2011 Annual Mining and Public Land Law Update

Brian E. Barner[1]
Crowell & Moring LLP

I. METAL/NONMETAL MINING

A. *Earthworks v. Dep't of Interior*, No. 09-01972

A coalition of environmental, conservation, and Native American organizations filed suit in the U.S. District Court for the District of Columbia on October 20, 2009, against the Department of Interior, Department of Agriculture, Bureau of Land Management, and the Forest Service. The plaintiffs challenge the Bush Administration's 2003 Millsite Rule, 68 Fed. Reg. 61,046 (Oct. 24, 2003), that reversed the Clinton era Babbitt/Leshy 1997 Millsite Opinion that had allowed only one millsite for each valid mining claim. The suit also challenges the Bush Administration's fair market value determination in the 2008 Mining Claim Rule, 73 Fed. Reg. 73,789 (Dec. 4, 2008). Plaintiffs seek to require payment of fair market value for the use of certain lands claimed under the mining law and to generally prohibit agencies from permitting mining activities on lands not covered by valid mining claims. The National Mining Association and Northwest Mining Association, Barrick and Round Mountain Gold, and the States of Nevada and Alaska have been granted intervention. The Interior Department is defending the rules and answered the complaint denying the allegations.

B. *Financial Assurance Requirements Under the Comprehensive Environmental Response, Compensation, and Liability Act*

The Environmental Protection Agency ("EPA") has identified the hardrock mining industry as a priority for development of financial assurance regulations under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). In *Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009), the court ordered EPA to comply with CERCLA section 108(b)'s mandate to identify classes of facilities that would be required to "establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances," giving "[p]riority in the development of such requirements . . . to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury." 42 U.S.C. § 9608(b)(1). EPA first identified classes of facilities within the hardrock mining industry for development of financial responsibility requirements, basing its decision primarily on the amount of releases the hardrock mining industry reports under the Toxic Release Inventory program, government expenditures on cleanup of legacy sites, and sites listed on the CERCLA National Priorities List. 74 Fed. Reg. 37,213 (July 28, 2009). Senator Murkowski disagreed with EPA's designation of hardrock mining for financial assurance regulation,

[1] The author would like to thank his colleagues at Crowell & Moring LLP and the numerous general counsels who provided advice and support.

and on March 8, 2011, she submitted to the Secretaries of Interior and Agriculture a series of questions and information requests directed at assessing the overlap between existing financial assurance requirements for mining and EPA's initiative to impose similar requirements under CERCLA.

Under the requirements of the Regulatory Flexibility Act, EPA is convening a Small Business Advocacy Review Panel for the development of the proposed rulemaking because it may have significant impact on a substantial number of small entities. *See* http://www.epa.gov/sbrefa/hardrockmining.htm. The next step is for EPA to develop the actual financial responsibility regulations. EPA projects to publish a proposed rule in the Federal Register in February of 2012.

C. *Toxic Substances Control Act Inventory Update Rule*

The Environmental Protection Agency issued a Proposed Toxic Substances Control Act Inventory Update Reporting ("IUR") Modifications Rule. 75 Fed. Reg. 49,656 (Aug. 13, 2010). The IUR rule enables EPA to collect and make public information on the manufacturing, processing, and use of commercial chemicals, including metals and metal compounds. EPA is proposing to require electronic reporting of IUR information and to modify IUR reporting requirements, including certain circumstances that trigger reporting, the specific data to be reported, the reporting standard for processing and use information, and Confidential Business Information reporting procedures.

D. *Critical Minerals Policy Act*

Senator Murkowski and others introduced the Critical Minerals Policy Act of 2011 (S. 1113), and Representative Lamborn and others introduced the National Strategic and Critical Minerals Policy Act of 2011 (H.R. 2011). Both bills are directed at revitalizing the domestic mineral supply chain. Key features of the bills include congressional findings on the need for a vibrant domestic mining industry, an examination of permitting delays and regulatory burdens that discourage investment in the exploration and development of domestic minerals, and updated assessments of the mineral resource potential and needs of the nation.

