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Mining Law Reform Redux, Once More¹

On May tenth of this year, *The New York Times* marked the 130th anniversary of the venerated or vilified—take your pick—Mining Law of 1872 with an editorial. *The Times* minced no words: Its editorial was titled “A Bad Law’s Birthday,” and it called the law a “destructive relic.”

The Times noted that the Bush Administration had “suggested” reform. This was an overstatement. The Administration has mentioned an interest in the idea, but it has not submitted, nor apparently does it intend to submit, a concrete reform proposal to the Congress. Its actions speak louder. As described in more detail below, the Administration has moved aggressively to placate the industry by weakening or abandoning Clinton Administration initiatives to reform the Mining Law’s implementation.

While calls for reforming the Mining Law have been around almost as long as the law itself, achieving it has been elusive. Still, hope springs eternal. As the embers of reform are once again being poked, it is useful to take another look at the subject, especially because the issues involved have changed in some fundamental ways in recent years.

I. THE MINING LAW—A THUMBNAIL SKETCH²

The Mining Law of 1872 is the last important surviving remnant of nineteenth century federal land policy. Although its scope has been sharply limited and its operation greatly modified by subsequent legislation, much of the law’s basic architecture remains in place. Meanwhile, its companions in the great westward movement—the homestead acts, the railroad land grants, and all the rest—have long since been repealed.

Though diminished in scope, the Mining Law still applies to many important so-called “hardrock” minerals like gold, silver, copper, molybdenum, lead, zinc, and uranium. And it still applies to hundreds of millions of acres of federal land, mostly managed by the Bureau of Land Management and the U.S. Forest Service. Where such lands are not withdrawn from the operation of the Mining Law by executive or legislative action, they remain open to exploration and development by persons who locate mining claims for such minerals. These mining claims may ripen into private property interests and, if the claimant complies with applicable federal (and, to some extent, state and local) regulations, may be developed without paying the United States any royalty. The law also authorizes the

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mining claimant to gain fee simple title to the land and the minerals (the so-called "patent" provision, in public lands parlance) for a nominal payment of either \$2.50 or \$5.00 per acre. Since 1994, however, Congress has annually legislated a moratorium on new applications for patents (explained further below).

II. A CAPSULE HISTORY OF REFORM EFFORTS

In what might be called Reform Phase I (from about 1880 until the 1960s), reform advocates were found within the mining industry itself. Larger, more sophisticated companies sought relaxation of the numerous limitations the Mining Law placed on location and use of mining claims. These limitations (most of which are still in effect today) forbade claim location until discovery, limited the size of individual claims, and required different types of claims to be located for various purposes. They all complicated claim location and maintenance and provided the companies little security during the search for viable mineral deposits.

The smaller prospectors stoutly opposed what they saw as an attempt by the big operators to throw them off the public lands. Still, the problems raised by the claim limitations combined with Progressive-Era opposition to the giveaway of public resources to persuade Congress to remove important minerals from the Mining Law in 1920. After enactment of the Mineral Leasing Act that year, the petroleum and fertilizer minerals on federal lands could be made available to industry only by lease, in the discretion of the government, and the industry had to pay a royalty on production.

Reform Phase II (from the late 1960s until the mid-1980s) was sparked by the modern environmental movement. Reformers generally advocated putting hardrock mining under a leasing system comparable to the Mineral Leasing Act, with leasing being discretionary, all mineral activity subject to thorough environmental regulation, and miners paying a royalty. In response, the hardrock industry closed ranks, papered over its differences, and presented a united front to defend what it liked to call its "Magna Carta." Reform was supported across a broad spectrum (including both the Nixon and Carter Administrations); yet, while numerous bills were introduced, none passed either house of Congress.

But the reformers did make some headway. As part of a comprehensive overhaul of the public land laws, the Federal Land Policy and Management Act of 1976 (FLPMA) directed the Secretary of the Interior to "prevent unnecessary or undue degradation of the public lands" and made clear that this applied to hardrock mineral activity.³ In 1980, the Bureau of Land Management (BLM) took modest steps toward fulfilling this obligation with its first-ever regulations to attempt to control the environmental effects of hardrock mining on BLM public lands. (The Forest

Service had done the same on national forests a few years earlier, belatedly implementing the authority that Congress had given it in 1897 to safeguard the forests "from destruction."⁴) FLPMA also required systematic planning on the public lands and strengthened the authority of the Secretary of the Interior to withdraw federal lands from the operation of the Mining Law.

Reform Phase III began in the late 1980s. Reformers in Congress, with the acquiescence of environmentalists, backed off advocating a leasing system. Reluctantly agreeing to maintain the framework of the claim location system, they sought to (a) end patenting, (b) require a royalty on production, (c) strengthen the ability to designate some federal lands unsuitable for hardrock mining, and (d) toughen regulation of hardrock mining activities to protect the environment. The industry continued to resist any reform, although more moderate elements sought, unsuccessfully, to find common ground with the environmental interests.

Congress took another reform step in 1992. Without fanfare it adopted legislation that, for the first time, required each claimant holding more than ten claims to pay a \$100 fee each year to hold each claim. This requirement was initially in effect for only two years but was renewed by Congress in 1993, 1998, and again in 2001, and currently runs through 2003.⁵

In 1994, with the reform-minded Clinton Administration in office, and Democrats still in control of both houses of Congress, comprehensive legislative reform came tantalizingly close to success. For the first time since 1872, both the House and the Senate passed Mining Law reform bills. The House's version was a sweeping measure that would have ended patenting, installed comprehensive environmental controls, and levied an eight percent royalty on production. The Senate's version was a skeletal bill, largely devoid of substance, that was merely a "ticket to conference" with the House. The two versions could not be reconciled before the 103rd Congress adjourned in October 1994.

That same month, however, Congress took another reform step. The industry's ability to obtain patents (fee simple title to federal land and minerals) for a token payment had long been the most notorious and most indefensible feature of the Mining Law. Responding to Secretary Babbitt's effective lampooning of the patent feature in widely publicized events, Congress began a practice (which it has followed ever since) of including, in the annual Interior Appropriations bill, a moratorium on accepting new patent applications and issuing new patents. The halt has not been absolute; Congress has allowed continued processing of a few hundred patent applications that were well along in the pipeline. (As this is being written, fewer than 75 applications in the pipeline remain to be processed.)

With the Republicans winning control of Congress in the fall of 1994, the political landscape shifted on Mining Law reform, as it did on practically everything else. This sharp turn to the right led to several years of sparring between the Administration and the Congress. It began when

the industry's congressional allies, in a fit of hubris, pushed a token reform effort through the Congress. The cosmetic changes made by this "reform" (some of which are discussed further below) were a transparent attempt to deflect efforts toward meaningful reform. The reform was included in a giant "omnibus budget reconciliation bill" that was sent to the President at the end of 1995. The President vetoed it, objecting, among other things, to what the conservation groups took to calling "sham Mining Law reform." When the dust died down from this episode, the Clinton Administration proceeded to pursue administrative reforms, addressed in the next section.

III. THE REFORM LANDSCAPE TODAY

The debate over reforming the Mining Law continues to evolve. Over the last decade, the reform agenda has disaggregated into discrete parts, and the fundamental issues have changed somewhat. Through it all, the industry has yielded ground very grudgingly. It has shown a remarkable ability to defend positions and to deflect criticisms that have brought other heavy industries to heel in battles with environmentalists. Nevertheless, it remains on the defensive.

A. Patenting

Officially, the battle over patenting has not ended. Congress must renew the moratorium every year in the statute appropriating funds to the Department of the Interior. But the reformers now have the high ground. Unlike most other Mining Law issues, the patenting giveaway is easily explained and understood. The industry's claim that it needs patents to provide security for its investments founders on the fact that it has for many decades invested billions of dollars in mines on unpatented mining claims. Indeed, the patent Secretary Babbitt issued to American Barrick in May 1994 (the event that precipitated Congress's decision to institute a moratorium on patenting a few months later) came *after* Barrick had invested a cool one billion dollars in the mine.

Any attempt to abandon this annual practice would bring unwanted negative publicity to the industry and its congressional allies. Nothing excites journalists (or moderate eastern Republican members of Congress) like the patent issue, and nothing would advance the cause of comprehensive reform so much as an attempt by industry and its allies to try to lift the moratorium.

The Bush Administration has not publicly opposed the moratorium, but it has made the patenting process easier for companies. Prior to the Clinton Administration, patent decisions had been made at a very low level in the BLM, without much legal or policy review for consistency. One of Bruce Babbitt's first moves upon becoming Secretary was to create a new

process, with multiple reviews, for examining patent applications. He also stopped a program that had allowed mining companies to pay for the preparation of mineral reports. These reports made the crucial determination whether the company was entitled to a patent. Babbitt's new review process was upheld in court.⁶

The Bush Administration has resumed allowing mining companies to pay for mineral reports and has delegated the patent decision back down the chain of command as far as the Director of the BLM.⁷ This retreat is so far only applicable to those patent applications that were grandfathered from the congressional moratorium.

