

UNDER THE RADAR

A Mining Law for the 21st Century

The law governing hardrock mining is going to change, but by how much depends on the November election outcome.

BY DONOVAN BURBA

WHILE HOTTER ISSUES attract most of the attention in the 2010 general election campaigns, the outcome of that election will almost certainly have a significant impact on the future of the hardrock mining industry in the United States.

Bills in both the U.S. House and Senate seek to impose federal royalties and stringent environmental standards on hardrock mining production, which operates with relatively little government regulation. Regardless of November's outcome, the fact that both political parties and mining groups acknowledge the need for change means the General Mining Act of 1872—passed when many of the states it most influences were still territories—is just a nudge away from obsolescence.

The 1872 law was designed to encourage the exploration and settlement of the West by granting private access to public lands for mining purposes for a nominal upfront fee—between \$2.50 and \$5 per acre, generally—and no subsequent royalty payments. Minerals and metals covered by the law include zinc, tungsten, copper, fluorspar and magnesium, among others. Minerals that can be used for fuel—coal, oil and gas—were removed from the law in 1920, when royalties were imposed.

"The coal, oil and gas industries have been paying royalties [on production] for decades, anywhere from 8% to 18%, so it's not as if other industries that take public resources aren't compensating taxpayers," says Jane Danowitz, director, U.S. Public Lands, at the Pew Environment Group in Washington, D.C. "Mining stands out as being exempt."

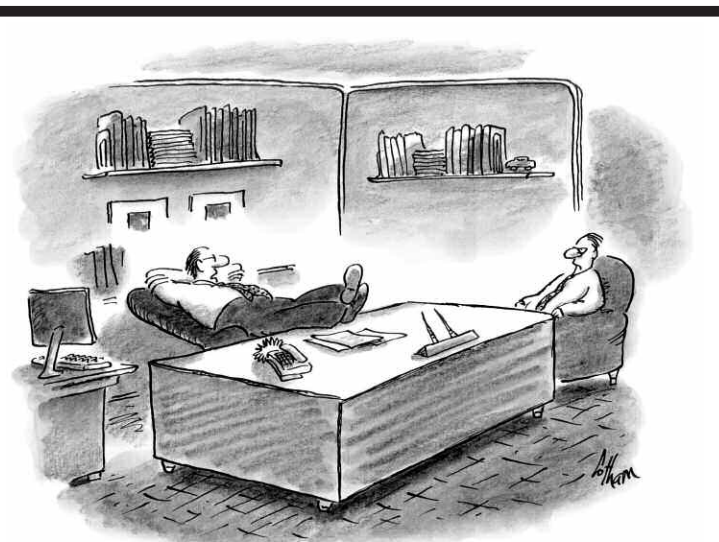
Mining today is a very different process from the picks and shovels of the 19th century. Mines are much larger projects, covering thousands of acres, and they produce significant tailings that can pollute water and land. Toxic chemicals such as cyanide can be used to leach minerals from rock. The free extraction of minerals from public lands, say environmentalists, has left abandoned and often pol-

luting mines dotting the West. Bringing the mining law into the 21st century would level the playing field for companies that extract minerals, say advocates.

With a staggering national debt, the federal government is also looking for any and all revenue sources. According to Congressional Budget Office estimates, mining companies' "total income subject to the proposed royalty would average roughly \$1 billion a year" from minerals covered by the 1872 law.

The Proposals

Two recently proposed bills, both in committee, take different approaches to royalties. The House bill, sponsored by Nick Rahall (D-West Virginia), chairman of the House Natural Resources Committee, calls for an 8% net smelter return (NSR) royalty on new claims, with existing claims paying 4%. A similar bill, introduced in the Senate by Jeff Bingaman (D-New Mexico), calls for a royalty between 2% and 5% of the value of mineral production on all new claims, exempting existing claims. (See sidebar: Calculating Value.)



"Sometimes, when business is brisk, I have to settle for no nap at all."

