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Mining on Federal Lands

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SUMMARY

The General Mining Law of 1872 is one of the major statutes that direct the federal government's land management policy. The law grants free access to individuals and corporations to prospect for minerals in public domain lands, and allows them, upon making a discovery, to stake (or "locate") a claim on that deposit. A claim gives the holder the right to develop the minerals and may be "patented" to convey full title to the claimant. A continuing issue is whether this law should be reformed, and if so, how to balance mineral development with competing land uses.

The right to enter the public domain and freely prospect for and develop minerals is the feature of the claim-patent system that draws the most vigorous support from the mining industry. Critics consider the claim-patent system a giveaway of publicly owned resources because of the small amounts paid to maintain a claim and to obtain a patent.

In addition to the general issue of whether to reform the General Mining Law, two issues also have been controversial. One involves mining millsites. At issue is whether the General Mining Law limits claimants to one millsite of no more than five acres per mining claim, or whether multiple millsites are allowed. In 1997, the Solicitor of the Department of the Interior ruled that only one millsite of no more than five acres is allowed per claim. The 106th Congress provided a two-year exemption from the Solicitor's opinion for mines with approved plans of operation, operations with plans submitted prior to the Solicitor's opinion, and patent applications grandfathered as part of the 1995 mining patent moratorium (P.L. 106-113).

A second issue involves the Clinton Administration's revisions to the regulations governing hardrock mining operations on federal lands (43 CFR 3809), which took effect January 20, 2001. The revised regulations authorized BLM to deny mining operations if they would result in "substantial irreparable harm" to significant resources that cannot be mitigated, and made mining operators more responsible for reclaiming mined land. On March 23, 2001, the Bush Administration proposed suspending the new regulations and reinstating the previous ones, until a review of the new rules is completed and a decision is made regarding them. On October 30, 2001 (66 Fed. Reg. 54833), BLM issued a final rule that removed many of the controversial aspects of the Clinton regulations. On the same day (66 Fed. Reg. 54863), BLM proposed making the same changes.

Most recently, Congress retained the mining patent moratorium for one year. Three bills pertaining to hardrock mining have been introduced in the 108th Congress: The Elimination of Double Subsidies for the Hardrock Mining Industry (S. 44), the Abandoned Hardrock Mines Reclamation Act of 2003 (H.R. 504), and the Mineral Exploration and Development Act of 2003 (H.R. 2141). H.R. 504 would establish a Reclamation Fund financed by reclamation fees imposed on hardrock mineral producers. H.R. 2141 imposes an 8% net smelter royalty, allows for an unsuitability review by the Secretary of the Interior or Agriculture, and establishes a reclamation bond or financial guarantee and a reclamation fund.

MOST RECENT DEVELOPMENTS

The Bush Administration, in the 107th Congress, expressed an interest in reform legislation, but no proposal emerged from the House or Senate committees. It is uncertain whether there will be sufficient momentum to reform the Law.

Proposals to reform the General Mining Law of 1872 were reintroduced early in the 108th Congress. The Elimination of Double Subsidies for the Hardrock Mining Industry Act of 2003 (S. 44) was introduced in the Senate on January 7, 2003. A second bill, the Abandoned Hardrock Mines Reclamation Act (H.R. 504), was introduced in the House on January 29, 2003. A broad-based third bill, the Mineral Exploration and Development Act of 2003 (H.R. 2141) was introduced on May 15, 2003 to overhaul the General Mining Law of 1872.

BACKGROUND AND ANALYSIS

Background

The purposes of the 1872 Mining Law were to promote mineral exploration and development on federal lands in the western United States, offer an opportunity to obtain a clear title to mines already being worked, and help settle the West. The Mining Law granted free access to individuals and corporations to prospect for minerals on open public domain lands, and allowed them, upon making a discovery, to stake (or "locate") a claim on the deposit. A valid claim entitles the holder to develop the minerals. The 1872 Mining Law originally applied to all valuable mineral deposits except coal.

Public domain lands are those retained under federal ownership since their original acquisition by treaty, cession, or purchase as part of the general territory of the United States, including lands that passed out of but reverted back to federal ownership. "Acquired" lands — those obtained from a state or a private owner through purchase, gift, or condemnation for particular federal purposes rather than as general territory of the United States — are subject to leasing only and are not covered by the 1872 Law. Some public lands may be withdrawn or closed to mineral entry.

The 1872 Mining Law was one of the primary forces behind the development of mineral resources in the West, along with the industries and services that supported mineral production. Major hardrock minerals developed in the West include copper, silver, gold, lead, zinc, molybdenum, and uranium. During the 19th century, major mining districts for silver and gold were developed under the Mining Law in Colorado, California, Idaho and Nevada. Early in the 20th century, there were major developments of porphyry copper in Arizona. Large molybdenum and tungsten deposits in Colorado were also developed. The Mining Law continues to provide the structure for much of the Western mineral development on public domain lands. Western mining, although not as extensive as it once was, is still a major economic activity, and a high percentage of hardrock mining is on public lands.