True to form, the industry has not conceded the patent issue entirely. It still favors renewed patenting, but now says it is willing to pay fair market value for the *surface* of federal lands it would acquire; that is, "exclusive of and without regard to the mineral deposits in the [federal] land or the use of the land for mineral activities."⁸ There is, as Mae West supposedly said, less here than meets the eye. The industry is still not willing to pay much of anything for the federally-owned minerals. Their value of course dwarfs the value of the land *sans* minerals.

Moreover, the industry also is willing to give the government the opportunity, after the patent issues and the minerals have been extracted, to reacquire the land.⁹ At that point, if history is any guide, the land would be permanently scarred and, in many cases, a continuing source of water and air pollution. The industry appears to want, in other words, to have its cake and eat it too—to get title to the minerals for nothing, and then to saddle the government with long-term cleanup responsibility. To this observer, the industry's position brings to mind the classic definition of "chutzpah," where a person who murders his parents seeks mercy on the ground he is an orphan.

One could, however, make a respectable case for renewing patenting in narrow circumstances, as follows: Many modern mining operations are found on, or proposed for, lands that are in a hodgepodge of ownerships. Some of the lands are private (having been previously patented under the Mining Law, homestead acts, railroad land grants or other federal disposal laws). Some is state-owned (remnants of school trust and other federal land grants to states). And some of it is federal land.

Is there any justification for the United States continuing to hold pieces of federal land in such situations? I can think of two. The first is the future prospect of gaining royalty payments for the federal minerals extracted from such lands. If the United States were to be paid a suitable amount for such minerals, through a royalty payment on production or otherwise, this justification disappears. The second is that continuing federal ownership furnishes a basis for federal environmental regulation of the mine. This justification is not compelling, because the United States could, if it chose to do so, impose environmental regulation on purely

private mines under the commerce clause, just as it has for surface coal mining throughout the United States in the Surface Mining Control and Reclamation Act (SMCRA).¹⁰

Privatizing such remnant pieces of federal lands was seriously discussed with some mine operators toward the end of the Clinton Administration. The specific proposal was to exchange pieces of federal land on which mining claims had been located (found within both operating and proposed mines) for nonfederal land elsewhere. Mine operators sought title in order to gain exemption from any royalty Congress might impose in the future and to simplify regulatory requirements, since after the exchange they would have to answer only to one regulator (the state) rather than two. The United States was attracted to the idea because it would convert the value left in these remnant federal interests into land with conservation value, such as habitat for endangered species.

Although conceptually attractive, such proposals never advanced very far. For one thing, the valuation issues were challenging. What is an unpatented mining claim that supports an operating mine worth to the federal government when no royalty is currently authorized by law? The answer would seem to depend in part on the prospect that Congress might at some point enact a royalty that could recapture for the federal treasury some of the value of the minerals on these pieces of land. Fixing the value requires considerable speculation. The valuation difficulty is compounded where the mining company seeks to acquire title to an undeveloped mineral deposit (as opposed to an active mine). Beyond valuation, there was also a serious question whether a land exchange—which in effect patented the claimed land to the mining company—would be an unauthorized evasion of the congressional moratorium against new patents.

Before leaving the patent issue, two other things deserve mention. One is an exemplar of the tenderness with which the Department of the Interior has often treated mining claims. In the Wilderness Act of 1964, Congress decided that henceforth patents of mining claims in designated wilderness areas should convey only the minerals, and not the surface. This decision was, however, subject to "valid existing rights."¹¹ Without legal analysis, the Department long acted as if the valid existing right contained a right to the surface of unpatented mining claims as well as the minerals where a discovery had been made before the land had been designated as wilderness. We wrote a Solicitor's opinion explaining that valid existing rights did not include a right to patent the surface.¹² So far the Bush Administration has acted consistently with that Opinion.¹³

The second practice exemplified the sloppiness that had characterized much administration of the Mining Law. Whether a "discovery" of a "valuable mineral deposit" exists, and thus whether a patent may be issued, depends upon whether the mineral is "marketable." This in turn depends on, among other things, the market price for the

mineral. But the market price of many minerals has historically fluctuated, sometimes quite dramatically. The price of gold, for example—the most widely sought mineral subject to the Mining Law—has ranged from about \$250 to \$850 per ounce over the last twenty years. A key question in determining discovery, then, is what moment or period of time is selected to calculate the market price.

Rather amazingly, the Department had traditionally provided its mineral examiners (those responsible for preparing validity determinations) little guidance on this issue. Consequently, examiners made ad hoc decisions about what commodity price to use. Predictably, practice varied widely. To make the Department's patent review more consistent, the BLM finally adopted a specific policy on this issue in 1998.¹⁴ Where the mineral in question has widely reported market prices and is subject to "futures" trading based on project future market prices, mineral examiners are to use a market price averaged over a three-year period on either side of the date the discovery determination is made. So far the Bush Administration has not re-examined this approach.

B. Claimholding Limitations

This has two different elements. The first is the \$100 rental or claim maintenance fee, mentioned above, which was adopted by Congress in 1992. Although this fee must also be periodically renewed, and some in the industry would like to see the fee reduced (or the number of claims to qualify for an exemption enlarged), large production companies like (or don't really mind paying) the fee. Its main effect has been to drastically reduce the number of recorded claims, from well over a million in the 1980s to about 200,000 at the end of Fiscal Year 2000. Before the fee was imposed, claims were nearly costless to hold,¹⁵ giving the less scrupulous great incentive to locate them without any intention of mining, in order to be paid by those who had such intention. This cottage industry has withered because of the claim holding fee. This has simplified the task of assembling lands for a proposed mine. The government also likes the fee because the proceeds are dedicated to the administration of the Mining Law. For these reasons, the holding fee is well on its way to becoming entrenched, though further action by Congress is required to make it permanent.

The second, and more important, element of claimholding has to do with the Mining Law's most archaic feature: The fact that it creates different kinds of claims, with specific limits on the characteristics and area of land they can include. There are two different kinds of *mineral* claims (lode and placer) and one kind of *nonmineral* claim (mill sites). To further confuse things, the Mining Law also authorizes the location of so-called tunnel sites, but the courts have deemed these to be rights-of-way.¹⁶ The law

has also long been applied to limit the numbers of certain kinds of claims that can be held.

The line between the two kinds of mineral claims is drawn on the basis of the characteristics of the mineral deposit. But of course nature does not always draw neat lines, making determinations about which kind of claim to locate difficult. The Supreme Court has noted that a "placer discovery will not sustain a lode location, nor a lode discovery a placer location."¹⁷ This leads prudent mining companies to locate both kinds of claims where the circumstances are ambiguous, as they often are. But there's another catch: If the claims are located in the wrong order (because one type of claim can be abandoned by locating another type of claim on top of it) the claims are still void. As I have previously observed, "[t]hese contortions serve absolutely no useful purpose."¹⁸

Still, this is just an annoyance. Other claim problems are more serious. Perhaps the most notorious is the provision of the Mining Law that authorizes the location of nonmineral claims called mill sites, for the purpose of accommodating mineral processing and ancillary facilities on federal lands. The Mining Law limits mill sites to five acres and requires them to be noncontiguous to mining claims. They must also be located on nonmineral federal land open to the Mining Law.

Each of these requirements puts an awkward burden on miners. The claim size limit is especially problematic. Modern mining requires large acreages for processing facilities and tailings and waste rock piles. In typical contemporary cyanide heap-leach mining of widely disseminated gold deposits, hundreds of tons of material must be moved to produce ounces of gold.

The Mining Law has long been interpreted to limit mill sites to one per each (lode or placer) mineral claim. Although this interpretation had sometimes been departed from in practice (without any attempt to justify it under the terms of the law), I issued a Solicitor's Opinion in 1997 concluding that this limitation was still valid.¹⁹ The effect is that, in typical large-scale operations, mining companies can acquire larger acreages of federal land they desire for tailings and waste rock piles only through a land exchange or other means.

In policy terms, the effect is to give the government more control over such mining operations, because these alternative ways of gaining access to federal land for such purposes require the exercise of unfettered discretion by the government. Where a mining company needs more federal land for a mining operation than the mill site limitation allows, the company comes to the government in the same legal posture as a timber company, an oil and gas company, or a camper or other user of federal land. It is entitled to no special favors.

The industry's preferred reading of the Mining Law is to give it an unqualified right to gain access to as much federal land as necessary in

order to bring a deposit into production. This would mean, for example, that if a single, 20-acre mining claim contains a mineral that available technology requires 10,000 acres to process, the Mining Law allows the claimant to locate and use 2000 mill sites for that purpose, regardless of whether the government thinks it is an appropriate use of the land. The Solicitor's Opinion explains why this reading is not consistent with longstanding published interpretations of the Law.