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The hardrock mining industry has agreed to pay a 5% royalty on the value of what it takes out of the ground, but argues that the NSR royalty is effectively a gross royalty, since it doesn't allow companies to deduct construction and exploration costs, loan repayments, and other investment outlays. Proponents of the gross royalty argue that it offers more transparency and accountability.

Neither bill will be voted on before November even with general agreement that change is necessary. Even before the BP oil spill commanded Congressional attention, Senate Majority Leader Harry Reid (D-Nevada), a longtime advocate for the mining industry so crucial to his state's economy, indicated the Congressional calendar was too tight to address the legislation. The November elections will determine not only the timing of the vote but will dictate the terms of the bill that eventually becomes the Congressional solution.

Reid helped kill the last major Congressional effort to change the law, in 1994, and said in April that he'd block votes on both bills. But he is locked in a heated battle with Republican nominee Sharron Angle, and if he loses, he could be replaced as head of the Senate by a less mining-friendly Democrat such as Dick Durbin (Illinois) or Chuck Schumer (New York). Both Senators have voted against mining interests and for increased environmental regulations in the past. The change in leadership could determine which bill survives.

Draconian

"If we get the Rahall mining law, it would be devastating to the industry," says Laura Skaer, executive director of the Northwest Mining Association, an industry advocacy group based in Spokane, Washington. She describes the terms as "draconian." "It is a combination of the 8% gross royalty on new projects and 4% gross on existing production, land use restrictions, elimination of the right to use and occupy mining claims (no land tenure rights), the mine-veto provision, elimination of notice-level operations for exploration and ambiguous, impractical and unworkable environmental regulations," Skaer says. "The result would be less domestic production of mineral resources and an increased reliance on foreign sources of strategic and critical minerals."

As repeated efforts to change the mining law flared over the past 15 years, potential investors have moved overseas. The U.S. share of world minerals exploration fell to 7% from 20%.

"Companies need security that once they start investing millions of dollars, the government won't pull the rug out from under them," says Skaer. Making extraction

CALCULATING VALUE

There are several ways to calculate value on which to base a royalty in mining. The two bills under consideration for the reform of the General Mining Law of 1872 are:

Gross, or Net Smelter Return (NSR): NSR usually commands the highest market value of all royalty types because it is based on a fixed or variable percentage of the sales price, or gross revenue, earned by the mining company. A clause in the lease specifies whether the spot, contract or forward market price will be used to calculate royalties and allows deductions for processing costs. **Net Revenue or Net Proceeds:** Royalties are paid based on a fixed or variable percentage of gross revenue minus allowable production costs. Operations costs—direct cash costs at the site—and processing costs are deducted from the gross before calculation of the royalty.

SOURCE: MINERAL BUSINESS APPRAISAL

more expensive and tightening the regulatory environment will certainly exacerbate the exodus of mining companies to cheaper fields.

"Where will you allow hardrock mining?" asks Skaer. "Unlike siting a Wal-Mart, minerals are where they are. We can't move them."

And Then There's the Environment

Of the 700 million acres of subsurface minerals under the Bureau of Land Management's jurisdiction, about half is already either closed to mining or requires approval from the surface management agency and can't be in conflict with existing land designations or plans. National Park Service lands, wilderness study refuges and the Arctic National Wildlife Refuge, among others, fall into those categories.

"Environmental groups want land management agencies to have the right to say 'no' if an area is more valuable for non-mineral use. Well, there are other tools already in place for that," says Skaer. In May, for example, Secretary of Agriculture Tom Vilsack renewed a policy giving him sole approval over road projects on 58 million acres of federal land. That power, instituted by President Bill Clinton just before he left office in 2001, prevents mining companies from using provisions of the 1872 law that provide the right of reasonable access, which includes building roads for mineral exploration and development.

While the industry supports establishment of an abandoned mine lands fund, hardrock miners maintain that instituting additional environmental regulations—beyond existing laws such as the Clean Air and Clean Water Acts, which mining is subject to—would adversely affect future exploration and extraction. ⚡