



American Exploration &
Mining Association
EST. 1895

16201 E. Indiana Ave., Suite 3280
Spokane Valley, WA 99216
(509)624-1158 - www.miningamerica.org

September 27, 2023

Marla Koberstein
WA Department of Ecology
PO Box 47696
Olympia, WA 98504-7696

Dear Ms. Koberstein:

Thank you for the opportunity to comment on the Department of Ecology's proposal to designate four water bodies in Washington as Tier III(A) or Tier III(B) outstanding resource waters (ORWs). The American Exploration & Mining Association opposes these designations and believes they should be withdrawn or at the very least, changed significantly. We are primarily concerned with the proposal as it concerns portions of the Green River watershed in Skamania County.

Who We Are

The American Exploration & Mining Association (AEMA) is a 128-year-old, 1,400-member national trade association representing the hardrock minerals industry with members residing in 46 U.S. states, 7 Canadian provinces or territories and ten other countries. We were founded in 1895 in Spokane, and are proudly headquartered in Washington still today. AEMA is the recognized national voice for mineral exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. More than 80 percent of our members are small businesses or individuals who work for small businesses.

Minerals for the Energy Transition

Our members take great pride in producing the minerals America needs for infrastructure, and national and economic security, as well as the items people use every day. The U.S. mining industry is the safest, most environmentally responsible mining industry in the world. Mining and environmental protection are compatible, and mineral products make possible both the development of our society and the mitigation of modern society's impacts on the environment.

American miners continue to play an indispensable role in building and defending our Nation. From foundations to roofs, power plants to wind farms, roads and bridges to communication grids and data storage centers, America's infrastructure begins and ends with minerals and mining. As just one example, steel resulting from mining operations directly supplies the construction and development of roads, railways, appliances, buildings, stadiums, bridges, airports, conventional and renewable energy facilities, and other structures. Steel is used to reinforce concrete and other construction materials and 6 billion tons of steel are used across the U.S. National Highway System. Steel requires iron ore for its production, and sixty-five percent of the global zinc consumption is used to coat steel, for purposes of making it resistant to corrosion. Other metals that are important to steel alloys, including manganese, chromium, nickel, aluminum, vanadium, tungsten, titanium, cobalt, and niobium, are specifically identified on the U.S. Geological Survey's (USGS') final 2022 list of critical minerals.¹

Another example is copper, with its flexibility, conformity, conductivity, and resistance to corrosion, that make it an ideal and essential clean energy metal.² Forty-three percent of U.S. copper demand comes from the construction industry, as the average American home contains 439 pounds of copper. An electric vehicle (EV) uses approximately four times as much copper as a conventional car. Infrastructure improvement and development at all levels depends on metals and mining. As the Washington State Ferry system moves toward hybrid-electric conversion to reduce its carbon footprint, the electric motors, battery sets, and charging terminals for each boat will include massive amounts of copper.

There is no question that the minerals we produce are indispensable to modern society. They are essential to fighting climate change, and for zero-emission technologies such as wind turbines, solar panels, storage batteries and electric vehicles (EVs). As these technologies are deployed in ever-greater numbers, the demand for minerals is skyrocketing, and our Nation must do more to keep up. The International Energy Agency (IEA) published a report at the end of July 2022 titled "Global Supply Chains of EV Batteries," and noted that demand for EV batteries will increase from 340 GWh today to about 3500 GWh by the year 2030. To meet that demand, 50 new lithium mines, 60 more nickel mines and 17 more cobalt mines would need to come into production.³ As staggering as those demands are, an August 2023 report by S&P Global calculates that demand for copper in the energy transition outpaces demand for lithium, nickel and cobalt – combined – by a ratio of 2 to 1.⁴ The amount of copper needed to electrify the world and hit net-zero emission goals will be astounding.