The industry's response to the Mill Site Opinion has been to contest this interpretation everywhere except, curiously, in the courts. The conclusion seems inescapable that the industry is not very confident of winning in court—that the vehemence of its rhetoric disguises a weak legal position.

The industry first sought a fix from Congress through an appropriation rider. In 1999 Congress provided a modicum of relief. It included a rider that effectively exempted from the Mill Site Opinion "any operation for which a plan of operations has been approved" prior to the rider, or submitted to the BLM or the U.S. Forest Service prior to the date of the Mill Site Opinion.²⁰ Anticipating a potential court test, the rider cautioned that it should not "be construed as an explicit or tacit adoption, ratification, endorsement, approval, rejection or disapproval of" the Solicitor's opinion. Although the rider itself is not a paragon of clarity, the Bush Administration has interpreted it liberally, to exempt "any later revision, amendment or modification" of plans of operations approved prior to the rider or submitted to federal agencies prior the date of the Mill Site Opinion.²¹

Not satisfied with this limited victory, the industry has taken its argument for unlimited access to federal lands back to the executive branch, this time apparently finding more sympathetic ears in the Bush Administration. As of this writing, the Administration is actively reexamining the Mill Site Opinion.

The Mill Site Opinion remains a problem for proposed new mining operations. Some mining companies have sought to skirt the mill site limitation by using mineral claims for mill site purposes. I addressed this practice in another Solicitor's Opinion adopted in early 2001.²² This Opinion concluded that land within mining claims may be used for purposes ancillary to mining on that claim, as well as for mineral extraction. It noted, however, that if mining claims are used exclusively for ancillary purposes, they may be invalid. This is because such use gives rise to an inference that the mining claims being used this way do not contain valuable mineral deposits. The inference is particularly reasonable if the miner intends to bury the claimed land under thousands or millions of tons of tailings or waste rock, rather than remove minerals from it. Therefore mining claims used for such purposes (and operations dependent upon such use) are subject to legal challenge.

Other companies have tried to circumvent the mill site limitation by "slicing and dicing" their mineral claims (*e.g.*, dividing a single 20-acre claim into 21-acre claims) and then arguing they are meeting the one mill site per mineral claim standard. This strategem is also of dubious validity.²³

Still other problems arise from the Mining Law's archaic claim limitations. Many large mines operate on dozens or even hundreds of mining claims. Courts have long insisted that miners must show a discovery on each claim. But modern mining imperatives usually mean it is not economic to extract minerals from a single claim. No court has squarely addressed the legality of this modern practice.²⁴

Relocating or amending mining claims after they are first located is frequently necessary as an ore body is further identified and defined. An arcane and complicated mixture of state and federal rules governs the relocation or amendment process. Failure to navigate this thicket properly can lead to the claims being voided. Where the federal land involved has since been withdrawn from new claim location, whether the claim may be amended or must instead be relocated could spell the difference between life or death for new mine proposals. Environmentalists stand ready to police compliance with these rules.²⁵

I have previously capsulized the debate over these claim limitations this way:

The mill site imbroglio is emblematic of a larger issue: namely, how to interpret this old Mining Law. Some members of the mineral law community see the Mining Law as almost infinitely flexible, so long as the flexibility runs in one direction—to serve the interests and needs of the domestic mining industry. [The Interior Department's] perspective [that is, in the Clinton Administration] has been different. Doubtless a basic purpose of the Mining Law was to promote the development of federal minerals, but if the enacting Congress had wanted the Executive Branch to bend every effort toward that end, it needed to say nothing more than that. As we all know, however, Congress instead chose to include exquisite (or mind-numbing, depending upon your perspective) details in the law. We concluded that Congress did not intend the statutory mill site acreage limitation to be ignored to give miners a right to claim (and patent) an unlimited amount of public land acreage for waste dumps and spoil piles.²⁶

All told, the mill site and other claim limitations make it difficult to assemble and maintain land positions for modern new mining operations. Congress has acted to mitigate the effect of the mill site limitation on existing mines, or mines that were pending approval in 1997. But it has left

the limitation, as construed in these Solicitor's Opinions, in place for all new operations.

Assuming the Administration reverses the Mill Site Opinion (a reasonable assumption, given its so far boundless willingness to give this industry what it wants), the industry will not be out of the woods. For one thing, environmentalists stand ready to challenge any rollback in court and could well succeed. Furthermore, the environmentalists will likely challenge mining claims that are "sliced and diced" in order to avoid the limitation on grounds of lack of discovery. And they could mount a similar challenge where mining claims are used for mill site purposes.²⁷

All this means that, absent legislative intervention, these limitations on claims could be an Achilles heel for any attempt to open a new mine on federal mining claims. If the courts refuse to accede to the industry's demand for infinite flexibility, the burden of seeking reform of the Mining Law will be shifted to the industry. This would fundamentally alter the terms of the reform debate because, as explained in Part IV below, both sides—environmentalists and their congressional allies, and industry and its allies—currently have a veto power over any change.

In a legislative debate, some of these claim limitation issues will be useful bargaining chips for environmental advocates. For example, there is no particular environmental benefit to strictly enforcing the distinction between lode and placer claims. But other issues, such as limiting the amount of acreage to be used for waste dumps and tailings piles, are important to environmentalists.

C. Royalty/Reclamation Fees

Compared to some of the other reform issues, this one is relatively straightforward. Hardrock miners on the federal lands are among very few hardrock miners on Planet Earth who do not pay the owner of the resource a percentage of the value of production. Miners on state lands, on private lands, and in most foreign countries routinely pay the owners a royalty. Not so on federal land.

This is because "free minerals," like "free soil," was a powerful cry in the nineteenth century and proved sufficient to carry the day for miners in the post-Civil War drive to settle the West as rapidly as possible. Even then, some observers saw the risk of giving the miners the minerals for free. Army Colonel Mason, who toured the gold fields of the Sierra Nevada foothills in California as the California gold rush was just getting underway, reported that he engaged in "serious reflection" about how the government ought to extract a fee from the miners. But prudence won out: "[U]pon considering the large extent of country, the character of the people engaged, and the small scattered force at my command [indeed, many of his soldiers had deserted to look for gold], I resolved not to interfere." That was

probably a good thing. But Mason also issued an eerily prophetic warning: "[S]till the Government is entitled to rents for this land, and immediate steps should be devised to collect them, for the longer it is delayed the more difficult it will become."²⁸

Today, campers on BLM and national forest land, like visitors to national parks and wildlife refuges, livestock graziers, coal and oil and gas producers, telecommunications site operators, and timber harvesters all pay fees to extract or otherwise use the resources of the federal lands. The exemption enjoyed by hardrock miners is ever more glaring and ever more difficult to sustain. The industry itself now concedes as much. In the last few years it is now willing to support a royalty, so long as the rate is set very low and it is generously larded with deductions, exemptions, and grandfather clauses.

A royalty is generally assumed to require legislation. As with the tax code, the devil is very much in the details. The royalty rate, expressed as a percentage of value of production, tends to attract the most political attention. For comparison's sake, under the Mineral Leasing Act, miners of federal coal recovered by surface mining pay a minimum of twelve and one-half percent royalty; producers of federal oil and gas the same; producers of federal phosphate pay not less than five percent.²⁹ The hardrock mining industry pays private or state mineral owners an average royalty of something over four percent, although some go as high as eighteen percent.³⁰

At least as important as the rate, however, is what the royalty is levied on (gross versus net value of production or, more precisely, what kinds of deductions for what costs are allowed to arrive at the value of production upon which the royalty is calculated). The federal coal royalty is levied on "the value of coal as defined by regulation"; the oil and gas royalty is on the "amount or value of the production"; the phosphate royalty is on the "gross value of the output."

Also important is the scope of any grandfather clause or phase-in. There are relatively few major mines, and some produce minerals for a century or more. New mines are opened infrequently (low gold prices in recent years have been a major factor in very few new mines opening in the United States). Thus, a permanent exemption for existing mines would rob a royalty of much meaning for a long time.

Industry understands this, of course. The industry's "sham reform" bill vetoed by President Clinton in early 1996 included a five percent royalty on the "net proceeds" of mineral production. But it also contained a detailed and lengthy list of deductions, as well as a grandfather clause that would have exempted not only all existing, active mines, but also could exempt most or all mines that might ever open on all existing mining claims.³¹ The latter widens a large loophole into a chasm, for the industry has long had a penchant for hoarding and maintaining mining claims that

might be valuable at some time in the future. It was not surprising (although it was bitterly resisted by the Republicans, who sought to squelch the report) that the Congressional Budget Office concluded that the royalty in this "reform" bill would generate very little revenue for the federal treasury from this multi-billion dollar industry.

