, 740 F.2d 932, 938, 940 (CA Fed., 1984). Those rights are within the protection of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.
>
> It seems abundantly clear that, while a guaranteed right to a mineral patent is in question, there is no doubt that the revocation or interference with the vested rights under a valid oil shale mining claim, whether by statute or the authorized action of an administrative official, will constitute a taking under the Fifth Amendment to the U.S. Constitution.[60]

As the House Report debate for H.R. 1039 reveals, the Committee determined that whether the bill restricting the patent process amounts to a legislative taking turned on whether the holder of an unpatented claim for oil shale had a vested property right in the ability to patent the claim.

The legislative history for that bill also shows that the House Subcommittee on Mining and Natural Resources heard testimony from several attorneys and the Director of the Bureau of Land Management regarding whether H.R. 1039 would constitute a legislative taking.[61] Of particular note, the BLM Director testified:

> If Congress enacts legislation affecting claimants' property rights, first it should determine the manner in which that legislation would affect claimants' rights previously established, and whether there would be an interference with those rights that would constitute a compensable taking. The Department is concerned that H.R. 1039 may well present constitutional problems . . .[62]

[60] *Id.* at 21–23.

[61] H. Hrg. 100-1 (Mar. 3, 1987).

[62] H. Hrg. 100-1 (Mar. 3, 1987) at p.24.

The BLM Director further identified Section 2(b)(2) of H.R. 1039, which addressed the conversion of existing oil shale mining claims to leases, as "a clear setting for [takings] concerns."[63] After summarizing case law concerning the constitutionality of protective requirements affecting unpatented mining claims, including *United States v. Locke*, *Freese v. United States*, and *Alaska Miner's Association v. Andrus*, the Director cautioned the subcommittee to carefully consider whether H.R. 1039 would amount to a compensable taking.[64]

B. Senate Bill No. 2089, 100th Cong. (1988)

After H.R. 1039 passed the House, the Senate considered it and the companion bill, S.B. 2089. Like H.R. 1039, S.B. 2089 would have (1) prohibited the issuance of oil shale mining claim patents after February 5, 1987, for any claim located prior to enactment of the MLA; and (2) required the owners of valid oil shale mining claims, located pursuant to the General Mining Law prior to enactment of the MLA, to make specified elections within 180 days after enactment of the act or be conclusively deemed to have abandoned the oil shale claim. Specifically, claim holders could elect to either convert their claims to leases or maintain their claims by compliance with federal mining laws and the Act.[65]

The Senate Subcommittee on Mineral Resources Development and Production held a hearing on S.B. 2089 and H.R. 1039.[66] The Subcommittee heard statements from numerous witnesses discussing whether the bill would constitute a legislative taking.

For instance, James E. Cason, Deputy Assistant Secretary, Land of Minerals Management, testified in his prepared remarks that Land and Minerals Management believed S. 2089 would constitute a taking.[67] "A valid mining claim carries with it a full bundle of rights, and S. 2089 would grant a clearly lesser set of rights. The undefined reduction would raise the issue of taking without just compensation . . . If S. 2089 were passed in its present form its effect on claimants' rights would be too onerous and not consistent with the Fifth Amendment as related to takings. Therefore, we strongly oppose S. 2089." Mr. Cason then further explained the agency's reasoning:

> From our perception, it certainly [would be a taking]. If you take a look at . . . a Supreme Court decision, back contemporaneous with the passage of the Mineral Leasing Act, and just post that period where we were beginning to deal with the issue again, in *Wilbur v. Krushnic*, . . . they looked at whether an unpatented mining claim is a private property right and decided that an unpatented mining claim is a property in the full sense of that term. The owner is not required to purchase the claim or secure a patent from the United States. But so long as he complied with the provisions of the Mining Law, his possessory right for all practical purposes is ownership. It is as good as if it were secured by a patent.[68]

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[63] *Id.*

[64] H. Hrg. 100-1 (Mar. 3, 1987) at p.27.

[65] *See* S. 2089, 100th Cong. (1988).

[66] *See* S. Hrg. 100-744 (Apr. 22, 1988).

[67] *Id.* at 47-49.

[68] *Id.* at 63.