The Claim-Patent System

After a prospector has conducted exploration work on public domain land, he or she may locate a claim to an area believed to contain a valuable mineral. Under legislation initially enacted by the 102nd Congress (P.L. 102-381), claimants must pay an annual maintenance fee of $100 per claim to hold a claim on public land. This superseded a previous requirement that $100 of annual development work be conducted per claim. The Omnibus Consolidated Appropriations Act for FY1999 (P.L.105-277) extended the maintenance fee through FY2001 at $100 per claim or site. In FY 2002 the maintenance fee was extended for an additional two years (P.L. 107-63). There is also a $25 location fee for first-time claimants to locate and record a claim, as initially required by P.L. 103-66 and subsequently extended through FY2002.

For FY2000, the maintenance and location fees generated an estimated $23.9 million in revenue, according to the Bureau of Land Management (BLM). This reflects a significant decrease from $30.7 million for FY1995, the first year that both fees were collected. It is a more sizeable drop from the peak of $35.9 million for FY1997, largely reflecting a decline in gold and copper prices since that time.

Once a claimed mineral deposit is determined to be economically recoverable, and at least $500 of development work has been performed, the claim holder may file a patent application to obtain title to surface and mineral rights. A patent is not necessary to develop the minerals within a claim. Beginning January 3, 1989, a fee of $250 per application plus $50 per claim within each application has been required. If the patent application is approved, the claimant may purchase surface and mineral rights at a rate of $2.50 per acre for placer claims and $5 per acre for lode claims. A placer deposit is an alluvial deposit of valuable minerals usually in sand or gravel; a lode or vein deposit is of a valuable mineral consisting of quartz or other rock in place with definite boundaries. (Source: *Dictionary of Mining, Mineral and Related Terms, Bureau of Mines*, 1968.) A placer claim is usually limited to 20 acres but a lode claim may be slightly greater than 20 acres. These per-acre fees were substantial when the Mining Law was enacted - claimed land and minerals now far exceed these amounts in value.

The following provisions currently apply to claims:

- There is no limit on the number of claims a person can locate.
- There is no requirement that mineral production ever commence.[1]
- Mineral production can take place without a patent or revenue payments to the federal government.
- Claims can be held indefinitely with or without mineral production, subject to challenge if not developed.

Most of the current mining activity and mineral claims under the Mining Law are in Nevada, Arizona, California, Montana, and Wyoming. As of the end of FY2001, approximately 45% of mining claims were in Nevada alone and another nearly 35% were in

[1] However, before the enactment of P.L. 102-381, claimants were required to conduct at least $100 of development work per year.

the other four states. According to the Bureau of Land Management (BLM), the number of claims declined from about 1.2 million claims in FY1989 to 294,678 for FY1993. Many claims were dropped as a result of provisions of law charging a $100 per-claim annual maintenance fee to hold a claim. The number of claims subsequently rose to 324,651 in FY1997, reflecting the relative strength of the gold and copper industries. The number of claims has fallen to a low of 207,757 for FY2001, reflecting a decline in the gold and copper industries and, according to a BLM representative, changes in public land policy that significantly lengthened the time it takes in practice to get permission to mine.

Only a small percentage of claims are ever patented, totaling about 3.3 million acres from 1867 through 2000. This represents approximately 1.5% of all public lands patented; most public lands have been patented under homestead entries, statehood grants, railroad grants, and other non-mineral public land laws. It is not required to patent a claim to mine a deposit, and a great deal of mining activity is currently taking place on unpatented claims. However, patenting a claim gives the holder legal title to both the surface and the minerals.

Major Mining Legislation After the 1872 Mining Law

In 1920, the Mineral Leasing Act removed oil, gas, oil shale, phosphates, sodium, and certain other minerals on federal public domain lands from the claim-patent system of the 1872 Mining Law and set up a system of leasing in which the federal government retains ownership of the leased lands. Coal, which previously had its own claim-patent law (the 1873 Coal Act), was also included in the 1920 Leasing Act. After 1955, common variety minerals such as sand, stone, gravel, cinders, and pumice were sold under the Materials Act of 1947, as amended. A strong push for an all-leasing system developed during the 1930s and 1940s, but no such legislation was enacted.

As mentioned, acquired federal lands were never subject to the General Mining Law. The Mineral Leasing Act for Acquired Lands of 1947 authorized the leasing of leasable minerals in some acquired federal lands. The Reorganization Plan of 1946 (no.3) and earlier acts authorized the leasing of hardrock minerals on acquired forest lands.