II. COAL MINING

A. *Nat'l Mining Ass'n v. Jackson*, No. 10-1220

The National Mining Association ("NMA") filed a complaint on July 20, 2010, in the U.S. District Court for the District of Columbia, challenging the Environmental Protection Agency's ("EPA") and Army Corps of Engineers' ("Corps") enhanced coordination process and EPA's detailed guidance on the issuance of Clean Water Act ("CWA") permits for surface coal mining operations in Appalachia. The June 2009 Enhanced Coordination ("EC") Process created an alternate CWA permitting pathway for surface coal mining projects in Appalachia, generally enhancing EPA's role under the statute. Once a permit is designated for the EC Process, there is no requirement for the coordination period to be commenced in a timely manner, in contrast to the Corps'

regulations. The April 2010 Guidance applied to all surface coal mining projects in six Appalachian states. Among other things, it sets forth a *de facto* water quality standard for specific conductivity, instructing EPA regional employees to insist on the inclusion of permit limits that are designed to ensure that conductivity remains below a specific level (500 micro Siemens per centimeter). EPA also suggested that coal mining projects that involve more than one valley fill or more than one mile of stream loss are likely to result in significant environmental impacts and require an environmental impact statement under the National Environmental Policy Act ("NEPA").

NMA challenged the EC Process and Guidance as legislative rules issued in violation of the Administrative Procedure Act for lack of notice and comment. The government filed a motion to dismiss, arguing that the three pronouncements are not final agency action, are not ripe for review, and are all non-binding policy statements not requiring notice and comment. The government also challenged NMA's standing to contest the EC Process. The court denied the government's motion to dismiss, reasoning that the guidance is final and ripe for review because it is being applied in a binding manner.

NMA also raised a number of statutory claims under the CWA and NEPA, arguing that the Corps and/or EPA exceeded their statutory authority because the EC Process violates the statutory division of authority between the two agencies under section 404 of the CWA, and because the pronouncements impermissibly enhanced EPA's authority under those statutes. In ruling on NMA's motion for a preliminary injunction, the court held that NMA is likely to succeed on the merits, but denied the motion because the court held that NMA was unable to show irreparable harm. The case is pending on the merits and summary judgment briefing is underway.

In a related development, Representatives Mica and Rahall, Chairman and Ranking Member of the House Transportation and Infrastructure Committee, introduced on May 27, 2011, the Clean Water Cooperative Federalism Act (H.R. 2018). The Act would restrict EPA's ability to second-guess state water quality standards and decisions, limit EPA's veto authority for CWA section 404 permits, and place deadlines on federal agency comments to pending permit applications.

B. *Wildearth Guardians v. Salazar,* No. 10-01174

Environmental NGOs filed suit in the U.S. District Court for the District of Columbia challenging the federal government's decision to authorize coal leasing on public lands in the Powder River Basin. The NGOs argued that the Powder River Basin should be recertified as a coal production region, which would require the Bureau of Land Management ("BLM") to select tracts for leasing under the competitive regional leasing process, instead of responding to industry requests for specific tracts under the current leasing-by-application process. On May 8, 2011, the court granted the defendant's motion for partial judgment on the pleadings, holding that plaintiffs' claim was an untimely collateral attack on the BLM's January 1990 decision to decertify the Powder River Coal Production Region; that there was no legal requirement for the BLM to certify coal production regions; and that the question of when and where to establish coal

production regions was a matter committed to agency discretion by law without a judicially manageable standard.

C. *Greenhouse Gas Rule*

On December 23, 2010, the Environmental Protection Agency ("EPA") entered into two proposed settlement agreements with a number of states and environmental plaintiffs to issue rules that will address greenhouse gas (GHG) emissions from fossil fuel-fired power plants and refineries. The Fossil Fuel-Fired Power Plants Settlement Agreement obligates EPA to promulgate proposed performance standards and emission rules for greenhouse gas (GHG) emissions under Clean Air Act sections 111(b) and 111(d) by July 26, 2011.

On April 7, 2011, the House of Representatives passed legislation (H.R. 910) that would strip EPA of the power to regulate GHG emissions. A Senate measure fell short (50-50) of the 60 votes necessary to proceed without a filibuster. In the courts, numerous challenges are pending to EPA's suite of GHG regulations.

III. MINE SAFETY

A. *Cumberland Coal Resources LP*, 31 FMSHRC 1147 (Sept. 2009) (ALJ)

This case questions whether the Secretary of Labor can assume an emergency has already occurred for purposes of determining if violations of mandatory safety or health standards are significant and substantial ("S&S"). It is currently on appeal to the Federal Mine Safety and Health Review Commission, which heard oral argument on March 31, 2011. *See* 18 MSHN at 220-22 (Apr. 25, 2011). The issue regards the third prong of the *Mathies* test for S&S – whether there is a reasonable likelihood that the hazard the violation contributed to will result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Secretary of Labor argues that in evaluating violations of safety standards related to emergency equipment, such as lifelines in escapeways, the Commission should assume that an emergency such as a fire or explosion has already occurred, and then determine the likelihood of an injury due to the defective safety equipment.

