

An Update on Mining Law Reform and a Quick Look at Colorado
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February 8, 2008

Federal Legislation

On November 1, 2007, the House of Representatives, by a vote of 244-166, passed HR 2622, comprehensive Mining Law reform legislation, which had been introduced by Representative Nick Joe Rahall (D.-W.Va.). A summary of some of the bill's material provisions. The Senate held hearings on Mining Law reform last month.

HR 2622 Summary

Section 2 – Definitions

- **New Definitions**
 - Broad definitions of “affiliate” and “control.”
 - Bill no longer limits the size of a millsite claim to not more than 5 acres per 20 acres of mining claim with which the millsite is associated.
 - “Valid existing rights” defined as a mining claim properly located and maintained and supported by a discovery of a valuable mineral deposit, or a millsite claim properly located and maintained that meets the limitations under existing law for millsite claims (does not define what those existing limitations are).
 - New definition (not in the original bill) defining “undue degradation” as “irreparable harm to significant scientific, cultural or environmental resources on public lands that cannot be effectively mitigated.”

Section 3 – Application Rules

- **Preexisting claims.**
 - Act applies to all preexisting mining claims or millsites for which a Plan of Operations (“POO”) had not been approved or a Notice filed prior to the date of enactment.
- Existing operations where POO has been approved – have 10 years to meet the new environmental compliance requirements and reclamation standards (and during that 10 years new financial assurance requirements, new inspection and monitoring requirements, and new enforcement requirements apply on the basis of surface management requirements applicable to such POOs prior to the effective date of the Act).
- Only minor modifications to those existing POOs can be made under the old rules.
- Act applies to ancillary activities on mining claims or millsites even if mineral production is from non-federal lands.

Title I – Mineral Exploration and Development

- **Patent Moratorium** – Makes the patent moratorium permanent except for certain existing grandfathered claims.
- **Royalty** – Establishes a gross royalty payable to the U.S. on all existing and new claims.
 - 4% gross royalty on existing claims from which commercial production has commenced and for which an operations permit (not defined) has been approved.
 - 8% gross royalty on all other existing claims and all new claims.
 - Claimants must comply with extensive recordkeeping and reporting requirements - failure to comply can result in claim forfeiture of claims.
 - 25% penalty for underreporting royalties.
 - Joint and several liability to pay production royalty on the part of claim holder, operator, any person who controls claim holder or operator.
- **Location and Claim Maintenance Fees** – Increased to \$50 and \$150, respectively.
 - Provides that timely payment of claim maintenance fees “asserts” a mining claimant’s authority to use and occupy claims (language not in the original bill).

Title II – Protection of Special Places

- **Lands Not Open to Location:**
 - Areas of Critical Environmental Concern
 - Wilderness Study Areas.
 - Designated Wild and Scenic Rivers areas and those under study for inclusion in the National Wild and Scenic River System.
 - Lands identified in the Roadless Area Conservation Final EIS of November 2000.
 - Note that (i) lands recommended for wilderness designation or otherwise being managed as roadless; (ii) National Monuments; and (iii) lands identified as “sacred sites” pursuant to Executive Order 13007 have been removed from the original list.

- **Petitions:**
 - New language allows states, counties and Indian Tribes to submit petitions to withdraw tracts of federal land from operation of the general mining laws (without reference to valid existing rights). Petition must be granted unless Secretary makes a determination that decision to grant petition is not in the national interest.

Title III – Environmental Protection Standards

- **Overarching Environmental Protection Standard (different from original bill)** – “Mineral activities on any Federal land that is subject to a mining claim, millsite claim, or tunnel site claim” must be “carefully controlled to prevent undue degradation.”
- **Permitting** – Would prohibit all activities that may cause surface disturbance (defined to include land, air, ground water, surface water, fish and wildlife) unless mining claim was properly located and maintained and permit had been issued. Exception for casual use activities. Provides (in a new provision) for two types of permits: exploration and operations.
 - Exploration permits:
 - Limited in scope to exploration activities. 10 year maximum term. Must include a reclamation plan. Same AVS limitations as for operations permits.
 - Operations permits:
 - Must cover valid claims and allows for use of additional Federal lands only if operator obtains a Title V right-of-way under FLPMA.
 - Permit application must meet all of the following criteria or application can be denied:
 - (i) Must be complete, accurate and sufficient to allow for a good understanding of the anticipated impacts of the proposed mineral activities and the effectiveness of proposed mitigation and control;
 - (ii) Must demonstrate that proposed reclamation can be accomplished and will not cause undue degradation;
 - (iii) Must show that condition of land post-mining, including fish and wildlife resources and habitat contained thereon, will conform to the land use plan applicable to the area and lands will be returned to productive use;
 - (iv) Must show that area is open to location;
 - (v) Must demonstrate that planned operation is designed to prevent material damage to the hydrologic balance outside the permit area;
 - (vi) Must show that applicant will fully comply with financial assurance requirements;

