

## »Business Alert

### February 2009—Significant Changes to U.S. Mining Law proposed in the House of Representatives

On January 27, 2009, Nick Rahall (D), Representative from the 3rd District in West Virginia, introduced H.R. 699 (the "Hardrock Mining and Reclamation Act of 2009"). H.R. 699 significantly alters existing mining law and most notably would impose a royalty on mining operations on federal land that extract locatable minerals. As this bill has been referred to the House Committee on Natural Resources, it may undergo revision before it is voted on by the House. A brief summary of the significant changes to mining law proposed in H.R. 699 is provided below:

**FEDERAL ROYALTY** · *Current Law:* Presently, mining operations on federal land are not subject to production royalties. Accordingly, an operator can extract minerals from a valid mining claim on federal land without paying any portion of its revenue or profit to the federal government.

*Proposed Law:* All existing permitted mining operations on federal land that are producing commercial quantities of a valuable locatable mineral shall be subject to a 4% royalty on gross income. All new and existing operations extracting locatable minerals that do not qualify for the 4% royalty shall be subject to an 8% royalty on gross income. Any expansion area added to existing operations shall be subject to the 8% royalty. This royalty will likely apply to all unpatented claims, even those older claims involving minerals that were previously locatable but are no longer so. In the case of failure to pay the federal royalty, claimholders and operators shall be jointly and severally liable. The operator and/or claimholder shall be responsible for making and maintaining records of production sufficient for the purposes of implementing the royalty assessment.

*Comment:* An important consequence of the proposed royalty is the impact on existing contracts between claimholders, operators, lessees and other contracting

parties. The existing contracts between parties who own, operate, or lease mining operations likely do not include contingencies for the payment of a federal royalty. As H.R. 699 holds operators and claimholders jointly and severally liable for the royalty payment, the enactment of this bill will likely cause conflict between parties regarding who is responsible for the payment.

**PATENTS** · *Current Law:* Prior to 1994, claimholders could apply for and receive a patent on mining claims, transferring fee title to the land upon a showing of a valuable mineral deposit and payment of a purchase price. A temporary moratorium on patents has been in effect since 1994 and has been annually renewed since 1994, precluding processing of patent applications.

*Proposed Law:* This bill proposes to codify the moratorium on patents such that no annual renewal would be necessary. If the bill is enacted, no patent will be issued by the United States for any mining claim unless a patent application was submitted before September 30, 1994.

**EXPLORATION PERMIT** · *Current Law:* Exploration can be conducted on federal land by providing notice to the BLM or Forest Service, if the scope of the exploration is below a certain threshold. Otherwise, a plan of operations and financial assurance is required.

*Proposed Law:* An exploration permit from the Secretary of the Interior or the Secretary of Agriculture shall be required for all commercial exploration on federal lands. In connection with the exploration permit, a reclamation plan and financial assurance must be approved. The exploration shall have a term of no more than ten years.

**ELIMINATION OF RIGHT TO ACCESS** · *Current Law:* Ownership of a mining claim includes an implied right of access over federal lands. Claimholders can exercise their implied right of access by applying for a right of way pursuant to the BLM's or Forest Service's surface management regulations. A claimholder's implied right of access can be regulated to minimize damage to the environment; however, access cannot be completely denied. Claimholders or operators can also apply for a right of way through FLPMA; however, there is not an absolute right to access pursuant to

FLPMA and an application may be denied.

*Proposed Law:* The Secretary of the Interior or the Secretary of Agriculture will have the discretionary authority to issue an operations permit for use of non-mineral lands necessary for the mining operation, only if a right of way has been granted pursuant to FLPMA. This implies that all access roads now require FLPMA rights of way; accordingly, claimholders no longer can rely on implied access rights. As FLPMA rights of way are discretionary approvals, a claimholder can be denied access to his/her claim.

### **PETITION TO WITHDRAW PUBLIC LAND FROM MINERAL ENTRY**

· *Current Law:* Public land can be withdrawn from mineral entry only by the order of the Secretary of the Interior, the President of the United States, or by an act of Congress.

*Proposed Law:* States, Political Sub-Divisions and Indian Tribes will be permitted to petition the Secretary of the Interior for the withdrawal of public land from mineral entry. The Secretary shall solicit public comment and render a final decision granting the withdrawal unless the Secretary makes and publishes specific findings in the Federal Register identifying why the withdrawal is not in the national interest.

### **ELIMINATION OF LIFE-OF-MINE PERMITS**

· *Current Law:* Exploration can be conducted on federal land by providing notice to the BLM or Forest Service, if the scope of the exploration is below a certain threshold. Otherwise, a plan of operations and financial assurance is required.

*Proposed Law:* An exploration permit from the Secretary of the Interior or the Secretary of Agriculture shall be required for all commercial exploration on federal lands. In connection with the exploration permit, a reclamation plan and financial assurance must be approved. The exploration shall have a term of no more than ten years.

**CLAIM MAINTENANCE FEE** · *Current Law:* The effective claim maintenance fee for all mining claims, mill and tunnel sites, is \$125 per year.

*Proposed Law:* The claim maintenance fee for all mining claims, mill and tunnel sites, will increase to \$150 per year (excluding oil shale claims).

**LAND WITHDRAWAL** · *Current Law:* The lands listed below in "proposed law" include areas that are

presently open to mineral entry.

*Proposed Law:* The following lands shall not be open to location under the general mining laws: (1) Wilderness study areas; (2) Areas of critical environmental concern; (3) Areas designated for inclusion in the National Wild and Scenic Rivers System pursuant to the Wild and Scenic Rivers Act; and, (4) Any area identified in the set of inventoried roadless areas maps contained in the Forest Service Roadless Area Conservation Final Environmental Impact Statement.

**LOCATABLE MINERALS FUND** · *Current Law:* No Locatable Minerals Fund exists at this time.

*Proposed Law:* Funds collected as royalties and fees pursuant to the bill shall be deposited into the Locatable Minerals Fund and shall be used for reclamation of mining operations and community assistance for those areas socially or economically impacted by hardrock mining.

**SYNOPSIS** · The proposed bill, if enacted, would comprise the most significant change to the mining law of the United States in over 120 years. The royalty provision would fundamentally change the economics of the mining industry in the United States such that some production may be exported due to the added cost. Admittedly, legislation similar to H.R. 699 is introduced annually and fails to attract enough support to become law. As the majority leader of the Senate, Harry Reid (D-Nevada) has voiced opposition to similar bills in the past and may act to thwart this bill. The political climate, however, has shifted significantly with the incoming democratic administration and the fate of this bill may be different than that of previous versions. We will continue to post updates as this bill progresses.

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