B. *Freedom Energy Mining Co.*, No. 10-132

The Secretary of Labor filed suit in the U.S. District Court for the Eastern District of Kentucky on November 3, 2010, against this Massey Energy Co. mine. For the first time in the history of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), the Secretary sought relief under 30 U.S.C. § 818(a)(2), which authorizes the Secretary to seek injunctive relief, including the shutting down of an operating mine, if she believes the mine is engaged in a "pattern of violation" of the mandatory health or safety standards of the Mine Act, which, in her judgment, constitutes a continuing hazard to the health or safety of miners. Massey filed a motion to dismiss on grounds that the Secretary could not state a claim because, in essence, she had not exhausted the administrative "pattern of violations" enforcement scheme of 30 U.S.C. § 814(e)(1)

before seeking an injunction. The court held that although "pattern of violation" in § 818(a)(2) means the same thing as "pattern of violations" in § 814(e), the Secretary was not obligated to exhaust her administrative enforcement powers before seeking injunctive relief in court. While the case was pending, Massey announced it would close the mine, and ultimately the parties settled the case and the court dismissed the matter as moot. The Secretary immediately thereafter removed Freedom Energy Mining Co. from the Potential Pattern of Violations list.

C. *Rules, Rules, and More Rules*

The Mine Safety and Health Administration ("MSHA") is in the process of issuing numerous important rules. Under the Proposed Rule Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 75 Fed. Reg. 64,412 (Oct. 19, 2010), the respirable coal dust standard would be halved from 2.0 milligrams of dust per cubic meter of air to 1.0 mg/m^3, single-shift dust sampling would be employed instead of averaging of shifts, and sampling would be done through continuous personal dust monitors. Under the Proposed Rule on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, 75 Fed. Reg. 81,165 (Dec. 27, 2010), mine examiners and foremen would be required to locate and record all violations of mandatory safety or health standards, and no longer focus solely on hazardous conditions. Under the Proposed Rule on Pattern of Violations, 76 Fed. Reg. 5,719 (Feb. 2, 2011), non-final citations and orders that have not yet been adjudicated would be considered when determining whether a mine operator exhibits a pattern of violations of mandatory safety or health standards; notice of a *potential* pattern of violations would be eliminated; and the specific pattern criteria that MSHA will use as the basis for issuing pattern of violations notices would be posted on MSHA's website. MSHA also recently issued an Emergency Temporary Standard on Maintenance of Incombustible Content of Rock Dust in Underground Coal Mines, requiring a minimum 80% incombustible content; held public meetings on a potential rule regarding Safety and Health Management Programs for Mines; and issued an Advanced Notice of Proposed Rulemaking on Metal and Nonmetal Dams.

In addition to these MSHA rules, the Securities and Exchange Commission ("SEC") issued a Proposed Rule on Mine Safety Disclosure that would implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, requiring securities issuers that operate coal or other mines to disclose in their periodic SEC reports information regarding certain health and safety citations and orders, related penalty assessments and legal actions, and mining-related fatalities. 75 Fed. Reg. 80,374 (Dec. 22, 2010).

IV. PUBLIC LANDS

A. *Minard Run Oil Co. v. U.S. Forest Serv.,* 2009 U.S. Dist. Lexis 116520 (Dec. 15, 2009)

Minard Run Oil Co. and the Pennsylvania Oil & Gas Association challenged an April 9, 2009, U.S. Forest Service settlement agreement with the Sierra Club and a

contemporaneous Forest Service policy statement requiring National Environmental Policy Act compliance in the form of a Forest-wide environmental impact statement before the Forest Service could process oil and gas well drilling proposals on private oil and gas estates within the Allegheny National Forest. The U.S. had acquired the surface national forest lands under the 1911 Weeks Act. On December 15, 2009, the U.S. District Court for the Western District of Pennsylvania granted a preliminary injunction barring implementation of the settlement agreement and policy statement, finding a strong likelihood of success that the challenged actions were contrary to law, and that the industry plaintiffs were suffering irreparable harm, and finding an injunction to be in the public interest. The court further found that notice and comment rulemaking procedures should have been employed in any attempted regulatory change. The case is currently on appeal to the Third Circuit, and oral argument was heard on January 27, 2011.

