



August 29, 2022

By Electronic Submission

Steven Feldgus
Deputy Assistant Secretary, Land and Minerals Management
Bureau of Land Management
1849 C Street NW, Room 5645
Washington, DC 20240

Re: Comments in Response to Request for Information to Inform Interagency Working Group on Mining Regulations, Laws, and Permitting

Dear Dr. Feldgus:

In the announcement asking the public to submit comments to the interagency working group on mining,¹ the Department of the Interior underscored two directives from Congress and the Biden administration that raise a hard question: How can the permitting process for mining on public lands be hastened—especially for “critical” minerals—without compromising strong environmental safeguards or meaningful consultation with Tribal Nations and affected communities?

Our view at the Grand Canyon Trust is that every answer to that question will fall short unless the mining law’s principle of free access is replaced with a leasing or equivalent system. If Congress were to take that action, our support could be earned for a legislative compromise intended to accelerate mining of some minerals under some circumstances. Paramount among those circumstances would be statutory preconditions that empower Tribal Nations to better safeguard ancestral and sacred lands and that establish incentives, mandates, and infrastructure to maximize recycling and substitution of mineral commodities.

If the location-patent system remains unchanged, however, we believe that regulatory and policy reforms intended to speed up mineral development on the public domain are liable to needlessly damage the common lands and interests of the American people, Native and non-native alike. For that reason, our support for administrative reforms extends only to efforts to forestall harms that mining causes until Congress acts.

Although we have endorsed two other comment letters submitted to the working group, we write separately to stress this fundamental point about the importance of reforming the location-patent system, along with a few other observations about regulatory reform.

¹ 87 Fed. Reg. 18,811 (Mar. 31, 2022).

I. Urging Congress to enact a leasing system to replace the mining law should be a centerpiece of the working group’s recommendations.

A. The location-patent system is incompatible with meaningful consultation and genuine environmental safeguards.

To fashion an efficient, environmentally fair, and culturally respectful mineral-development policy, federal law must vest our civil servants with authority to comprehensively plan for mining on public lands and to make resource-allocation decisions that account for competing public values. As the law now stands, the agency staff carrying out the day-to-day management of the nation’s mineral estate believe that, absent a mineral withdrawal, they are powerless to forbid mining to preserve other values of public lands.

So long as that remains true, consultation with Tribal Nations and local communities will not be meaningful, for it does not leave room to consider the case-by-case argument that, in some places, mining should be disallowed or sharply curtailed. And the government will not mandate safeguards for the environment that are any stronger than the basic floor set by our generally applicable public lands and environmental laws, which will never be adequate in all cases if you accept the premise that some especially sensitive public lands should be preserved from mining even where those laws probably won’t be violated.

The location-patent framework gives outsized power to the mining industry in determining where and when to dig up a publicly owned resource on publicly owned land. And with that degree of control, the mining industry cannot earn a legitimate social license, for it is not expected to demonstrate that its use of public lands and minerals serves the public interest. That must change if environmental interests and the views of Tribes and public-lands communities are to be truly respected when our common mineral wealth is mined.

B. The Canyon Mine, a uranium mine, near the Grand Canyon, illuminates the shortcomings of the free-access principle.

In the region the Grand Canyon Trust seeks to protect, a uranium mine called the Canyon Mine illustrates the fundamental problem with the location-patent system.

The mine’s owner, a company called Energy Fuels, recently rechristened the mine the “Pinyon Plain Mine” to distance it from its original namesake: the Grand Canyon. The mine sits on two claims located in the late 1970s in a meadow in the Kaibab National Forest. The canyon’s South Rim unfolds not far north, just beyond the national park’s main entrance. A small but prominent peak called Red Butte, a place sacred to the Havasupai Tribe and listed under federal law as a traditional cultural property, is a few miles to the south.