During the 1960s and 1970s, the Multiple Use Sustained Yield Act, Wilderness Act, National Forest Management Act, National Environmental Policy Act (NEPA), and Federal Land Policy Management Act (FLPMA) addressed environmental protection, multiple use, and management of federal land generally. By imposing new requirements on agency actions, and by withdrawing some federal lands from development, these acts have affected mineral development under both the leasing system and the Mining Law claim-patent system. The Mining Law contains no direct environmental controls, but mining claims are subject to all general environmental laws as a precondition for development.

The evolving leasing system and later withdrawals of lands from hardrock exploration and development diminished the amount of lands under the Mining Law authority. For those hardrock minerals that remain under the Mining Law, however, the claim-patent system is essentially the same as it was when the law was enacted.

Critics argue that the West is now developed and that the 1872 Mining Law is obsolete and inconsistent with other federal natural resource policies. Supporters maintain that the combination of leasing for some resources and a claim-patent system for others works well

and should be maintained. The National Mining Association (NMA) states that the "existing law more than adequately meets the four criteria essential to any mineral tenure law": free and open access to explore for minerals on unappropriated public lands, exclusive exploration rights, the right to develop the valuable minerals discovered, and security of tenure.

When oil shale was transferred from the 1872 claim-patent system to the leasing system in the 1920 Mineral Leasing Act, a large number of existing unpatented oil shale claims were continued under the terms of the 1872 Mining Law. In a 1986 court case, the U.S. district court of Colorado reached a controversial finding that these claims were valid and could be patented if claimants had made $500 worth of improvements on the land, even if the statutory $100 annual work requirement had not always been fulfilled.

Legislation to resolve oil shale issues was enacted as part of the Energy Policy Act of 1992 (P.L. 102-486). This law offers general and limited patents based on the status of the application at the time of enactment. Limited patent holders will receive title to the oil shale only and are required to post a reclamation bond or financial guarantee. Patent fees remain $2.50 per acre.

Beginning in FY1995, Congress has enacted (in the Interior appropriations laws) a series of one-year moratoria on the issuance of mineral patents. For FY2000, the Consolidated Appropriations Act (P.L. 106-113, §312) essentially retained the mineral patent moratorium contained in previous appropriations laws. The Interior and Related Agencies Appropriations Act for FY2002 (P.L. 107-63) also contained a one-year extension of the moratorium on mining patents. Another one-year patent moratorium is pending in the FY2003 Interior bill.

Analysis

Claim-Patent System: Pros and Cons

The right to enter the public domain lands and prospect for and develop minerals is the feature of the claim-patent system that draws the most vigorous support from the mining industry. Modern hardrock mineral exploration requires a continuous effort using vast tracts of land and sophisticated and expensive technology. Industry officials argue that being able to obtain full and clear title to the land enhances a company's ability to bring an economic deposit into production; financing the project, for example, may be more feasible. They contend that restrictions on free access and security of tenure would curtail exploration efforts among large and small mining firms. In their view, the incentive to develop would be lost, long-run costs would increase, and the industry and the country would suffer.

Mining Law critics consider the claim-patent system a giveaway of publicly owned resources because of the absence of royalties and the small charges associated with keeping a claim active and obtaining a patent. They maintain that although such generous terms may have been effective ways to help settle the West and develop minerals, there is no solid evidence that under a different system minerals would not be developed today. They also believe the current system, by conveying title and allowing other uses of patented lands,

creates difficult land management problems through the creation of inholdings, and that current law does not provide for adequate protection of the environment.

In the claim-patent system, mineral claims may be held indefinitely without any mineral production. In some instances, claimed or patented land has been used for purposes other than mineral development. Once lands are patented to convey full title to the claimant, the owner can use the lands for a variety of purposes, including non-mineral ones. However, using land under an unpatented mining claim for anything but mineral and associated purposes violates the Mining Law. Critics believe that many claims are held for speculative purposes. However, industry officials argue that a claim may lie idle until market conditions make it profitable to develop the mineral deposit.

Another issue surrounds "discovery" and "prediscovery protection." The law requires that "no location of a mining claim shall be made until the discovery of the mineral within the limits of the claim." If a discovery is made and a valid location established, the claimant has a valid possessory right against all other parties. One purpose of the discovery requirement was to help reduce speculation. However, demonstrating discovery of a valuable mineral deposit may require considerable time and effort on the part of a prospector. The prospector may find indications of a deposit, but demonstrating its value may involve exploration over a large area and drilling and analyses of core samples to define the quality and extent of the mineral. The Supreme Court has ruled that all claims located are deemed valid until proven otherwise. Typically, in practice, the federal government has allowed claims based on general indications that a mineral deposit exists, and required proof of discovery only upon application for a patent unless circumstances warrant full proof sooner, e.g., mineral claims in sensitive areas.