Mr. Cason's response to questioning from Senator Wirth is also insightful. Sen. Wirth asked how the agency could view S. 2089 as a taking when unpatented mining claim holders do not have a property interest *in the option* to apply for patents under their claims. In response, Mr. Cason focused on the impact that S. 2089 would have on the underlying marketability of the unpatented claims, stating "we believe that the production requirement in S. 2089 raises the bill to a level of taking because of the very strong likelihood that shale oil in significant marketable amounts will not be obtainable from a claim within 10 years of enacting. This would be deemed abandoned . . . The elimination of the market value associated with the prospect of future utility we believe would be an un-constitutional taking."[69]

S. 2089 did not make it out of committee, and it is uncertain to what extent members of the Senate Subcommittee on Mineral Resources Development and Production were persuaded by the testimony heard on the legislative takings issue. Nevertheless, this testimony and legal analysis is useful in analyzing whether the disruption of unpatented mining claim interests or their conversion into mineral leases would constitute a federal taking, entitling claim owners to just compensation.[70]

C. Senate Bill No. 1126, 101st Cong. (1989-1990)

Senate Bill No. 1126, entitled "a bill to provide for the disposition of hardrock minerals on Federal lands, and for other purposes," was introduced during the 101st Congress (1989-1990).[71] S. 1126 never made it out of committee, but it would have forced owners of existing unpatented mining claims located pursuant to the General Mining Law to either (i) relocate their claim pursuant to the requirements of the new law or (ii) become obligated to comply with enhanced claims maintenance requirements set forth in the new law.[72] Furthermore, patents issued under the new law would have been subject to both a royalty and a reversionary interest in favor of the United States at the end of production. The hearing on S. 1126 before the Subcommittee on Mineral Resources Development and Production, Committee on Energy and Natural Resources, included an extensive discussion of whether the new law would amount to an unconstitutional taking.[73]

We note that a near identical version of S. 1126 was introduced in the subsequent Congress but like S. 1126 the newer bill did not make it out of Committee.[74] Before S. 433 was defeated, and in considering whether it would amount to a taking, the Subcommittee on Mineral Resources Development and

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[69] *Id.* at 66.

[70] We note that near identical versions of S. 2089 and H.R. 1039 were introduced in the subsequent Congress but also were not adopted into legislation. *See* S. 30, 101st Cong. (1989); H.R. 643 and H.R. 2392, 101st Cong. (1989); *see also* H.R. Rep. No. 101-49 (House Report for H.R. 643 including discussing of majority and minority views as to whether bill would constitute a taking).

[71] *See* S. 1126, 101st. Cong. (1989).

[72] *See* S. 1126, 101st Cong., §§ 501–502 (1989).

[73] S. Hrg. 101-205; *see* Statement of Sen. James McClure, S. Hrg. 101-205 (June 7, 1989) at 113 ("[i]t is very clear that a property owner may have the right to proceed to patent. It is not so clear whether that is a property right subject to the taking question."); Statement of Sen. Malcom, *id.* at 114 (describing the law's treatment of existing claim holders as a "constitutional taking"); *see also* Statement of Attorney Stephen Alfers, Davis, Graham & Stubbs, *id.* at 338 (providing legal analysis of whether the law would constitute a taking); Statement of John D. Leshy, Professor of Law, Arizona State University, *id.* at 362 (same).

[74] *See* S. 433, 102nd Cong. (1991).

Production again heard testimony from many of the same legal experts on the constitutional taking issue.[75]

VI. LEGAL ACTIONS AND JUST COMPENSATION RESULTING FROM UNCONSTITUTIONAL TAKINGS WOULD REQUIRE EXTENSIVE FEDERAL RESOURCES

If legislation were adopted in which unpatented mining claims are (1) converted into leases, (2) burdened with royalties, or (3) limited by restrictions that diminish economic viability, then Fifth Amendment takings liability would become a central obstacle. In such cases, taxpayer dollars would be wasted – at a minimum in litigation – as the government defends its destruction of these private property rights, contravening current case law precedent.[76] In the event of a taking, as required by the U.S. Constitution, the federal government would have to pay the claim holders "just compensation" usually measured by the "fair market value" of the property taken.[77] "[W]hen market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public," other complicated measures are employed.[78] In these instances, courts would have "discretion in adopting a methodology that awards a takings plaintiff just compensation."[79] As a general matter, however, methodologies for just compensation must be based on "[t]he highest and most profitable use for which the property is adaptable[.]"[80]

With respect to unpatented mining claims, just compensation evaluations would likely require, first, an analysis of valid existing rights,[81] followed by an evaluation of the confirmed or unconfirmed mineral resource, potential mining costs, examination of the market value against similar mining claims, and a costly review of alternatives and multiple unique factors applicable to each unpatented mining claim or claim group. There are currently on record nearly 400,000 active unpatented mining claims on public

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[75] *See* S. Hrg. 102-258, 102nd Congress (1991).

[76] *Chittenden v. United States*, 126 Fed. Cl. 251, 262 (2016), *aff'd*, 663 F. App'x 934 (holding that unpatented mining claims are "valid against the United States if there has been a discovery of mineral within the limits of the claim."); *Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981)

[77] *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (stating that fair market value is the Court's "relatively objective working rule" in determining just compensation); *United States v. Fuller*, 409 U.S. 488, 490 (1973) (noting that prior Supreme Court decisions have used fair market value as the standard of measuring just compensation); *United States v. Miller*, 317 U.S. 369, 374 (1943) (to find a practical standard of measuring just compensation, courts have adopted the concept of market value).