B. *Department of Interior's Wild Lands Initiative*

The Department of Interior announced a new "Wild Lands" policy on December 22, 2010, in the form of Secretarial Order 3310 and new Bureau of Land Management ("BLM") Manuals implementing the policy. BLM Director Abbey explained that the Wild Lands policy was intended to comply with requirements of the Federal Land Policy and Management Act of 1976 that the BLM maintain an inventory of public lands and their resources, including wilderness values. On April 14, 2011, Congress passed the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112-10), which included a provision that prohibited the use of appropriated funds to implement, administer, or enforce Secretarial Order 3310. On June 1, 2011, Interior Secretary Salazar issued a memorandum to BLM Director Abbey confirming that, pursuant to the 2011 Continuing Resolution, the BLM will not designate any lands as "Wild Lands," and outlined how the Department of Interior will collaborate with Members of Congress, states, tribes, and local communities to identify public lands that may be appropriate candidates for congressional protection under the Wilderness Act.

On May 26, 2011, Senator Barrasso and others introduced the Wilderness and Roadless Area Release Act (S. 1087) that would permanently bar the implementation of the Wild Lands policy, and release inventoried roadless areas within the National Forest System that are not recommended for wilderness designation from the land use restrictions of the 2001 Roadless Area Conservation Rule and the 2005 State Petitions for Inventoried Roadless Area Management Rule.

V. INTERNATIONAL MINING

A. *Commerce Group Corp. v. El Salvador*, No. ARB/09/17

International Center for Settlement of Investment Disputes ("ICSID") case between American mining joint venture and the Republic of El Salvador. The Commerce Group Corp. ("Claimant") claimed that El Salvador violated the Central American-Dominican Republic Free Trade Agreement ("CAFTA") when El Salvador revoked environmental permits and did not renew exploration licenses, effectively putting an end to gold and silver mining. The arbitral tribunal dismissed for lack of jurisdiction, holding that

Claimant failed to materially comply with CAFTA's Waiver Provision when it filed its request for arbitration, because Claimant did not take action to terminate a parallel proceeding that continued before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice. The tribunal also dismissed Claimant's alternative basis for jurisdiction under the Foreign Investment Law of El Salvador, holding that Claimant failed to properly plead any causes of action under that law.

B. *Pac Rim Cayman LLC v. El Salvador*, No. ARB/09/12

ICSID case between American gold mining company and the Republic of El Salvador. Pac Rim Cayman LLC ("Claimant") claimed that El Salvador violated CAFTA and expropriated Claimant's investment when the Salvadoran government imposed a ban on all mining permits. The government refused to act on Pac Rim Cayman's applications for environmental permits necessary for the issuance of mining-related licenses, and failed to grant an allegedly-promised mining exploitation concession after Claimant incurred significant exploration expenses. The arbitral tribunal denied El Salvador's preliminary objections, holding that Claimant properly pled its claims, and that Claimant complied with CAFTA's Waiver Provision when it filed its Notice of Arbitration, because the multiple claims were all filed as a single, indivisible, ICSID arbitration proceeding. El Salvador has filed a second set of jurisdictional objections, which are currently under review by the Tribunal.

C. *International Cyanide Management Institute*

The International Cyanide Management Institute ("ICMI") made significant strides. ICMI administers a voluntary code for safe management of cyanide during production, transport, and use for recovery of gold. In 2010, the Code experienced growth from 58 to 89 signatory companies. As of February 2011, a total of 211 individual operations were either certified or designated for certification in 41 countries on six continents. ICMI updated its guidance this year to allow for pre-operational certification for production and transport operations, based on draft operating plans and written commitments to operate in compliance with the Code. This change will allow production facilities such as repacking operations or warehouses, or trucking companies that have not previously transported cyanide to be evaluated prior to managing cyanide. To further assist production and transportation companies, ICMI clarified the difference between warehousing (production) and interim storage (transportation). ICMI is also coordinating with key European parties, including the European Mining Association, regarding the European Commission's ongoing review under the EU Water Framework Directive of priority substances for surface water, which proposes a free cyanide draft standard of 0.10 ppb in freshwater and 0.01 ppb in marine water. ICMI believes the proposed European standards ignore naturally-occurring background levels of cyanide and cannot be accurately measured in flowing waters at such low concentrations.