The industry has indicated it wishes to avoid major challenges to the principle of free access and the right to obtain a patent. The industry generally opposes placing hardrock minerals under a leasing system because this would give the federal government discretionary control over development, impose royalty payments, and retain government ownership of surface and/or mineral rights.

Past Amendment Proposals

Proposals to amend the 1872 Mining Law have fallen under the following broad categories:

- Modify the claim-patent system to retain the patent feature, but require payment of fair market value for all or part of the value of the land. The Government also would collect some percent of the value of mineral production as royalties.

- Convert the claim-patent system to a permitting system, and prohibit further patenting. Advocates of this proposal argue that a permitting system would be effective in achieving a fair market value return to the federal Treasury for public lands. This system would collect royalties and add new environmental standards to mining operations. Mineral industry supporters, on the other hand, contend that the Department of the Interior is already overburdened with the current leasing system and that comprehensive

hardrock mining reform would only add to its inefficiency and ultimately increase costs through royalty and rents.

- Continue the current claim-patent system, but with some amendments. Proposed changes have included eliminating the distinction between lode and placer claims, imposing a time limit within which claims must be developed, expanding the size of a claim, providing better prediscovery protection, and opening more public lands to mineral exploration.

The Clinton Administration's Call to Eliminate Subsidies

The Mining Law currently allows a claimant to produce minerals without a patent and without paying royalties or rents to the federal Treasury. This is considered a subsidy by many because the miner does not pay for a factor of production — i.e., land and mineral resources. By contrast, royalties are paid to the federal government for oil and gas leasing on federal lands, and non-federal land owners (e.g. private and state owners) typically receive a royalty from those who produce minerals on their lands. Also, if the claimant patents the surface and mineral estate for the $2.50 or $5.00 per acre, this too can be considered a subsidy because the claimant is paying less than fair market value for the surface and mineral estates. Various tax incentives, such as the percentage depletion allowance (a tax deduction for the depletion of a mineral resource) and "expensing" (writing off in the year of expenditure) the costs of exploration and development, have been characterized as subsidies to the industry as well.

Eliminating some of the natural resource subsidies, in the Clinton Administration's view, would have been one way to increase revenues to the Treasury and help ensure a fair return to the taxpayer for the development of public lands. In its FY2001 budget request, the Clinton Administration proposed charging mining companies a 5% fee on net smelter production from hardrock mining on federal lands. The Bush Administration did not make a similar proposal in its FY2003 budget request.

As has been previously noted, the original intention of the Mining Law was to develop the nation's minerals and to develop the West. Proponents of retaining the current system contend that an incentive still is necessary for those who take substantial financial risk to develop a mineral deposit. Mining is a capital-intensive process that often takes years of development before minerals are produced.

Imposing royalties, increasing holding fees, and repealing the percentage depletion allowance would have some impact on domestic hardrock mineral production, but the level of any production decline attributable solely to new fees is difficult to estimate. The mining industry generally has opposed legislation to repeal the percentage depletion allowance. The elimination of some incentives to the industry would come at a time when the West is already developed (an original goal of the law) and mineral/metal demand is relatively good. However, prices are fluctuating, and the mining industry is looking outside the United States for lower-cost deposits. Also, several mineral-producing nations are rewriting their mining laws to attract more U.S. and western investment. Some U.S. deposits are becoming much less competitive with foreign deposits. Any new cost increases in one area, without cost reductions in others, may make U.S. mineral deposits less competitive or uneconomic.

Of the many issues surrounding the Mining Law, at least three are of perennial concern. One is whether the government should receive a fair market return from public domain hardrock mineral dispositions. The others are about environmental protection, and withdrawals of federal land from mineral exploration and development.

Fair Market Value

Many believe that the federal government does not receive fair market value for land and resources transfers under the Mining Law. It receives no royalties or rents from mining activities conducted under the law. In addition, the $2.50 and $5.00 per-acre price for clear title to the surface and mineral rights has not changed since the law was enacted. The per-acre price appears to be based on the value of Western farmland and grazing land before the enactment of the law in 1872.

