

**House Natural Resources Committee**  
**Subcommittee on Energy and Mineral Resources**  
**July 27, 2021**

**Testimony of Samuel N. Penney, Chairman**  
**Nez Perce Tribal Executive Committee**

Good morning. My name is Sam Penney. I am a member of the Nez Perce Tribe and serve as Chairman of the Nez Perce Tribal Executive Committee, the nine-member governing body of the Nez Perce Tribe. I would like to thank Chairman Lowenthal for the invitation to testify on the General Mining Law of 1872 (“1872 Mining Act”) and its profound impacts on the Nez Perce Tribe’s treaty-reserved rights and also how the Act affects the trust relationship between the United States and sovereign tribal nations. The 1872 Mining Act was intended to promote mineral exploration and development of the western United States during the latter half of the nineteenth century. During the last 150 years, the American West, and the United States’ unique relationship with sovereign tribal nations, have changed dramatically but the 1872 Mining Act has not.

The Nez Perce Tribe believes a cultural and legal shift around mining in this country is needed. Mining should no longer be presumed to be the “highest and best use” of our federal public lands—it should no longer enjoy priority status. Mining exploration and mines should not be allowed to displace other recreation, resource, and spiritual values and legal rights on federal public land. The urgent need for both statutory and regulatory form on this issue is exemplified through current and historical mining activities on the ceded and reservation lands of the Nez Perce people, or in our language the *Nimiipuu*. For this reason, the Nez Perce Tribe supports Chair Grijalva’s efforts to provide thoughtful and needed reforms to the 1872 Mining Act that reflect and honor the United States’ unique relationship with, and treaty and trust obligations to, Indian tribes and his efforts to improve government-to-government consultation with tribes.

Nez Perce Treaty of 1855

Since time immemorial, the *Nimiipuu* have occupied a geographic area encompassing a large part of what is today Idaho, Oregon, and Washington. The territory exclusively occupied by the Nez Perce—over 13 million acres—stretched from the Bitterroot Mountains on the east, to the Blue Mountains of northeastern Oregon and southeast Washington on the west. The Nez Perce also traveled far beyond their exclusive homeland to fish, hunt, gather, and pasture—frequently going east to buffalo county, in what is today the state of Montana, and west along the Snake and Columbia rivers to the Pacific Ocean.

Nez Perce Tribal citizens actively maintain their connection to the land, water, and resources of this vast geography. Seasonal rounds and migration patterns for cultural and subsistence uses are carefully coordinated to take full advantage of the once abundant fish, wildlife, and available root

crops. These annual cycles correspond not only to the resource needs of the Nez Perce and the seasonal availability of their resources but also to the ceremonial activities and social gatherings that occur throughout the year. The Nez Perce's intimate knowledge and continuous use of their homeland over millennia has created a unique and reverential bond between people and place that defines Nez Perce culture and identity.

In order to protect its people, culture, and way of life, the Nez Perce Tribe entered into a treaty with the United States government in 1855. *See* Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 ("1855 Treaty"). The 1855 Treaty reserved to the Nez Perce Tribe, for its "exclusive use and benefit," 7.5 million acres of its more than 13-million-acre homeland, including an area spanning present-day north-central Idaho, southeast Washington, and northeast Oregon. The 1855 Treaty also reserved to the Tribe certain rights central to maintaining its culture and way of life, including: the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. 1855 Treaty, art. 3. Nez Perce Tribal citizens now exercise these Treaty rights on and off reservation, including on federal public lands, which remain aboriginal lands. These lands continue to support sacred indigenous landscapes and resources and indigenous identity and culture. Tribal citizens rely on federal public lands for subsistence, cultural, spiritual, and economic purposes that long predate federal land management statutes and regulations instituted in the nineteenth and twentieth centuries.