D. *Dodd-Frank §§ 1502 and 1504 Reporting on Conflict Minerals in the Congo Region and Payments to Foreign Governments Related to Extraction Activities*

Two provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act affect international mining. Section 1502 requires securities issuers to disclose in their periodic Securities and Exchange Commission ("SEC") reports information regarding "conflict minerals." The SEC's proposed implementing regulations require companies to disclose annually whether they use "conflict minerals" (cassiterite, columbite-tantalite, gold, wolframite or their derivatives) that are necessary to the functionality or production of a product that they either manufacture or contract to be manufactured that originate from within the Democratic Republic of the Congo or adjoining countries. If so, the issuer would be required to furnish a report describing the measures taken to exercise due diligence on the source and chain of custody of the conflict minerals used. 75 Fed. Reg. 80,948 (Dec. 23, 2010).

Section 1504 requires resource extraction securities issuers to disclose payments made to the U.S. or foreign governments. The SEC's proposed implementing regulations require resource extraction issuers to disclose non-*de minimis* payments made to further the commercial development of oil, natural gas, or minerals. Commercial development includes exploration, extraction, processing, and export, or the acquisition of a license for any such activity. The types of payments to disclose include taxes, royalties, fees, production entitlements, and bonuses. 75 Fed. Reg. 80,978 (Dec. 23, 2010).

E. *UK Bribery Act and Increased Enforcement of Foreign Corrupt Practices Act*

On March 30, 2011, the UK Ministry of Justice released guidance regarding procedures that companies can put in place to prevent associated persons from engaging in bribery. It announced that the UK Bribery Act would enter into force on July 1, 2011. On the same day, the Serious Fraud Office and the Director of Public Prosecution published joint prosecutorial guidance. The U.S. Department of Justice has also markedly increased prosecutions under the Foreign Corrupt Practice Act. Together with the provisions of the Dodd-Frank Act regarding payments to foreign governments related to extraction activities, these activities present a significant transparency initiative on the part of the U.S. and UK governments that will increasingly affect mining companies forced to venture into evermore politically risky countries in search of minerals.

F. *International Mining Trends*

i. Resource Nationalism

Efforts of the Chinese and others to spread their wings and make significant investments around the world have been met by questions from countries like Canada (e.g. BHP Billiton's attempt to take over Potash Corp.), Australia, and the U.S. about whether their resources should be controlled by offshore companies. In a similar vein, China has reduced exports of rare earth metals in an attempt to force companies to create finished products in China. The U.S. is currently ramping up production of rare earth metals through companies such as Molycorp Minerals and Thompson Creek Metals.

Resource nationalism has returned to Latin America as well, most notably in Bolivia. In Bolivia there is an ongoing debate over a new General Mining Law which should be enacted in the course of this year as mandated by a new 2009 Constitution. Issues of property rights, taxation, consultation with indigenous populations, authority of control, jurisdiction, forms of contracts, treatment of private investments, industrialization, and general policies are at the heart of most of the discussions, within a general framework of nationalistic tendencies given the orientation of the current Bolivian administration headed by President Evo Morales.

Finally, resource nationalism has impacted international mining royalty and tax issues. In an effort to enhance their economic take from mineral development, countries are renegotiating concessions and permits, or imposing new taxes or royalties. When commodity prices are high, mining companies become targets for government treasuries.

ii. Mine Development Arrangements

The International Bar Association has issued a Model Mine Development Agreement. Similarly, the World Economic Forum unveiled a program called the "Responsible Mineral Development Initiative" that focuses on convening stakeholders around dialog.

iii. Indigenous Peoples and Social Engagement

On May 12, 2011, the International Finance Corporation ("IFC"), a member of the World Bank Group, announced updates to its environmental and social standards, including the adoption of the principle of "Free, Prior, and Informed Consent" for projects with potential significant adverse impacts on indigenous peoples. IFC Performance Standards are the basis for IFC project finance loans, and for the Equator Principles that most investment banks abide by when lending to extractive industries. The issue of consent can be challenging, because in many countries the sovereign state is the one that wants to give consent, rather than indigenous peoples. As international mining companies spread to places such as Central Asia, North Africa, and the Gulf, they are realizing the importance of social engagement with state, local, and tribal group governments. These family-oriented groups are often more important than dealing with the central government, or the rule of law.

The International Council on Mining and Metals ("ICMM") released a "Good Practice Guide: Indigenous Peoples and Mining," detailing best practices for extractive industries dealing with local groups. The importance of this issue was highlighted recently in April 2011, when the Peruvian government cancelled Southern Copper's Tia Maria project, amid violent protests by local residents over environmental issues.

iv. Safety

Mining disasters in Chile and New Zealand have heightened international scrutiny over safety concerns. Even China has started ordering mine managers to enter the mines.