- (vii) Must demonstrate no AVS issues; and
 - (viii) Must demonstrate that 10 years following mine closure, no treatment of surface or ground water for carcinogens or toxins will be required to meet water quality standards at point of discharge.
- Requires consultation with EPA prior to issuance of operations permit.
- Permits are not to exceed a 20 year term but may be renewed for up to 20 additional years (original bill provided for 10 year initial term and 10 year renewal) upon successful completion of new compliance reviews. Operations must be commenced within two years after permit is granted.
- Permit Modification.
 - Can be at the request of the applicant.
 - Can be required by Secretary of Interior or Secretary of Agriculture for unanticipated events such as: development of acid or toxic drainage; loss of springs or water supplies; unanticipated water quantity or quality impacts; need for long-term water treatment; significant reclamation difficulties or failure; discovery of new significant scientific, cultural, or biological resources; the discovery of hazards to public safety.
- Requires approval of temporary cessation of operations (anything over 180 days, up from 90 days in original bill).
- Public participation provisions relating to issuance of permits include opportunity for comment, hearing.
- AVS System – permits can be denied or suspended if the claimant, the applicant (or any affiliate or officer or director of the claimant or the applicant) is currently in violation of:
 - any provision of the Act or regulation under the Act, any applicable state or federal toxic substance, solid waste, air, water quality, fish and wildlife conservation law or regulation, or SMCRA (permits may be reinstated upon correction or during an appeal).
- Financial assurance is required as a prerequisite to permit issuance.
 - Assurance must cover all lands within the permit areas and all affected waters that may require restoration, treatment or other management.
 - Amount of assurance must be enough to cover the obligations as if the work were to be performed by the Secretary concerned. Must take into account the administrative costs associated with a government agency reclaiming the site.
 - Adjustment of the financial assurance amount is allowed.
 - For operations with discharges to water, no release of financial assurance is allowed until five years after discharge has ceased or until all applicable effluent

limitations and water quality standards have been met for five years without treatment. No release of any financial assurance without notice and opportunity for public comment.

- **Operation Standards** – General rule is that operator must restore lands to a condition capable of supporting the uses which such lands were capable of supporting prior to the surface disturbance, or other beneficial uses which conform to applicable land use plans. Standards (which may be performance-based or technology-based) to be promulgated by regulations to address:
 - Segregation, protection and replacement of topsoil, as well as prevention, where possible of soil contamination.
 - Maintenance of stability of all surface areas.
 - Control of sediments.
 - Minimization of the formation and migration of acidic, alkaline, metal-bearing or other deleterious leachate.
 - Reduction of visual impacts, including, as necessary, backfilling.
 - Establishment of a diverse, effective and permanent vegetative cover of the same seasonal variety as vegetation native to the permit area, and equal in extent of cover to the natural vegetation of the area.
 - Design and maintenance of leach operations, impoundments and excess waste according to standard engineering standards to achieve and maintain stability and reclamation of site.
 - Removal of structures and roads and sealing of drill holes.
 - Preservation of cultural, paleontological and cave resources.
 - Restoration of, or mitigation for, fish and wildlife habitat.
 - Prevention and suppression of fire.

Title IV – Mining Mitigation

- Two new funds are created:
 - **Locatable Minerals Mine Reclamation Fund:**
 - **Funding** – Funded by donations, 2/3 of royalty payments, penalties, monies from enforcement and citizen suits, balance of maintenance fees after paying for costs of administration.
 - **Use of Funds** – Fund used to reclaim and restore land and water resources adversely affected by past mineral activities, with sites consisting of as much as 50% non-federal lands eligible.

- **Locatable Minerals Community Imprint Assistance Fund:**
 - **Funding** – Funded by 1/3 of royalty payments.
 - **Use of Funds** – To provide assistance for the planning, construction, and maintenance of public facilities and the provision of public services to States, political subdivisions and Indian tribes that are socially or economically impacted by mineral activities conducted under the general mining laws.

Title V – Administrative and Miscellaneous Provisions

- **Mining and Minerals Policy Act of 1970** – revised to not only promote the development of an economically sound and stable domestic mining industry but also to “ensure that mineral extraction and processing not cause undue degradation of the natural and cultural resources of the Federal Lands.”
- **User Fees** – authorizes establishment and collection of fees as necessary to reimburse the United States for the expenses incurred in administering the requirements of the Act.
- **Inspections and Monitoring** –
 - Inspections must be conducted at least once per quarter for active operations.
 - Any person who has reason to believe they may be adversely affected due to a violation of the environmental protection requirements may request an inspection.
 - A monitoring and evaluation system must be implemented to identify compliance with all environmental protection requirements.
- **Citizen Suits** – Any person may commence a civil suit alleging a past or current violation of the Act or regulations promulgated pursuant to the Act.
 - Plaintiff must bring suit in U.S. district court, must give written notice (unless imminent threat to environment or public health exists).
 - Suits not allowed if the Secretary is diligently prosecuting a civil or criminal action (but not an administrative action) to require compliance.
- **Administrative and Judicial Review** – Any person issued a notice of violation or cessation or assessed a penalty under the Act may request Secretarial review within 30 days.
 - A public hearing may be requested.
 - D.C. Circuit will hear all appeals, except for patent appeals, in which case the Secretary will choose the appropriate Federal District court.
- **Enforcement** – authorizes orders to immediately cease all mineral activities when claimant does not act within 30 days of receipt of notice of violation.