### Mining History in Nez Perce Country

The Nez Perce Tribe's 1855 Treaty was quickly followed, however, by the discovery of gold within the Tribe's reservation boundaries in 1860, and by the rapid influx of miners onto the Tribe's newly established reservation. These scofflaw miners disregarded instructions to vacate the land, and the Nez Perce Tribe's reservation was quickly and illegally overrun. The United States government responded by seeking a controversial new treaty with the Tribe—one that would reduce the size of the Tribe's reservation and, it hoped, reduce conflicts between the Tribe and mining prospectors. Those negotiations with a small portion of the Nez Perce Tribal leadership at that time culminated in another treaty in 1863. *See* Treaty with the Nez Perces, June 9, 1863, 14 Stat. 647 ("1863 Treaty"). With the 1863 Treaty, the Nez Perce Tribe were forced to cede to the United States approximately 90 percent of the lands it had reserved in the 1855 Treaty while preserving its rights to hunt, fish, gather, and pasture on open and unclaimed land off-reservation, within its homeland. In 1877, When Chief Joseph and hundreds of other Nez Perce protested the 1863 Treaty, often referred to as the "Steal Treaty," war erupted between the Nez Perce and the United States. Over 200 Nez Perce men, women, and children died or were wounded in the ensuing military campaign that forced Chief Joseph and the Nez Perce from their homeland and on a 1,170-mile exodus through four states over the Bitterroot Mountains to Montana.

## Mining History of the Stibnite Site

Beginning early in the twentieth century, miners again arrived in the Nez Perce Tribe's homeland to seek their fortunes—this time along the East Fork of the South Fork (EFSF) Salmon River in Idaho and an area in its headwaters they would name the Stibnite Mining District, after the mineral stibnite. The Stibnite site, located on the Payette and Boise National Forests, is within the area adjudicated by the Indian Claims Commission in 1967 to have been exclusively used and occupied by the Tribe, and over which the Tribe has Treaty-reserved rights and resources.

Since then, miners and mining companies have come and gone from the Stibnite Mining District, extracting almost one million ounces of gold and over two million ounces of silver, along with tungsten and antimony. What they have left is a legacy of mining pits, tailings piles, and other heavily disturbed sites that continue to discharge harmful pollutants into the headwaters of the EFSF Salmon River and block fish passage.

## Nez Perce Tribe's Interest in the Stibnite Site

Nez Perce Tribal citizens, pursuant to the Nez Perce Tribe's Treaty-reserved rights, continue to fish, hunt, gather, and pasture across the Tribe's vast aboriginal homeland and at traditional places, including areas within and surrounding the Stibnite Mining District and in waters directly downstream. The Payette National Forest provides irreplaceable habitat for the Nez Perce Tribe's Treaty-reserved fish, wildlife, plants, and resources, including: spring/summer Chinook salmon, steelhead, bull trout, west slope cutthroat trout, redband rainbow trout, mountain whitefish, western pearlshell mussel, Rocky Mountain bighorn sheep, North American wolverine, fisher, gray wolf, elk, mule deer, moose, white-tailed deer, Clark's nutcracker, whitebark pine, limber pine, bent-flower milkvetch, Sacajawea's bitterroot, Idaho Douglasia, huckleberries, serviceberry, elk thistle, yarrow, wild onion, wild tobacco, Indian hemp, tule, elderberry, chokecherry, Indian tea, Oregon grape, thimbleberry, alder, birch, and kowskows.

Regrettably, some of the resources sacred to the Nez Perce Tribe are at risk of disappearing in the Payette National Forest. The Nez Perce Tribe is especially concerned about the decline of Snake River spring/summer Chinook salmon, Snake River steelhead, and bull trout, each of which is listed as "threatened" under the Endangered Species Act ("ESA") due to population declines, habitat loss, and the risk of extinction. The Nez Perce Tribe has worked to recover these species in the South Fork Salmon River watershed, including in the EFSF Salmon River. The Nez Perce Tribe's Department of Fisheries Resources Management, one of the largest tribal fish management departments in the nation, works extensively throughout the South Fork Salmon River watershed, expending approximately \$2.79 million annually on fisheries supplementation, research, and watershed restoration work, as part of the broader Columbia River Basin salmon restoration efforts. While the Nez Perce Tribe's fish restoration efforts are important, substantial federal

resources and funds are needed to address the legacy of toxic waste left by past mining activities. Without such a federal commitment of resources and time, the Stibnite site will be vulnerable to future activities that cause further harm and deterioration to an area vital to the culture and livelihood of the Nez Perce Tribe. Indian tribes and the American public should not be forced to rely on mining interests' promises to "restore" legacy mines only if those mining interests are allowed to re-mine those areas.