In order to deliver, the mining industry needs access to mineral deposits. The challenge of finding and developing mineral resources in the United States, or anywhere in the world, is very

¹ <https://www.federalregister.gov/documents/2022/02/24/2022-04027/2022-final-list-of-critical-minerals>

² According to the World Bank, copper is used in ten low-carbon energy technologies. <https://pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf>

³ <https://iea.blob.core.windows.net/assets/4eb8c252-76b1-4710-8f5e-867e751c8dda/GlobalSupplyChainsofEVBatteries.pdf>

⁴ <https://cdn.ihsmarkit.com/www/prot/pdf/0823/Impact-IRA-Metals-Minerals-Report-FINAL-August2023.pdf>

difficult because mineral deposits are geologically rare and hard to discover. Exploration and mining projects must undergo multiple lengthy stages of development. First, there is the initial identification of deposits that hold potentially developable mineral reserves. To this point, the United States has only explored and mapped the mineral potential on approximately 12 percent of the country's lands. The USGS estimates that it would take more than 10 years just to find and map all domestic resources, using modern technologies, with at least another 7-10 years to get those resources to market.

We include all that to underscore how difficult it is, and how it should not be dismissed lightly, when a resource like the copper discovery near Goat Mountain is found. Designation of the proposed stretch of the Green River as an Outstanding Resource Water will greatly impair the development of any mineral project near Goat Mountain by setting water quality standards at a deliberately unattainable level, so as to preclude any reasonable development.

It is important to understand that there is no guarantee that a mineral deposit, when discovered, will become a mine. Any mineral project, whether at the exploration phase or after economic feasibility is determined, has to navigate a thorough and transparent permitting process, in which the public is involved. A potential project situated like the one in question, on federal land, would need to undergo the National Environmental Protection Act (NEPA) process, and in fact, already has. Permits would likely be necessary under the CWA, the Clean Air Act (CAA), possibly the Safe Drinking Water Act, and consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act might be required if any threatened or endangered species are identified in the hypothetical project area. Without even discussing the full list of federal permits and laws governing compliance for mine projects, we already see several federal agencies that would likely be involved, and we have not even begun to discuss tribal, state and local governments that might be entitled or interested to participate in the permitting process. Permitting any mine is incredibly complex.

Due to the scrutiny that goes into the permitting process, however, (and that scrutiny remains in order to continue operating under those permits) no mines permitted since 1990 have been added to EPA's National Priorities List (also known as the Superfund list). That is a record the of which hardrock mining industry is proud.

If the standard is that no change in water quality is allowed in an ORW, taken to its logical extreme this could mean that development activities could be precluded practically anywhere upstream or alongside the designated ORW. This could in turn lead to severe restrictions or even preclusion of the important projects our members represent if even microscopic changes in water quality could be detected. Paired with the upstream effect, an ORW designation could prohibit potential development in an entire watershed. This could be a devastating economic blow to counties that already struggle to cope with heavy federal ownership of land, thereby shrinking the base of taxable land within the county borders. These challenges are why many other states have been very cautious in using ORW designations; yet the proposal will undeniably open the

door to more ORW designations. The project sponsors who nominated are not shy about their intentions to nominate more waterways when this round is done.⁵

The question then, is not whether mining is currently allowed on the lands that would be drawn into this ORW proposal. It most certainly is, and that appears to be the point. Project sponsors are clear about the goal of preventing development within an ORW boundary.⁶ However, the proposed ORW designation will deprive property holders of their rights through a Fifth Amendment taking, as explained below.

Fifth Amendment Considerations Are Lacking

The General Mining Law states as follows:

That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Mining Law of 1872 § 1, 17 Stat. 91 (codified at 30 U.S.C. § 22) (“Section 22”). Section 22 provides a “free and open” invitation to all U.S. citizens (and those who intend to become U.S. citizens) to enter federal lands to explore for and produce minerals, and engage in activities reasonably incident to mining. This statutory grant allows the attainment of property rights to be self-executing and creates a right of self-initiation for U.S. citizens to enter, occupy and acquire privately owned interests in the public domain. Property interests acquired under this law include the right to explore, possess, profit from and exercise mineral and mineral-related surface rights, and these property interests in federal lands evolve incrementally through the entry, location and maintenance process. Certain rights and protections are acquired early, before the unpatented claim is even documented in the public records, and before the discovery of any valuable mineral deposit.⁷ From their initial location, unpatented mining claim rights are considered “real property

⁵ “Yet only a very small portion of those waterways are protected from threats... Increasing that percentage can happen in several ways. The most common tool is to designate waterways under the federal Wild and Scenic Rivers Act, which currently covers less than 1% of river miles in the country. A less widely known, but also effective, tool is for states and tribes to designate Outstanding National Resource Waters (ONRWs).”

