THE PERVERSITY AND POLITICS OF THE 1872 MINING LAW

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Abstract. Though inconsistent with many economic standards for resource policy, the Mining Act of 1872 is still a valid management priority on federal lands throughout the western U.S. When the Law was enacted, its stated objective was to promote private development of federally held minerals. However, the Act's free access provisions, the lack of substantial pre-discovery rights, and the retention of outdated claim size limitations are examples of the Law's many problems for commercial mineral developers. No legislative direction has been given since 1872. The longevity of this law is largely the result of the political strength of small-scale miners who fear exclusion from deposits by corporate mineral developers, and the dislike shared by all miners for leasing programs proposed by environmental and administrative reformers.

Introduction

On May 10, 1872, Congress approved, "An act to promote the development of the mining resources of the United States." Providing "that all valuable mineral deposits in lands belonging to the United States...are hereby declared to be free and open to exploration and purchase..." (Statutes at Large 1872, 91). Though both the physical methods used by the hardrock mining industry and public attitudes toward federal lands have changed significantly since 1872, the Mining Law has not (Later 1981, 579). This

stubborn resistance to change has long been recognized by interested observers. As a result, many articles and reports have concluded that the provisions of the Mining Law are practically obsolete and that substantial reform is now appropriate (Swenson 1968, 757). However, despite widespread acknowledgement that the Law is seriously flawed, the political conditions surrounding it make any changes extremely difficult.

This paper will consider the reasons for the Law's political durability. The discussion begins with a description of the Mining Law's major provisions and then explains why some groups, including the mining industry, would like to alter portions of the outdated statute. After discussing its weaknesses, the forces which ultimately preserve the Act are considered. And finally, once the political situation surrounding the Mining Law is discussed, recent attempts to repeal or amend the Law are evaluated with some perspective on the reasons for their eventual failure.

The Mining Act of 1872

Origin of the Mining Law

In 1955 C.O. Martz, a professor of natural resource law, characterized the provisions of the Mining Law as

"codified pick and shovel mining customs that retard development, create chaotic uncertainties as to mining rights and obligations, permit bad faith appropriations of valuable resources and condone waste" (375). Professor Martz was not the first or harshest critic of the 117 year old policy statement on federal mineral development. With its procedural and inspirational origins tied to the 1848 gold discoveries in California (Bakken 1988, 214-216), it is not surprising that the provisions of the 1872 Mining Law never completely accommodated advances in mineral exploration and development technology. Today it is widely agreed that the realities of more recent mining practices do not conform to what Martz called the "gold rush mining law" (1955, 375).

Although Congress had considered the management of federally held minerals before 1872, the western discoveries on public lands encouraged legislative action. For Congress, the mineral policy debate eventually focused on two options. The first option was an outright sale of mineral lands to those willing to develop the resource. This option was not introduced as a means of discouraging mineral development, but rather as a possible source of federal revenue (Leshy 1987, 14). However, instead of selling these lands, several western senators convinced Congress to accept the second option. This option simply provided formal legislative recognition and approval of the

local mining customs which had developed in the long absence of federal policy. These "customs" reflected the notion of a miner's rights on lands to which he had no title (Martz 1955, 378). Besides a simple statement allowing private citizens to enter and claim federal mineral lands, Senator Stewart of Nevada added provisions to "perfect the existing conditions" found in western mining districts (Leshy 1987, 15). While some western Senators wanted an unencumbered statement of free access, Stewart's perceived familiarity with western mining conditions proved to be a persuasive factor with other Senators interested in encouraging an orderly process for federal mineral development.

Provisions of the Mining Law

While debating Stewart's provisions, opponents of any procedural standards argued that federal interference would only complicate mineral development (Leshy 1987, 1). However, despite these complaints, Congress legislatively outlined a few conditions for obtaining rights to public lands containing "valuable deposits." By following these requirements, the individual or corporation discovering certain minerals can establish an exclusive claim and perhaps gain permanent rights to both mineral and surface properties (Statutes at Large 1872).

