

Mining and Mineral Extraction Committee Newsletter

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MINING ON 10 MILLION ACRES IN SIX STATES IMPACTED BY BLM'S PROPOSED WITHDRAWAL TO PROTECT SAGE-GROUSE HABITAT

Sarah Stauffer Curtiss, Eric Martin, and Shannon Morrissey

On September 24, 2015, the federal Bureau of Land Management ("BLM") published notice of the proposed withdrawal of roughly 10 million acres of "sagebrush focal areas" from mineral location and entry under the General Mining Law of 1872. 80 Fed. Reg. 57,635 (Sept. 24, 2015), corrected, 80 Fed. Reg. 63,583 (Oct. 20, 2015). The BLM notice commenced a temporary segregation period of up to two years during which the location and entry of new mining claims is prohibited within these areas in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming. The Secretary of the Interior ("Secretary") could decide to withdraw these areas on BLM and U.S. Forest Service ("USFS") lands from mineral location and entry for up to 20 years, with the opportunity to extend the withdrawal in the future.

The Decision Not to List the Greater Sage-Grouse

The BLM's proposal to withdraw sagebrush focal areas from mineral location and entry aims to protect the greater sage-grouse and its habitat from the adverse effects of locatable mineral exploration and mining. In March 2010, the U.S. Fish and Wildlife Service ("FWS") determined that the

greater sage-grouse was warranted for protection under the Endangered Species Act ("ESA") due to the loss and fragmentation of its habitat but opted not to list the species due to the need to address higher-priority listing decisions. Several conservation groups challenged the "warranted, but precluded" decision, and, as part of a settlement agreement, the court required the FWS to make a listing decision by September 30, 2015.

Eight days before the deadline, Interior Secretary Sally Jewell announced that the FWS would not list the greater sage-grouse under the ESA. In support of its determination, the FWS noted that a listing is no longer warranted because the greater sage-grouse's primary threats have been reduced by federal, state, and local conservation efforts. 80 Fed. Reg. 59,858 (Oct. 2, 2015). The FWS's decision was based, in part, on amendments to 98 federal land management plans affecting the six states impacted by the temporary segregation plus California, Colorado, North Dakota, and South Dakota. Finalized in September 2015, the plan amendments adopt a tiered land use allocation system that provides the greatest protection for habitat that is most important to the greater sage-grouse (i.e., sagebrush focal areas). Sagebrush focal areas are characterized by large, contiguous blocks of federal land, high population connectivity, and high densities of breeding birds. In the plan amendments, the BLM and USFS recommended that the Secretary withdraw sagebrush focal areas from mineral location and entry because the FWS identified habitat fragmentation caused by

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hardrock mining operations as a primary threat to the greater sage-grouse and its habitat.¹

Segregation and Withdrawal – Not Good for Mining Claims

The Federal Land Policy and Management Act of 1976 (“FLPMA”) authorizes the Secretary to withdraw federal lands from “settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.” 43 U.S.C. §§ 1702(j), 1714. This withdrawal authority includes the authority to remove federal lands, subject to valid existing rights, from the General Mining Law of 1872.

If the Secretary receives an application for withdrawal or proposes a withdrawal, the Secretary is to publish notice that specifies the extent to which the subject land is to be “segregated from the operation of the public land laws” for up to two years while the proposed withdrawal is considered. The Secretary must submit a report to Congress if a withdrawal of more than 5,000 acres is approved. The report is to address 12 statutory issues, including known mineral deposits, past and present production, mining claims and leases, and future opportunities for mineral development. (The U.S. Geological Survey released its sagebrush mineral-resource assessment data in August 2016.) There are no specific standards or criteria that a proposed withdrawal must satisfy. Instead, FLPMA gave Congress the opportunity to veto withdrawals of more than 5,000 acres. However, that legislative veto has been held to be unconstitutional and severable from the remainder of FLPMA’s withdrawal authority. *Yount v. Salazar*, 933 F. Supp. 2d 1215 (D. Ariz. 2013). An appeal of this decision is currently pending before the Ninth Circuit.

Here, the BLM’s notice of proposed withdrawal specified that the sagebrush focal areas were, subject to valid existing rights, “segregated from location and entry under the United States mining

laws.” The BLM will prepare an Environmental Impact Statement under the National Environmental Policy Act (NEPA) to study the long-term impacts of the proposed withdrawal. It conducted eight public meetings on the proposed withdrawal and scope of the Environmental Impact Statement this past winter and issued the scoping report in April 2016.