In 2012, this area and about a million acres around it were withdrawn from mineral entry for two decades, partly to guard against the risk that uranium mining around the Grand Canyon will deplete and pollute water, which is awfully scarce in the region.² The withdrawal was also motivated by the Interior Secretary’s finding that “[a]ny mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them” in a way that likely “could not be mitigated.”³

If this sensitive and sacred place were mined, Energy Fuels estimates that it could unearth about 2.5 million pounds of uranium, assuming that the market were trading at \$60 per pound.⁴ This is a trifling amount. If it were mined out over five years, it would supply about 1 percent of the uranium purchased by U.S. nuclear reactors each year.⁵ And it is a tiny fraction of known U.S. reserves, which the Energy Information Administration has estimated in recent years to range from 436 million to 1.2 billion pounds at a price of up to \$100 per pound.⁶ Estimates of probable and speculative uranium resources in the United States are many times higher.⁷

Should we as a nation put a place as treasured as the Grand Canyon at risk to mine so little uranium, unsympathetic to the resolute objections of the Havasupai Tribe? Regardless of how you might answer that question, it is one our representative government should weigh before any mining privileges can accrue to the mining industry. Yet the mining law obviates the question, allowing a company like Energy Fuels to claim an entitlement to mine before the public has any say in the matter.

And the federal government has historically treated mining claims like those at Canyon Mine with great tenderness. After the Canyon Mine claims were staked, the mine’s owner spent millions beginning to build out the mine. Meanwhile, the price of uranium tanked from an inflation-adjusted high above \$170/lb. in the late 1970s to a low of about \$12/lb. in the early 2000s.⁸ The mine was mothballed, but not cleaned up, while Energy Fuels commenced a decades-long wait for the next market bonanza.

² Record of Decision, Northern Arizona Withdrawal, pp. 2, 9–10 (Jan. 9, 2012).

³ *Id.* at 9.

⁴ See Roscoe Postle Associates, Technical Report on the Canyon Mine, p. 1-3 (Oct. 6, 2017).

⁵ See U.S. Energy Information Administration, “2021 Uranium Marketing Annual Report” (May 2022).

⁶ See U.S. Energy Information Administration, “2021 Domestic Uranium Production Report” p. 13 (May 2022); U.S. Energy Information Administration, “U.S. Uranium Reserves Estimates” p. 1 (July 2010).

⁷ See, e.g., U.S. Energy Information Administration, “Annual Energy Review 2010” p. 121 (Oct. 2011) (reporting estimated additional reserves of 4.85 billion pounds and speculative resources of 3.48 billion pounds at a cost category of \$100/lb.).

⁸ See International Monetary Fund, Primary Commodity Price Data, NUEXCO Exchange (Aug. 15, 2022) *available at* <https://www.imf.org/en/Research/commodity-prices>.

All the while, the government did not examine the validity of Energy Fuels' mining claims until just after the 2012 withdrawal, even though it is beyond far-fetched to believe that, during all of the prior 30 years, the uranium at the mine could be "extracted, removed and marketed at a profit," the legal test for claim validity.⁹ After all, a prudent mining company would have mined the uranium deposit were there a profit to be made. And with the government's acquiescence, the mine has now occupied the Kaibab National Forest for over 40 years, on a gamble that the future will deliver a more favorable market for uranium.

C. Mineral withdrawals are a valuable, but imperfect, response to the principle of free access.

For those of us wanting to protect some public lands from the mining law's self-initiation principle, there is a single tool available: a withdrawal. Yet because mineral withdrawals are difficult to secure, whether administrative or congressional, and because they foreclose all mining in the withdrawn area, they often encourage all-or-nothing outcomes over large territories. And it is customary that withdrawals do not extinguish "valid existing rights," which can allow mining to occur despite a withdrawal unless taxpayers compensate mining companies to relinquish their claims.