Free Access and Self-initiation. While Senator Stewart's standards still shape mining practices on federal lands, the principle of free and self-initiated entry into those lands is certainly the cornerstone of the Mining Law. Today, the decision to prospect and explore is subject to various state and federal environmental laws and geographically limited by specific withdrawals of federal lands from mineral entry. However, the right of a U.S. citizen to enter unreserved or unappropriated federal lands for the purpose of finding minerals may not be preemptively denied by administrative action seeking to simply protect other resources. The agency responsible for surface management must work with the miner to minimize the impact of congressionally mandated exploration work (Later 1981, 583).

Exploration and Pre-discovery Rights. While the right to search for minerals on federal lands is not totally unrestricted, the subsequent steps for mineral development become far more complicated for developers. For the mining interests, the legal problems start as soon as the search begins. The statutory content of the Mining Law is completely silent on the rights of the prospector during the period of exploration and before the crucial "discovery" of minerals. Without statutory guidance, the federal courts have upheld state common law doctrines of pedis possessio. This doctrine grants possessory rights to

those actively searching for minerals and protects them against the intrusion of later entrants (Finberg 1982, 1032).

Discovery. Of course, the protection offered by the pedis possessio doctrine is only necessary during the exploratory stage of mineral development. As enacted by Congress, the Mining Law clearly provides that once a discovery of a valuable deposit is made, the individual or corporation may claim exclusive rights to a 20 acre parcel for any mining related uses (30 U.S.C.A. sec. 23). Unfortunately, Congress failed to define either "discovery" or "valuable deposit." "Fashioned more by custom and official acquiescence than by positive decision..." (Leshy 1987, 6), the courts and administrative agencies interpreting the Law have applied their own discovery requirements. The unsurprising consequence of these interpretations is several conflicting standards used to approve or deny the validity of an entrant's claim (Hansen 1967, 5).

Assessment and Patenting. While certainly not free from legal controversy, the final steps of establishing rights to federal mineral lands are generally much less ambiguous. Once the claim has been formally located, the claimants may maintain their rights by completing at least $100 of annual assessment work or by gaining a patent through an administratively established procedure (Tank

1980, 421, 435). Since describing the Law's well-documented legal and administrative dilemmas is not the purpose of this paper, the preceding summary is not intended to explain the details of enforcing or observing the Mining Law. However, a brief discussion of the practical problems associated with the Mining Law is still necessary to fully appreciate its unusual durability.

Problems of the Mining Law

Complaints about the Mining Law come from many sides. The timber industry, environmental groups, ranchers, and recreation groups have all pronounced their dissatisfaction with the Mining Law (Sheridan 1977, 11). These groups often emphasize the policy failings associated with the legal preeminence of mining on such a large portion of the public lands. The Act's invitation for mineral development is often viewed as incompatible with sensitive resources and alternative land uses.

The Mining Law's durability could be examined by considering its resistance to the fundamental policy change desired by many non-mining interest groups. However, the Law's perversity is probably most convincingly shown by examining its resistance to even the incremental procedural changes required for adjustment to the modern realities of mineral development. The irony of its longevity is currently highlighted by the ardent support the Law

receives from its procedural critics, namely the mineral industry (Senzel 1977, 46). Their unhappy but intense support for the Law is the basis of a relationship which deserves explanation.

Despite changes in mining technology and methods over the past century, the industry is still trying to comply with exploration and development procedures which are no longer practical or, in some cases, even possible. Since today's mineral explorers seldom find high-grade deposits exposed at the surface, the discovery provisions of the 19th century law make costly exploration unnecessarily risky and discourage investment in large-scale mining operations (President's Materials Policy Commission 1952, vol.5, p.7). Though a hundred years of criticism has covered most aspects of the Mining Law, it is reasonable to conclude that the requirement for the discovery of a valuable deposit is at the heart of most of the problems affecting miners.

Aside from the many technical problems of effectively defining a discovery (Haggard & Curry 1984), more general procedural problems related to the discovery requirement are also troublesome for the mining industry. The concerns raised by the industry over these procedural flaws include competition from claimants not really interested in mineral development, the insecurity of pre-discovery rights, and the difficulties of observing claim size restrictions while

proving a valid discovery.