The segregation period functions as a moratorium on locating new mining claims. In addition, development of preexisting mining claims within the proposed withdrawal area will be impacted. *See* 43 C.F.R. § 3809.100. Prior to approving a plan of operations (or modification to a plan approved before the segregation) for a preexisting claim during the segregation period, BLM policy calls for the submission of evidence showing a physical exposure of a locatable mineral deposit as of the segregation date. If that cannot be shown, a validity determination must first be conducted to assess whether the claim constitutes a “valid existing right.” If a physical exposure can be shown, BLM policy gives its managers discretion to approve a plan of operations (or modification) without a validity determination, but only if the purpose of the segregation supports such a decision. In the context of the sagebrush focal area segregation, it seems unlikely that BLM managers will exercise discretion to avoid validity determinations. After the Secretary approves a withdrawal, the moratorium on new mining claims is extended and a validity determination is a prerequisite to approval of a plan of operations (and a modification).

A mining claim is a “valid existing right” if a valuable mineral deposit has been discovered within the boundaries of the claim as of the segregation date and the date of the validity determination. Exposure of the deposit by the segregation date is a necessary precondition. The evidence must show a reasonable prospect that the deposit can be mined, removed, and marketed at a profit, considering historic price and cost factors. *United States v. McKown*, 181 IBLA 183 (2011). If these requirements are not satisfied, the BLM will move to terminate the mining claim.

Litigation Commences

The BLM and USFS plan amendments and the proposed withdrawal are highly controversial and have spurred lawsuits in Idaho, Nevada, Utah, Wyoming, the District of Columbia, and North Dakota.² In late September 2015, Elko and Eureka Counties in Nevada and two exploration companies filed suit against the BLM and USFS alleging that the plan amendments violate a host of federal laws, including the General Mining Law of 1872 and that the proposed withdrawal violates FLPMA. The court in early December 2015 denied a motion for a preliminary injunction to halt implementation of the amendments. Idaho Governor C.L. “Butch” Otter also filed suit in late September 2015 challenging the plan amendments, alleging violations under FLPMA, NEPA, the National Forest Management Act, and the Administrative Procedure Act. In addition, the Wyoming Stock Growers Association filed suit in October 2015, and Utah Governor Gary Herbert filed suit in February 2016, both alleging similar violations of FLPMA and NEPA. The Utah suit requests that the federal court discard the federal plan amendments and proposed withdrawal in deference to the State of Utah’s plan for sage-grouse management. In April 2016, the American Exploration & Mining Association filed suit alleging, among other claims, that the federal agencies failed to provide for adequate public participation during the NEPA environmental review process, exceeded their statutory authority by adopting a net conservation gain mitigation standard, and failed to comply with multiple use management requirements. The following month, the Western Energy Alliance and North Dakota Petroleum Council filed suit alleging, among other things, that the federal agencies violated the Mineral Leasing Act and FLPMA by improperly ceding authority over oil and gas operations to state and federal wildlife agencies.

On the other side of the debate, the Center for Biological Diversity and several other conservation groups filed a complaint in late February 2016. This lawsuit against the BLM and the USFS alleges that the land use plan amendments “fail to ensure that sage-grouse populations and habitats will be protected and restored in accordance with the best

available science and legal mandates” of NEPA and other federal laws.

These legal challenges are emblematic of the controversy surrounding the measures upon which the FWS based its decision not to list the greater sage-grouse. In many respects, the FWS’s decision not to list may ultimately have greater adverse impacts on mining than a decision to list the greater sage-grouse, because there are mechanisms under the ESA under which development can occur (e.g., habitat conservation plans). In contrast, segregation and withdrawal under FLPMA are much more restrictive. Although the Secretary is poised to approve the proposed withdrawal, the sage-grouse saga is far from over.

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Endnotes

1 The plan amendments have other impacts on mining. For example, they identify 35 million acres of “priority habitat management areas,” within which new operations to mine common variety materials (e.g., aggregate) are prohibited. In September 2016 the BLM issued seven Instruction Memoranda providing guidance on plan amendment implementation, including implementation of their habitat disturbance cap and energy production and mining facility density cap.