The Grand Canyon region again serves as an example. When a short-lived uranium boom arrived in the mid-2000s, claim locations surged on the public lands around the canyon that remained open to mineral development.¹⁰ Over 10,000 claims had been staked by 2009.¹¹ That sort of unbridled exploitation of a prized landscape led the Interior Department to intervene in 2009 and eventually withdraw from mineral entry about a million acres for twenty years.¹²

Those lands around the Grand Canyon deserve permanent protection from uranium mining, and if the working group identifies particular public lands that should be permanently withdrawn from mining, these lands are worthy of that listing.¹³ But one of the larger lessons in the clash over the uranium industry's role in this region is that our current laws discourage a middle way: careful planning, site-specific determinations of where mining should occur considering the public interest and community input, orderly development in those places, and preservation of lands deserving of protection.

And because that kind of planning was lacking around the Grand Canyon, the most controversial mine—the Canyon Mine—might yet operate despite the current withdrawal. Indeed, in the months following the withdrawal, while the price of uranium remained elevated following a four-decade high, the Forest Service, for the

⁹ See *United States v. Coleman*, 390 U.S. 599, 600-03 (1968).

¹⁰ Record of Decision, Northern Arizona Withdrawal, p. 3 (Jan. 9, 2012).

¹¹ *Id.*

¹² *Id.*

¹³ See Grand Canyon Protection Act, H.R. 1052, 117th Cong. (2022); Grand Canyon Protection Act, S. 387, 117th Cong. (2022).

first and only time, completed an examination of the validity of the Canyon Mine claims. In that unusually favorable market, the agency concluded that the mine's owner had discovered a valuable mineral deposit, establishing valid existing rights as of the date of the withdrawal and the contemporaneous mineral examination.¹⁴

In keeping with tradition, this determination was generous to the mine's owner. An essential precondition for showing a "discovery" under the mining law is that the deposit can be mined and marketed at a profit, without relying on speculation that a mineral's price will someday rocket upwards.¹⁵ You might think that a mine that had produced no sales in three decades couldn't satisfy that standard. But the Forest Service came to the opposite conclusion, mostly because of two questionable points of methodology.

First, uranium prices were still elevated following the 2007 price spike when the Forest Service completed its mineral examination, leading the agency to forecast that the mine would make significantly more revenue than could in fact be made in the uranium market during and after 2012. By late 2016, uranium prices had fallen to below half the amount used to forecast profits in the 2012 validity determination,¹⁶ but the Forest Service has not revisited the validity examination despite unquestionably having the discretion to do so.¹⁷

Second, following Interior Department precedent, the Forest Service's profit calculation counted only future mining costs, leaving out many millions spent to build out the Canyon Mine in prior decades. That approach allowed the agency to conclude that the uranium at the Canyon Mine could be mined at a "profit," even if, in truth, it could be mined only at a financial loss.

Whatever you might think about how this approach squares with the law, there's no denying that it was charitable to the mine's owner. That sort of munificence encourages mining companies to dig up and interminably fence off public lands on a wager that the market will one day return a profit, at the expense of all the other interests we share in our public lands.

¹⁴ See *Grand Canyon Trust v. Provencio*, 26 F.4th 815, 819 (9th Cir. 2022).

¹⁵ See *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1370 (9th Cir. 1976) ("The test of marketability is not satisfied by the existence of a possible market for the mineral at some future date under altered economic conditions.").

¹⁶ See International Monetary Fund, Primary Commodity Price Data, NUEXCO Exchange (Aug. 15, 2022) available at <https://www.imf.org/en/Research/commodity-prices>.

¹⁷ See *Cameron v. United States*, 252 U.S. 450, 460 (1920) ("[S]o long as the legal title remains in the government[,] [the Land Department] does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.").

D. Conclusions and Recommendations on Legislative Reform

The mining law's principle of free access is a misguided public policy. It is a policy that disempowers the public, Tribal Nations, and our civil service in choosing how to prioritize competing uses of our public lands. And until that problem is remedied—until the location-patent regime is abolished—mining on public lands cannot be accelerated while ensuring strong protections for the environment and meaningful consultation with Tribal Nations and affected communities. It's the possibility that the government could reject or drastically curtail a mine proposal that would infuse consultation and permitting with meaning for Tribal Nations and public-lands communities and give the public fair bargaining power with the mining industry.