Free Access. The mining industry defends the Mining Law and all its procedural nuisances largely because the Law still promotes the policy of free access to federal mineral lands. However, even this cornerstone of support creates distractions for the serious developer. In the 1950's, the Paley Commission found that only three percent of the unpatented mining claims were commercially viable (President's Materials Policy Commission 1952, vol.5, pp.5-6). While these kinds of statistical findings are easy to dispute, there is little question that individuals have occupied millions of acres of U.S. mineral lands for uses unrelated to mineral development. For the mining industry, these mining claims are unavailable unless the serious developer is willing to pursue some legal action or purchase the rights of the original claimant. There is a long history of unpatented claims being used for reasons which have little relation to mineral extraction. Claims on public lands have been used as private resort sites (Cameron 1918), junkyards (GAO 1974, 37), and even for removal of other valuable resources, such as timber (Teller 1901). In 1974 the General Accounting Office (8) investigated 240 claims in the western U.S. and found that only 3 showed evidence of mineral extraction.

Furthermore, despite the unquestioned authority of government agencies to remove those Mining Law entrants who

have little interest in mineral development, the legal guarantees of free access encourage claims to be re-located again and again. As a result, neither the U.S. Forest Service nor the Bureau of Land Management have been willing to expend the considerable time and money required to dislodge the majority of presumably invalid claims (President's Materials Policy Commission 1952, vol.5 p.5). Except in the most blatant cases of disregard for the Law's intent or when especially sensitive or unique areas are threatened, the agencies responsible for enforcement have generally avoided legal proceedings against claimants with spurious development objectives (Leshy 1987, 64).

Pre-Discovery Rights. As mentioned before, the 1872 Mining Act does not provide exclusive rights to potential developers while they search for a valuable mineral deposit. This omission is particularly significant when exploration requires large financial investments to find less obvious deposits. While the application of pedis possessio has provided a basis for some pre-discovery rights, the history of legal decisions provides few guarantees against competing claimants (Office of Technology Assessment 1979, 118). Two major shortcomings of the pedis possessio doctrine seriously threaten exploration investments. First, the doctrine has never protected entrants from government disposal of lands being explored. Though public land disposals for homesteads and

other private non-mineral purposes no longer occur, modern government land transactions still convey land from federal to private, state, or local ownership. Without a discovery, any exploration work on formerly public lands may have to be abandoned depending solely upon the decisions of the new land owner. Second, pedis possessio only protects against adverse claimants. In cases of peaceable entry upon claims not adequately protected (i.e. occupied) against rival claimants, the common law doctrine does not apply (Finberg 1982, 1042). Occupying possibly thousands of acres during the exploration phase serves no actual development purpose.

Though diagnosing the inadequacy of pedis possessio is simple, remedies are more difficult to prescribe. Strict adherence to occupancy standards may threaten the economic viability of a mining operation by reducing the eventual scale of exclusive development rights (Martz 1955, 380). If only the lands occupied are protected, the full extent of a low-grade deposit may be unavailable to the original entrant. On the other hand, loosening occupancy standards will not only protect legitimate developers, but would also serve to protect the purely speculative holdings which also hinder mineral development (Finberg 1982, 1049). Unless pre-discovery rights are re-defined legislatively, the alternatives available to the courts and government agencies are generally limited to the incremental

tightening or loosening of occupancy standards under pedis possessio.

Claim Size. After discovering a valuable deposit, the claimant may gain exclusive rights to 20 acres. Requirements for properly locating a claim include satisfactorily marking the claim on the ground and recording a notice according to federal and state law (30 U.S.C.A. sec. 28). Clearly, the 20 acre claim size limit is not practical for most modern commercial mining operations. The Office of Technology Assessment reported that a group of 20 to 100 claims is necessary to support a mining operation on today's more common low-grade deposits (Leshy 1987, 169). But, regardless of these development realities, the Mining Law still requires a discovery on each and every claim before any property rights are granted (30 U.S.C.A. sec. 23). Without a discovery, the entrant is completely dependent upon the tenuous protection offered by pedis possessio. Furthermore, since geologic inference is not sufficient to prove a discovery, the locator must show physical evidence of a discovery on each claim (Knutson & Morris 1980, 550).