2 *Western Exploration LLC v. U.S. Dep’t of the Interior*, Case No. 3:15-CV-00491 (D. Nev. Sept. 23, 2015); *Otter v. Jewell*, Case No. 1:15-CV-01566 (D.D.C. Sept. 25, 2015); *Wyoming Stock Growers Ass’n v. U.S. Dep’t of the Interior*, Case No. 2:15-CV-181 (D. Wyo. Oct. 14, 2015) with which *Wyoming Coalition of Local Gov’ts v. U.S. Dep’t of the Interior*, Case No. 2:16-CV-041 (D. Wyo. March 1, 2016) has been consolidated; *Herbert v. Jewell*, Case No. 2:16-CV-00101 (D. Utah Feb. 4, 2016); *Western Watersheds Project v. Schneider*, Case No. 1:16-CV-00083 (D. Idaho Feb. 25, 2016); *Am. Exploration & Mining Ass’n v. U.S. Dep’t of the Interior*, Case No. 1:16-CV-00737 (D.D.C. Apr. 19, 2016); *Western Energy Alliance v. U.S. Dep’t of the Interior*, Case No. 1:16-CV-00112 (D. N.D. May 12, 2016).

REACTION TO THE GOLD KING BLOWOUT: ADDRESSING ABANDONED MINE DRAINAGE

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On August 5, 2015, an EPA contractor, attempting remediation, unstopped a blockage at the Gold King Mine in Colorado, releasing 3 million gallons of contaminated water from the mine into tributaries of the Animas River, water contaminated with cadmium, arsenic, lead, and other heavy metals. The Gold King spill literally turned the water orange in creeks and rivers where the EPA had only recently confirmed that the benthic community and fish populations had already been devastated for decades by steady lower volume releases from the Gold King and other abandoned mines in the Upper Animas Mining District. EPA, *Draft Baseline Ecological Risk Assessment for the Upper Animas Mining District (April 2015)* (“BERA”).

The events following that deluge were remarkably similar to other spill incidents in recent years. News accounts chastised EPA because the initial volume of the spill was markedly understated, and notification to downstream residents was delayed. EPA publicly promised to take complete responsibility for cleaning up the spill and compensating for any resulting injury, while downstream residents and their state, local, and tribal governments were vocal in their skepticism and threatened legal action. Stories alleged that the EPA’s agents were reportedly offering immediate compensation in exchange for waivers of liability. EPA assured the public that risks from the spill were small, but was unable (or unwilling) to produce sampling data for water and sediment, and then offered belated recognition that long term impacts on sediment remained possible. In a draft fate and transport report issued February 5, 2016, it estimated that more than 400,000 kg of metals entered the Animas River from the Gold King Mine release, but that “by the time the plume reached the Lower Animas River the metal load in the

plume was roughly equivalent to one day’s worth of high spring runoff of AMD [acid mine drainage] discharges into the Animas River from all existing AMD sources in the Animas River watershed.”

However, this article is not about the *schadenfreude* felt by many who have been similarly beset by criticism—and worse—from EPA and the public when they were forced to deal with similar catastrophic events. While EPA may be facing a huge public embarrassment and loud congressional criticism, the incident has also served to highlight the fact that contamination from the blowout is a small fraction of the already existing acid drainage from the Gold King and other mines reaching the Animas and other rivers in the mining country of the Rockies. This article focuses on how the parties are addressing the blowout and the larger mine drainage issues in the Animas River, and, one year later, the broader issue of “uncontrolled fluid releases” at abandoned mines throughout the country.

CERCLA Remedies

The Gold King blowout sounds like the simplistic example of a CERCLA claim offered in a survey environmental law course. The threat of litigation is not idle. CERCLA contains an explicit waiver of sovereign immunity for the United States, and suits under CERCLA naming the United States as a party are hardly unusual. As many of us are painfully aware, CERCLA creates a wide-spread net of liability and extremely limited potential defenses for almost anyone associated with the release of a hazardous substance. That liability includes both cleanup costs and any resulting natural resource damages. Under CERCLA, a responsible party could expect to pay millions of dollars to contain the spill, prevent further releases, monitor impacts on the affected creeks and rivers for years, and restore any injured natural resources.

However, CERCLA also has a liability exception for “rendering care or advice.” 42 U.S.C. 9607 (d). Under that provision, no person [not otherwise a liable party under Section 107 (a) (1–4)] is liable

for costs or damages under CERCLA for rendering care or advice in accordance with the National Contingency Plan (NCP) or at the direction of an on scene coordinator appointed under the NCP. The work resulting in the Gold King blowout appears to fall squarely under that provision.

