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Authored by Frank Erisman, James F. Cress, Alex Ritchie,
and A. John Davis III

SENATE PROPOSAL WOULD IMPOSE ROYALTY TYPE FEE ON ALL U. S. HARDROCK MINES

Section 403 of S. 796 recently introduced by Senator Bingaman of New Mexico imposes an immediate "hardrock" minerals mining reclamation fee on all hardrock mineral mining operations no matter where located, on federal land or not, in the United States. The fee is established at not less than 0.3 percent and not more than 1.0 percent of the "value of the production" as established by the Secretary of the Interior. The fee is payable 60 days after the end of each calendar year. The reclamation fee is unique among recent mining law reform proposals because the fee is imposed not only on unpatented mining claims, but also on the mining of all hardrock minerals within the United States, including mining operations on private fee lands and tribal lands. In other words, an iron ore mine in Minnesota, a zinc mine in Tennessee, a tourmaline mine in Maine, or a uranium mine in Texas will all be subject to the payment of the reclamation fee. In addition, all hardrock mines will also be subject to the very strict and cumbersome reporting and audit provisions, as well as the enforcement provisions of S. 796. This would be an astounding imposition of a new fee on mining within the United States. There is no grandfathering provision regarding the imposition of the reclamation fee.

For many years, Congress has attempted to reform the General Mining Law of 1872. Each Congress since the 1960s has had at least one reform proposal. However, the consensus among mining law experts is that there will be no reform until after the November 2010 elections.

Holme Roberts & Owen has been active in recent mining law reform activities and has represented major clients in Washington, D.C. working with Senate and House staff and committees on proposed bills. Our partner, Jim Cress, testified before committees of the House and Senate in 2007 and 2008 on the implications of royalty proposals for the mining industry.

Many in the mining industry, other than a few companies and individuals who are actively involved in the reform effort, have tended to ignore reform proposals because they have gone nowhere in the past. We believe the current reform efforts should not be ignored. Accordingly, with this Alert we highlight little known or little watched, but potentially significant traps that current proposals contain, focusing on S. 796 recently introduced by Senator Bingaman.

There is general consensus that mining law reform will eliminate patenting, impose a royalty, require permits and land use fees, increase environmental scrutiny, and require financial assurance, including trust funds for long-term assurance for treatment of water and other long-term, post-mining maintenance and monitoring requirements. However, seemingly minor proposals such as the reclamation fee described above could have great significance on the mining industry. Other less obvious but troublesome proposals in S. 796 include the following:

Limits on Relocation

Section 102(a)(4)(B) prohibits, for a 10-year period, a mining claim owner from relocating his claim if that claim had been relinquished or been allowed to become null and void. It may be intended to counter the practice of "rolling" claims sometimes employed by unprincipled locators to avoid paying the existing federal claim fees. Even if this practice is to be discouraged, the proposed language goes far beyond any reasonable deterrent, and fails to recognize that old claims are often relinquished in favor of new claims that are better surveyed or otherwise conform to better practices. With the elimination of patenting, the relocation of claims to correct surveying problems will likely be lessened, but miners will still desire to be certain that claims cover all ground intended and that no gaps exist if in fact the mining claim is to be brought into production. This language could wreak havoc with customary operations.

HRO CONTACTS Energy & Natural Resources – Mining

Frank Erisman
Partner
frank.erisman@hro.com
303-866-0337

James F. Cress
Partner
jim.cress@hro.com
303-866-0290

Alex Ritchie
Senior Counsel
alex.ritchie@hro.com
303-866-0313

A. John Davis III
Partner
john.davis@hro.com
801-323-3288



Holme Roberts & Owen LLP.
Attorneys at Law

Abandonment of Pedis Possessio

Section 102(a)(8) establishes that payment of the maintenance fee to the Bureau of Land Management (BLM) will satisfy “any obligation the claim holder has under the pedis possessio doctrine for any claim properly located.” In other words, payment of the maintenance fee will perpetuate a claim even though the miner is not on the property working toward discovery. The doctrine of pedis possessio has served for more than 100 years to keep claims active and prevent the holding of claims indefinitely for speculation without any work being done to develop the claims.