Initial exploration may require the expenditure of hundreds of thousands of dollars (Continental Oil Co. 1978) for aerial reconnaissance, geophysical analysis, surface sampling, and deep drilling over tens of thousands of acres. However, the legal aspects of mineral exploration

are still based on the procedural compliance with the 20 acre claim. This eventually requires physical work on each claim, as well as the costly and otherwise pointless practice of surveying and marking contiguous 20 acre parcels (Knutson & Morris 1980, 535-545). Failure to observe the particular elements for protecting each claim can result in successful overstaking efforts on the neglected claims (Continental Oil Co. 1978).

Durability of the 1872 Mining Act

Resistance to Leasing

Mining Law reform has been the topic of many congressional hearings and a subject for several reports. In fact, between 1969 and 1977 every session of Congress had legislation proposed to replace the existing procedures of the Mining Law, known as the location system, with a leasing system for federal minerals (Sheridan 1977, 10). Though the mining industry has historically pressed hardest for reform, the leasing system offered in recent legislative proposals is an unacceptable alternative among most mineral interests. As a result, the industry is currently supporting the 1872 law which it has acknowledged is seriously flawed.

Industry Resistance. Since 1920, many subsurface resources have been subject to federal leasing (Statutes at Large 1920). The fuels and fertilizers, such as oil and phosphates, are not available under the free access provisions of the 1872 Act. Many in the industry believe that the principles of self-initiation and minimal regulatory interference would be lost by implementing a comprehensive federal mineral leasing system (Mock 1977). Critics cite many bad experiences with the governmental discretion associated with today's limited federal mineral leasing. For instance, an executive with St. Joe Minerals Corporation described his company's difficulties in obtaining the Prospecting Permit required under the federal leasing laws (Walthier 1980, 73-74). Though the area involved was only 40 acres and adjacent to an existing mining operation, federal approval for the permit took five years. As a result of what the company considered "bureaucratic red tape", exploration work which should have been completed in less than four years took almost nine years.

Two lawyers for the industry wrote that while the present location system was not perfect, replacement with leasing "would probably precipitate a national disaster" with development delays that would "literally stagger the imagination" (Marsh & Sherwood 1980, 305). There is little doubt that miners, large and small, hate the idea of

leasing and the regulations it entails. Recognizing that development of extensive low-grade deposits will likely dominate future mining activity, the industry fears the discretionary nature of leasing on very large tracts of public lands and the consent it would require from agencies (Senzel 1977, 46). So, industry representatives have united in full public support of the 1872 Law largely to avoid the unwanted changes proposed by non-mining groups since the 1960's.

Congressional Resistance. Though leasing has recently been the dominant reform proposal considered by Congress, it has never really come close to enactment. In the end, influential members of Congress sympathetic to the interests of miners have successfully argued against leasing of hardrock minerals. These members claim that leasing not only increases costs for development of essential commercial resources, but that it also adds new government controls which would prevent exploitation of marginal ore bodies containing crucial mineral supplies (AMC 1980, 28). The importance of a strong mineral industry for national security and economic reasons is an accepted, though perhaps untested basis for much of the congressional support for the interests of domestic mineral producers.

Small-scale Miners

Since the 19th century, the structure of the mineral industry has not included a significant role for small-scale miners. Though the provisions of the Mining Law of 1872 were designed with the individual prospector in mind, even in the 1870's commercial mineral development required money and equipment unavailable to the lone prospector. With lower and lower grades of ore supplying the world's demand for both industrial and precious metals, the need for capital has continued to increase much faster than has been required in other economic sectors (Strauss 1986, 59). Because no revenue is earned in the early stages of mine development, commercial mining requires access to millions of dollars and is necessarily financed by a very large accumulation of debt. As a result of the emphasis on capital and correspondingly high fixed costs, mining operations must start out very large and maximize output throughout short term slumps in the minerals market. Clearly, the nature of commercial mineral development does not conform to the assumptions of the "pick and shovel mining law."