[78] *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *see also Miller*, 317 U.S. at 374–75 (where property is taken and other property in its vicinity has not been sold in recent times, application of fair market value test is, at best, a guess); *Olson v. United States*, 292 U.S. 246, 255 (1934) ("Just compensation includes all elements of value that inhere in the property[.]").

[79] *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608, 613 (2013); *see also Childers v. United States*, 116 Fed. Cl. 486, 497 (2014) ("Just compensation should be carefully tailored to the circumstances of the case . . ."); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (holding that fair market value is "not an absolute standard nor an exclusive method of valuation"); Fuller, 409 U.S. at 490 ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.") (citing *Commodities Trading Corp.*, 339 U.S. at 124).

[80] *Olson*, 292 U.S. at 255; *see also Clark's Ferry Bridge Co. v. Pub. Serv. Comm'n*, 291 U.S. 227, 234 (1934); *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878).

[81] *See Vane Minerals (US), LLC v. United States*, 116 Fed. Cl. 48, 57 (2014); *Shumway*, 199 F.3d at 1102 (9th Cir. 1999); *Swanson v. Babbitt*, 3 F.3d 1348, 1353 (9th Cir. 1993).

lands managed by the BLM.[82] In addition to takings liability for these unpatented mining claims themselves, changes to the General Mining Law could create potential takings liability to private landowners in situations where unpatented mining claims exist on federal lands checkerboarded with private sections, where inholdings are found, and where patented and unpatented mining claims are intermixed. To this point, federal courts have established that partial takings affecting the "integrated use" of such tracts may justify their treatment as a "single" or "larger" parcel for purposes of calculating Fifth Amendment takings damages.[83] Consequently, a determination of what constitutes "just compensation" for each mining claim would be a difficult and costly task, not to mention federal government liability and other costs associated with a likely flood of takings lawsuits.[84]

VII. CONGRESS SHOULD FOLLOW LEGISLATIVE PRECEDENT AND EXPRESSLY EXEMPT PREEXISTING UNPATENTED CLAIMS FROM ANY PROPOSED LEASING/ROYALTY SCHEMES

To avoid Fifth Amendment takings and the attendant inequity and costs, any mining law amendments or revisions enacted by Congress should follow the precedent of allowing claimholders to continue holding their pre-existing claims under the General Mining Law. The MLA and its "savings clause" provide a seminal example of legislation purposed towards changing unpatented claim procedures into a leasing scheme, without unconstitutionally taking protected property rights. Under Section 37, the "savings clause" of the MLA, unpatented mining claims that were actively maintained were protected regardless of whether valuable mineral deposits had been discovered or all aspects of the claim location process had been finalized.[85] The record reflects that both lawmakers and claimholders were concerned about how the law's transition to a leasing process would affect existing rights.[86] They were particularly concerned that the MLA would amount to a conversion of possessory interests and initial exploration

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[82] In fiscal year 2019 BLM reported 386,936 active mining claims. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2019 128 tbl. 3-22 (2020), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf; *see also* THE DIGGINGS, https://thediggins.com (currently reporting 422,500 active mining claims) (last visited July 25, 2021).

[83] *United States v. 33.92356 Acres of Land*, 585 F.3d 1, 10 (1st Cir. 2009) (quoting *Baetjer v. United States*, 143 F.2d 391, 394–95 (1st Cir. 1944)) ("[W]hether the parcels are a 'single tract' for takings purposes 'does not depend upon artificial things like boundaries between tracts . . . whether the owner acquired his land in one transaction . . . [or] whether holdings are physically contiguous.' The key question is whether the parcels have an 'integrated use.'" (addition in original)); *see also United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999) (If the value of the remaining land diminishes when the condemned portion is removed from the larger whole, "the landowner is entitled to compensation 'both for that which is physically appropriated and for the diminution in value to the non-condemned property.'") (quoting *United States v. 33.5 Acres*, 789 F.2d 1396, 1398 (9th Cir. 1986); citing 71 Nichols on Eminent Domain § 12.03).

[84] *See, e.g.,* 58 Cong. Rec. Part 5, Leasing of Oil Lands 4,577-78 (daily ed. Aug. 30, 1919); (Sen. Jones reading correspondence from E.L. Medler stating that unpatented claimholders have vested property rights and prolonged litigation will ensue if the MLA strips them of these rights); *compare Earthworks v. United States DOI*, 496 F. Supp. 3d 472 (D.D.C. 2020).

