



State mineral production taxes and mining law reform

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ABSTRACT

Fuel and leasable minerals mined in the United States have historically been subject to federal royalties while locatable minerals have not. In recent years there have been multiple attempts to alter this policy and subject locatable minerals to federal royalties as well; most recently the preliminary 2012 Obama budget included a gross royalty on hard-rock mining on public lands. This paper analyzes the issue of imposing such federal royalties from both a legal and economic perspective. From a legal perspective, it is argued that the state of western property rights precludes royalties on currently extant claims so revenues from a royalty would not be realized for many years. From an economic perspective, it is argued that the effect on revenue would be smaller than one might anticipate due to such a royalty crowding out state levies or encouraging vertical disintegration on the part of mining firms to avoid much of the burden of the royalty.

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Introduction

Reform of the “1872 Mining Law,” which forms the basis of the General Mining Law (U.S.C., 2000), has been something of a “Holy Grail” for various groups for several decades. These groups span the U.S. political spectrum, ranging from environmentalists to fiscal conservatives, who argue that the 1872 Mining Law results in mines operating on federal lands receiving preferential treatment over other interests and paying too little in taxes and royalties. Former Solicitor General for the Department of Interior [John Leshy \(1987\)](#) recounts the story of attempts in the 1970s to reform the law and, to some extent, lays the groundwork for the reform efforts beginning in the 1990s and continuing to the present (see [Dobra, 1994](#) and [Morriss et al., 2004](#) for a review of these efforts). More recently, the issue of mining reform returned in the in both the 2007 and 2009 sessions of Congress; H.R. 2262 (2007) and H.R. 699 (2009), both sponsored by Rep. Nick Rahall of West Virginia (who also sponsored reform efforts in the 1990s), largely repeat the 1990s reform effort. Additionally, early versions of President Barack Obama’s proposed FY2012 and FY2013 federal budgets contained provisions for the imposition of new federal mining royalties on mines currently subject to the 1872 Mining Law.

The 1872 Mining Law settled a significant problem in its day—the issue of extralateral claims. These are claims located next to a known deposit and/or operating mine. The owner(s) of the extralateral claims would wait until they believed that a miner crossed the boundary line between their claims, and then sued. Contemporary accounts suggest that these lawsuits virtually shut down mining on the Comstock Lode in Nevada where Nevada’s future Senator William Stewart was a successful mining attorney. When he got to the Senate, Stewart sponsored mining laws in 1866 and 1872 to clear up the issue of title to subsurface mineral rights, i.e., invalidate extralateral claims. Extralateral claims were only valid if their owner diligently tried to develop them ([Smith, 1943](#)).

The majority of mines that would be impacted by reforming the Mining Law of 1872 engage in so-called “hardrock” mining (as opposed to “softrock” mining, i.e., coal mining, other fuel minerals like oil and gas, and “common variety” minerals like aggregate and industrial minerals e.g., lime, gypsum, and clay). Hardrock minerals are defined here to include non-ferrous metals such as copper, gold, silver, platinum group metals, molybdenum, lithium, etc. These minerals are generally referred to as “locatable” minerals under 30 U.S.C.A. § 22 in that they can be located and claimed following the general guidelines of the General Mining Law of 1872. So-called “common variety” minerals, such as sand, gravel, coal, oil, and gas, are considered “leasable” under the Mineral Leasing Act of 1920 (30 U.S.C.A. Section 201(b)). Proponents of federal mining royalties typically attempt to draw a comparison between leasable and locatable minerals.

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One simple justification for the distinction between locatable and leasable minerals is that the former are harder to find, and because of this, the discoverer is rewarded for their discovery with ownership. Such an arrangement would arguably tend to encourage economic efficiency, as prospectors for harder-to-find minerals will require higher potential rewards to compensate for the risk involved. Another important distinction between hard-rock minerals and both common variety minerals and fuel minerals is that the latter are generally usable commodities at the point of extraction: the quarry, the mine mouth, or the well-head. Hardrock mineral ores usually require significant beneficiation, or processing, after extraction. Additionally, there are geological differences between these types of minerals as well. Leasable minerals like gravel, oil, natural gas, coal, etc., are generally found in horizontal geological structures, like river beds with aggregate, or coal fields, where if one finds a leasable mineral in one place, it is very likely that more of it can be found nearby.¹ Conversely, locatable minerals have historically been found in vertical geological structures, i.e., veins or faults in the earth's crust that hosted veins or hydrological structures (e.g., hot springs).² Modern mineral exploration and processing techniques, as well as economics (principally, higher prices) have made it possible to locate and process ore from larger, more disseminated geological structures. However, the fact remains that locatable minerals are much more difficult to locate than leasable or common variety minerals. In short, these geological and economic factors indicate that there is unlikely to be a one-size-fits-all answer to the issue of mining taxation, and that the taxes and regulations that work for hardrock mining are unlikely to be identical to those that work for other types of minerals.