It is, on the other hand, not unreasonable to protect, to some extent, the ability of existing mines to continue to operate without paying a royalty, at least for some reasonable transition period. Although the industry is fond of expressing the argument to exempt existing mines from a royalty in constitutional terms, there is no serious constitutional question involved. The matter is political, not constitutional, but of course politics counts, especially in a political institution like the Congress. How to handle existing mining claims was the principal factor delaying enactment of the Mineral Leasing Act for a decade.³²

The hardrock industry also argues that a royalty will put it out of business. It points to the historic wide fluctuations in the market price of metals, the most important hardrock minerals. This argument conveniently ignores the fact that all federal mineral royalty provisions now on the books, and all those in Mining Law reform bills, authorize the Secretary to suspend royalties when ongoing operations are operating at a loss.³³ That has not been enough for the industry. Characteristically, it wants special, favorable treatment.

Another form of monetary recovery has sometimes been proposed. This is a "reclamation fee," similar to that levied under the Surface Mining Reclamation and Control Act of 1977, the landmark federal coal surface mining statute.³⁴ A reclamation fee in the hardrock context would capture for the federal treasury some value from mineral production from state and private land (much of the latter being land that was probably patented under the Mining Law of 1872), as well as federal land. The reclamation fee is in the nature of a tax rather than a royalty, because it is not based on the United States owning title to the mineral. It could be combined with, or levied in place of, a royalty.

In the end, arguments over a royalty and reclamation fee are only over money. The amount involved is not trivial, though it is not Pentagon-scale either. According to one estimate, hardrock minerals worth nearly \$1.5 billion are removed from the federal lands each year. A four percent royalty would produce on the order of \$60 million per year. Looking at it another way, domestic gold production from all lands, not just federal lands, has averaged about 11,000 ounces per year, for a total value of \$3.3 billion at \$300 per ounce. A reclamation fee of three percent would produce nearly \$100 million per year. For comparison's sake, the federal government takes in several *billion* dollars per year in bonus bids, royalties, and rentals from the coal and oil and gas industries operating on federal lands.³⁵

The hardrock industry has recognized it can no longer politically defend such a unique exception, when the result is that a family engaged in recreational camping on federal land pays the United States more than operators of billion-dollar mines. Still, there will have to be hard bargaining over how much the miners will pay and how the royalty and/or fee is phased in.

D. Abandoned Mine Lands Cleanup

Modern proposals to levy a royalty and/or reclamation fee earmark the proceeds to clean up land previously mined under the Mining Law that went unreclaimed and abandoned. Many of these abandoned mine sites pose safety problems and are continuing sources of pollution.

There is considerable variation in estimates of number of problem sites and the estimated cleanup costs, but overall the dimensions of the problem are rather staggering. Estimates of abandoned mines on federal land range into the many hundreds of thousands; EPA puts the figure at over 200,000.³⁶ More than 25 individual sites are on the Environmental Protection Agency's Superfund list. A 1998 federal survey found more than 30 mining sites in the West to present an "imminent hazard" to public health and the environment. EPA officials have estimated that 40 percent of the watersheds in the West are affected by mining pollution.³⁷ Another estimate is that 16,000 miles of western streams are polluted by hardrock mines. The amount of mining waste flowing from the Silver Valley into Coeur D'Alene Lake in Northern Idaho has been estimated at 70 million tons, which if piled up on a football field would rise 4.7 miles above the earth's surface.³⁸

Earmarking federal revenues from a hardrock royalty or reclamation fee to clean up abandoned polluting mines is a straightforward idea. Viewed independently, it should command widespread political support. The industry in the main does not shirk from the idea of a cleanup program. The states would welcome it, especially if they get a piece of the action and some or all of the administrative responsibility to carry it out. Cleaning up the mess is a good idea, and it is not inappropriate to secure the necessary funds from the industry that created it in the first place. The cost estimates for such a cleanup run to many billions of dollars (upwards of \$35 billion, according to the pro-reform Mineral Policy Center). The size of these estimates raises an interesting question: Has, in the end, the hardrock mining in the West been worth it? Would an objective cost-benefit analysis (if there were such a thing) show that the value of minerals extracted exceeded the costs of repairing the damage caused to the environment?

E. Environmental Regulation

Here the issues are the most complex, and may be the most intractable. But here too the reform landscape has changed substantially in the past few years, especially on the public lands managed by the Bureau of Land Management. (Regulations applying to hardrock mining on national forests have changed little over that period.³⁹)

The starting point has already been mentioned: A major, though somewhat camouflaged, provision Congress included in section 302(b) of the Federal Land Policy and Management Act of 1976. It mandated that the Secretary of the Interior shall, "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands." Congress left no doubt that this directive applied to activities carried out under the Mining Law of 1872, albeit in a left-handed way.⁴⁰

1. *The Original Part 3809 Regulations*

The Secretary responded with regulations promulgated in late 1980 that regulated hardrock mining activities on public lands to protect the environment. These regulations, which came to be known as the Part 3809 regulations (because that's where they were found in volume 43 of the Code of Federal Regulations), contained some major loopholes. For one thing, they exempted from advance approval all mining operations that disturbed fewer than five acres of public land.⁴¹ Operators of these so-called "notice mines" merely had to notify the BLM. The burden was on the BLM to ensure that these operations met environmental good housekeeping standards. If they did not, the burden was on the BLM to bring a lawsuit against the operator and make its case for compliance to a federal court. The BLM hardly ever, if ever, went to the trouble of doing that. The "notice" loophole was substantial; over the years from 1981 to 2000, the BLM received between 558 and 2451 notices each year.⁴² The BLM also categorically exempted the "notice" mines from the otherwise near-universal environmental impact assessment requirement of the National Environmental Policy Act (NEPA).⁴³

The 3809 regulations required mines disturbing more than five acres⁴⁴ to obtain advance approval from the BLM of proposed plans of operations. From 1981 to 2000, between 149 and 575 plans of operations were approved each year.⁴⁵ The need for BLM approval triggered NEPA requirements, although the BLM was slow to engage in full environmental impact statement preparation on such proposals.

The second major loophole in the original 3809 regulations was that they did not flatly require operators to provide the BLM with financial assurance (such as bonding requirements) to insure that disturbed mine sites would be reclaimed to protect the environment in the event of operator default. Furthermore, they were vague on what would satisfy the financial

assurance requirements— whether an actual performance bond had to be posted, or whether “self-bonding” (which has been aptly described as “taking the operator’s word for its financial soundness”) was sufficient.

A third shortcoming of the original 3809 regulations was their failure to provide administrative penalties for violations. This meant that violations could only be sanctioned by taking operators to court, a cumbersome process that required Interior to persuade the Department of Justice to set aside other priorities to undertake the necessary litigation. As a result, enforcement actions were rare.

Fourth, they lumped together the Department’s obligations to protect against “unnecessary” and “undue” degradation of the public lands from hardrock mining activities. The statute seems clearly to make these separate obligations, because it links them with the disjunctive “or.” The regulations blurred the two by defining the degradation standard this way:

Unnecessary or undue degradation means surface disturbances greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area...that level of protection shall be met.⁴⁶

2. Upgrading the 3809 Regulations

Despite their shortcomings, the regulations were better than what came before, which was no regulations at all. The Department recognized from the beginning, however, that its first foray into the regulatory arena would need reexamination, and it promised to review the new regulations within three years of promulgation. That did not happen (it was the first Reagan term, after all). By the end of the Reagan Administration, however, General Accounting Office reports and congressional and public criticism had prompted the Department to undertake an inquiry into whether the regulations should be overhauled. This ripened, in the first Bush Administration, into an advance notice of proposed rulemaking that formally kicked off the upgrading process.

The Clinton Administration put this effort on hold while it worked with Congress to try to achieve legislative reform of the Mining Law. In January 1997, when it became clear that agreement on statutory reform was not possible, the Administration revived the 3809 reform rulemaking. It took four years to complete, mostly because it required working through numerous obstacles in the form of Interior Appropriation Act riders, which were thrown in the path of completion by the industry and its congressional allies. Riders were adopted that required more consultation with the states and creation of a National Research Council (NRC) panel to report on the operation of the existing rules. The last and most significant rider required any new rules to be "not inconsistent with the recommendations contained in the National Research Council (NRC) report entitled *Hardrock Mining on Federal Lands*."⁴⁷ The NRC's 1999 report contained sixteen specific recommendations for improving the Department's regulation of hardrock mining activities.⁴⁸

3. *Making the NRC Recommendations Substantive Law*

Unlike most appropriation riders, which expire at the end of the year for which the appropriations are made, the last rider remains in effect until Congress provides otherwise. That is because, by its own terms, the rider applies to the expenditure of money appropriated not only by the appropriations act which contains the rider, but also funds appropriated by "any other Act." Effectively, then, the rider has laid the NRC recommendations over FLPMA's duty to prevent "unnecessary or undue degradation."

