The 1872 Mining Law: Reforming a Dinosaur

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By Glenn R. Phillips

In a rapidly changing world, we as natural resource managers need to be progressive, adaptive—willing to tailor our mode of operation to fit the changes that are continuously occurring in our modern society. Indeed, the agencies that many of us work for and even our professional Society have undertaken planning processes to help us respond in an organized fashion to the ever-changing needs and desires of our constituencies.

Theoretically, the same holds true in the U.S. Congress: new laws are crafted to deal with newly emerging issues and old laws are amended and refined to better address today's problems. Recent and ongoing improvements to the Clean Air and Clean Water Acts are examples of this process. However, there is at least one piece of legislation that we have failed to modernize: the 1872 Mining Law. According to former Secretary of the Interior Stewart Udall, "The most important piece of unfinished business on the nation's resource agenda is the complete replacement of the Mining Law of 1872."

I recently spent an evening paging through my daughter's history book to try and put the setting of this antiquated legislation in perspective. When Congress passed the 1872 Mining Law the West was just beginning to be settled under the 1862 Homestead Act, the Civil War had recently ended (1865), Ulysses S. Grant was president, and the population of the United States was 35 million. If you were a miner you could file your claim using a typewriter (invented in 1868), but you would have to work by candlelight because Thomas Edison had not yet invented the light bulb (1879). You could travel to the West using the recently completed transcontinental railroad (1869), but you would have to wait over 35 years to buy one of Henry Ford's Model T's. Taming the wilderness and putting the land to use were national priorities. Few envisioned that society would some day worry about protecting wild lands and fishery resources.

So what exactly is this 1872 Mining Law? The law provides that miners can purchase mining claims on public (federal) lands at a price of only $2.50 per acre for placer claims (which are usually located in stream bottoms) and $5.00 per acre for lode claims. Purchase prices have not changed since the law's inception. Where mining claims occur, mineral development, under the 1872 Mining Law, is considered the best and most appropriate use of the land.

According to Senator Dale Bumpers of Alabama, "During the past 118 years, the government has sold 3.2 million acres of land, ... an area the size of the state of Connecticut. From 1989 through 1990, the Bureau of Land Management issued 657 patents, for a total of 4,752 claims covering approximately 179,915 acres ...." More recently, Phil Hocker of the Mineral Policy Center estimates that greater than 20 million acres of federal lands have been sold.

Not only are these lands continuing to be sold at ridiculously low prices, but there is no guarantee they will be used for legitimate mineral development. There are numerous examples of patented land (federal land sold to private citizens) being developed for recreational purposes, or even worse, sold at a large profit. One western Montana miner is capitalizing on his patented placer claim (purchased at $2.50 per acre) by selling summer home sites along a trout stream; others are maintaining claim sites as private hunting camps in prime elk country. In Oregon, a portion of the Oregon Dunes Recreational Area was successfully patented for a total price of $1,950. The new owners are now trying to trade or sell the property back to the Forest Service and Bureau of Land Management (BLM) at an asking price of $12 million. A recent GAO report (1989) lists values of lands given away for the going patented price at $200 to $200,000 per acre.

To appreciate the extent of patented mining claims on federal properties, look at virtually any map of national forest or BLM land in the western United States and note the numerous private inholdings—many along streams. If the inholdings are irregularly shaped, it is a good bet they are patented mining claims. Even the national park system has over 2,000 patented inholdings. Yet federal land managers presently have no discretion to weigh other resource values, such as stream fisheries, against the value of the proposed mining operation or the minerals that will be extracted.

Another troublesome aspect of the 1872 Mining Law is that the government receives no payments or royalties for hard rock mineral extractions. Oil, gas, and coal developers presently pay federal royalties. Royalties could be used to begin reclaiming the thousands of miles of streams that have been torn up by placer mining or continue to be polluted from acid mine drainage. According to the U.S. Bureau of Mines, there are roughly 12,000 miles of streams where water has been contaminated by past mining activities, and this figure does not include streams where the surrounding habitat has been destroyed by placer mining.

Why has reform not been enacted to date? Primarily for two reasons: first,

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the mining industry has been successful at fending off reform, and second, most Americans are not aware of the degradation that has occurred—much of it to streams that once supported valuable fisheries. President Carter's administration unsuccessfully attempted to reform the law while President Reagan's openly opposed reform. Opponents of reform argue that other laws are already equipped to handle the problems associated with the mining industry. However, anyone familiar with Forest Service and BLM mining regulations and their administration knows that there are numerous examples of miners, particularly small miners, not being held accountable for damage to streams and other public resources. Similarly, at least in Montana, state regulatory agencies are not effectively preventing small placer miners from digging up miles of stream bottom. Realistic stream reclamation costs are not included in the cost of conducting a mining operation and some small miners—under 5 acres in Montana—are not required to perform reclamation. Reform in mining law must include strict reclamation and bonding standards for placer miners, ensuring that the cost of reclamation is factored into the cost of doing business and that damaged fishery habitat is fully restored.

New legislation (H.R. 2614) proposed by Congressman Peter DeFazio (D-OR) would retain the self-initiated claim system of the 1872 law but would remove patenting. Other important provisions of this bill include: (1) miners would be required to pay a 5% royalty on gross income from mineral production, resulting in an estimated $200 million that could be used in part to begin reclaiming streams that are polluted or degraded due to mining; (2) miners would be required to pay a holding fee, beginning at $5 per acre and doubling every 5 years up to $20 per acre—the claim would expire at the end of 20 years if development had not occurred or annually if the fees were not paid; (3) residential occupancy on mining claims would be prohibited; (4) reclamation and bonding would be required on all mining claims at a level that would restore the land to the same productive uses that existed prior to mining; (5) federal land use agencies would be required to promulgate strict reclamation standards and would be given discretion to weigh proposed mining activities against other resource values and, if necessary, to deny mining; and (6) miners would be subject to civil and criminal penalties for violations of the Act, and there are also provisions for citizen lawsuits.

The American Fisheries Society has already been active in the movement to reform the 1872 Mining Law. In June 1991, AFS and the Mineral Policy Center jointly supported portions of H.R. 918 (submitted by Congressman Nick Rahall D-WV) and H.R. 2614 (submitted by Congressman DeFazio) by submitting testimony to a committee of the U.S. House of Representatives supporting reform of the 1872 Mining Law. AFS also made specific recommendations for improving both of these bills to better protect streams and other resources affected by mining. In July 1991, AFS Executive Director Paul Brouha cosigned a letter with leaders of 23 other conservation organizations supporting a moratorium on patenting (the measure failed in the Senate by a margin of one vote).

Mining law reform deserves continued shepherding and support by the American Fisheries Society. Chapters and other subunits of the Society can help by providing their congressional representatives with specific information on streams affected by mining in their region. You can also register support for 1872 Mining Law reform by writing Congressman Rahall. Let's stop fishery habitat degradation caused by mining now!