We recognize that it's up to Congress, not the working group, to overhaul the mining law. But urging Congress to do so should be a centerpiece of the working group's efforts. Were Congress to take up comprehensive reform, we can envision giving our backing to a legislative compromise that could give the federal government tools to accelerate mineral development under some conditions.

Indeed, a leasing system could be crafted to allow the executive branch flexibility to prioritize the permitting and production of particular "critical" minerals—not by forgoing procedural safeguards—but by preempting at the outset the most controversial proposals, while putting staff and financial resources into promptly and thoroughly evaluating the rest. And a higher priority could be given to "critical" minerals that could be designated, and de-designated, in response to their unique markets, technological changes, the stability of foreign supplies, mineral-processing capacity, and the like.

Overhauling the location-patent system could also provide greater predictability and efficiency for the mining industry. Pre-discovery protection could be secured via exclusive prospecting permits. The risk that exists today of forfeiting a once-valid claim due to changes in the metals markets would be eliminated by providing security of tenure via a lease, rather than the possessory interest conferred by an unpatented mining claim. And these reforms could greatly diminish, if not eliminate, the problems that legitimate operators face from nuisance and other non-bona fide claimants.

But in addition to remedying those shortcomings in the mining law to the mining industry's benefit, other shortcomings should be remedied to benefit the interests of Tribal Nations and the general public:

- **Consultation.** Today, when evaluating mining projects outside of Indian Country, federal agencies consult with the governments of Tribal Nations without any legal obligation to accede to those governments' views. That policy does not accord the perspectives of Tribal Nations the respect they are due. Reform of the mining law should include a substantive legal standard ensuring that the federal government must do more to honor the

positions taken by tribal governments on public-lands mining operations that may affect the interests of Tribal Nations.

- **Recycling and Substitution.** A crucial predicate for our support of mining law reforms that could accelerate mineral development in some cases is the enactment of parallel reforms to maximize recycling and substitution of minerals, with a goal of minimizing new mining operations on public lands. We have endorsed specific proposals on this subject in a separate comment letter.
- **Ad valorem royalties.** An ad valorem royalty should be established with the goal of promoting economically efficient mineral development while delivering fair returns to the public as the owner of the land and minerals. We recognize that the mining industry already pays federal income taxes and various state taxes and economic rents, which provide some return to the public. But a core function of a royalty should be to deliver returns to Americans as landowners, while discouraging overproduction of minerals from public lands.
- **Reclamation Fund.** Fees should be assessed to fund remediation of abandoned hard rock mines.

* * *

With demand currently growing for some specialty minerals used in renewable-energy technologies, we see an especially ripe opportunity to strike a compromise to accomplish reform of the mining law that is long past due. We hope the working group, and ultimately Congress, will agree.

II. Absent congressional action, regulatory and policy reforms should focus on protecting public lands and the interests of Tribal Nations.

In the absence of congressional action to fundamentally reform the mining law, we're of the view that regulatory and administrative reforms intended to accelerate mineral development on the federal public domain are a recipe for perpetuating environmental injustices and needlessly damaging public lands. As a result, if the working group promotes or pursues regulatory and policy reforms that do not involve Congress, the Grand Canyon Trust's support for that agenda extends only to reform efforts that would alleviate harm caused by mining.

Specific proposals for reforms of that nature are set out in the rulemaking petition and comments that we, along with many other conservation groups and Tribal Nations, submitted to the Interior Department and U.S. Forest Service in August 2015, October 2018, and September 2021. Rather than repeat all those specific requests here, we'd like to stress only a few points.

A. The regulations governing temporary cessation of mining activities, or “standby,” should be revised.

One of the most serious regulatory gaps that exists today is the latitude allowed for placing mining operations into long-term standby. The Canyon Mine, whose 40-year tenure in the Kaibab National Forest is described above, is one example. Another uranium mine owned by Energy Fuels on the Grand Canyon’s North Rim, called Arizona 1, has a similar history.

