Testimony of
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Senate Energy & Natural Resources Committee
Subcommittee on Public Lands, Forests, and Mining
S. 366, Concerning Claimants of a Small Miner Waiver
April 25, 2013

Thank you for the opportunity to testify today on S. 366, 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 one particular mining claimant whose mining claims have been deemed abandoned for failure to comply with applicable laws and regulations, and would give that claimant the opportunity to obtain fee title to the reinstated mining claims from the Government.

The Department of the Interior opposes S. 366 because of the enormous administrative burden it would generate, and because it singles out one mining claimant 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 lode mining claim or site and $140 per every 20 acres or portion thereof for a placer claim. 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 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 statute as amended 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.

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S. 366 (Section 1(a)) would amend the maintenance fee statute that requires 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 and an opportunity to cure the defective, but timely, filing. Unlike the current maintenance fee statute, failure to timely file the waiver request would be considered a "defect" under S. 366. 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. Sec. 1(a) also purports to provide the same 60-day cure period for an untimely "affidavit of annual labor associated with the application and required application fees."

The BLM opposes the provision in Sec. 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

the provision in S. 366 purporting to allow claimants to "cure" defective affidavits of annual assessment work filings, including failure to timely file the affidavits as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA). Currently, the cure provision in 30 U.S.C. § 28f(d)(3) applies only to maintenance fee waiver requests, and it is unclear whether the legislation would extend the opportunity to cure the failure to timely file an affidavit of annual assessment work to any claimant who fails to timely file the affidavit, or only to those claimants who have submitted a defective small miner waiver request.

BLM's primary concern with the proposed legislation, however, is that it would effectively eliminate the deadline for filing a small miner waiver. Defining an untimely small miner waiver 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 and hold the claims or sites in suspense until the BLM is able to identify the deficiency and notify the claimant.

Under Sec. 1(a) of S. 366, if a mining claimant files either an untimely maintenance fee payment, an untimely waiver request, or fails to make any filing at all, including a maintenance fee payment, the BLM would no longer be able to simply declare the mining claim or site 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 or file a maintenance fee waiver request by the deadline, the BLM will have to first determine whether each and every claimant who failed to timely pay maintenance fees is qualified as a small miner and, if so, give notice and opportunity to cure -- whether or not the claimant had any intention of paying the fee or filing a maintenance fee waiver request.

These additional administrative steps 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. 366 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. 366 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 held by the claimant “and related parties” on the date that the maintenance fee payment was due (30 U.S.C. § 28f(d)). The BLM would also have to determine if the claimant had any “related parties” that owned claims or sites which would make the claimant ineligible if together the claimant and related parties owned more than 10 claims or sites. Since claimants may be a “silent” related party to corporations or other individual claimants owning more than 10 claims or sites, it would be almost impossible for the BLM to determine factual eligibility of all claimants.

It would be costly and difficult for the 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. 366. 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 in Sec. 1(b) under "Transition Rules" on behalf of the mining claimant who forfeited his claims for failure to meet the filing requirements discussed above. Section 1(b) is essentially a private relief bill that gives special treatment to the claimant, allowing his mining claims to be reinstated, and allowing him to have his patent application considered "grandfathered" from the patent moratorium.

The mining claims described under Sec. 1(b) 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 FLPMA, and the Interior Board of Land Appeals (IBLA) 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, presumably under the amended version of the statute proposed in this legislation.

Sec. 1(b)(1) of 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. Even if this claimant had complied with annual FLPMA requirements, his patent application was not considered "grandfathered" under the guidelines imposed through Congress. Congress was clear that the exemption from the patenting moratorium applied only to applicants who had satisfied the requirements of the Mining Law of 1872 for obtaining a patent before the moratorium went into effect. Singling out this claimant and patent application to receive special treatment by considering his patent application "grandfathered" is unfair to the other 220 pending "non-grandfathered" patent applications. Additionally, 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 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 at the IBLA of BLM decisions declaring their claims forfeited or abandoned 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. 366. I would be glad to answer your questions.