[85] *See generally Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 347 (1919) ("[T]he order of time in which these acts [discovery, marking and recording a claim] occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals . . . ."); *see also Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) ("[I]t is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location . . . ."); *Earthworks,* 496 F. Supp. 3d at 479, 491 (recognizing pre-discovery rights vested in unpatented mining claim owners, including exploration rights and *pedis possessio*, as well as the protection of those rights);

[86] 58 Cong. Rec. Part 5, Leasing of Oil Lands 4,577-78 (daily ed. Aug. 30, 1919) (Sen. Jones reading 13 pieces of correspondence received from constituent claimholders in New Mexico.).

rights, even in those cases where a valuable discovery had not yet been fully identified.[87] These claimants were prepared to defend their mining claims and property interests through various means, including litigation.[88]

In response to these concerns, the MLA's drafters protected all unpatented mining claims being actively maintained by claimholders. Notably, one senator confirmed that the MLA exempted any claimholder who "may not have made a discovery, but [who] complied with the mining laws up to the date of the passage of [the MLA]."[89] Another senator stated that the congressional record clearly establishes intent for the savings clause to apply to *all* preexisting unpatented claims.[90] Instead of legislating a blanket conversion of property interests, in 1920, Congress surgically amended the General Mining Law so as to not disturb pre-existing rights. This approach benefitted the federal government in later years when takings claims were addressed against the United States, as it simplified the judiciary's analysis to simply evaluating whether the mining claims had been actively maintained by the private owner,[91] and the larger liability exposure of the United States was avoided.[92]

In each instance where Congress modified rights under the General Mining Law, it avoided "takings" concerns through savings clause provisions. Notably, the MLA is the only major amendment to the General Mining Law that substantively changed the claims interest structure for mineral deposits on public lands into a leasehold process. The Multiple Surface Use Act of 1955, which reduced surface rights associated with unpatented mining claim ownership, also included a savings clause that preserved the existing rights of claimholders,[93] and numerous steps were taken in FLPMA to avoid triggering the Fifth Amendment with the implementation of that Act.[94] These successful amendments to the General Mining Law provide strong precedent for avoiding takings of protected property interests in the future.

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[87] *See id.*

[88] *Id.* (Sen. Jones reading correspondence from E.L. Medler stating that unpatented claimholders have vested property rights and prolonged litigation will ensue if the MLA strips them of these rights.).

[89] *Id.* at 4,580-81 (Sen. Lenroot providing an example of a claimholder who falls under the protection of the savings clause.).

[90] *Id.* at 4,582 (Sen. Jones stating that, considering the congressional record, the Interior Department would not be justified in turning down a patent application for a claim that had been maintained under the Mining Law after the MLA is in effect.).

[91] *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 57–58 (1970) (holding Secretary of Interior was correct to invalidate existing oil shale claims where the claimants had not substantially complied with the maintenance requirements adopted by the MLA's savings clause); *accord Orion Rsrvs. Ltd. v. Salazar*, 553 F.3d 697, 708 (D.C. Cir. 2009); *Exxon Mobil Corp. v. Norton*, 346 F.3d 1244 (10th Cir. 2003); *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1260–61 (10th Cir. 2002) (holding mineral claimant's failure to perform assessment work for 46 years was merely "token" assessment work, inconsistent with the requirements of the MLA's savings clause, and the claims were, therefore, invalid).

[92] *See generall*y *supra* note 90.

[93] *See, e.g.,* The Act of July 23, Pub. L. 84-167, § 7, 69 Stat. 367 (1955) (preserving the existing surface rights associated with unpatented mining claim ownership which were held by *any claimant*).

[94] The various public land withdrawals from appropriation under the public land laws also uniformly preserve unpatented mining claims existing at the time of withdrawal. *See e.g., Skaw v. United States*, 740 F.2d 932, 933 (Fed. Cir. 1984) (withdrawal of the St. Joe River main stem under the Wild and Scenic Rivers Act of 1968, Pub. L. 90-542, 82 Stat. 906 (1968)); *Freese v. United States*, 639 F.2d 754, 755 (Ct. Cl. 1981) (withdrawal to create Sawtooth National Recreation Area under the Sawtooth Act, Pub. L. 92-400, 86 Stat. 612 (1972)); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (public reservation for Army post under the Acts of March 3, 1899, c. 423, 30 Stat. 1064, 1070 and May 26, 1900, c. 586, 31 Stat. 205, 213).

VIII. CONCLUSION

Congress is likely to consider converting unpatented mining claims on federal lands into leases or imposing royalty burdens through future legislation. Congress may also consider imposing statutory obligations on claimholders that would diminish the economic viability of unpatented mining claim ownership. Any such destruction of property rights would expose the federal government to substantial liability risk under the Fifth Amendment of the United States Constitution. Any reformative measures to the General Mining Law should follow responsible congressional precedent by including a savings clause to preserve existing claims, including the right to pursue discovery. To do otherwise would not only be unjust, but could result in substantial federal resources and taxpayer dollars being wasted on takings issues, just compensation determinations, and needless litigation.