For example, one of the NRC's recommendations was to eliminate the "notice" mine loophole.⁴⁹ The congressional rider converts this from a blue-ribbon recommendation to substantive law. Because it forbade BLM from promulgating new rules that were inconsistent with the recommendation, any new rules had to eliminate notice mines.

To take another example, the NRC's very first recommendation was that all non-casual hardrock mining activities on federal lands should be accompanied by "[f]inancial assurance" to ensure "reclamation of disturbances to the environment."⁵⁰ The NRC explained that cleanup costs "should not be a public burden," and yet under the then-prevailing regime there was "inadequate protection of the public and the environment."⁵¹ The NRC's resolve was probably stiffened by a number of hardrock mining company bankruptcies in the late 1990s, where company financial assurances fell far short of the amount needed to cover the costs of reclamation.⁵²

The rider combines with the NRC recommendation to create a statutory floor for new rules that require the government to secure financial assurance from companies engaging in hardrock mining activities under the Mining Law of 1872. Thus having no choice in the matter, the Bush Administration retained the Clinton Administration's financial assurance

rule, except for a minor change to the deadlines by which operators had to furnish financial guarantees.⁵³

Of course, calculating cleanup costs for fixing financial assurance obligations is hardly an exact science, especially in trying to accurately predict the amount of water pollution a mine may cause, and what would be necessary to clean it up. In some cases, it may be necessary to treat the water permanently.

Even before the new rules took effect, state regulators were being sensitized to the issue. Environmentalists helped by publishing a guide to bonding practices to better educate state regulators to their responsibility. The new rules themselves provided some specificity about the kinds of financial assurances necessary to insure reclamation in the event of operator default.⁵⁴ The federal rider, the NRC Report, and the new federal rules should further stiffen regulators' backbones. There is some indication that the tougher bonding requirements are having some impact on the ground. In late 2001 New Mexico state regulators told Phelps Dodge it may have to post a bond of nearly a billion dollars to cover the cost of closing and reclaiming one of its large open pit copper mines. Some industry members have spoken darkly of a bonding "crisis," brought on by a confluence of unhappy events: Mining company bankruptcies, surety company bankruptcies, fewer companies issuing surety bonds, surety companies requiring more collateral to obtain bonds, and government regulators getting tougher (requiring higher bonds and no longer allowing corporations to self-insure).⁵⁵ The financial assurance issue clouds the ability of industry to gain approval for new operations.

In sum, the rider requiring consistency with the NRC recommendations has altered the reform landscape. By in effect giving the NRC recommendations the force of law governing new 3809 regulations, Congress has poured more content into the "unnecessary or undue degradation" standard, and thereby limited the Department's flexibility to weaken rules the industry does not like.

4. Improvements Outside the NRC Recommendations

Where the NRC did not provide a specific recommendation, the Department is still bound by the duty to prevent "unnecessary or undue degradation." The NRC did not, for example, make any specific recommendation about the kinds of financial assurances that were appropriate. Under the terms of the congressional rider, then, this left the Department to decide what was needed to prevent "unnecessary or undue degradation." Even though the NRC did not specifically recommend against allowing operators to "self bond," it did note that the financial assurance mechanism "should be secure and sufficiently liquid to allow responses to near term needs."⁵⁶ If the Department decides that self-bonding fails to prevent "unnecessary or undue degradation," it has a duty to prohibit it.

The Clinton Administration completed its overhaul of the new rules in late 2000, carefully explaining in its preamble to the final rule why its proposals were "not inconsistent with" the NRC recommendations. The rules addressed a number of hardrock mining issues on which the NRC did not make specific recommendations.

5. *The "Right to Say No"*

The most important of these was the inclusion of a "right to say no" to new proposed plans of operations that threatened to cause "significant irreparable harm to outstanding resources that could not be mitigated." This standard, which riled the industry, was based upon a Solicitor's Opinion issued in late 1999.⁵⁷ The Opinion addressed the Secretary's authority over a proposed plan of operations for an open-pit, heap-leach gold mine (the Glamis mine) on BLM land in the California Desert. The mine was strongly opposed by the local Quechan Tribe of Indians, who objected because it would obliterate a trail and other features of cultural importance to the Tribe. The Advisory Council on Historic Preservation issued a report endorsing the Tribe's concern and recommending that the proposed mine be denied, if the Secretary had authority to do so. The Solicitor construed FLPMA §§ 601 (which applies only in the California Desert, and which contains a "no undue impairment" standard) and 302(b) (which contains the "unnecessary or undue degradation" standard, applicable to all public lands), as giving the Secretary the authority to turn down the proposed Glamis mine plan of operations.⁵⁸

The Clinton Administration's new 3809 rules also contained detailed performance standards, and provisions authorizing the Department to impose administrative penalties for noncompliance. The latter followed the NRC's recommendation that federal land managers have authority to issue administrative penalties for violations of regulatory requirements, because this was necessary to provide a "credible and expeditious means to secure compliance."⁵⁹

6. *Bush Administration Retreats*

Almost immediately upon taking office, the Bush Administration set about to roll back some key provisions of the Clinton reforms.⁶⁰ It issued a new Solicitor's Opinion, which overruled the Glamis Opinion,⁶¹ and issued new rules that watered down the Clinton rules in some key respects.⁶²

The administrative penalty provisions were also stripped from the reform measures. The rationale here was particularly interesting. The Bush Administration explained that whether the Department has authority to impose administrative penalties is "unsettled," and therefore it is "prudent to await clear guidance from Congress." Perhaps more to the point, it complained that if it defended the Clinton Administration position that it

already had such authority, the industry would contest it in court, and being sued by industry was something that, according to the Administration, ought to be "avoided by future legislation."⁶³ Curiously, although not surprisingly, the Bush Administration to date has not submitted legislation to Congress to obtain such authority. The inference one can readily draw is that the Administration does not want the authority to issue administrative penalties, despite the NRC recommendation, because it would rile the industry.

The new Administration also weakened the performance standards, narrowed the definition of "operator" to exclude references to parent entities and affiliates, and removed a requirement that operators assume joint and several liability for meeting reclamation standards. Most significantly, it stripped out the "right to say no" based on a "substantial irreparable harm" standard. Remarkably, it claimed that its "fundamental goal" in crafting all these new policies was "to enhance the BLM's ability to protect public health, public land resources, and the nation's taxpayers," for Secretary Norton declared that she would "not support any proposal that either jeopardized the environment or shifted the costs of reclamation of mined lands to the public."⁶⁴ And it may not be through yet. In April 2002 it asked for more public comment on these rules, and may be considering watering down the requirements still further.⁶⁵

These regulatory retrenchments have been challenged by environmentalists in federal court in the District of Columbia. As of this writing, motions for summary judgment are soon to be filed.

The litigation could provide a key test for how the Department's responsibilities under FLPMA and the rider incorporating the NRC recommendations are to be interpreted. The outcome could greatly influence the future course of Mining Law reform in the executive and legislative branches.

F. Mineral Withdrawals

During its eight years in office, the Clinton Administration continued the long-term trend of withdrawing more and more federal land from the operation of the Mining Law. Although the industry expresses alarm at this, several hundred million acres remain open to the Mining Law. The Clinton Administration withdrawals encompassed several million acres in the nearly two dozen national monuments President Clinton proclaimed, as well as the Rocky Mountain Front in Montana, the San Francisco Peaks in Northern Arizona, the area around the site of the proposed Glamis Mine in the California desert, the area along the northeastern boundary of Yellowstone National Park, a 1.1 million acre tract in southwestern Oregon, and other areas. The Yellowstone withdrawal was combined with a buyout of the New World gold mine that was proposed on the site of an old mine

near the Park. The San Francisco Peaks were withdrawn from new claim location at the same time the federal government bought and phased out a highly visible existing pumice mine in the area.

So far, the Bush Administration has rolled back only one of these actions, reducing the Oregon withdrawal by 90 percent, from 1.1 million acres to about 117,000 acres. The area contains a number of wild and scenic rivers, and the mineral activity here is mostly recreational mining for gold in streambeds. (Whether the Mining Law supports mineral activity being conducted for recreational purposes is an interesting legal question.) Environmental advocates claim the powerful suction dredges used threaten endangered coho salmon spawning areas, although the miners and the Forest Service dispute this. Given the Bush Administration's other efforts on behalf of the industry in other areas, it would not be surprising to see more withdrawn areas restored to the operation of the Mining Law. (On the other hand, the Bush Administration has itself withdrawn about 183,000 acres from the operation of the Mining Law.)