The 1872 Mining Law has been criticized for a number of limitations, which can be sorted into two broad categories. First are arguments that the 1872 Mining Law gives primacy to mining operations and largely ignores other concerns such as environmental protection. The second category is fiscal; primarily, that the 1872 Mining Law contains no provisions for federal royalties on minerals mined from federally owned lands, leading to what is perceived both as foregone revenues as well as differential treatment of mining among states, potentially causing a race to the bottom. This argument is bolstered by the “common sense” notion that, because deposits on privately owned land accrue royalties to the owners of the land, deposits on publicly owned land should accrue royalties to the owners of the land as well. There are other specific criticisms that can be leveled but they will generally fall into the categories of either environmental/land use issues or fiscal issues. We will briefly look at the first class of issues, that the General Mining Law of 1872 lacks provisions for environmental protection and that the law gives mining uses priority over all other potential uses of federal lands, before turning to the fiscal issues relating to federal royalties.

The criticism that the 1872 General Mining Law lacks environmental protection provisions, while true, is misplaced as other laws have been passed that do address possible degradation of natural and cultural resources. The 1872 General Mining Law simply defines the process by which individuals can acquire and maintain property rights in mineral resources on federally owned land. As possible environmental degradation would occur as a result of the extraction of a resource, rather than the mere ownership of the right to extract said resource, there is no compelling reason that both issues need to be addressed in the

same law. More generally, the criticism that the 1872 General Mining Law gives land use priority to mining uses of federal lands ignores the fact that the law has been amended and augmented numerous times by numerous federal statutes (see, for example, the Antiquities Act of 1906, the Clean Water Act of 1972, the Endangered Species Act of 1973, the Federal Land Policy Act of 1976, and so forth) as well as by federal rule making pursuant to these acts (principally CFR 43 3809). It is still true that, *a priori*, mining is presumed to be the highest valued use of public lands. From the standpoint of economic surplus produced per acre disturbed, this is likely to be true. A sticking point in this argument, of course, is the non-use value of the land, i.e., the value of leaving the land undisturbed (Cummings et al., 1986). This invariably brings the debate outside the realm of “pure” economics; critiques based on non-use value of land typically question the underlying assumption of economic value trumping esthetics or religion, especially with respect to Native American tribal religions.

There is a significant permitting process that puts the presumption that whichever land use maximizes economic value is the best use of a particular piece of land to serious and open public scrutiny. While such processes may be imperfect, they nonetheless undermine the statutory primacy of mining claims by allowing non-economic issues, such as esthetic or religious concerns, to potentially outweigh purely economic value maximization on a case-by-case basis. Indeed, a significant percentage of U.S. federally owned lands are closed to mineral entry (i.e., staking mining claims) for precisely these reasons. Of the 700+ million acres of federal land administered by the U.S. Bureau of Land Management, 27 percent are closed to mineral entry. If one adds in federal lands administered by other agencies with restricted entry such as national parks, Indian reservations, national monuments, wilderness areas, wetlands, etc., the percentage of federal lands closed to mineral entry or with significant restrictions is around 40 percent (U.S. Library of Congress, Congressional Research Service, 2008). The exact percentage is difficult to state precisely because the definitions of “closed” and “restricted” are somewhat elastic. Nevertheless, the fact remains that non-economic factors have hardly been ignored.

The criticism that there is no provision for federal royalties in the General Mining Law is the concern upon which this paper will primarily focus. As with the concerns mentioned above, the general premise is also correct insofar as there are no federal royalties on minerals covered under the General Mining Law. This criticism also requires further examination. It should first be noted that the issue over potential federal hardrock mineral royalties is largely symbolic. Nationwide, mining is a relatively small industry. In their report examining the impact of H.R. 2262 in 2007, the Congressional Budget Office estimated the income derived from hardrock minerals removed from federal lands to be approximately \$1.0 billion (Congressional Budget Office, 2007).³ At President Obama's proposed royalty rate of 5%, this amounts to

¹ Coggins and Wilkinson (1981) note that there is little reason to reward “discovery” of these kinds of minerals with ownership since their location is generally local common knowledge.

² See Lacy (1998, Ch. 4) and Coggins and Wilkinson (1981 pp. 344–351) for a discussion on the importance of the discovery of a valuable mineral deposit.

³ Two caveats on the \$1 billion estimate. First, the \$1 billion estimate is not the estimated value of all hardrock mining, just the mining that occurs on federal land. CBO states that “Although general data on the value of hardrock minerals produced throughout the United States are available, estimates of the portion attributable to federal land—and gross income to firms with federal mining claims—are uncertain, particularly because companies are not currently required to report data related to production from federal land. However, based on information from BLM, the U.S. Geological Survey, and industry experts, CBO estimates that total income subject to the proposed royalty would average roughly \$1 billion a year, with most of that income earned by gold producers.” Secondly, as the value of mineral products have risen substantially since 2007, this number is likely to have risen significantly, even in real terms. For example, the price of gold (which CBO stated accounts for most of the relevant income) rose by roughly 200% between May 2007 and September 2012.

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