One limitation on the “rendering care and advice” defense to CERCLA liability is that the provision does not preclude liability for costs or damages as a result of the person’s negligence. See *AMW Materials Testing Inc. v. Town of Babylon*, 584 F.3d 436, 446–449 (2d Cir. 2009) (interpreting the application 9607(d)(3) to the related defense provided to state and local jurisdictions); *U.S. v. Stringfellow*, 1993 WL 565393 (Nov. 30, 1993) (State of California liable under CERCLA where it negligently selected and managed waste site). Two government reports have been issued, with differing conclusions on the question of negligence. Cf., *EPA Internal Review of the August 5, 2015 Gold King Mine Blowout*, August 24, 2015, and *Technical Evaluation of Gold King Mine Incident*, Bureau of Reclamation, October 2015, both available at the EPA Gold King Mine website. The EPA Inspector General also announced on November 4, 2015, that it would conduct its own investigation. That potential at least leaves open the possibility of a future finding of EPA liability under CERCLA.

At present, EPA has avoided addressing that issue and has informed persons seeking to assert claims related to the discharge to file any claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* See <http://2.epa.gov/goldkingmine/claims-process-and-standard-firm-95-damage-injury-or-death-result-gold-king-mine> (It was EPA’s efforts to provide FTCA claim forms that apparently led to erroneous stories that the agency was trying to obtain quick settlements accompanied by releases for future damages.)

Given that EPA appeared to be moving quickly to assess and address the blowout itself, the absence of immediate lawsuits was not entirely surprising despite the outrage expressed by the tribes and the three states affected by the spill.

Instead, what has happened over the last several months has been a full-court press on EPA and the Congress to assure that the agency would exercise extreme diligence in addressing conditions for which it is responsible. At the behest of Congress, the EPA Inspector General has also opened both a program evaluation and a criminal investigation. With no statute of limitations looming, a prudent party could easily decide there was no reason to rush to the courts in an effort to obtain through uncertain and expensive litigation little or nothing beyond what it was obtaining now through other means.

As a result of the fallout from the Gold King, EPA is also working to develop “best practices” for mine remediation to avoid a repeat of the Gold King blowout. In the interim, it issued on March 29, 2016, a memo to all Region offices, identifying work planned in 2016 at mines with a probable risk of “fluid releases,” and requiring a pre-work briefing package for Headquarters consultation. EPA obviously has learned one lesson from Gold King—look before you dig.

The Litigation Option

However, everyone realizes the litigation option remains open. Immediately after the spill, the Chairman of the Navajo Nation directed his Legal Department to take action, and the Nation retained a law firm. More recently, in mid-January, the State of New Mexico, downstream of the spill, sent a notice letter under RCRA, 42 U.S.C. 6972(a)(1)(B), to EPA, the State of Colorado, and BLM, as well as the EPA contractor and the owners of both the Gold King Mine and the adjacent Sunnyside Mine. After expressing frustration about what it viewed as inadequate responses by EPA, on May 23, 2016, New Mexico filed suit alleging violations by EPA, its contractor, and the owners of the Sunnyside complex of mines, of not only CERCLA and RCRA, but also the Clean Water Act and various state tort causes of action. On August 16, 2016, the Navaho Nation also filed suit against EPA. Those suits will face some of the same obstacles discussed above under CERCLA. RCRA does not have the Good Samaritan provision, but a citizen suit would be

barred if EPA had commenced and was diligently prosecuting a claim, or if it is engaged in a removal action under CERCLA or has incurred costs to initiate an RI/FS and is diligently pursuing a remedial action. 42 U.S.C. 6972(b)(2)(B). Thus, the listing of the Bonita Peak Mining District NPL site, discussed below, could threaten that claim.

More recently, New Mexico expanded its litigation efforts. On June 23, 2016, it filed a motion with the United States Supreme Court, requesting leave to file a Bill of Complaint against the State of Colorado, alleging that Colorado, through decades of mismanagement, was responsible for the Gold King blowout under CERCLA, RCRA, as well as nuisance and negligence causes of action.

But what can litigation accomplish?

