THE MINING LAW REVIEW

Ninth Edition

Editor
Erik Richer La Flèche

THE LAWREVIEWS

THE MINING LAW REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Erik Richer La Flèche

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Amy Banda

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Claire Ancell

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-481-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2020 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BERTRAND-GALINDO BARRUETO BARROILHET & CÍA

DENTONS TASHKENT

EAST AFRICAN LAW CHAMBERS

ESTUDIO MUÑIZ, OLAYA, MELENDEZ, CASTRO, ONO & HERRERA ABOGADOS

FALCON & HUME INC

GENI & KEBE

GUILHERME DANIEL & ASSOCIADOS

HERBERT SMITH FREEHILLS

HOLLAND & HART LLP

HOLLAND & KNIGHT

JPAB – JOSÉ PEDRO AGUIAR-BRANCO ADVOGADOS

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK SCRL

MAYER BROWN

PINHEIRO NETO ADVOGADOS

RSM MEXICO BOGARÍN SC

SION ADVOGADOS

STIKEMAN ELLIOTT LLP

TIAN YUAN LAW FIRM

VHG SERVICIOS LEGALES SC

VIEIRA DE ALMEIDA

CONTENTS

PREFACE

I am pleased to have participated in the preparation of the ninth edition of *The Mining Law Review*. The *Review* is designed to be a practical, business-focused 'year in review' analysis of recent changes, developments and their effects, and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 19 chapters, each dealing with mining in a particular jurisdiction. These countries were selected because of the importance of mining to their economies and to ensure a broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of the book has three chapters that focus on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

At the time of writing, the covid-19 pandemic is continuing. It has greatly reduced economic activity throughout the world and the road to recovery will be long and uncertain.

Governments are trying their best to mitigate the effects of the pandemic, but consumer demand is down and certain sectors of the economy (e.g., transportation, hospitality) have been flattened. We are very far from the Goldilocks scenario of 2019 with steady world growth.

The impact of the pandemic on mining has been uneven. Taken as a whole, mining has done better than many sectors but it is undeniable that the pandemic has materially affected the demand for most minerals. This having been said, cuts in production because of the pandemic have helped maintain the price of some minerals (e.g., iron ore).

The story for gold and other precious metals continues to be a favourable one. Extraordinary increases in the monetary supply of the US, the uncertainty brought about by the pandemic and US–China trade frictions have contributed to the surge in gold, silver and other precious metals.

It is unclear what the next 12 months will bring and we can only hope that new vaccines and therapeutics will be developed and distributed in the not-too-distant future.

As you consult this book, you will find more on topics apposite to jurisdictions of specific interest to you, and I hope you will find the book useful and responsive.

Erik Richer La Flèche
Stikeman Elliott LLP
Montreal
September 2020

Part I

Mining

Chapter 18

UNITED STATES

Karol L Kahalley and Erica K Nannini[1]

I OVERVIEW

i Government policy towards mining and international investment

The US government values the mining industry for its production of domestic raw materials and strategic minerals, and high-wage jobs, despite the United States' reputation for creating a burdensome permitting and environmental regulatory regime. Federal, state and local governments receive billions of dollars annually in taxes, royalties and fees from the mining industry. The United States seeks and attracts international investment, including financial investment and direct investment in mining operations.

US law generally permits foreign investments in US industries, including mining. The US government places few restrictions on such investments, unless they are deemed to have national security implications. Projects involving the export of particular minerals, such as uranium or rare earth elements, can be subject to greater scrutiny when foreign companies are involved. Foreign investors are increasingly looking to the United States as a secure source of investment in mineral projects and to obtain reliable sources of minerals.

ii Risk factors

Security of title and tenure for mining claims, leases and licences is key to attracting foreign investment in US mining. There is little risk of expropriation of mining operations by government seizure or political unrest. The US political landscape has been characterised by inaction in the area of mining law reform; Congress has been working towards comprehensive mining law reform for many decades, but the General Mining Law has remained relatively unchanged since its passage in 1872. Thus, there is little risk that title to land for mining operations will be threatened by government intervention as long as all required fees, rentals and royalties are paid in a timely manner.

Perhaps the biggest risk in US mining ventures is the delay caused by the environmental review, compliance and permitting of a project. These steps can be very costly and time-consuming and, even without protracted litigation, it is not unusual for a major mining project to require in excess of 10 years to obtain all the necessary environmental approvals.

iii Mine ownership

Ownership of the US mining industry is in private hands: there are no government-owned mines or mining companies. Many companies operating US mines are based in the United States, such as Peabody Energy Corporation (coal), US Steel (iron ore) and Freeport-McMoRan

1 Karol L Kahalley is of counsel and Erica K Nannini is an associate at Holland & Hart LLP.

(copper). Many other operations are owned by foreign companies, including Barrick Gold's and Newmont Goldcorp's numerous mines (gold) and Rio Tinto's subsidiaries, such as Kennecott Utah Copper Corporation (copper-molybdenum).