### Perpetua Resources' Proposed Stibnite Mining Project

Perpetua Resources (formerly Midas Gold) is the latest mining company seeking its fortune in the Stibnite Mining District. Over the last decade, Perpetua Resources has planned and proposed the construction of a massive gold mine, the Stibnite Gold Project ("Mine"), on Payette and Boise National Forest lands within the Stibnite Mining District. The Mine, one of the largest in the nation, would create three open mining pits and produce hundreds of millions of tons of additional mine waste and tailings that will endure in perpetuity and almost certainly require wastewater treatment long after Perpetua Resources has finished mining the site.

The Mine is not limited to re-disturbing the current Mine site. Only 40 percent of Perpetua Resources' Mine will cover previously disturbed ground, while 60 percent of the Mine (or 800 acres) will cover currently undisturbed habitat. On top of these long-lasting adverse impacts at the Stibnite site, the Mine threatens much larger ecological disruption and degradation. Access to the remote Stibnite site is difficult even in summer, and Perpetua Resources has responded to heavy criticism of its earlier plan to use the EFSF Salmon River Road—a dirt road that runs through Yellow Pine—because of the high risks of adverse impacts to ESA-listed salmon, steelhead, and bull trout there. Perpetua Resources' September 2016 Plan of Restoration and Operations thus proposed to construct an all-season access road—the "Burntlog Road"—from Warm Lake through three Inventoried Roadless Areas and along a high ridge forming the boundary of the Frank Church-River of No Return Wilderness to reach the Mine site. Perpetua Resources also proposes to construct an upgraded electric transmission line corridor in a different area in order to provide year-round electrical power at the site. These new industrial infrastructure developments pose significant ecological threats and greatly increase the risk of landslides and other mass wasting failures into the South Fork Salmon River and other fish-bearing streams with salmon, steelhead, and bull trout.

### Forest Service's environmental review of the Mine

In 2020, the United States Forest Service ("Forest Service") released, pursuant to the National Environmental Policy Act, its Draft Environmental Impact Statement for the Mine. In that document, the Forest Service's analysis concluded that the Mine would harm the Nez Perce Tribe's Treaty rights and resources under all action alternatives. Specifically, the Forest Service

determined that Tribal access to areas would be restricted during the Mine's construction, operation, and closure and reclamation phases, preventing Nez Perce Tribal citizens from exercising off-reservation Treaty rights to fish, hunt, gather, and pasture, for a period of 20 years. The Mine would also impact salmon and other aquatic species and essential fish habitat that would in turn impact availability and harvestability of these resources by the Nez Perce Tribe at its traditional fishing, hunting, and gathering areas.

The Nez Perce Tribe has committed thousands of hours and substantial resources evaluating the Mine. The Nez Perce Tribe also passed a resolution in 2018 opposing the Mine based on existential threats to our Treaty rights and resources, cultural resources, and other interests. We have since continued to closely monitor the Mine through consultation with the Forest Service, emphasizing at every opportunity the Agency's obligation to protect the Tribe's Treaty rights. As an agency of the United States, the Forest Service has a treaty-based duty, enshrined in the U.S. Constitution and supported by numerous U.S. Supreme Court decisions, to ensure that its actions, including approving the Mine, do not result in harm to the Nez Perce Tribe's Treaty rights.