Determination of fair market value of mineral-bearing lands is complex because many geologic, engineering, and economic factors must be considered, and fair market value determinations typically are controversial. According to a 1989 report by the General Accounting Office (GAO), the fair market value of mineral-bearing lands is substantially more than the $2.50 and $5.00 per acre that a claimant pays for patenting a claim. GAO estimated that, for 20 patents it reviewed, the federal government had received less than $4,500 since 1970 for lands valued between $13.8 million and $47.9 million.[2]

The GAO appraisal method, however, was criticized by the Bureau of Land Management (BLM) in a May 1989 Report to the Secretary of the Interior. The GAO report obtained information on land values from BLM, Forest Service officials, and local real estate brokers. GAO's estimates were based on recent sales of comparable land, not the value of the land at the time claims were patented; much of the land may have had very little value at the time it was claimed or patented. BLM argues that sales of adjacent tracts that either have no mineral development potential or are sold for mineral rights alone cannot be used to establish fair market value of the surface of patented mining claims and that data on comparable sales are rare.

The Department of the Interior (DOI) estimates the value of hardrock mineral production on federal land at $1.0 billion for FY2000, a decrease from an estimated $1.8 billion in FY1993. The decline can be attributed in part to a reduction in the value of mineral production from the federal lands because of acreage conveyed out of federal ownership through patenting, according to a BLM official.

Environmental Protection

The lack of direct statutory authority for environmental protection under the Mining Law of 1872 is a second major issue that has spurred reform proposals. Many Mining Law supporters contend that other current laws provide adequate environmental protection. They note that the mining industry must comply with applicable requirements of the Clean Water and Clean Air Acts, NEPA, state reclamation standards where they exist, and federal and

[2] The Mining Law of 1872 Needs Revision, United States General Accounting Office, GAO/RCED-89-72, March 1989, p. 24.

state statutes relating to the handling and disposal of certain toxic wastes, among other laws. Critics, however, argue that these general environmental requirements are not adequate to assure reclamation of mined areas and that the only effective approach to protecting lands from the adverse impacts of mining under the current system is to withdraw them from development under the Mining Law. Further, critics charge that federal land managers lack regulatory authority over patented mining claims and that clear legal authority to assure adequate reclamation of mining sites is needed.

Federal Land Withdrawals

BLM is responsible for approximately 700 million acres of federal subsurface minerals, and supervises the mineral operations on about 56 million acres of Indian trust lands. Some of these lands have been withdrawn from mineral development; a withdrawal is an action that restricts the use or disposition of public land. In some cases land is reserved for a specific use that may preclude locating mining claims and granting leases.

A BLM study determined that of the approximately 700 million acres of federal subsurface minerals under the agency's jurisdiction in 2000, approximately 165 million acres have been withdrawn from mineral entry, leasing, and sale, subject to valid existing rights. Lands in the National Park System (except National Recreation Areas), the Wilderness Preservation System, and the Arctic National Wildlife Refuge (ANWR) are among those that are statutorily withdrawn. Also of the 700 million acres, mineral development on another 182 million acres is subject to the approval of the surface management agency, and must not be in conflict with land designations and plans, according to a BLM official. Wildlife refuges (except ANWR), wilderness study areas, and roadless areas, among others, are in this category.[3]

FLPMA mandated review of public land withdrawals in 11 Western states to determine whether, and for how long, existing withdrawals should be continued. BLM continues to review approximately 70 million withdrawn acres, giving priority to about 26 million acres that are expected to be returned by another agency to BLM, or, in the case of BLM withdrawals, made available for one or more uses. As of November 2001, BLM had completed reviewing approximately 7 million withdrawn acres, mostly BLM and Bureau of Reclamation land; the withdrawals on more than 6 million of these acres have been revoked. According to the BLM Manual, retention of a withdrawal requires a compelling show of need, and an agency manager "recommending that lands not be opened to multiple use, particularly mining and mineral leasing, must convince the BLM Director, Secretary, and watchful segments of the public, that there is no reasonable alternative to continued withdrawal or classification." The review process is likely to continue over the next several years, in part because the withdrawals must be considered in BLM's planning process and be supported by documentation under the National Environmental Policy Act (NEPA).

Mineral industry representatives maintain that federal withdrawals inhibit mineral exploration and limit the reserve base even when conditions are favorable for production. Mineral reserves are not renewable. Thus, they argue that whether minerals are in the public

[3] Public Lands, On-Shore Federal and Indian Minerals in Lands of the U.S., Bureau of Land Management, U.S. Department of the Interior, December 1, 2000.

or private sector, without new reserves or technological advancements, mineral production costs may rise. As a result, according to the industry, exploration on foreign soil may increase, raising the risk to investors and boosting import dependence. In this view, governmental policies that increase costs to the mineral industry may result in increased costs to society. Mining industry supporters also assert that too much land has been unnecessarily withdrawn from mining, through administrative actions, to pursue preservation goals.

Critics of the Mining Law believe that in many cases there is no way to protect other land values and uses short of withdrawal of lands from development under the law. They point to unreclaimed areas that have been mined for hardrock minerals in the past, Superfund sites related to past mining and smelting, and instances where development of resources could spoil scenic, historic, cultural, and other resources on public land.