To paraphrase Hobbes, contested CERCLA suits and similar environmental litigation tend to be nasty, brutish, but unlike life in the 17th century, frustratingly long. Although the course of any litigation is difficult to predict, litigation here would entail complications resulting from the ongoing EPA remediation actions, should the site be listed; the Supreme Court action, if allowed, would presumably proceed before a Special Master, adding another layer of complication. Whatever the venue, EPA decisions regarding adequacy of any cleanup likely would be given a level of deference by the court that no company would ever receive. Beyond that the case would probably present the usual claims and defenses, but with EPA and its co-defendants now forced to take positions EPA has cavalierly dismissed when raised by corporate parties. Specifically, the plaintiffs would likely contend that the Agency was negligent in allowing the blowout and so a liable party under CERCLA and that the contamination from the blowout makes EPA jointly and severally liable for the cleanup of the creeks and rivers downstream. EPA could be in the uncomfortable position of arguing that any contamination from the blowout was divisible from the earlier releases from the Gold King and other mines, but would be hard-pressed to establish that divisibility through expert testimony. Indeed, in its Draft Analysis of Fate

& Transport of Metals in the Animas & San Juan Rivers (February 5, 2016), EPA concludes, “[i]t may not be possible to isolate the specific effects of the [Gold King Mine] event from the ongoing cumulative effect of multiple sources of metals from past or future runoff.” It is not clear that there are other viable parties associated with the Sunnyside complex, but the addition of other mine owners and operators could reduce liability shares through allocation. If additional solvent parties exist, however, their joinder would add complexity and years of length to already messy litigation. Given the difficulties and high costs of litigation, it may simply be that the New Mexico suits are more a move to increase leverage over EPA in negotiations over what cleanup actions and restoration will occur in downstream areas than an effort to obtain judicial control over the cleanup. The Supreme Court filing certainly grabs attention.

However, the problems of mining contamination in the Animas River extend far beyond this spill. Statements that water quality is back to pre-blowout levels are not very comforting if one understands, per the EPA BERA, that portions of the river, pre-blowout, were unable to sustain fish populations. As suggested earlier, the downstream creeks and rivers have been constantly impacted by discharges from upstream mines, not simply those near the Gold King. The Upper Animas Mining District is estimated to contain 300 hard-rock mines, which have been a source of contaminated water in the Animas watershed for many decades. Any comprehensive remedy would need to take into account the full situation faced by those downstream of the mining district where the Gold King is located. The question for the downstream tribes and states is whether initiating CERCLA litigation would force EPA to address that larger concern.

The court would likely find that immediate response to the Gold King blowout substantially addressed the immediate threats to human health and the environment. In fact, the Navaho Tribe has now removed its restrictions on use of the water in the San Juan River. Active litigation does not appear to be necessary to accomplish that end. Whether a court would go further and order EPA (and others)

to clean up the entire watershed (and how that might be accomplished) is quite another issue.

On the natural resource damage, ironically, EPA has also provided itself with a pretty good defense, at least with respect to the blowout. Its 2015 BERA provides what almost never exists in spill situations— a credible pre-spill baseline study. In this case, comparison with the baseline for benthic and fish resources is likely to establish that while the spill certainly did not help the environment, it added little to the insults already suffered by the river from decades of less dramatic releases. If the baseline condition of resources in the river just before the blowout was near zero, any damages resulting from the blowout would be de minimis at best.

In any event, litigation against EPA over this spill would undoubtedly be interesting to observe, but the case would likely take years to litigate and be unlikely to produce a happy outcome for either side.

What's the Alternative?

For over two decades, the leading suggestion has been to list the Upper Animas Mining District, or at least the Upper Cement Creek area that includes the Gold King, on the NPL. EPA has been fully aware of those discharges and their impact on the river for decades, and in the 1990s proposed to the local community that the district be placed on the National Priorities List (NPL). That would have allowed EPA to seek recoveries from former owners and operators of the mines, should any be solvent or have insurance, and to add its own Superfund money, to implement a more complete solution to the problem of mine drainage. The communities resisted that designation, and EPA agreed to defer listing so long as other efforts improved water quality in the river. Those efforts appeared to be succeeding until 2005, but at that point progress stopped, and water quality in fact significantly declined in 20 miles of the river, with substantial impacts on benthic invertebrates and fish, a situation confirmed by EPA in its 2015 BERA.

Even after the Gold King blowout, the local community still opposed listing. However, the Navajo Nation made a public call for such

a designation at the time of the spill. Listing became more certain when the local communities concluded that with the blowout, the area now had the stigma of a Superfund site without the accompanying possibility of financial resources for cleanup. Having agreed that only a Superfund cleanup could provide the necessary funding to clean the river, the town of Silverton and San Juan County voted to request listing (if the name of the site could be the Bonita Peak Mining District Site). In April, EPA then proposed for listing a site that includes not only the Gold King, but an area including 45–50 other mines that leak contaminants into the watershed. That listing became final in September.