<https://www.pewtrusts.org/en/research-and-analysis/articles/2021/05/04/more-us-rivers-deserve-outstanding-designation>

⁶ *Id.*

⁷ *See, e.g., Earthworks v. United States DOI*, 496 F. Supp. 3d 472, 479, 491–92 (D.D.C. 2020) (specifically recognizing pre-discovery rights vested in unpatented mining claim owners, including exploration rights and *pedis possessio* rights, as well as their protections); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Creede & Cripple Creek Mining Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) (“[I]t is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location”); *see also Union Oil Co. of Cal. v. Smith*, 249 U.S. 337 (1919) (“[T]he order of time in which these acts [discovery, marking and recording a claim] occur is not essential in the acquisition from the United States of the exclusive right of possession”); *Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964) (“[O]ccupation and working of the claim . . . gives the locator a limited defendable right of possession”).

in the fullest sense” enforceable by law.⁸ As such, Constitutional protections extend “to every sort of interest the citizen may possess.”⁹

The Fifth Amendment prohibits governmental “takings” of private property for public use without “just compensation.”¹⁰ A taking occurs if there is: (1) an “actual” taking (*i.e.*, the government physically (or legislatively) confiscates or occupies property)¹¹; or (2) a “regulatory” taking (*i.e.*, government action, by legislation or regulation deprives the owner of economically reasonable use of the property).¹² Whenever the government’s action constitutes a taking, it is required to pay the property owner “just compensation” (*i.e.*, fair market value).¹³

In the context of an “actual” taking, any seizure from the bundle of privately held rights is considered a categorical or *per se* taking, requiring appropriate compensation.¹⁴ This means the constitutional protection is triggered whether the government takes or limits only a portion of the privately held interests, or takes the entirety of rights held by the private party.¹⁵ This point has

⁸ *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930) (holding the perfected location of mining claim “is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States”); *Best*, 371 U.S. at 335–36; *Shumway*, 199 F.3d at 1100 & n.26 (defining a mining claim as “real property in every sense, and not merely an assertion of a right to property” and citing *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892)); *Independence Min. Co. v. Babbitt*, 885 F. Supp. 1356, 1366 (D. Nev. 1995) (citing *Swanson v. Babbitt*, 3 F.3d 1348, 1350 (9th Cir. 1993)); see also *Saltzman v. United States*, No. 13-1014L, 2014 WL 4050181 at *3 (Fed. Cl. Aug. 15, 2014) (finding plaintiff alleged valid property interests in an unpatented mining claim); see also *Belk v. Meagher*, 104 U.S. 279, 283 (1881) (“There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States.”).

⁹ *Freese v. United States*, 639 F.2d 754, 757 n.3 (Ct. Cl. 1981) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

¹⁰ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹¹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

¹² *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹³ *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 319 (1987); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510–12 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893); see also *Freese*, 226 Ct. Cl. at 255–56 ([G]overnmental seizure of private property for public use -- is unconstitutional unless followed by payment . . . of the fair market value of what was taken” and holding that “federal mining claims are ‘private property’ enjoying the protection of the fifth amendment.” (quotation marks omitted, citation omitted)).

¹⁴ See, e.g., *Vulcan Materials Company v. City of Tehuacana*, 369 F.3d 882, 888–89 & n.5 (5th Cir. 2004) (discussing a “partial taking” (where the government action triggers the Fifth Amendment in destroying or taking one or more strands from the bundle of sticks)).

¹⁵ *Id.*; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *United States v. Causby*, 328 U.S. 256, 262 (1946) (government use of airspace above property adjacent to its runways constituted a taking in the form of an easement which triggers the Fifth Amendment “as directly and completely as if it were used for the runways themselves”); *Jacobs v. United States*, 290 U.S. 13 (1933); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991); *Florida Rock Indus. v. U.S.*, 18 F.3d 1560, 1568 (Fed. Cir. 1994) (“Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner’s remaining property interests.” (emphasis omitted)); *Freese*, 226 Ct. Cl. at 256 n. 3 (noting that the

been emphasized by the United States Supreme Court as recently as 2021, when it struck down a California access regulation that limited the rights of farm owners to exclude others from their property.¹⁶ “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”¹⁷

Courts have consistently held that appropriations of patented mining claim interests constitute an “actual taking” under the Fifth Amendment.¹⁸ As Ecology determines whether to proceed with this rulemaking, Fifth Amendment considerations should be front of mind. More than a century of caselaw has upheld the Fifth Amendment rights of property holders, including mining claims such as those near Goat Mountain.