G. The Role of the States

In the last decade, the political debates over reforming the Mining Law have contained a good deal of discussion of the role states should play in regulating hardrock mining on federal lands. All western states now have regulatory programs that apply to hardrock mining within their borders.⁶⁶ The U.S. Supreme Court has made clear that state environmental regulations may apply to hardrock mining being conducted on federal land, to the extent there is no conflict with federal law or regulations.⁶⁷ The NRC concluded that the overlapping system of federal and state regulation worked reasonably well, and was "generally well coordinated," although it did make some suggestions for improvement.⁶⁸

Nevertheless, the industry advocates for complete federal deference to state rules. It argues that it can more successfully work with (a cynic might say dominate) state regulatory authorities. Thus, when the State of New Mexico sought to require higher bonds from hardrock miners, the mining companies (led by Phelps Dodge) went to the governor and the state legislature looking for relief (but so far haven't obtained it).

But these are federal lands, managed to serve national interests. Federal standards apply to fossil fuel and fertilizer minerals, to timber harvesting, livestock grazing, and other activities on these lands. There is no reason to treat hardrock mining differently. Indeed, one very important fact counsels against federal abdication of regulation to the states: When regulatory failures happen in hardrock mining, they can be doozies—very difficult and costly to repair. Moreover, when that happens, as it has several times in recent years, it is the federal government (*i.e.*, the federal taxpayer) that usually picks up the bill if the mining company has become insolvent

and left an inadequate financial assurance. If the feds pay, the feds should regulate. (This is just a variation of the old maxim that if you want to marry the federal treasury you're likely to get federal regulation as an in-law.)

Some of the most spectacular modern failures of environmental regulation of hardrock mining have been state, not federal. The "poster child" is the infamous Summitville mine, where the State of Colorado's disastrous decision to approve a poorly-capitalized, badly-located mine saddled federal taxpayers with a cleanup cost approaching \$200 million.⁶⁹

Skepticism about the ability of the states to stand up to hardrock miners is also fueled by a consideration of what states have done (and not done) to regulate extraction of water in connection with mining operations on federal lands. By longstanding tradition and law, states have substantial control over water. State regulation of water use in connection with hardrock mining activities in Nevada, and with the booming coalbed methane extraction industry in Wyoming, does not inspire confidence. The State of Nevada, for example, has done almost nothing to regulate massive water withdrawals at open pit mines within its borders. Groundwater levels have declined drastically, and the long-term effects (especially when mining ceases and the giant open pits fill up with water) are not known.⁷⁰ But history suggests that if serious harm results that will require substantial expenditures to clean up, proposals will be made to tap the federal treasury.

While it is important that federal law and regulation set a regulatory floor for the conduct of hardrock mining operations on federal land, state regulatory programs can be tougher than the federal standards. This was illustrated in the case of the controversial proposed Crown Jewel gold mine in northern Washington. This proposed mine has been stopped because the Washington State Pollution Control Hearings Board overruled the state Department of Ecology's certification that the mine would comply with state water quality standards. The federal courts, in the meantime, had rejected environmentalist claims that the federal approval violated NEPA and other laws.⁷¹ In another example, the voters of the State of Montana, acting through the initiative process, have outlawed heap leach gold mining within their borders. The industry is challenging the law in court, but the Department of the Interior has expressed the view (in the preamble to its Part 3809 rule revisions) that the Montana law is not preempted.⁷²

IV. THE POLITICAL LANDSCAPE

As noted at the outset of this essay, the Bush Administration has paid lip service to the idea of legislative reform. In a carefully worded letter to the chairs of the authorizing committees of the Congress in October of 2001, Secretary Norton called for reform legislation to update the Mining Law. She identified five specific features reform legislation should include: "Permanent authorization of a mining claim holding fee"; "Revision of the

patent system"; "Authorization of a production payment system"; "Authorization of administrative penalties"; "An expanded role for the States in managing the mining program."⁷³ In some key respects, the letter was a masterpiece of obfuscation. For example, what kind of "revisions" in the "patent system" would the Administration support? Lifting the moratorium on new patents? The industry approach of continuing to pay nothing for the minerals, but pay fair market value for the surface? What kind of "production payment system" would the Administration support? A meaningful royalty? Or one riddled with loopholes and deductions? Secretary Norton's letter also spoke favorably of the "existing framework of the mining claim system." Does this mean the Administration does not support lifting the limits on the number of mill sites, or abolishing the silly distinction between lode and placer claims? It appears we won't learn answers to these questions anytime soon, because the Administration has no plans to submit its own reform bill to the Congress.

In the Congress itself, the largest political obstacle to achieving Mining Law reform is this: With few exceptions (mostly eastern and midwestern members of the House), Republican members of Congress have marched in lockstep with the industry in opposing meaningful reform. The Republican Party's near-solid identification with the industry was not always so; after all, President Richard Nixon in the early 1970s supported a leasing bill to replace the Mining Law.

The focal point of opposition is in the United States Senate. As a result of the great constitutional compromise in Philadelphia in 1787, sparsely populated rural states where hardrock mining occurs (like Alaska, Idaho and Nevada) have as much sway in the upper body of Congress as states like New York, California, and Florida. Moreover, the Senate's internal rules allow unlimited debate unless a super-majority of 60 Senators votes to cut it off. The mining industry has therefore concentrated its efforts on securing the support of nearly all of the Senate's 49 Republicans, along with a few Western Democrats like Harry Reid of Nevada. This coalition has for more than a decade given the industry in excess of the forty votes it needs to block reform.

The picture in the House is different. In the committee of jurisdiction, the House Resources Committee, Republican control since the Gingrich revolution of the fall of 1994 has meant that the committee chair—first Don Young of Alaska and, more recently, Jim Hansen of Utah—has been distinctly unfriendly to reform. But supporters of meaningful reform command sufficient votes on the House floor. A core group of 50–75 Republican moderates, mostly from the East and Midwest, have consistently supported Mining Law reform in recorded votes. That has provided an ample margin to prevail over the majority of the House Republicans and the few conservative House Democrats who tend to vote in support of the industry position. For example, the House voted in 1999

to endorse the Clinton Administration interpretation of the mill site provision by a margin of 273 to 151. In June 2001, the House adopted, by a vote of 216 to 194, an amendment to the Interior appropriations bill sponsored by Jay Inslee (D. Wash.) and Stephen Horn (R. Cal.) that would have prevented Secretary Norton from amending the Clinton Administration's 3809 regulations.⁷⁴ This was significant because the vote was "whipped" by the House Republican leadership, meaning strenuous efforts were made to head off Republican defections. Nevertheless, thirty Republicans voted for it (fourteen Democrats voted against it).

As this glance at the congressional dynamic shows, Mining Law reform is a relatively cost-free way for members outside the Rocky Mountain West to cast a green vote. There are also some signs that the political appeal of Mining Law reform may be growing in the burgeoning urban areas of the West. Senator Slade Gorton engineered an appropriation rider that exempted the proposed Crown Jewel mine from the Mill Site Opinion. The voters of Washington then engineered Senator Gorton's ouster by a very narrow margin, after a spirited campaign in which his handling of the Crown Jewel matter became an issue. The only Western Democrat to oppose the Inslee-Horn amendment was Shelley Berkeley of Nevada.

Looking to the future of Mining Law reform in the Congress, some key variables are, first, whether the Administration tries to roll back the Mill Site Opinion and generously interprets or abandons other claim limitations; and second, the outcome of litigation filed by environmentalists challenging the Bush Administration's hardrock mining regulatory rollbacks. If the courts ultimately side with the environmentalists, the burden will likely shift to the industry to move curative legislation.

Because the Republicans have retained control of the House in the recent elections, the industry may get what it wants in the House Committee (where the westerners dominate) but could have problems on the House floor, where it will likely lack the votes to control the outcome. Although the Republicans have regained control of the Senate, they may not be able to deliver for the industry. Mining Law reformers could probably kill an industry-sponsored bill that lacks sixty votes.

Nick Joe Rahall, a longstanding opponent of the existing law, has introduced comprehensive reform legislation in the 107th Congress.⁷⁵ It is also possible, even likely, that the Mining Law may be reformed piecemeal by specific measures that address specific problems. For example, Rep. Mark Udall has introduced a bill that would, among other things, require mining companies producing from patented and unpatented claims to pay a reclamation fee, with the proceeds dedicated to abandoned mine land reclamation.⁷⁶ Some reform legislation may take a more indirect course. For example, Representatives Rahall and Kildee have recently introduced the Native American Sacred Lands Act (H.R. 5155), which is designed in part

to reverse the Bush Administration's position that it has no legal authority to turn down the proposed Glamis Mine because of its impacts on tribal cultural resources.