Listing is certainly not necessary to address the recent blow-out, but it is more likely to produce at least some halting initial steps toward a long-term solution to the continuing problem of mine drainage to the Animas. A listing that encompassed the entire mining district would likely produce an administrative disaster, leading, as has happened with other mega-sites, to multi-decade, hundred plus million dollar investigations even before a dollar is spent on cleanup. Even a cleanup limited to the proposed Bonita Park Mining District will take decades to address, however, and almost inevitably cost many millions of dollars. A treatment system for water from the Upper Cement Creek mine drainage, which is the most frequently cited solution, has been estimated to cost at least \$20 million to build and would have to operate indefinitely as more water works its way into and through the abandoned mine shafts. In sum, the Superfund process is not an ideal response, but mine cleanup is not a situation well-suited to quick fixes.

And, of course, the Bonita Peak site is just one area within Colorado, and indeed across the country, where drainage from abandoned mines has resulted in significant and ongoing environmental harm. Recognizing that, the Governor of Colorado has requested that the surrounding states work with Colorado to address the larger regional problem. The potential for regional cooperation, however, took a hit with New Mexico's motion to the Supreme Court alleging decades of

mismanagement by the State of Colorado. Whether the affected states can develop a regional approach to mine reclamation and remediation remains an open question.

Meanwhile, in Congress, the House has passed a package of legislation intended to assist mine cleanup through support for voluntary cleanup efforts and “Good Samaritan” relief for mining companies and others who undertake cleanup efforts. (H.R. 3844, H.R. 3734 and H.R. 3843). Similar efforts in the past have failed due to opposition from environmental groups, which have opposed Good Samaritan relief that could be used by mining companies and instead support an approach relying on additional charges on mining companies to fund of cleanup efforts. The fate of the current House bills likely will depend heavily on the outcome of the fall elections.

Conclusion

CERCLA is usually a situation where the absence of litigation is the result of the parties recognizing that the government has been given all the cards, so aggressive defense simply means a loss on the merits plus high transaction costs. At Gold King, despite the aggressive tactics of the State of New Mexico, active litigation with EPA as a responsible party is also unlikely, but for different reasons. Contentious litigation between tribal and state parties against EPA and Colorado would not only waste limited financial and legal resources, but would create a breach between parties who should ideally be working together to protect the public interest in a clean environment. Congressional efforts to address both the Gold King and the larger abandoned mine problem may prove a more productive approach both regionally and nationally. However the blowout brouhaha plays out, one hopes that, in the end, the combination of good judgment and governmental responsibility will calm the uproar and produce a good result for the affected public that addresses the larger AMD problems in the Animas watershed and elsewhere.

JACK OF ALL TRADES OR MASTER OF ONE: KENTUCKY MINE FOREMEN ARE NOT REQUIRED TO BE EXPERTS IN OTHER INDUSTRIES' SAFETY STANDARDS

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The Kentucky Supreme Court has provided some welcome guidance regarding the duties of mine foremen to inspect non-mining related construction activities that occur on mine property. In response to a certified question from the United States Circuit Court of Appeals for the Sixth Circuit, the Kentucky Supreme Court held in *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 230 (Ky. 2015) that an independent contractor who was killed while installing a garage door on mine property could not hold the mine operator liable for violation of Kentucky mine safety statutes and regulations which were intended to address the unique hazards associated with coal mining.

In *McCarty*, a contractor was hired to install a large commercial-grade garage door in a building being constructed on the surface of a mine site. While installing the door, Mr. McCarty, a highly skilled garage door installer, was killed when the door unexpectedly closed on the stepladder he was standing on and caused him to fall. An MSHA inspector concluded that the accident was caused by improper placement of the step ladder and failure to properly secure the door during installation. McCarty's widow sued the coal mine operator alleging that it was negligent *per se* for violating several mine safety statutes and regulations.