The claims there were located in 1979.¹⁸ BLM approved a plan of operations in 1988, projecting that the mine would run for about 7–10 years.¹⁹ The claimant then began to develop the mine.²⁰ But, for the same reason that Canyon Mine was placed in standby in the early 1990s, so too was Arizona 1.²¹ About twenty years later, Energy Fuels, who had bought the mine in the interim, began mining at Arizona 1.²² In 2015, the company announced that it had “completed ore production” at the mine.²³ But instead of incurring the expense of reclamation, Energy Fuels put the mine back into standby.²⁴ And so it remains today.²⁵

While BLM has the authority to require Energy Fuels to begin reclamation,²⁶ the agency has not done so. Nor has it examined the validity of the Arizona 1 claims, which are on lands that have now been withdrawn from mineral entry, even though an 8-year period of “temporary” standby is a good sign that whatever uranium may be left at the mine (if there is any) cannot be “extracted, removed and marketed at a profit.”²⁷

In our view, this history reveals either that Energy Fuels is gaming BLM’s standby rules to avoid the expense of reclamation or that the rules are too lenient. Put simply, the government should not allow a mining firm to tie up public lands interminably by extracting paying quantities of a mineral once every 40 years.

We submitted a rulemaking petition to the Forest Service and BLM in 2015 offering a detailed proposal for addressing this problem, and we won’t repeat that

¹⁸ See Bureau of Land Management, Mineral & Land Records System, Claim Serial Nos. AZ101313115, AZ101514253, AZ101515690, AZ101400689, AZ101404232, AZ101425996.

¹⁹ Ltr. from G. William Lamb, District Manager, Arizona Strip District Office, Bureau of Land Management (May 9, 1988).

²⁰ See Roscoe Postle Associates, Inc., Technical Report on the Arizona Strip Uranium Project, 1-5 (June 27, 2012).

²¹ See *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1088 (9th Cir. 2013).

²² *Id.* at 1089.

²³ Energy Fuels, “Energy Fuels Announces 2014 Year-End Results” (Mar. 20, 2015) available at <https://www.energyfuels.com/news-releases?item=161>.

²⁴ *Id.*

²⁵ See Energy Fuels, Form 10-Q for the Quarterly Period Ending June 30, 2022 at 37 (Aug. 5, 2022).

²⁶ See 43 C.F.R. § 3809.424(a)(3).

²⁷ See *Coleman*, 390 U.S. at 599, 600–03.

proposal here, aside from stressing one key point. Forcing government staff to exercise discretion to require reclamation over the objection of a mining company, especially without detailed standards and guideposts to apply, puts civil servants in a difficult position. While there is an argument that agency staff need some discretion to handle the zombie-mine problem on a case-by-case basis, clear bookends on that discretion should be set by rule so that there is some enforceable outside limit on how long mining companies can tie up public lands without producing minerals.

B. Validity examinations should be required by rule for all mining operations on withdrawn lands.

The Bureau of Land Management, as a rule, does not examine the validity of mining claims in withdrawn areas if a plan of operations has been approved for the mine in question.²⁸ The Forest Service has asserted that it follows that approach as a matter of policy.²⁹ And yet, because neither agency typically examines claim validity when approving plans of operation, there is no logical reason to assume that claims are valid simply because a plan has been approved.

When the government makes that assumption, it is granting a windfall to the mining industry that does not square with the mining law's command that the privilege to mine arises only from discovery of a valuable mineral deposit.³⁰ This problem should be remedied by revising both agencies' regulations to require validity examinations for all mineral operations on withdrawn or segregated lands.