V. CONCLUDING CONSIDERATIONS

The hardrock mining industry tended to regard the Clinton Administration (like the Carter Administration that preceded it) as its worst nightmare. Secretary of the Interior Babbitt, the industry's *bete noire*, never shrank from an opportunity to attack the Mining Law and the special privileges it gave the industry. He effectively lampooned the patenting provision with press events and otherwise used his authority effectively to rein in industry practices and require adherence to details in the law the industry had been more than happy to ignore or forget.

The industry had long predicted that ending patenting or increasing regulation would strangle the domestic mining industry and send it rushing abroad. The cry increased as legislative reform efforts drew closer to success and continued at a loud volume during the Clinton/Babbitt years.

Yet during this, the industry's worst nightmare, a remarkable thing happened. Hardrock mining production on federal lands, especially gold, vastly increased. Starting in the late 1980s, domestic gold production zoomed to unprecedented levels. It maintained the pace throughout the Clinton Administration. And this was in the face of a steady decline in gold prices, from a high of around \$850 an ounce in the early 1980s to a low of \$250 an ounce in the late 1990s. By the late 1990s, in fact, the industry was producing nearly 12,000 ounces of gold per year. The highest previous levels, less than 5000 ounces per year, were reached in the first two decades of the twentieth century, and again in the late 1930s. Gold production today is more than four times greater than it was at the height of the California Gold Rush, or any other domestic gold rush of the nineteenth century.⁷⁷ Today the United States is the world's second largest producer of gold, silver, and copper, and the largest producer of molybdenum—all Mining Law minerals.⁷⁸

Meanwhile, gold prices have been rising since 9/11, improving industry's profit margins. For example, gold prices have recently hovered between \$300 and \$330 per ounce. Reported cost of production for Newmont's operating mines in the Carlin trend of Nevada have been in the neighborhood of \$200-220 per ounce.⁷⁹ A rising price means that some controversial proposals to open new mines, previously held in abeyance, will likely be resuscitated.

Also during the 1990s, the industry's companion cry—that the Mining Law was vital to produce minerals of strategic importance in a hostile world—was undercut by the end of the Cold War, the changing

economy, and new technologies that reduced dependence on some minerals. Appreciation also grew that the debate over the Mining Law was mostly about the production of gold for jewelry. Gold had so little strategic value that the government actually ordered gold mines shut down during World War II, so that the workforce could engage in more productive work elsewhere. All those inconvenient facts have not stopped General Richard Lawson, formerly the head of the National Mining Association, from fulminating that changing the Mining Law "will risk the lives of our sons and daughters, for many will surely die in battle on some foreign shore because of it."⁸⁰

Another feature with political ramifications is that, even as production increased dramatically, the number of jobs did not increase proportionally. Miners are paid well,⁸¹ but the number of miners continues to shrink as companies substitute ever larger and more sophisticated machines for people. Between the early and the mid-1980s, the number of metal mining jobs in the United States was more than cut in half, from more than 100,000 to less than 50,000. In the last 15 years, even though domestic metal production has doubled, the number of jobs in the industry remained essentially static. Moreover, the industry became ever more concentrated, now found in only a few states and a few localities.⁸² Nevada is responsible for more than 70 percent of total U.S. gold production, but the state's mining industry employed only about 10,000 workers in 2001, fewer than one percent of the jobs in the entire state. In the last decade, the total number of mining jobs in Nevada has declined even though production increased.⁸³

Recent national political trends also bolster prospects for Mining Law reform. Faith in government and governmental regulation is growing. Corporate responsibility and accountability are fast emerging as major electoral concerns. And public concern about environmental pollution remains high, a particularly salient fact because hardrock mining's biggest impact is on water quality. (Supporters of the Inslee/Horn amendment to prevent the Bush Administration from rolling back the Clinton Administration's hardrock regulatory reforms usually invoked concern about water quality.)

New mine proposals are put forward periodically that train a spotlight on the antique character of the Mining Law. Media coverage of such mines helps educate the public and newer members of Congress to the Law's inadequacies. In the last couple of years, the Rock Creek Mine in northwestern Montana has served that purpose. The proposed underground mine would tunnel into a designated wilderness area. The mine was approved by the Forest Service in December 2001, but the approval was suspended pending the outcome of biological opinion being prepared on the proposal in compliance with the Endangered Species Act. Another mine proposed for federal land near Reno, Nevada, this one for a

clay substance called montmorillonite (but better known by its popular name, kitty litter), has attracted controversy. The local county has recently turned down the company's proposal for a processing facility on private land the company owns, and the company is considering trying to locate the processing facility on its mining claims on federal land. The industry has so far not made the argument that kitty litter is a strategic mineral.

Given the continuing controversy (including a rising tide of local opposition to mining projects in more urbanized parts of the West), the increasing difficulty of opening new hardrock mines, and the decline in the number of jobs at stake and areas affected, one would be forgiven for wondering how the industry commands the support it does in the Bush Administration and among the Republicans in the Congress. And one might also wonder why the will cannot be found to craft environmental and fiscal reforms that do not seriously threaten substantial investments in existing mines.

I have pondered those questions for years. There are conventional explanations. It has not proved easy to mobilize the citizenry about such an obscure and rather localized issue. The industry seems to make more, and more effective, political contributions than its opponents, and to spend much more money on lobbying.⁸⁴ President George W. Bush was a director of something called the Lucky Chance Mining Company in the mid-1980s, and his father was an adviser to Barrick Gold, the world's largest gold mining company.⁸⁵

Yet these seem too facile. I prefer to believe that the secret to the Law's staying power is that it stirs deep within us the image of the lone prospector trudging up the windswept ridge with his burro in tow, eager to match his wits against mother nature to locate her hidden treasures and get rich quick. No matter how far that image is removed from the realities of modern mining—where sophisticated technologies locate deposits and giant earthmoving machines (and some cyanide) remove them—perhaps we are just too sentimental to do away with such a romantic symbol of cupidity and the old West.

ENDNOTES

1. Apologies to Yogi Berra.

2. In keeping with the essay format, I am minimizing footnotes. The Mining Law is found at 30 U.S.C. §§ 22-54. I have explored it in detail in my 1987 book published by Resources for the Future, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (hereafter, *THE MINING LAW*). Its chapter 14 contains a history of efforts to reform the Law. See also John D. Leshy, *Reforming the Mining Law: Problems and Prospects*, 9 *PUB. LAND L. REV.* 1 (1988); Jerome C. Muys & John D. Leshy, *Whither the Public Lands?*, 41 *ROCKY MT. MIN. L. INST.* 3-1, 3-32-35 (1995); John D. Leshy, *Public Lands at the Millennium*, 46 *ROCKY MT. MIN. L. INST.* 1 (2000); GEORGE COGGINS, CHARLES WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW*, 584-602 (5th ed. 2002). The latter two publications discuss many of the issues

addressed here, citing the relevant statutes and regulations. Also useful throughout are the report of the NATIONAL RESEARCH COUNCIL, *HARDROCK MINING ON FEDERAL LANDS* (1999), and an excellent, multi-part special report, *The Mining of the West*, prepared by Robert McClure and Andrew Schneider, published in the SEATTLE POST-INTELLIGENCER, June 11-14, 2001, which can be found at http://seattlpi.nwsource.com/specials/mining/26875_mine11.shtml (last visited April 2, 2002) [hereinafter *The Mining of the West*].

3. 43 U.S.C. § 1732(b).

4. 36 C.F.R. Part 228, implementing 16 U.S.C. § 551; see *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981).

5. 30 U.S.C. §§ 28f-28k.

6. See, e.g., *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997); Peter Schaumberg & Karen Hawbecker, *Patent Pending: Department of the Interior Administration of the Mining Laws*, 46 ROCKY MT. MIN. L. INST. 16-1 (1999).

7. See Secretarial Order No. 3228 (April 10, 2001); BLM Departmental Manual, 209 DM 7 (adopted June 28, 2001).

8. This language quoted is from the industry-sponsored "reform" bill that was vetoed by President Clinton on December 6, 1995, H.R. 2491, § 5374(a)(1), 104th Cong. 1st sess.

9. See H.R. 2491, *supra* note 8, § 5374(b).

10. See, e.g., *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). In FLPMA, Congress told the BLM to apply its hardrock mining regulations to lands newly patented under the Mining Law in the California Desert Conservation Area. 43 U.S.C. § 1781(f).

11. 16 U.S.C. § 1133(d)(3).

12. *Patenting of Mining Claims and Mill Sites in Wilderness Areas*, M-36994 (May 22, 1998).

13. See Letter from Acting Assistant Secretary Piet deWitt to N.B. Tweet of Nome, Alaska, dated June 12, 2001, relying on the Opinion to reject a patent application.