First, McCarty's estate claimed that the mine operator owed a duty to Mr. McCarty pursuant to Kentucky Revised Statutes Chapter 351, which relates to the Department of Natural Resources. The court examined the purpose of

the statutes expressed by the General Assembly and concluded that the statutes were intended to apply to traditional coal mining activity rather than construction work:

These statutory provisions are dominated by references to miners and the dangers miners confront while performing their jobs. In light of this emphasis, these provisions signal that the class of persons the legislature intended to protect by the statutory framework of KRS Chapter 351 is the traditional coal miner and others associated with the process of extracting coal who also are routinely exposed to the unique dangers and risks inherent to coal mining. For the same reason, the dangers that these statutes purport to address are the occupational hazards traditionally associated with mining coal and working in a coal mining environment.

Id. at 230.

Of particular importance was the court's analysis of KRS 352.280, KRS 352.330, KRS 352.040 and attendant regulations which require mine foremen to inspect and supervise mining activities at certain intervals. Mr. McCarty's estate claimed that these regulations were intended to protect specialized independent contractors as well as traditional mine employees. The court rejected this interpretation, finding that mine foremen are not required to be experts in safety standards of other industries:

Given the extensive statutory emphasis on the dangers of mining, we regard it as highly improbable that the General Assembly intended to burden coal mine inspectors and supervisors with the duty to become versed in the safety requirements of such extraneous activities as installing massive garage doors and other processes unique to the business of erecting buildings and foreign to the process of extracting coal. The mine operator's unfamiliarity with the special techniques, requirements, and hazards of the various construction trades is certainly a major reason for using specialized outside contractors instead

of in-house laborers. Expecting the mine operator to provide safety inspections for the unfamiliar work of specialized independent contractors would divert resources away from the safety of workers actually engaged in mining coal, thereby increasing the very risks that the statute is designed to reduce.

Id. at 232–33. The Kentucky Supreme Court accordingly concluded that “[n]othing in the statutory text tasks the mine operator with tending to the safety of non-mining craftsmen and technicians and protecting them from the hazards of their own non-mining occupations.”

Relying on the Kentucky Supreme Court's analysis, the United States Court of Appeals for the Sixth Circuit recently affirmed entry of summary judgment against Mr. McCarty's estate. *McCarty v. Covol Fuels No. 2, LLC*, No. 13-6484, 2016 WL 611736 (6th Cir. Feb. 16, 2016).

Importantly, the Kentucky Supreme Court's decision does not address duties arising from federal MSHA regulations, and the court acknowledged that a mine operator still owes a general duty as a land owner “to make the property reasonably safe and to warn of unknown or latent dangers.” In reaching its conclusions the court relied heavily on the fact that the injured person was a skilled independent contractor and the building in which the incident occurred was not yet being used for mining activity. A different result could be expected were mine employees perform construction work directly or where the construction work in question is more closely related to the active production of coal.

THE SENATE ENERGY POLICY MODERNIZATION ACT OF 2015'S POTENTIAL IMPACT ON DEVELOPMENT OF CRITICAL MINERAL RESOURCES

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On April 20, 2016, the Senate passed the Energy Policy Modernization Act of 2015 (the Act) by a vote of 85–12. If signed into law, the bipartisan bill would impact the research, exploration, development, production, manufacturing, and recycling of critical mineral resources and make numerous other changes intended to keep pace with the nation's rapidly changing energy industry.

Critical Mineral Resources Provisions of the Act

Key provisions of the Act relating to critical minerals focus on the process of designating what constitutes a “critical mineral” for purposes of the Act; assessment of known and undiscovered critical mineral resources; improvements to the permitting process; and analysis and forecasting of production and consumption of critical minerals.

The Secretary of the Interior (acting through the Director of the United States Geological Survey (USGS)) must publish a draft methodology for determining which minerals qualify as critical minerals within 90 days after the Act is enacted and must publish a final rule within 270 days after the Act is enacted. Factors to be considered in the determination will include whether the minerals are subject to supply restrictions (including foreign political risk, demand growth, military conflict, unrest, anti-competitive behaviors, and other risks through the supply chain) and whether the minerals are important in use (including applications related to energy technology, defense, currency, agriculture, consumer electronics, and health care). Qualitative data may be considered to the extent that quantitative data is insufficient. The Secretary must also publish an initial list of critical minerals designated pursuant to these

factors within one year after the Act is enacted and must review the list every three years thereafter. Notwithstanding the criteria, the Secretary may also designate and include on the list any mineral or element determined by another federal agency to be strategic and critical to the defense or national security of the United States.