Unfortunately, the Preliminary Regulatory Analyses conducted by Ecology do not seem to even ponder the Fifth Amendment implications of the Proposed Rule. Such considerations are likely routine for transportation or other government agency projects where rights-of-way or other parcels must be acquired in order to complete the project, or where a proposed law or regulation may diminish the economic value of privately held property. Any such analysis is conspicuously absent here. The costs to the state of proceeding without adequate contemplation of this point could be substantial.

Miners are Good Neighbors

Because mineral projects require a skilled and educated workforce and project labor agreements with local unions are not uncommon, mining jobs typically pay well above the average wage for the communities in which they are located. Even those skilled, certificated workers without bachelor’s or graduate degrees typically earn six-figure incomes as mine employees.

By their very definition, mineral projects create wealth, and most mines purchase and contract for goods and services as much as possible in their local communities. These dollars circulate through the community many times over. Mine employees around the country have been known

Constitutional protection extends to “every sort of interest the citizen may possess” (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

¹⁶ *Cedar Point Nursery v. Hassid*, 594 U.S. ____, 141 S. Ct. 2063, 2021 U.S. Lexis 3394 at *24 (2021) (Even when “the government’s intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold ... [W]e recognize a physical taking all the same.”); see also *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

¹⁷ *Tahoe-Sierra Pres. Council*, 535 U.S. at 322 (“[C]ompensation is mandated when [even] a leasehold is taken ...”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); *United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (“[T]he government cannot reserve its own land from an unpatented mining claim without paying the owner the value of the claim, because an unpatented mining claim is property.”); *Freese*, 226 Ct. Cl. at 256.

¹⁸ See, e.g., *Horne v. Dep’t of Agriculture*, 576 U.S. 350, 357–358 (2015); *Ark. Game and Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.” (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302, 322 (2002)); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 529–31 (1906); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982); *Shumway*, 199 F.3d at 1103.

to donate their time, talents and skills as coaches or volunteer bus mechanics for the local school district, to name just a few examples.

A region dependent on one economy is more vulnerable to disruption during downturns, and a more broad-based economy is more resilient. This is a basic fact of economics and economic development.

Skamania County is highly dependent on tourism and a recreation economy, both of which suffered heavily during the COVID-19 pandemic. In contrast, mining was declared an essential industry during that time, and with effective worker protections, most mines in the United States were able to continue operating. The stable paychecks and ongoing purchases from local vendors provided a great deal of economic stability to the rural communities where most mines operate in a time of great upheaval and uncertainty.

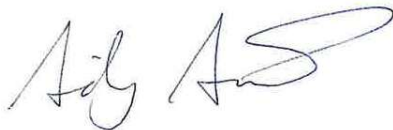
During the pandemic many of our member companies understood that their obligations to their communities went far beyond simply providing an economic boost, as they found opportunities to donate much-needed supplies like masks and other PPE gear.

Conclusion

There can be no question that clean air, clean water and a robust recreation economy are important to all in Washington. They are important to us at AEMA as well. Our members live in the communities in which they operate, and opportunities to pedal, hike, fish, and paddle are things we value as well. But those activities can be pursued in tandem with a healthy economy supported by mining. As we noted at the beginning, mining and environmental protection are compatible. We take great pride in the strides our industry has made to improve its environmental performance over the last 50 years, and in the products we provide to make it possible for nearly all of us to enjoy nature. As we often say, "If it can't be grown, it has to be mined."

Unfortunately, Ecology's Proposed Rule fails to fully consider the ramifications of such a restrictive designation, and looks to place all of the local economy's eggs in the recreation basket. It will close the door for reasonable development, simultaneously opening the state to litigation due to Fifth Amendment takings. We urge you to significantly change or withdraw the proposal. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Sidney C. Smith". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Sidney C. Smith
Government Affairs Manager