With these facts in mind, it is not surprising that the Mining Law has not always received the full support of those involved in commercial mining. In fact, the procedural flaws in the 1872 Act were quickly recognized by the mining industry. One prominent mining geologist told

Congress in 1922 that "the mining law as it stands is defective, inadequate, antiquated, and pernicious, and is opposed by the majority of mining operators" (Hearings on HR 7736 1922, 36). It is the differences between the large mining companies and the prospector or small-scale miner which have historically divided the position of miners toward the Mining Law. At no time were these divisions more obvious than during the early attempts to reform the Mining Law.

Differences Between the Industry and Small-scale Miners. Early appraisals of the Law tended to presume that improving the ease and efficiency of mineral development were the ultimate goals of federal mining policy. With early reform efforts based on the interests of miners, the differences between miners were highlighted. Among the continuing concerns of the mining industry are the problems of nuisance claims, pre-discovery rights, and the acreage available for exclusive development rights. Each was discussed previously. For the small-scale miner, these "problems" are actually seen as opportunities to gain the benefits of mineral development which they feel would otherwise be monopolized by the well-financed large operator (Leshy 1987, 293).

Supporters of the existing law have always pointed out that the Mining Act of 1872 was designed to discourage a single owner from controlling an entire deposit of a

valuable ore body (Mock 1977, 575). So, while the industry led attempts to reshape the Law to fit what they considered to be the new realities of mineral development, small-scale miners actively opposed the changes, usually emphasizing the need to protect individuals or small-scale developers from the large mining companies. Though once accused of being "suspicious and uninformed" (Hearings on HR 7736 1922, 39) about Mining Law reform, as a group small-scale miners have always won in legislative reform battles against the large companies.

Significance of the Small-scale Miner. In the first half of this century, testimony before congressional committees responsible for mineral policy often included statements pronouncing the insignificance of the small-scale miner. In 1941, the Secretary of Interior proclaimed that the "individual prospector no longer exists" (Hearings before subcommittee 1941, 11). However, there is still considerable confusion concerning the facts surrounding the actual number and economic significance of small-scale miners.

Of course, defining "small" has proven difficult and measuring their role in U.S. mineral development has provided confusing and disputed results. One industry study concluded that the small-scale miner could be defined as any "individual, partnership, or corporation...which has capitalization of less than $1 million, which employs fewer

than 50 persons or produces less than 200,000 tons [of ore] a year" (Sheridan 1977, 22-23). For the last century, the small-scale miner has had virtually no role in the actual extraction of minerals. Though some economic operations initially benefitted from the independent exploration efforts of small companies (Warren 1973, 46), even exploration has become too capital intensive for individuals without the ability to incur substantial debt.

While their economic significance is questionable, there is little doubt about their political clout. For over a hundred years the small-scale miner has had the political strength and popular support necessary to maintain the Law in its present form. As a group, their commitment to the Mining Law has proven to be the most persuasive factor for defending a law which every other interested group would prefer to change (Sheridan 1977, 11). As the discussion on recent reform efforts will show, members of Congress must respect the position of small-scale miners or face serious political consequences.

The significance of support for small-scale mining interests has not been lost upon those in the industry. When the Secretary of Interior suggested that leasing be applied to all federally held minerals, a representative of the American Mining Congress spoke at great length about the contributions of the small-scale miner and the unanimous support of all mining interests for the existing

provisions of the Mining Law (Hearings before subcommittee 1941, 355-362). Leasing, or any other proposal requiring further government oversight, always unites the industry and the prospector with a full measure of enthusiasm for each other and the location system. As environmental and non-mineral interests have increased their demands for leasing, the industry has learned to live with and use the curious but undeniable political influence of the small mine operator and prospector.