Legislative Activity

In addition to the General Mining Law, two other mining issues also have been controversial and the subject of oversight or legislation in the 107th Congress. One relates to mining millsites, while the other relates to hardrock mining on federal lands. The 107th Congress extended the moratorium on the issuance of mining patents and extended the claim maintenance and location fees. These issues are addressed below.

The Mill Site Debate

One of the most controversial issues in the 106th Congress related to a November 7, 1997, legal opinion of the Solicitor of the Department of the Interior that each mining claim can use no more than 5 acres for activities associated with mining ("millsites"). The decision affected modern mining operations, such as heap-leach mines for gold and other hardrock minerals, which typically require large tracts of land beyond that of the mining claim for mining-related purposes, including disposal of waste rock. Critics of the decision charged that it constituted a new interpretation of the relevant provisions of the 1872 Mining Law (30 U.S.C. 42), was inconsistent with the practice of the Department of the Interior in granting operating plans for mining without regard to acreage limitations or the ratio of millsite locations to mining claims, and was an indirect way of reforming the 1872 Mining Law. The Department of the Interior has rebutted these criticisms, asserting that its opinion was based both in law and practice.

Based on the Solicitor's 1997 opinion, on March 26, 1999, the Solicitor ruled against the Battle Mountain Gold Company's plan of operation for a gold mine (the Crown Jewel Mine in Washington state) based on noncompliance with the General Mining Law of 1872. However, the denial of the plan of operations for the Crown Jewel Mine was overturned in the 1999 Emergency Supplemental Appropriations Act (P.L. 106-31). This law directed that the number or acreage of millsites for the Crown Jewel mining operation not be limited, and that its plan of operation be approved. It further directed that *other* patent applications and plans of operation submitted prior to the law be given permits.

The issue again became contentious during consideration of the FY2000 Interior appropriations bill, with the House and Senate passing opposing language on the subject.

The House agreed to support, and the Senate to overturn, the 1997 opinion of the Solicitor. During initial floor consideration, the House had agreed to language barring funds "appropriated by this act" from being used to process applications for approvals of patents, plans of operations, or amendments to plans that conflict with the opinion of the Solicitor. By contrast, the Senate-passed language would have prohibited the Departments of the Interior and Agriculture, "in any fiscal year," from limiting the number or acreage of millsites based on the ratio between the number or acreage of millsites and the number or acreage of mining claims. The Senate millsite language sought a permanent prohibition on limiting acreage or millsites based on the number of mining claims, using the BLM Handbook for Mineral Examiners (H-3890-1, 1989) and the BLM Manual (Section 3864.1.B, 1991) as its basis. It apparently would have reversed the Solicitor's opinion permanently and comprehensively as well as prospectively. On the floor, the Senate rejected an amendment to remove the millsite language from the bill, so as to allow the Solicitor's opinion to stand. A related amendment, essentially designed to protect ongoing mining operations from the Solicitor's opinion, was withdrawn.

The 106th Congress ultimately enacted (P.L. 106-113, §337) a 2-year exemption from the Solicitor's millsite opinion for: (1) patent applications grandfathered as part of the 1995 mining patent moratorium; (2) any mining operation with an approved plan of operation; and (3) any operation with a plan of operation submitted to the BLM or the Forest Service before November 7, 1997 – the date of the Solicitor's opinion. (An earlier conference report had excluded plans of operation submitted prior to May 21, 1999, but this was opposed by the Clinton Administration). The explanatory language accompanying the conference agreement expressed the view that it would be "inequitable" to apply the opinion "retrospectively" in these instances. Specifically, the exemption was for FY2000 and FY2001. (For further information, see CRS Report RL30310, *The Mining Law Millsite Debate*.)

As the 2-year exemption was set to expire, the Interior Department under the Bush Administration decided on September 28, 2001, not to apply the Millsite Opinion to those plans of operations submitted before November 7, 1997, or plans approved before November 29, 1999, as well as the grandfathered patent applications. Further, the Millsite Opinion is under review by the Interior Department's Solicitor.

Both industry and the Department of the Interior acknowledged that a 5-acre per claim millsite limit is outdated and cannot accommodate the modern mining industry. Rather than increase the number or acreage of millsites, the Clinton Administration favored other options such as the use of land exchanges (Section 206) or permits and leases (Section 302(b)) under the Federal Land Policy and Management Act. Recent practice has included the use of more than 5 acres per mining claim and the use of land exchanges. One of the major policy questions is whether the millsite debate will open the door for broader Mining Law reform.

