Joint Comments on Hardrock Abandoned Mine Lands Issues

The Public Lands Foundation (PLF) and the National Association of Forest Service Retirees (NAFSR) are pleased to provide joint comments in response to the Request for Information to Inform Interagency Working Group on Mining Regulations, Laws, and Permitting as requested through the Federal Register at 87 FR 18811, March 31, 2022.[1]

Who We Are

The PLF is a national nonprofit membership organization that advocates and works for the retention of America's Public Lands in public hands, professionally and sustainably managed for responsible use and enjoyment by American citizens. The PLF endorses and embraces the multiple use mission of the U.S. Department of the Interior (DOI), Bureau of Land Management (BLM). Members are predominately retired BLM employees from across the United States.

The NAFSR is dedicated to sustaining the Forest Service mission and adapting to today's and tomorrow's challenges. The NAFSR represents Forest Service retirees who are dedicated to: sustaining the heritage of caring for the National Forests and Grasslands, partnering with the Forest Service, and helping understand and adapt to todays and tomorrow's challenges.

Background

Both the PLF and the NAFSR have members with extensive backgrounds in program management and field operations relevant to hardrock abandoned mine land (AML) remediation. Our member subject matter experts have come together to provide initial comments on questions posed by the Interagency Working Group (IWG) as related to the AML program. Many of the issues and challenges that our members helped to address during their careers remain relevant today, along with some additional challenges and opportunities.

Unlike the AML program established under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as administered by the Office of Surface Mining in partnership with State and Tribal agencies, there is no consolidated nationwide program to remediate hardrock AML sites. Instead, these AMLs fall within the scope of multiple Federal departments and agencies along with those of some State and Tribal agencies. Similarly, unlike the SMCRA-based program which

[1] The PLF previously submitted comments addressing present and future hardrock mining. See: comment l2d-ssc3-ol1p accepted on April 24, 2022.

relies on fees generated by coal mining, there is no single funding source to reclaim hardrock AML sites.

While the multiple agencies collaborate where they can, each has their own appropriations, priorities, policies and procedures, AML inventory database, staffing, and procurement processes. There have been a multitude of estimates made over the years about how many hardrock AMLs there are in the U.S. in terms of both the number of sites and individual features (e.g., types of physical safety and environmental hazards). Not all programs have the capability to inform the public on a nationwide basis where each mine site (or feature) stands in the inventory and remediation process.

Laws and Regulations

Most hardrock AML sites are remediated under agency-specific authorities, policies and procedures implementing either the National Environmental Policy Act (NEPA) for physical safety hazards, or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund) for environmental hazards. While there are no hardrock AML-specific reclamation/remediation standards, most programs have established guidance and recommended approaches and techniques. However, the question always rises concerning to what extent AML problems and features should be mitigated: i.e., is it better to clean up ten sites to 90 percent remediation, rather than one site to 100 percent remediation, if the last 10 percent of the one site costs ten times more?

Under CERCLA and the Clean Water Act, Federal agencies apply the "polluter pays" principle to the extent that it can identify potentially responsible parties (PRPs) who can pay for or assist in covering remediation costs. Some of these sites are owned by local governments by failure of owners in keeping up their property taxes. This is neither easy nor always cost effective given that many AML sites were owned and operated by small mining companies that are long gone and for whom the lands may have been split and divided among heirs over the many years since the mines were closed. It's an expensive proposition: agencies must decide how much of their funds they should invest in PRP searches versus applying those funds towards on-the-ground remediation. However, we recommend that the land management agencies should be authorized to perform PRP searches on mine sites of mixed federal-private lands and even completely private lands particularly if the site effluents impact federal lands or waterways. That way, the agencies can pursue PRPs for cleanup. If there are no extant PRPs, then the agencies should be authorized to clean up a site to protect the natural resources the agencies are responsible for managing. In addition, if there are no extant PRPs, the agencies should be authorized to cleanup a site with their AML funds. If federal funds are used to remediate sites on private land for the purpose of protecting public land resources, consideration should be given to transferring the involved land to federal ownership to protect the federal investment.

Scope of the Problem

The Government Accountability Office (GAO) reported in 2020 that at least 140,000 features have been identified by the Forest Service, Bureau of Land Management, National Park Service,

and U.S. Environmental Protection Agency. Of those, 67,000 pose or may pose physical safety hazards and about 22,500 pose or may pose environmental hazards. The GAO also reported that agency officials estimated there could be more than 390,000 AML hardrock features that have not been captured in their databases. Moreover, a combined expenditure of $287 million was spent annually by these agencies and the Office of Surface Mining to address AML hazards between fiscal years 2008 through 2017, with $1 billion being reimbursed by private parties. About 88 percent of expenditures were to address environmental hazards with the remaining spent on physical safety hazards. Environmental hazards cost far more to remediate, with some requiring long-term or even permanent treatment such as for water pollution.