Ambiguous Royalty

Section 201 proposes a royalty of not less than 2 percent and not more than 5 percent “of the value of the production, not including reasonable transportation, beneficiation, and processing costs.” While the rate for a particular mineral is to be determined by the Secretary of the Interior by regulation, the proposal, by basing the royalty on “value of the production” as opposed to the proceeds received from the sale of minerals, and lacking any statutory definition of the term, will certainly ensure disagreements on the royalty calculation. The value in the eyes of the government may be different from the amount actually received, especially if the sale is pursuant to a long-term sales agreement. Major battles have been waged over the meaning of “value of production” for relatively straightforward oil and gas and coal royalties.

Royalty Grandfathering

The royalty S. 796 imposes does not burden production that is subject to an approved plan of operations or an operations permit on the date of enactment if the claim is producing in commercial quantities on that date. This language will lead to litigation by miners who had not yet achieved commercial production and are confident they have a discovery or by those who are “producing” but not in commercial quantities in the government’s view.

Enforcement

S. 796 contains 28 pages relating to enforcement of the royalty and reclamation provisions. Perceived problems in collecting oil and gas royalties and enforcing reclamation obligations under Surface Mining Control and Reclamation Act (SMCRA) have resulted in onerous recordkeeping and audit requirements, as well as civil and criminal penalties for violation of S. 796 — even though there is no evidence that compliance will be a problem in the mining industry.

Permits

As expected, S. 796 requires a permit to conduct mineral activities on federal land. Perhaps what was not expected was the definition of “casual use” as limited to mineral activities that “ordinarily result in no or negligible disturbance.” Casual use is basically reconnaissance exploration, including the collection of geochemical samples. Anything that requires improvement or construction of a road or drill pad will require an exploration permit pursuant to Section 302. Exploration permit applications must show that “the formation of acid mined drainage will be avoided to the maximum extent practicable” and “the mineral activities will . . . use best management practices.” These standards could be used to define a new set of federal reclamation standards that would duplicate the existing state reclamation laws and federal standards that were subject to intensive rulemaking less than 10 years ago. Prior to the approval, a public hearing concerning the issuance of exploration permits “may” be held.

Land Open to Location

Section 307 requires that the Secretary of the Interior, acting through local land managers, review public lands to ascertain whether they should remain open to the location of mining claims. Similar provisions in the past have often resulted in temporary withdrawals as studies are conducted, and it has yet to be seen whether that will be attempted. Areas to be reviewed for withdrawal include: areas of critical environmental concern; buffer zones for National Parks; wildlife refuges and other critical areas; wild and scenic river areas; and inventoried roadless areas. This review will require revisions to existing Resource Management Plans, an exhaustive process that requires National Environmental Policy Act (NEPA) review, public comment and a high potential for litigation by dissatisfied user groups. Moreover, the governor of a state, the head of an Indian Tribe, “or an appropriate local government official” may petition that specific land be subject to a review for potential withdrawal and the secretary is required to make that review. The appropriate local government official is not defined. It is generally the law in the western states that local governments have only the power granted to them by the state government, so it would seem sufficient to have the petition for review rest with the governor and not a local official.

Uncommon Varieties

Section 504 disallows the location of mining claims for uncommon varieties of sand, gravel, cinders, clay, etc. Henceforth, all such minerals shall be subject to disposal of mineral materials under 30 U.S.C. §611.

Status of Uranium

Section 505 requires a review of uranium developments on federal lands. The review is to be completed within 18 months and shall make a recommendation whether uranium deposits shall henceforth be leasable. S. 796 does not impose a moratorium on the location of uranium mining claims during the time of the study, but such a moratorium would not be unprecedented.

The mining industry has been prone to focus on the main thrust of mining law reform such as the imposition of royalty and the elimination of patenting. S. 796 certainly suggests the mining industry should endeavor to spend an equal amount of time considering other potential pitfalls in proposed mining law reform legislation.

If you have any questions, comments, or concerns regarding the issues raised by this Alert, please feel free to contact either Frank Erisman, Jim Cress, Alex Ritchie, or John Davis. Their contact information is on the right side of page one.

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