In addition, the Secretary must consult with other entities (including state and local governments as well as representatives of academic institutions and industry) to complete a comprehensive national assessment of each initially-designated critical mineral within four years after the Act is enacted and must assess newly designated critical minerals within two years. This assessment is intended to identify and quantify known resources and to provide a quantitative and qualitative assessment of undiscovered critical mineral resources (including probability estimates, tonnages, and grade). The Act authorizes the Secretary to carry out surveys and field work (including drilling, remote sensing, geophysical surveys, geological mapping, and geochemical sampling and analysis) to obtain supplementary data as needed. In addition, it requires the Secretary to submit to Congress within two years after the Act is enacted a report describing the status of surveying on federal lands for certain mineral commodities, including those not designated as critical minerals and those for which the United States was dependent on a foreign country for more than 25 percent of the U.S. supply.

Regarding permitting, the Act requires the Secretary (acting through the Director of the Bureau of Land Management) and the Secretary of Agriculture (acting through the Chief of the Forest Service) “to the maximum extent practicable” to complete federal permitting and reviews “with maximum efficiency and effectiveness.” It also requires submission of a report within one year after the Act is enacted identifying additional measures to increase timeliness of permitting activities; identifying options to ensure adequate federal staffing and training (including cost recovery paid by permit applicants); and quantifying the amount of time typically required to complete each

step of permitting process for use as baseline. The Secretary must also develop a performance metric to evaluate progress in expediting permitting and submit reports summarizing the implementation of identified options using that performance metric. In addition, all *Federal Register* notices must be published in final form within 45 days of a notice's initial preparation.

The Secretary is also required to consult with the Energy Information Administration, academic institutions, and others to conduct a comprehensive review of critical mineral production, consumption, and recycling, including quantities produced and consumed; market price data for critical minerals; and assessment of the minerals required to meet needs during the preceding year and reliance on foreign sources to meet those needs. The Secretary must also complete a comprehensive forecast of projected critical mineral production, consumption, and recycling.

The Act would also strengthen educational and research capabilities and workforce training; bolster international cooperation; promote recycling of and development of alternatives to critical minerals that do not occur in "significant abundance" in the United States; and establish contingencies for production of or access to critical minerals without domestic sources.

Other Key Provisions

Additional provisions in the Act would:

- Promote energy efficiency of buildings, appliances, manufacturing processes and vehicles;
- Encourage renewable energy development with a focus on hydroelectric, geothermal, marine hydrokinetic, and biomass energy resources;
- Improve infrastructure by facilitating the research and development of electric grid energy storage, expediting and improving the permitting process for electric transmission infrastructure, enhancing grid

reliability, and providing more expedited emergency response to disruptions;

- Facilitate the trade of liquefied natural gas;
- Designate FERC as the lead agency for coordinating federal authorizations and NEPA compliance for liquefied natural gas projects; and
- Establish a pilot program for streamlining the review and approval of applications for permits to drill for oil and gas.

Status

The House passed a similar bill on December 3, 2015, so Congress is now tasked with reconciling the House bill and the Act. After the Senate disagreed with a request by the House to report the bill back with a new section relating to consideration of impacts on climate change, the bill was sent to a conference committee which met on September 8. Time will tell whether the conference committee will produce a reconciled bill that will be passed by both the House and the Senate.

The bill would then be delivered to the White House for President Obama's signature. Whether the President will sign the bill into law will likely depend on the specific provisions of the reconciled bill. While the Office of Management and Budget's Statement of Administration Policy took issue with several provisions of the House bill, Energy Secretary Ernest Moniz has noted the Senate bill's "many positive elements." Retaining key provisions of the Senate bill is therefore crucial to both the legislation's success and its potential for impact on critical mineral resources.

What This Means to You

The Act could significantly impact the critical mineral resource industry as well as industries that use critical minerals in production of equipment and components for energy technology, defense, currency, agriculture, consumer electronics, and health care. The Act is intended to avoid supply shortages, mitigate price volatility, and prepare for demand growth and other market shifts; to facilitate

development of domestic resources to meet critical mineral needs; and to prevent unnecessary paperwork and minimize delays associated with permitting. To achieve these purposes, the Act allocates \$50 million for implementation of the Act's critical mineral provisions for each of fiscal years 2017 through 2026.

Understanding the potential impacts of the proposed legislation could help your business and your clients be positioned to take advantage of the numerous opportunities that are likely to result if the Act is signed into law. In addition, your participation in the legislative process could help educate Congress on the needs of your business and your clients and ultimately impact specific provisions of the Act.

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