In addition to traditional hardrock AMLs resulting from metals mining, abandoned uranium mines need to be factored into any discussion on funding and remediation. The U.S. Department of Energy's Defense-Related Uranium Mines (DRUM) program is a partnership between DOE, federal land management agencies, state abandoned mine lands (AML) programs, and tribal governments to verify and validate the condition of a unique set of abandoned uranium mines. These mines provided uranium ore to the U.S. Atomic Energy Commission (AEC) for defense-related activities.

It is important to recognize that land ownership is a major contributor to addressing hardrock AMLs, especially environmental hazards. This is because of the many mixed-ownership sites involved and because some hazards, such as water pollution, often traverse mixes of public and privately-owned lands.

State and Tribal Coordination

We trust that the IWG will reach out to include State and Tribal agencies in its deliberations. We highly recommend coordinating with the National Association of Abandoned Mine Land Programs (NAAMLP).

Specific Comments

The IWG posed two AML questions which we would like to address.

1. **How might the U.S. best support reclamation of existing AML sites including the development of meaningful good Samaritan proposals as well as remining and reprocessing of mine tailings and waste, where feasible?**

Successful hardrock AML programs need to be funded adequately to address the full suite of AML activity including filling data gaps in existing inventories, completion of required NEPA and CERCLA studies and processes, contracting and/or partnering with States and Tribes, project management, and future monitoring and maintenance obligations.

There are several possible funding mechanisms (or combinations) the IWG should consider. For example:

- Establishment of an abandoned mine reclamation fund for hardrock mines similar to that which exists for abandoned coal mines under the Surface Mine Control and Reclamation Act. Such legislation would provide an important source of funding to support the ongoing AML work of land management agencies. This would likely require a royalty or targeted fee on production.

- Appropriating the Hardrock AML program authorized in the Infrastructure Law ($5 billion), presumably from general Treasury revenues. The PLF and NAFSR support the appropriations of these authorized funds, recognizing that this would only be a start. Under provisions of the law, funds would be available to the Secretary of the Interior with provisions for grants to State and Tribal agencies, and to the Forest Service. In addition, the law provides for the Interior Secretary to take the lead in establishing a hardrock AML program, including an inventory.

- A portion of funds from filing and maintenance fees collected by the BLM through the Mining Law Program.

- Funding allocated for maintenance of Federal facilities. As hardrock mines are remediated, nearly all will require varying degrees of monitoring minesite facilities and features to ensure that the remedies applied remain in place. Some sites will require long-term funding to maintain water treatment facilities or to ensure fencing remains in place. As more sites are remediated, monitoring and maintenance costs of existing features diminish the funds available to undertake new reclamation projects.

Remining and Reprocessing of Mine Tailings and Waste

We generally support the authorization of remining and reprocessing operations at AML sites provided adequate financial assurances are in place in the event such operations were to fail and again place the burden of remediation back on the land management agencies and taxpayers. We recommend that the IWG survey the mining industry (e.g., the National Mining Association and state mining associations), State, and Tribal agencies to assess the overall viability of remining and reprocessing to contribute to reduce the number of hardrock AML sites.

Good Samaritan Legislation

We also support Good Samaritan legislation to facilitate interested and capable organizations who are willing to undertake hardrock AML remediation to do so. Again, adequate financial assurances are needed to address liability issues and scenarios where such projects are not completed in accordance with plans. We recommend that the IWG assess the extent to which such organizations have expressed interest in undertaking Good Samaritan projects to scale the probable contribution Good Samaritan legislation would make towards addressing hardrock AML problems.

Settlement Funds Involving National Forest System Lands
The Forest Service should advocate for new legislation to allow it to retain any interest earned on settlement funds received from actions such as claiming financial assurance for a mining project. While the Forest Service has authority to retain the proceeds of settlements for past and future costs pursuant to 16 USC 579c, any interest that the U.S. Treasury earns on the settlement amount is simply deposited into the General Treasury account as Miscellaneous Receipts. Therefore, the agency does not get the benefit of the full future costs of the settlement, because the agency does not get to keep and use the interest accumulated over time. As a result, this leads to a loss of future purchasing power based on a stagnant settlement fund that hampers full restoration efforts. The Department of Interior already has such investment authority.