Recent Reform Efforts

Mineral Development Act of 1971. In the early 1970's support for reform did gain momentum in Congress. Though there were several bills to enact a leasing system, the American Mining Congress and pro-mining members of the U.S. Congress produced a bill they hoped would side-track passage of any leasing measures (Delcour 1989, 839). Colorado Congressman Wayne Aspinall, Chairman of the House Interior Committee, introduced the legislation which updated the provisions of the Mining Law to assist commercial mineral development . Authors of this bill designed these alterations to alleviate some of the problems and complaints associated with the old Law, without totally repealing the 1872 Mining Act. As an industry compromise to gain passage of this bill, it included a provision for royalties to be paid to the

federal government (AMC 1980, 28). Though the mining industry was willing to accept the royalty provision to avoid leasing regulations, Congressman Aspinall's Mineral Development Act of 1971 never passed. In 1972 Aspinall was defeated in a primary election, and the Senate sponsor, Alan Bible of Nevada, did not reintroduce the bill "due to the intense opposition expressed by small miners" (Sheridan 1977, 11).

Reform Efforts in the Late 1970's. As the seventies continued, so did the pressure for adoption of a mineral leasing system. Finally, with active support from the Carter Administration, and the placement of active pro-leasing Senators and Representatives in key committee chairmanships, enactment of leasing looked more likely than ever (Leshy 1987, 304). But, once again, repeal and reform were avoided. As hard times hit the copper industry in the late seventies, Congressman Morris Udall of Arizona backed away from his long-standing support of leasing. Udall explained that his concern for Arizona's copper industry would not permit him to press for Mining Law reforms at that time. Though the troubles of copper probably did influence his sudden conversion, it is also true that Udall was experiencing a recall effort by a group of small-scale miners angered by his past leadership on comprehensive leasing proposals. As the Chairman of the House Interior Committee, his change of view effectively stopped the last

major reform effort. Combined with the immediate concerns of the "energy crisis", Congress abandoned all substantive reform legislation (Leshy 1987, 305).

The Mining Act of 1989. In June 1989, a Senate subcommittee held hearings on the most recent bill (Hearings on S 1126 1989). As introduced, this bill was opposed by the usual pro-mining Senators, the American Mining Congress, and small mining groups. With royalties, higher recording fees and provisions for administrative and environmental controls, opponents stated that this was just another leasing bill which would threaten the viability of U.S. hardrock mining operations. Once again, the industry expressed its willingness to accept a royalty provision (Hearings on S1126 1989, 226); however, the regulatory adjustments were not acceptable. Claiming that existing laws sufficiently regulate mining activity, those opposed to the bill repeated that a repeal of the 1872 Act is unnecessary and dangerous for continuing domestic mineral production. As expected, the small mining associations maintained their position that any alteration in the Law, including royalty requirements, would be harmful to all those involved in U.S. mineral production and consumption. As of October 1989, this bill had still not come out of committee.

Conclusion

Supporters of the Mining Law like to point out that the Law has evolved to meet modern requirements. Adjustments, such as the application of pedis possessio, are given as examples of the Law's flexibility toward modern conditions. These supporters also remind us that the Mining Law is the last of a series of public land laws that encouraged the development the American West. All miners, and particularly the small-scale miner, are reluctant to give up this remnant from another time.

While this remnant is still functional, even the mining industry has admitted that it is not particularly efficient. The Law does have room for improvement. As so many reports have concluded, reform has to be carried out in order to enhance mineral development on federal land and ensure the continuation of other activities and uses of federal resources. "This means, sad to say, an end to certain frontier freedoms, even for miners" (Sheridan 1977, 34).

But, as this paper has shown, observing the weaknesses and proposing reforms has not resulted in any significant changes in the policy or procedures of the Mining Law. The interests of those concerned pull reform efforts in different directions. The mining industry has demonstrated its occasional desire for reforms, but the small mining

interests have always convinced Congress to protect the individual from the large corporations. While non-mining interests have also pushed for changes, the reforms they most want are not supported by the industry. Their proposals for equalizing the interests of miners with those of other resource users, inevitably involve some form of leasing system. Countering the arguments of non-miners, the mining industry highlights the national significance of both the small-scale miner and a strong domestic mineral industry, and then explains how leasing threatens each. This threat has apparently been credible to many in Congress.

Congress may repeal the Mining Law some day, but the history of the Law strongly suggests otherwise. It has outlived critics who have charged that it was outdated. Repeal has always been expected but never achieved. It seems that the Law's specific but undefined provisions are the strange combination which has allowed this old Law to remain functional. The result is an imperfect but durable law.

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