

**Testimony of
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Bureau of Land Management
Department of the Interior
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands and Forests
S. 303, Concerning Claimants of a Small Miner Waiver
March 22, 2012**

Thank you for the opportunity to testify today on S. 303, which would require the Bureau of Land Management (BLM) to allow mining claimants a chance to "cure" their failure to meet the required filing deadlines. This bill would also give private relief to two particular mining claimants whose mining claims have been deemed forfeited or abandoned for failure to comply with applicable laws and regulations, and would give one of those claimants the opportunity to obtain fee title to the reinstated mining claims from the Government.

The Department of the Interior opposes S. 303 because of the enormous administrative burden it would generate, and because it singles out two mining claimants for special treatment and leaves open the question as to how other mining claimants in similar situations would be affected.

Background

The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 §§ 10101 to 10106, 107 Stat. 312, 405-07 (Aug. 10, 1993) (maintenance fee statute), established an annual maintenance fee for unpatented mining claims, mill sites, and tunnel sites. This annual maintenance fee is currently set by regulation at \$140 per mining claim or site. The maintenance fee statute also gave the Secretary of the Interior the discretion to waive the annual maintenance fee for certain "small miners" -- mining claimants who hold 10 or fewer claims or sites.

Following the enactment of the maintenance fee statute, the Department promulgated regulations that exercised the Secretary's discretion to allow the "small miner waiver." These regulations state that in order to qualify for this "small miner waiver" under the maintenance fee statute, the claimant must, among other things, file a maintenance fee waiver request that certifies that he and all related parties hold 10 or fewer mining claims or sites. Under the original regulations, the deadline for filing the maintenance fee waiver request for the upcoming assessment year was August 31, which was the same day as the statutory deadline for filing annual maintenance fees. When Congress changed the statutory annual maintenance fee deadline to September 1, the Department changed the deadline for maintenance fee waiver requests to also be September 1 for the coming assessment year. The Secretary's decision to make the regulatory deadline for filing maintenance fee waiver requests the same as the statutory deadline for paying annual mining claim maintenance fees took into consideration the statutory constraint that maintenance fee waivers could not legally or practically be sought any later than the deadline for the maintenance fee itself.

The same year that Congress changed the deadline for paying the maintenance fee to September 1, it amended the maintenance fee statute to allow claimants seeking a "small miner waiver" to cure a "defective" waiver certification. Omnibus Consolidated and Emergency Supplemental

Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-235 (1998) (codified as amended at 30 U.S.C. § 28f(d)(3)). The amendment required the BLM to give claimants filing timely "defective" maintenance fee waiver requests notice of the defect and 60 days to cure the defect or pay the annual maintenance fee due for the applicable assessment year.

Another change in the administration of mining laws and regulations occurred in the Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332 §§ 112-113, 108 Stat. 2499, 2519 (Sept. 30, 1994), which placed a moratorium on the patenting of new mining claims or sites, and the further processing of existing patent applications; this moratorium has continued unbroken through subsequent appropriations language. The processing of a patent application to completion can result in the transfer of fee title or "patent" to the claimant for the Federal lands where the claims and sites are located.

Congress provided an exemption from the patenting moratorium for applicants who had satisfied the requirements of the Mining Law of 1872 for obtaining a patent before the moratorium went into effect. Only patent applications for which a "First Half of Mineral Entry-Final Certificate" (FHFC) had been issued were considered exempt or "grandfathered" from the moratorium. Over 600 patent applications were pending with the BLM when the moratorium went into effect on October 1, 1994. Of those, 405 patent applications had received a FHFC by September 30, 1994, and were determined to be "grandfathered" from the moratorium. Mining claimants in a "grandfathered" patent application are not required to comply with the maintenance fee statute after the FHFC was issued.

The remaining 221 patent applications were considered "non-grandfathered" and subject to the moratorium. The BLM did no further processing of these patent applications and the mining claimants were responsible to continue to meet annual maintenance requirements -- timely payment of the annual maintenance fee, or filing a small miner waiver and completing the required annual assessment work -- in order to keep their mining claims active and their "non-grandfathered" patent applications pending.

S. 303

Section 1(a) of S. 303 would require the BLM to provide holders of 10 or fewer mining claims or sites with written notice of any "defect" in their maintenance fee waiver request or their affidavit of annual assessment work associated with the request. Unlike the current maintenance fee statute, failure to timely file the waiver request or affidavit of annual assessment work would be considered a "defect" under S. 303. As under the current statute, mining claimants would have 60 days from the receipt of written notice to correct that defect or pay the applicable maintenance fee.

The BLM opposes the provision in Section 1(a) to amend the maintenance fee statute to make failure to timely file a small miner fee waiver request a curable "defect." The BLM also opposes amending the maintenance fee statute to allow claimants to "cure" defective affidavits of annual assessment work, including failure to timely file the affidavits as required by section 314 the Federal Land Policy and Management Act. Currently, the cure provision in 30 U.S.C. § 28f(d)(3) applies only to maintenance fee waiver requests.

As written, the legislation would effectively eliminate the deadlines for filing a small miner waiver and affidavit of annual assessment work. Defining an untimely filing as "defective" would require the BLM to accept late filings after the deadline, no matter how late. This change will place an excessive administrative review and notification burden on the BLM and would vastly increase the cost of administering the small miner waiver. Further, it would enable a mining claimant to avoid filing the waiver or affidavit of annual work and hold the claims or sites in suspense until the BLM is able to identify the deficiency and notify the claimant.