2. What would a successful mine reclamation program include? Are there existing programs that the U.S. should adopt?

We recommend:

- **Comprehensive Study.** We recommend undertaking a comprehensive study to identify best practices among the multiple Federal, State, and Tribal AML programs. Such a study should include the full gamut of program funding, administration, applied science and technology, engineering, recruitment and retention of qualified subject matter experts, legal support, application of the "polluter pays" principle, and ability to report and document meaningful progress.

- **Inventories and Inventory Databases.** We maintain that the existing program agencies could be doing more to collaborate on developing and maintaining a more comprehensive hardrock AML inventory database. To the extent inventory work remains to be done, we support use of modern tools and technologies to gather and update data. We also urge that the data contained in these agency inventories be made available to the public with adequate controls to not encourage people to visit these sites. In addition, agency program performance reports should demonstrate measurable progress being made each year against inventories.

- **Reclamation Standards or Guidelines.** We recommend the IWG consider the need for consolidated reclamation guidelines for hardrock AML programs. However, there must be flexibility within such guidelines to allow the land management agencies, States, and Tribes to address local needs among the wide variation of site conditions and available resources. As an example, see the Office of Surface Mining's guidelines for AML reclamation programs and projects at 66 FR 31250, June 11, 2001.

- **Apply the "Polluter Pays" Principle.** At hardrock AML sites posing environmental hazards, agencies should continue to balance resources in making good faith efforts to apply the Polluter Pays principle where feasible. Given that many of these sites are quite old, agencies and their legal counsel need to weigh the costs of pursuing Potentially

Responsible Parties against the likelihood of success and overall remediation costs. The IWG may want to consider developing guidelines to help agencies and legal counsel in analyzing these situations and making these decisions.

- **Addressing Potential Future Mining Problems.** America does not need any more abandoned mines. While we are focusing primarily on the IWG's AML questions, there are several important factors that we urge the IWG to address that are often behind mine reclamation failures.

- **Acidic mine drainage (AMD).** AMD can take many years to appear and profoundly affects mine reclamation. Regulations must be enhanced to address this often-slow maturing problem. During the site characterization phase of a mine proposal, the groundwater, acid forming minerals, and potential AMD pathways must be thoroughly studied, which means, for example, that a one-off pump test (often without adequate observation wells) is wholly inadequate. We recommend that the mine plan review process include a thorough risk study like those performed by the U.S. Geological Survey in the upper Animas River, Colorado and Boulder, Montana watersheds.

- **Financial Assurance.** A key to avoiding future AML sites is to ensure adequate financial assurance for all current and new mining projects. A comprehensive monitoring program must be performed throughout the mining and post reclamation bonding period. If at any time there develops a threat to surface waters and groundwater, the regulatory agency must be prepared, and regulations must be adequate, to require measures to address the problem. Financial assurances must be adequate to fund treatment plants indefinitely in the event of AMD. Financial instruments must be secure and provide for release only by the regulatory agency, e.g., ~~self~~ bonding may not be viable for some mining projects. Ideally, the total amount of bonds should be released only when reclamation is complete. ~~No~~ partial bond release should be allowed as reclamation proceeds. This requirement will incentivize mining companies to complete reclamation in a timely manner, and, if a mining company defaults on reclamation, the agencies will have the funds to reclaim the site.

  The bond amount calculation should assume a government contractor will be needed to perform the reclamation and provide the government with adequate funding to complete reclamation in the event of default by the mining company.[2]

  It is recommended that financial assurance instruments be conditioned such that the entire amount of the bond be payable to the respective agency upon request. At the Zortman-Landusky Mine in Montana the bond was adequate for the reclamation work, but water treatment was not covered. Also, the surety bond was distributed in yearly increments which lost interest money for Montana and the BLM, complicating project

[2] This is because an emergency response may occur. For example, cases such as the Summitville mine in Colorado and the Pegasus Mine in Montana.

administration. Moreover, the surety filed for bankruptcy and the government had to step in. A onetime initial payout to the Montana Department of Environmental Quality would have mitigated this problem.

- **Permitting.** We recommend the IWG examine the extent to which additional safeguards for hardrock mine permitting are needed. For example, consider a provision (similar to that provided for in SMCRA) to authorize regulatory agencies to withhold a permit from any applicant who either directly, indirectly or through a relationship of ownership or control is in violation of the Mining Law or other environmental laws and regulations. Such a provision will assist permitting agencies to address problems where mining companies set up subsidiaries or other arrangements to ultimately avoid reclamation costs.[3]

The PLF and NAFSR appreciate this opportunity to provide input and recommendations for consideration by the IWG. We stand ready to offer the IWG with further input and assistance based on our years of experience implementing hardrock AML remediation programs.

[3] See 30 CFR Part 773.