- No notice of violation necessary and immediate order allowed if there is an imminent danger to health or public safety or a significant, imminent environmental harm.
- **Compliance/Civil and Criminal Penalties** – authorizes the Attorney General to institute a civil action for relief, including a permanent or temporary injunction or restraining order, or any other appropriate enforcement order, including the imposition of civil penalties.
 - Authorizes penalty of up to \$25,000/day for each violation of environmental protection requirements.
 - Authorizes a penalty of a minimum of \$1,000/day for failure to correct a violation for which a cessation order has been issued.
 - Knowing violations of mining without a permit or an environmental protection requirement or permit provision, are punishable of a fine of not less than \$5,000 nor more than \$50,000 per day of violation or by imprisonment on not more than three years, or both.
 - Knowing and willful violations of the Act for which civil penalties are assessed are, upon conviction, punishable by a fine of not more than \$50,000 or imprisonment of not more than two years, or both.
- **Regulations; Effective Dates** –
 - Provisions of the Act are effective immediately unless otherwise noted.
 - Regulations as necessary are authorized.
- **Oil Shale Claims** – makes activities on oil shale claims subject to the same environmental protection standards as are set forth in the Act.
- **Miscellaneous Powers** – all fees, penalties etc. are adjusted for inflation every five years. Broad powers to investigate, inspect or make inquiries; Secretary can require affidavits, administer oaths, subpoena, order testimony to be taken by deposition, have right of access to properties.

Proposed Colorado Legislation

H.B. 08-1161. Kefalas/Fischer and Johnson. Hardrock Mining/Ground Water Protection.

Summary (initially prepared by Dianna Orf): Amends the Mined Land Reclamation Act (“MLRA”) as it applies to applications filed and mining operations occurring on or after the effective date to:

- Re-define “designated mining operation” to include uranium mining in all forms (although any particular operation could seek an exemption);
- Defines “in situ leach mining” to exclude oil shale and sodium mining using in situ techniques;

- Prohibits in situ uranium operation less than 10 acres or 70,000 tons extraction from applying for a limited impact expedited permit under section 110 of the MLRA.
- Requires reclamation plan for all MLRA section 112 operations to include maps and descriptions of affected surface and ground water as well as affected lands;
- Requires an applicant for a proposed in situ leach mining operation to also notify owners of record of land within three miles of the affected lands;
- Requires as a condition of permit that the applicant for an in situ leach mining operation submit a plan for initial site characterization and on-going monitoring of affected land and surface and ground water. Such work must be carried out by a contractor selected by the MLRB and paid for by the applicant.
- Requires restoration of water quality at an in situ leach mining operation to begin immediately upon cessation of production or extraction, whether temporary or permanent.
- Sets forth conditions for discretionary and mandatory denial of permits.
- For in situ leach mining, sets forth a number of circumstances requiring mandatory denial of a permit including requirement that permit be denied unless applicant shows 5 examples of in situ leach mining operations that operated successfully for 5 years and have been closed for 5 years without leakage or migration to ground water outside the mining area;
- For in situ leach mining, includes previous history of willful violation of reclamation or similar laws as a condition for denial of permit.
- For in situ leach mining, prohibits substitution of lands to meet reclamation requirements;
- Requires reporting of failure or imminent failure of containment structures or structures designed to detect, prevent, minimize, or mitigate adverse impacts within 24 hours of discovery of such condition.

H.B. 08-1165. Fischer/Kefalas and Shaffer. Hardrock Mining Amendments.

Summary (initially prepared by Dianna Orf): Amends the MLRA as it applies to applications filed and mining operations occurring on or after the effective date:

- Gives local governments veto power over mining operations and processes; (presumably designed to address Summit County case)
- Expands the Mined Land Reclamation Board (“MLRB”) by adding the Director or designee of the Colorado Department of Public Health & Environment and a representative of local government;

- Gives the CDPHE an opportunity to comment during Board decision-making;
- Requires the Board to incorporate CDPHE recommendations as a permit condition if necessary to protect human health, wildlife or the environment;
- Adds (i) prevention and mitigation of significant adverse environmental impacts and (ii) protection of public health, safety, and welfare including environment and wildlife resources to MLRB powers;
- Requires the MLRB to recognize the “established principle of reasonable accommodation” (intent is presumed to apply to split estates, but this term is not defined nor appropriate as used);
- Requires prospecting permit information to be made public except to information related location, size or nature of an ore deposit;
- Requires that reclamation bonds be set using costs at time of reclamation rather than costs at time permit is issued;
- Limits type of proof of financial responsibility that may be offered by a foreign entity (no certified financial statements);
- Increases time for objection or support for permit application from 20 to 45 days; allows 60 days to file appeal of Board’s final agency action;
- Includes measures taken in connection with in situ leach mining to prevent adverse impacts on human health, wildlife, or the environment as justified actions under the DRMS emergency response authority;
- Establishes separate fee schedule for in situ leach mining operations (similar to oil shale).