Under Section 1(a) of S. 303, if a mining claimant either files an untimely maintenance fee payment or waiver or fails to make any filing at all, the BLM would no longer be able to simply declare the mining claim void by operation of law, as authorized under the current maintenance fee statute since 1994. Rather, under this new provision, if any claimant fails to pay the annual maintenance fee by the deadline, the BLM will have to first determine whether the claimant is qualified as a small miner and, if so, give notice and opportunity to cure -- whether or not the claimant had any intention of filing a maintenance fee waiver request.

This additional administrative step would be required even if the holder of the mining claim or site had not filed a maintenance fee waiver in the past, for two reasons. First, fewer than 13,000 mining claimants among those who are eligible for a maintenance fee waiver each year actually request a waiver, and S. 303 does not restrict the "cure" provisions to those claimants who had intended to file a waiver but missed the deadline. Second, verifying eligibility for the "cure" provisions of S. 303 would be required each year for any mining claimant who missed the payment deadline because eligibility for a maintenance fee waiver depends on the number of mining claims and sites on the date that the maintenance fee payment was due. See 30 U.S.C. § 28f(d).

It would be costly and difficult for BLM to assess whether every mining claimant who either makes an untimely filing or fails to file anything is eligible to invoke the "cure" provisions of S. 303. Moreover, because the agency would have no way to determine if a claimant holding 10 or fewer claims or sites had simply decided not to pay the fee or file the fee waiver request and intentionally relinquish his claims, the BLM would have to send a "defect" notice to all such claimants who fail to either timely pay their maintenance fees or timely file a maintenance fee waiver request and give them the opportunity to cure. This effectively extends the payment deadline for any claimant holding 10 or fewer mining claims by removing any penalty for failing to pay in a timely manner.

In addition, this increased administrative burden would so drastically increase the processing time for all mining claimants as to allow some claimants to continue to hold and work their claims for months or potentially years after what would have been forfeiture by operation of law under the current statute without providing payment. It would be challenging for the BLM to reliably determine if a mining claimant intended to relinquish his mining claim or site. Action on the part of individuals wishing to maintain a claim to a Federal resource is a basic responsibility found in many of our Federal programs. Relieving individuals of this basic responsibility is contrary to the interest of the general public that owns the property.

In addition, the BLM opposes the bill's provisions outlined in Section 1(b) under "Transition Rules" on behalf of two mining claimants who forfeited their claims for failure to meet the filing requirements discussed above. Section 1(b) is essentially a private relief bill that gives special treatment to two sets of claimants, allowing their mining claims to be reinstated, and allowing one of them to have his patent application considered "grandfathered" from the patent moratorium.

The mining claims described under Sec. 1(b)(1) belonged to a claimant from Girdwood, Alaska. The claimant owned nine mining claims located in the Chugach National Forest in southeastern Alaska. The claimant had filed a patent application for these mining claims, but his application had not received a FHFC by the deadline. As such, his patent application was considered "non-grandfathered" and his mining claims were subject to ongoing annual maintenance requirements. The BLM determined these mining claims to be statutorily abandoned in January 2005 when the claimant failed to file his annual assessment work documents in accordance with the Federal Land Policy and Management Act of 1976, and the Interior Board of Land Appeals subsequently upheld the BLM's decision. The bill would give the claimant the opportunity to "cure" the defects that led to his mining claims being declared abandoned and void, and to pay prior maintenance fees or seek a waiver of those fees for his mining claims.

The bill would also consider the claimant "to have received first half final certificate" for these voided mining claims before September 30, 1994, thereby "grandfathering" his patent application from the patent moratorium. A portion of the land formerly covered by these claims is now closed to mineral entry, because the State of Alaska has filed Community Grant Selection under the authority of the Alaska Statehood Act. Considering the claimant's patent application "grandfathered" would give him priority over the State of Alaska with respect to these lands, and may mean that he, rather than the State of Alaska, would obtain the fee title.

The forfeited mining claims described under Sec. 1(b)(2) belonged to claimants from Homer, Alaska, and are located on the Seward Peninsula in western Alaska. In 2009, the BLM declared the claimants' mining claims to be forfeited for failure to timely pay maintenance fees or file a maintenance fee waiver request, and the Interior Board of Land Appeals upheld the BLM's decision in 2010. The claimants are now challenging the Department's voidance decision in Federal court in Alaska. The bill would allow the claimants' forfeited mining claims to be reinstated by "curing" their untimely maintenance fee waiver request or paying the applicable maintenance fees. The claimants are seeking private relief because the State of Alaska has selected these lands under the authority of the Alaska Statehood Act. As discussed above, selection by the State of Alaska has closed these lands to mineral entry, so the claimants may not relocate their claims.

The BLM's final concern with respect to this legislation requiring the BLM to consider failure to timely file a maintenance fee waiver certificate a curable "defect" is that the bill is unclear as to the retroactive effects on other small miners who have forfeited or abandoned their mining claims because they failed to timely file a small miner waiver or affidavit of annual assessment work. This includes those small miners who have lost their challenges of BLM decisions declaring their claims forfeited or abandoned at the IBLA. Furthermore, the Department of Justice advises that, as a practical matter, it seems likely that small miners will pursue a "cure"

for failure to pursue a small miner waiver only where the claim owner cannot simply relocate that claim, which might occur if, for example, intervening rights have been granted or the land has been conveyed or assigned other uses. If that has happened, then reinstating any forfeited or abandoned mining claims would create confusion, and generate litigation, and could arguably create takings liability on the part of the United States.

Conclusion

Thank you again for the opportunity to testify on S. 303. I would be glad to answer your questions.