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Hardrock Mining and the Public Land Law Review Commission: The More Things Change....21st Century Mining, a 20th Century Report, and a 19th Century Law

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Natural Resources Law Center

University of Colorado

MARTZ SUMMER CONFERENCE

The Past, Present and Future of Our Public Lands

June 2-4, 2010

Boulder, Colorado

Hardrock Mining and the Public Land Law Review Commission

The More Things Change

21st Century Mining, a 20th Century Report, and a 19th Century Law

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Major Findings and Recommendations of the PLLRC Report on Hardrock Mining – and What Eventually Happened

1. *Finding/Recommendation:* “Public land mineral policy should encourage exploration, development, and production of minerals on public lands.” “Mineral exploration and development should have a preference over some or all other uses on much of our public lands.”

Result: This is still BLM and Forest Service policy on non-withdrawn lands, based on the 1872 Mining Law. However, federal and state environmental laws enacted in the 1970s protect other resource values (see below). Recent congressional efforts to reform the 1872 Mining Law (to date unsuccessful) would give clear discretion to BLM/Forest Service to deny mining to protect non-mineral values.

2. *Finding/Recommendation:* “The traditional right of self-initiation of a claim to a deposit of valuable minerals must be preserved.” Note: The PLLRC Report recognized the minority viewpoint of some Commissioners that all federal minerals, including hardrock, should be subject to discretionary leasing program (e.g., like oil and gas).

Result: Due to the lack of comprehensive reform of the 1872 Mining Law, the self-initiated claim-location system under the Mining Law remains in effect.

3. *Finding/Recommendation:* Allow patenting for the minerals only, with the option to lease or purchase the surface at fair market value.

Result: No change in patent provisions under 1872 Mining Law. However, since 1993/94, congressional moratorium against any new patent applications has effectively ended patenting (subject to generous grandfathering of then-existing applications).

4. *Finding/Recommendation:* Revise claim sizes and structures to facilitate orderly development of minerals. Revise millsite claim limits to allow unlimited use of non-mineral public lands for tailings, processing, and other uses “to meet all reasonable requirements for a mineral operation.”

Result: Not enacted. Lode and placer claims must still conform to the requirements of the 1872 Mining Law. Regarding millsites, Secretary Babbitt ruled in 1997 that mineral claim holders were limited to one 5-acre millsite claim for each lode or placer claim used in the operation. Secretary Norton reversed Babbitt ruling in 2003 and allowed unlimited number of millsite claims as long as they are reasonably related to the mining operation. Conservation and Native American groups file lawsuit in federal court in the District of Columbia in 2009 to overturn Norton rule. Earthworks v. Dept. of Interior, 09-cv-1972 (D.D.C.). Briefing is expected to begin in the summer of 2010.

The lawsuit also raises the issue of whether there is a right under the 1872 Mining Law to develop claims that have not been shown to be valid (i.e., contain the requisite “discovery of a valuable mineral deposit” for lode and placer claims and for millsites, whether the claims satisfy the 5-acre limit and other requirements).

5. *Finding/Recommendation:* Charge “equitable” royalties on minerals taken from public land.

Result: Never enacted. Hardrock minerals are still not subject to any royalties. Recent congressional reform proposals have debated royalty levels (e.g., gross vs. net).

6. *Finding/Recommendation:* Eliminate dormant claims and require claimholders to record and file claims with BLM.

Result: Enacted by FLPMA in 1976. Claimholders must now file yearly claim notice with BLM to keep claim active. Since 1993/94, claimholders must pay yearly "claim maintenance fee" of \$100+/yr. Small claimholders may elect to file yearly affidavit of assessment work to maintain active claim.

7. *Finding/Recommendation:* Require permits for exploration and development.

Result: Enacted. After FLPMA, BLM adopts 36 CFR Part 3809 regulations in 1980 to govern permitting of hardrock mining. Forest Service adopts its own regulations in mid-1970s, 36 CFR Part 228, based on authority from 1897 Organic Act. Most smaller operations are still exempt from permitting requirements.

8. *Finding/Recommendation:* Increase consideration of environmental impacts from mining, but federal land managers cannot preclude mining in non-withdrawn areas.

Result: Under FLPMA and the 3809 regulations, BLM has authority to "prevent unnecessary or undue degradation" of public lands from mining. See Mineral Policy Center v. Norton, 292 F.Supp. 2d 30, 42 (D.D.C. 2003)(BLM has "the obligation to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land."). Forest Service 228 regulations allow the agency to "minimize adverse impacts" from mining.

However, both agencies continue to take the position that they cannot deny mining proposals without evidence that the operation would violate another federal or state law.

Events Since 1970: Courts Apply Federal/State Environmental Laws to Limit or Prohibit Mining

Outside of the permitting and claim recordation requirements enacted in FLPMA, the primary change in the regulatory landscape for hardrock mining since 1970 has been the passage of the landmark federal (and related state) environmental and public land laws in the 1970s. The most important, as they relate to hardrock mining, have been the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), Clean Air Act (CAA), the Endangered Species Act (ESA), and the National Forest Management Act (NFMA). Recent decisions include:

South Fork Band Council v. Interior, 588 F.3d 718 (9th Cir. 2009)(EIS violated NEPA; FLPMA requires protection of Indian Sacred Site, but mine approval held to not adversely affect Site in that case).

Center for Biological Diversity v. Interior, 581 F.3d 1063 (9th Cir. 2009)(BLM land exchange with copper company violated NEPA).

Great Basin Mine Watch v. Hankins, 456 F.3d 955 (9th Cir. 2006)(EIS failed to consider cumulative impacts of nearby mines, but no CWA violation for dewatering aquifer).

Hells Canyon Preservation Council v. Haines, 2006 WL 2252554 (D. Or. 2006)(Forest Service cannot approve mining without assurance of CWA and NFMA compliance).

Friends of Pinto Creek v. EPA, 504 F.3d 1007 (9th Cir. 2007)(EPA-issued discharge permit for copper mine violated CWA's "impaired waters" provisions).

Sierra Club v. El Paso Gold Mines, 421 F.3d 1133 (10th Cir. 2005)(discharge from abandoned mine subject to CWA liability).

Rock Creek Alliance v. Forest Service, 05-cv-107 (D. Mont. 2010)(approval of copper/silver mine violated CWA and NEPA).

Center for Biological Diversity v. Stahn, 08-cv-8031 (D. Ariz. 2008)(Forest Service categorical exclusion of uranium exploration projects near Grand Canyon violated NEPA).

Bering Strait Citizens v. Army Corps of Engineers, 524 F.3d 938 (9th Cir. 2008)(CWA permit upheld).

Siskiyou Project v. Forest Service, 565 F.3d 545 (9th Cir. 2009)(small mining operations not subject to NFMA Forest Plan standards).

Karuk Tribe v. Forest Service, 379 F.Supp.2d 1071 (N.D. Cal. 2005)(small mining operations not subject to NEPA, NFMA, or ESA review)(currently on appeal).

Additionally, state environmental laws may preclude mining, although pre-emption issues vis-à-vis federal laws are triggered:

Seven Up Pete Venture v. State of Montana, 114 P.3d 1009 (Montana 2005) (statewide cyanide ban not a "taking" under state and federal law).

South Dakota Mining Assov. V. Lawrence County, 155 F.3d 1005 (8th Cir. 1998)(county open pit ban preempted by 1872 Mining Law).

Oil-Dri Corp. v. Washoe County, 02-cv-2196 (2nd Jud. Dist. Nevada, 2004)(county denial of mining permit on BLM land not preempted by 1872 Mining Law)