C. The Forest Service's plan-modification regulations disserve the public interest and should be improved.

The provisions in the Forest Service's mining regulations for plan modifications stand out to us as especially deficient in serving the public's interests. Those rules purport to allow the Forest Service to require plan changes only if a "significant disturbance of surface resources" was "unforeseen" when the plan was approved and only if the disturbance can be "minimized using reasonable means."³¹ Agency officials with the initial authority to approve a mining plan must ask their boss for permission to later change the plan, and that higher-ranking official may require a plan change only after "determin[ing]" whether the subordinate official took "all reasonable measures" to predict environmental impacts when the plan was approved.³²

That standard at least implies that the Forest Service can do nothing to curtail significant harm to our national forests that the agency foresaw or reasonably could

²⁸ 43 C.F.R. § 3809.100.

²⁹ See, e.g., *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1053–54 (D. Ariz. 2015) *rev'd in part by* 906 F.3d 1155 (9th Cir. 2018).

³⁰ 30 U.S.C. § 22.

³¹ 36 C.F.R. § 228.4(e).

³² *Id.*

have foreseen when approving a plan of operations. In a sense, this rule purports to estop the Forest Service from protecting our national forests solely on the grounds that it could have better protected our forests when it first approved the plan. We see that approach as an unprincipled and illogical basis for declining to require the mining industry via plan modifications to minimize harm to the national forests. And this is especially true when mining firms are allowed to take mines in and out of standby indefinitely, all while operating under decades-old plans. These regulations ought to be overhauled.

D. The Interior Department should adopt a regulation that reverses the agency’s current policy of disregarding “sunk costs” when applying the marketability test during validity examinations.

The Interior Department should adopt a regulation eliminating the rule developed by the Interior Board of Land Appeals that calls for all “sunk costs”—past mining expenditures that cannot be recouped—to be disregarded when determining claim validity.³³ Zeroing out “sunk costs” in validity examinations allows mining claims to be declared valid even when they are made on deposits that cannot be “extracted, removed and marketed at a profit,” contrary to Supreme Court precedent.³⁴ And assuring mining companies that these expenses won’t be counted encourages those companies to make speculative investments mining on public lands, needlessly tying up and damaging those lands.

While the U.S. Court of Appeals for the Ninth Circuit recently upheld the IBLA’s current treatment of “sunk costs,” the court was clear that the Interior Department retained authority to change that treatment: “We need not go so far,” the court said, “as to pronounce [Interior’s] approach to sunk costs required by the statute or correct as a matter of principle. ... We do not decide that any other approach would be arbitrary and capricious.”³⁵

The Department should harness that latitude and develop regulations ensuring that all mining costs are counted when determining whether a “valuable mineral deposit” has been discovered.

E. Serious consideration should be given to reversing judicial interpretations of the mining law that have stretched the law’s meaning to fit modern-day mining practices.

Last, we believe there is a strong case that the Interior Department should use its rulemaking authority to put meaning back into the mining law’s text where it has been gutted by the courts. Chief among those opportunities would be to reverse the counter-textual ruling in *Union Oil Co. v. Smith* allowing miners to locate claims and

³³ See *United States v. Mannix*, 50 IBLA 110, 119 (1980).

³⁴ See *Coleman*, 390 U.S. at 599, 600–03.

³⁵ *Grand Canyon Trust*, 26 F.4th at 827.

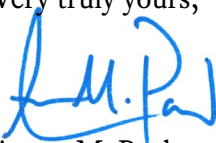
gain *pedis possessio* rights *before* discovering a valuable mineral deposit.³⁶ However expedient that outcome may be for the mining industry, it flatly contradicts the text that Congress adopted, which says: “[N]o location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.”³⁷

While we recognize that this change would be deeply disruptive for the mining industry, we submit that the simple act of enforcing the 150-year-old mining law as written would help the industry see that it is past time for legislative reform.

* * *

Thank you for the opportunity to comment on the working group’s agenda. We look forward to further engaging with you in the course of your work, and we look forward to the results.

Very truly yours,



Aaron M. Paul
Staff Attorney
Grand Canyon Trust

³⁶ 249 U.S. 337, 347 (1919) (“[I]t has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.”).

³⁷ 30 U.S.C. § 23.