Surface Impacts of Hardrock Mining on Federal Lands

A second issue involves the Department of the Interior's revisions to the regulations governing the surface impacts of hardrock mining operations on federal lands (43 CFR 3809). The Clinton Administration published a final rule on November 21, 2000, with an effective date of January 20, 2001. On March 23, 2001, the Bush Administration proposed suspending the new 3809 regulations and reinstating the ones that existed on January 19, 2001, until a review of the new regulations could be completed and a decision is made

regarding them. The Clinton Administration regulations were in effect until the Bush Administration published its final rule October 30, 2001. The Clinton Administration regulations authorized the Bureau of Land Management (BLM) to disapprove a plan of operations for mining if the mining would result in "substantial irreparable harm" to significant resources that cannot be effectively mitigated. However, this provision was removed from the Bush Administration's new final rule revisions.[4] The authority to deny mining operations was the most controversial aspect of the regulations, referred to by some in the mining industry as an unnecessary "mine veto" power. Other changes in the regulations make mining operators more responsible for reclaiming mined lands. New bonding requirements (retained in the Bush final rule revision) provide for miners to post bonds to ensure that they will clean up sites when the mines close, and a reclamation bond must be equal to 100% of the estimated cleanup cost.

In June 2001, the BLM announced that it expected to retain the provisions on bonding requirements with a modification to extend the deadline for mining operators to meet them. For mining operations which already have provided a financial guarantee, the deadline for complying with the requirements would be extended by 4 months (from July 19, 2001 to November 20, 2001). Operators who had not provided a financial guarantee would receive an additional 2 months (until September 13, 2001). Under the old rules, mines disturbing 5 acres or less per year did not require a cleanup bond and companies could pledge assets instead.

The ability to obtain bonding has been problematic for some mining firms. Among the many reasons presented at an oversight hearing (Subcommittee On Energy and Mineral Resources, July 23, 2002), the major cause for concern, according to the Alaska Mining Association, is the high risk the surety bonding companies face when complying with the current or proposed 3809 surface management rule. The major risk factors cited were the "uncertainty of amount, uncertainty of duration and uncertainty regarding bond release criteria." On the other hand, testimony from the Center for Science in Public Participation describes the high risk facing surety bonding firms as that normally associated with the capital intensive mining industry, and not necessarily linked directly to the surface management regulations.

Proponents of the earlier Clinton version (43 U.S.C. 1732) asserted they enhance the BLM's authority under law to prevent "unnecessary or undue degradation" of public land resources from mining operations (43 U.S.C. 1732). However, the mining industry asserted that the regulations were unlawful, impeded mining operations, and in some ways duplicated existing federal and state laws.

On October 30, 2001 (66 Fed. Reg. 54834), BLM issued a final rule that removed many of the more controversial aspects of the Clinton regulations. On the same day (66 Fed. Reg. 54863), BLM proposed making the same changes. Proposing the changes that were already finalized was intended to allow BLM to receive additional comments on legal, economic, and environmental issues that were raised concerning the new regulations. Some of the concerns were expressed in lawsuits challenging the Clinton Administration's rules. In some suits, industry plaintiffs and the State of Nevada assert that BLM improperly issued the rules and

[4] Federal Register, 66 FR 54834, October 30, 2001.

violated numerous statutes. In one such suit, the National Mining Association sought a preliminary injunction on the grounds that the regulations were unlawful in several respects, but this injunction was denied. By contrast, environmental plaintiffs charged that the new rules were weak, improperly allowing mining operations on lands without valid mining claims or mill sites.

During debate on the FY2002 Interior and Related Agencies Appropriations Bill (H.R. 2217), the House agreed to a floor amendment (216-194) that would bar the use of funds in the bill from being used to suspend or revise the Clinton Administration hard rock mining regulations that took effect on January 20, 2001. The amendment was advocated as maintaining necessary environmental protections, but opposed as precluding the Bush Administration from reviewing regulations that were amended perhaps too extensively by the Clinton Administration. The bill as reported by the Senate Committee on Appropriations did not contain language on this subject. The House language was not included in the conference report (H.Rept. 107-258).

Another significant difference between the Bush and the Clinton rules was on civil penalties. Instead of BLM discretionary penalties of $5,000 per day and suspensions of operations for noncompliance, the final rule sticks with language in the 1980 rule that allows for operators to be subject to enforcement if they do not comply with specified reclamation standards.

The Clinton Administration regulations that took effect on January 20, 2001, were the culmination of a decade-long review of hardrock mining regulations. They replaced earlier regulations that, for the most part, were issued in 1980. Congress had directed BLM as to what provisions could be included in the revised rules. In particular, the 106th Congress enacted provisions in the FY2000 and FY2001 appropriations laws to prohibit the Secretary of the Interior during the Clinton Administration from using funds to revise the hardrock mining regulations except to make changes "not inconsistent" with law and the recommendations contained in a National Research Council (NRC) report entitled "Hardrock Mining on Federal Lands"[5] (P.L. 106-113, §357; and P.L. 106-291, §156). In issuing the revised regulations, the Department of the Interior, under the Clinton Administration, interpreted this as allowing the regulations to address subjects other than those included in the specific recommendations of the NRC report, provided these recommendations were not directly contradicted. This interpretation has been controversial in Congress.