14. See 65 Fed. Reg. 41724 (2000).

15. Theoretically claimants had to perform \$100 worth of work (so-called "assessment work") on each claim each year, but this requirement was much more honored in the breach than in the observance. For a variety of reasons, the federal government almost never challenged the validity of claims for failure to perform assessment work, except in the context of oil shale claims grandfathered by the Mineral Lands Leasing Act of 1920. See *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250 (10th Cir. 2002); *Exxon Mobil Corp. v. Norton*, 2002 U.S. Dist. Lexis 10784 (D. Colo. May 29, 2002).

16. See *Creede & Cripple Creek Min. & Milling Co. v. Uinta Tunnel Mining and Transp. Co.*, 196 U.S. 337, 355 (1905); *Ekworth & Delores Loveland*, 89 IBLA 205, 207 (1985).

17. *Cole v. Ralph*, 252 U.S. 286, 295 (1920).

18. THE MINING LAW, *supra* note 2, at 94.

19. See M-36988, *Limitations on Patenting Millsites under the Mining Law of 1872* (Nov. 7, 1997).

20. See Dept. of the Interior Appropriations Act, 113 Stat. 1501, 1501A-199, § 337 (1999).

21. See Instruction Memorandum No. 2002-004 (Bureau of Land Management, Oct. 4, 2001).

22. *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001).

23. See Roger Flynn, *The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining*, 34 LAND & WATER L. REV. 301 (1999).

24. See THE MINING LAW, *supra* note 2, at 169-77.

25. See *Wilderness Society v. Dombeck*, 168 F.3d 167 (9th Cir. 1999).

26. John Leshy, *Public Lands at the Millennium*, 46 ROCKY MT. MIN. L. INST. 1, 1-13-1-14 (2000).
27. See generally Flynn, *supra* note 23.
28. Mason's report is reprinted in THOMAS DONALDSON, *THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS*, 312-17 (1884).
29. 30 U.S.C. §§ 207(a) (coal); 226(b)(1) (onshore oil and gas); 212 (phosphate); see also 43 U.S.C. § 1337(a)(1) (minimum 12 1/2% royalty for offshore oil and gas).
30. See *The Mining of the West*, *supra* note 2, June 13, 2001, at 8.
31. The bill would have specifically exempted all existing mining claims on which the claimant could assert a "vested possessory property right against the government." H.R. 2471, § 5374(c) (104th Cong. 1st Sess.).
32. See Robert Swenson, *Legal Aspects of Mineral Resources Exploitation*, in HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 739 (Paul W. Gates ed., 1968).
33. See 30 U.S.C. § 209 (authorizing the Secretary to waive, suspend, or reduce mineral royalties "whenever in his judgment the leases cannot be successfully operated under the terms provided").
34. See 30 U.S.C. § 12-32 (35 cents per ton produced by surface mining).
35. The production figures are found in *The Mining of the West*, *supra* note 2.
36. EPA's National Hardrock Mining Framework (1997), cited in *Hardrock Mining on Federal Lands*, *supra* note 2, at 62.
37. Liquid Assets 2000: America's Water Resources at a Turning Point (Environmental Protection Agency # 840-B-00-001) (May 2000) at 10.
38. *The Mining of the West*, *supra* note 2, is replete with this kind of information.
39. See 36 C.F.R. Part 228 (2001).
40. The section provides that nothing in FLPMA "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress or egress," except for four specified exceptions. One of the exceptions was the "last sentence of this section," which told the Secretary to prevent "unnecessary or undue degradation." Another exception was regulation under FLPMA § 601, which applied to the California Desert Conservation Area and came into play in the Solicitor's Opinion on the proposed Glamis Mine discussed further below.
41. Although the regulations were ambiguous on whether the five-acre cutoff applied to the total area disturbed over time, or referred to the maximum disturbance each year, BLM generously interpreted them to apply to the latter. This magnified the scope of the exemption, allowing an operation that, for example, disturbed 100 acres over 20 years to qualify.
42. *Hardrock Mining on Federal Lands*, *supra* note 22; BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2000, 143 (2001) [hereinafter PUBLIC LANDS STATISTICS 2000].
43. The Ninth Circuit upheld this exemption in *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988).
44. Per year, by interpretation; see *supra* note 41.
45. *Hardrock Mining on Federal Lands*, *supra* note 2, at 21; PUBLIC LANDS STATISTICS 2000, *supra* note 42, at 144.
46. 43 C.F.R. § 3809.0-5(k) (1999).
47. See 113 Stat. 1501, App. C., 113 Stat. 1501A-210, § 357 (1999). An identical provision was enacted in the 2001 Interior Appropriations Act, 114 Stat. 922, 962-63, § 156 (Oct. 11, 2000).
48. *Hardrock Mining on Federal Lands*, *supra* note 2, at 93-123.
49. See Recommendation #2, *id.* at 95.
50. *Id.* at 93.
51. *Hardrock Mining on Federal Lands*, *supra* note 2, at 61, 65.
52. See *The Mining of the West*, *supra* note 2.
53. See 43 C.F.R. § 3809.505; 66 Fed. Reg. 32571, 32572-73 (2001).
54. The Clinton Administration rules are found at 65 Fed. Reg. 69998 (Nov. 30, 2000).

55. See WALL ST. J., July 23, 2002, at A-2; D.W. Vagstad & Laurence S. Kirsch, *Crisis in Reclamation Bonding for Mining Companies*, 48 ROCKY MT. MIN. L. INST. (forthcoming 2002).
56. HARDROCK MINING ON FEDERAL LANDS, *supra* note 2, at 61.
57. Regulation of Hardrock Mining, M-36999 (Dec. 27, 1999).
58. See Roger Flynn & Jeffrey C. Parsons, *The Right to Say No: Federal Authority over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LITIG. 249 (2001).
59. HARDROCK MINING ON FEDERAL LANDS, *supra* note 2, at 102-03.
60. It proposed to suspend the Clinton Administration rules within a few weeks of taking office. See 66 Fed. Reg. 16162 (Mar. 23, 2001).
61. Surface Management Provisions for Hardrock Mining, M-37007 (Oct. 23, 2001).
62. 66 Fed. Reg. 54834 (Oct. 30, 2001).
63. 66 Fed. Reg. at 54843.
64. See letter from Sec. of the Interior Norton to Sen. Jeff Bingaman (Oct. 25, 2001).
65. 67 Fed. Reg. 17962 (2002).
66. The NRC summarized these in HARDROCK MINING ON FEDERAL LANDS, *supra* note 2, at 47-50.
67. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).
68. HARDROCK MINING ON FEDERAL LANDS, *supra* note 2, at 89-93.
69. Secretary of the Interior Gale Norton was Attorney General of Colorado in the aftermath of Summitville and thus presumably has some firsthand knowledge of the pitfalls of allowing "self-bonding" by fly-by-night operators.
70. See, e.g., JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY, & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES (3d ed. 2000) 362; *The Mining of the West*, *supra* note 2.
71. Okanogan Highlands Alliance v. Williams, 236 F.3d 468 (9th Cir. 2000).
72. See 65 Fed. Reg. 69998, 70008-09 (2001).
73. Letter from Sec. of the Interior Norton to Sen. Jeff Bingaman (Oct. 25, 2001), at 3.
74. See 107 Cong. Rec. HR 3434 (June 21, 2001). The provision was dropped in conference.
75. Mineral Exploration and Development Act of 2002 (H.R. 4748).
76. Abandoned Hardrock Mines Reclamation Act of 2002 (H.R. 4078).
77. Production statistics are notoriously hard to come by in this historically secretive industry. Production from federal lands can only be inferred as many large mines are on mixed federal, state, and private ownerships. The statistics I am citing come from the University of Nevada-Reno, as reported in *The Mining of the West*, *supra* note 2.
78. HARDROCK MINING ON FEDERAL LANDS, *supra* note 2, at 17 (citing U.S. Geological Survey statistics). See also John L. Dobra, *Mining: Working for Nevada*, 48 ROCKY MT. MIN. L. INST. (forthcoming 2002), identifying the United States as having produced 11.25 million ounces of gold in 2001, slightly behind South Africa's 12.86 million ounces. In Nevada alone, gold production did not exceed one million ounces in any single year until 1986, and then zoomed to over 8 million ounces in 1998. See also Dobra, *The U.S. Gold Industry, 2001*, available at <http://www.nbmj.unr.edu/sp32.pdf>.
79. WALL ST. J., May 17, 2002, at B4.
80. Quoted in *The Mining of the West*, *supra* note 2, June 11, 2001.
81. See Dobra, *supra* note 78, reporting that Nevada metal miners received an average of \$62,000 in wages in 2001, almost twice that received by the average Nevada worker.
82. See *The Mining of the West*, *supra* note 2, June 13, 2001, at 4.
83. See Dobra, *supra* note 78.
84. See *The Mining of the West*, *supra* note 2, June 14, 2001, at 2.
85. See *id.*