### Mining Reform Recommendations

The Nez Perce Tribe is deeply concerned that the Forest Service and other federal land management agencies responsible for administering the 1872 Mining Act and other public land mining laws will continue to defer to mining interests at the expense of treaty rights and other rights vital to protecting and honoring tribal sovereignty and self-determination. Given the history of mining in the Nez Perce Tribe's lands, the history of mining at the Stibnite site, and the current Mine proposed at the site, the 1872 Mining Act and relevant regulations within the United States Department of Agriculture and the Department of the Interior need to be updated to reflect the United States' unique relationship with, and ongoing obligations to protect the rights and interests of, Indian tribes.

The Nez Perce Tribe accordingly offers the following recommendations for statutory and regulatory mining reform:

- Statutes and rules should acknowledge the primacy of treaty-reserved rights. Treaties entered into by the United States, including treaties with Indian tribes, are the supreme law of the land under the U.S. Constitution.
- Federal officials must have clear and concrete direction on denial of permitting for mining exploration and plans that violate tribal treaty-reserved rights or interfere with the subsistence practices they facilitate; or unduly interfere with other environmental, recreational, or tribal traditional cultural properties or tribal sacred sites.

- Federal officials must be provided with clear direction as to how to effectively and proactively fulfill their trust responsibilities to tribes by evaluating treaty-reserved rights and conflicts with those rights and how and when to consult with tribes. Chair Grijalva and other members have introduced the “Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act” or the “RESPECT Act” (H.R. 3587). This bill would prescribe procedures for effective consultation and coordination by federal agencies with tribal governments in instances where federal government actions would impact tribal lands and interests. The bill would ensure that meaningful tribal input is an integral part of federal decision-making processes around proposed federal activities and proposed regulatory actions. Passage of this bill would strongly complement the suggested changes to statutes and rules.
- Remove archaic language in the 1872 Mining Act characterizing mining as the “highest and best use” of public lands. The language should instead provide that mining on public lands will only be allowed after the Secretary determines that the land is suitable for mining.
- Statutes and rules should include a “no degradation” of tribal rights or resources standard. For example, language could expressly prohibit degradation of water quality and environmental or cultural resources and services.
- Federal agencies should have the express authority to close to hardrock mining on federal public lands to which tribes are culturally or spiritually connected or on which tribes hold treaty-reserved rights.
- The federal government should provide full and robust funding for an abandoned or legacy mine fund to provide sufficient resources needed to clean up toxic mine sites throughout the American West—which every day are degrading tribal and public resources.
- The federal government should provide robust federal financial assurance requirements for new mines that preempt state financial assurance requirements. The current federal and state standards have not proven to be effective or consistent in providing for cleanup of contamination produced by mining projects.
- Discontinue the claim and patent system for hardrock mining. The patenting of federal public lands into private ownership removes the federal government as the owner, manager, and trustee of those lands. This jurisdictional change has enormous negative consequences for Indian tribes. When federal public lands are privatized, those numerous environmental, cultural, and other federal laws that are designed to protect and manage those lands on which Indian tribes depend are no longer applicable. As a result, an Indian

tribe's ability to consult with the federal government in the management of those lands in a manner that honors and protects tribal rights and interests no longer exists. The Nez Perce Tribe—and its vitally-important cultural and natural resources on federal lands—become subject to state and local management which is often at direct odds with tribal rights and priorities.

- When statutorily defining “Indian Lands,” the definition should encompass “Indian Country” under federal law (18 U.S.C. § 1151 and 40 C.F.R. § 171.3) as well as those federal lands in which tribes have reserved rights or other jurisdictional interests. Broadening this definition would allow for additional expenditures to remediate for all hardrock mines affecting Indian tribes.
- Ensure that any federal legislation aimed at prioritizing strategic mineral independence in the United States contains substantive safeguards preventing mining companies from using such designations if the proposed mining activity substantially involves non-strategic mineral extraction such as gold or silver.

The Nez Perce Tribe appreciates the opportunity to testify today on the General Mining Law of 1872, an issue that is both timely and relevant to tribal nations and the public.