Patent Moratorium

The FY2002 Interior appropriations Act (P.L. 107-63) in the 107th Congress continues the moratorium on the issuance of mining patents. The House and Senate-passed versions of H.R. 2217 (included in the conference report) contained identical language continuing the moratorium on accepting and processing applications for patents for mining and mill site claims on federal lands. However, applications meeting certain requirements that were filed on or before September 30, 1994, would be allowed to proceed, and third-party contractors would be authorized to process the mineral examinations on those applications. In the 106th

[5] Hardrock Mining on Federal Lands, Committee on Hardrock Mining on Federal Lands, National Research Council.

Congress, the moratorium on the issuance of mining patents was continued through provisions of the Interior appropriations laws (P.L. 106-113, §312 for FY2000, and P.L. 106-291, §311 for FY2001).

A one-year moratorium on patenting continues the uncertainty over whether the federal government will continue to try to reform the 1872 Mining Law. The mining industry would like to end the uncertainty to facilitate its long-term business planning. Environmentalists, who were hoping for new environmental protection language in a major mining law reform bill, argue that the patent moratorium does not protect the environment from current mining practices.

As of January 2001, there were 425 mineral patent applications pending, of which 237 are grandfathered and proceeding forward and 191 are subject to the moratorium and thus will not be processed. The patent moratorium will not stop the production of valuable mineral resources from the public lands, but will prevent the further transfer of ownership of public lands to the private sector (with the exception of the 237 patent applications already in the pipeline).

Claim Maintenance and Location Fees

To hold a claim on public land, claimants must pay an annual maintenance fee of $100 per claim. There also is a $25 location fee for first-time locators to locate and record a claim. These provisions of law, effective through FY2001, were extended for two years by the FY2002 Interior and Related Agencies Appropriations bill (P.L.107-63).

Reform Proposals

Reform bills similar to the bills introduced in the 107th Congress below are being reintroduced in the 108th Congress. Legislation did not move forward last Congress even though the Administration acknowledged interest in resolving the longstanding debate on how to best reform the General Mining Law of 1872.

On January 29, 2003, the Abandoned Hardrock Mines Reclamation Act (H.R. 504) was introduced in the House as a measure to help finance the cleanup of inactive and abandoned mine sites in certain eligible states. The proposal would establish an interest-bearing Abandoned Minerals Mine Reclamation Fund. Its revenues would come from a reclamation fee imposed on producers of hardrock minerals that received a claim or patent under the General Mining Law of 1872. The fee would be a percentage of the net proceeds from the mine. The bill would amend the Federal Water Pollution Control Act (33 U.S.C. 1342) by adding a section on abandoned or inactive mined land waste remediation permits. This section describes the permit process that a "remediating party" must follow to be issued a permit. The permit must include a detailed remediation plan. The federal administrator of the program shall issue a report to Congress not later than 1 year before the termination date of its permitting authority, 10 years from the date of enactment.

A second bill, the Elimination of Double Subsidies for Hardrock Mining Industry Act of 2003 (S. 44), introduced in the Senate, would disallow the percentage depletion allowance for hardrock mines located on lands covered by the general mining laws or patented under

these laws. The measure also would establish an Abandoned Mine Reclamation Trust Fund in the Treasury for reclamation and restoration of land and water adversely affected by mining. The bill was introduced on January 7, 2003, and referred to the Senate Committee on Finance. A similar bill was introduced in the 106th (S. 590), and 107th (S. 115) Congresses but no further action was taken.

A broad-based bill, the Mineral Exploration and Development Act of 2003 (H.R. 2141) would establish a permanent $100 per claim annual maintenance fee and $25 per claim location fee. The bill would limit the issuance of patents to claimants whose patent application was filed with the Secretary of the Interior on or before September 30, 1994 and met appropriate statutory requirements by that date. The bill includes an abandoned locatable minerals mine reclamation fund and an 8% royalty on "net smelter returns." Lands located under the General Mining Law of 1872 would be subject to an unsuitability review by the Secretary of the Interior or the Secretary of Agriculture to determine whether they are unsuitable for mineral activity. A reclamation plan and reclamation bond or other financial guarantee would be required before exploration and operation permits are approved. A provision in the bill allows for civil suits to be filed in U.S. District Courts should a person feel adversely affected . The bill was introduced on May 15, 2003 and referred to the House Committee on Resources.

FOR ADDITIONAL READING

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