iv Significant trading agreements concerning minerals

Many international treaties of general application apply to mining industry investment by foreign persons into the United States, but none specifically addresses investments in the mining industry or trading in various minerals. However, one failed transaction of note was the attempted acquisition by Chinese National Offshore Oil Corporation of the rare earth element mine at Mountain Pass, California (then owned by Unocal), which was blocked by the US government on national security grounds in 2005.

v Notable developments

On 4 June 2020, President Trump issued Executive Order 13927, 'Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities'. See 85 Fed. Reg. 35165. This Executive Order authorises federal agencies to invoke their emergency authorities to expedite transportation, defence and other infrastructure project approvals that would otherwise be subject to lengthy environmental review. The mining industry is likely to benefit from expedited permitting of infrastructure projects, particularly in the aggregates sector. However, environmental groups have indicated they will challenge projects approved pursuant to the order.

On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA) became effective, updating the existing North American Free Trade Agreement. The USMCA is expected to provide a boost to US steel and aluminium producers by requiring 70 per cent of each vehicle's steel and aluminium to originate in North America. The Trump Administration also vows to use the USMCA as a means to increase exports of US coal through ports in British Columbia to customers in Asia, bypassing restrictions on coal port permits imposed in the United States by the states of California, Washington and Oregon.

On 16 July 2020, the Trump administration finalised regulatory revisions to the National Environmental Policy Act (NEPA) review process. The new regulations remove existing requirements to consider climate change before proceeding with a project, shorten the time and scope of environmental analysis by federal agencies, limit the public comment process, decrease the number of infrastructure projects that will be subject to NEPA review, and limit the scope of judicial review for legal challenges. The revised NEPA process is expected to reduce by half the current time required to permit US mining projects that are subject to federal regulatory jurisdiction. These revisions are scheduled to go into effect on 14 September 2020. Environmental groups have confirmed their intent to litigate the regulatory changes.

The US Geological Survey reports that, in 2019, US mines produced an estimated US$86.3 billion in non-fuel minerals, up 3 per cent from the revised total of US$84 billion in 2018. The estimated value of metals production increased slightly to US$28.1 billion. The estimated value of US industrial minerals production in 2019 was US$58.2 billion, up about 3 per cent from the value in 2018. The value of industrial minerals production in 2019 was dominated by crushed stone, cement, construction sand and gravel, and industrial sand and gravel. In fact, crushed stone accounted for 22 per cent of the total value of US non-fuel mineral production in 2019, rendering it the leading non-fuel mineral commodity. The primary contributors to the total value of metal mine production in 2019 were gold,

copper, iron ore and zinc. Up from 12 US states in 2018, 13 US states individually produced more than US$2 billion worth of non-fuel mineral commodities in 2019. These states were Nevada, Arizona, Texas, California, Minnesota, Florida, Alaska, Utah, Missouri, Michigan, Wyoming, Georgia and Pennsylvania.

II LEGAL FRAMEWORK

i Introduction

The US legal system consists of many levels of codified and uncodified federal, state and local laws. The government's regulatory authority at each level may originate from constitutions, statutes, administrative regulations or ordinances, and judicial common law. The US Constitution and federal laws are the supreme law of the land, generally pre-empting conflicting state and local laws. In many legal areas, the different authorities have concurrent jurisdiction, requiring regulated entities to comply with several levels of regulation. Mining on federal lands, for example, is generally subject to many layers of concurrent federal, state and local statutes and administrative regulations.

Federal and state governments have developed comprehensive mining regulatory schemes. Although the United States is a common law nation, practising US mining law often resembles practising mining law in civil law countries because the regulatory schemes are set out in detailed codifications.[2] However, these mining law codifications are subject to precedential interpretation by courts pursuant to common law principles (and in some situations by quasi-judicial administrative bodies).

Determining which level of government has jurisdiction over mining activities largely depends on surface and mineral ownership. A substantial amount of mining in the United States occurs on federal lands where the federal government owns both the surface and the mineral estates. Federal law primarily governs mineral ownership, operations and environmental compliance, with state and local governments having concurrent or independent authority over certain aspects of federal land mining projects (e.g., permitting, water rights and access authorisations). If the resource occurs on private land, estate ownership is a matter of state contract law, but operations and environmental compliance are still regulated by applicable federal and state laws. Estate ownership on state-owned land is regulated by state law, and operations and environmental compliance are regulated by applicable federal and state laws.

ii Regulation of the mining industry

The General Mining Law of 1872 (GML)[3] is the principal law governing locatable minerals on federal lands. The GML affords US citizens the opportunity to explore for, discover and purchase certain valuable mineral deposits on federal lands open for mineral entry. Locatable minerals include non-metallics (asphaltum, bog iron, cement, diamonds, feldspar, granite, marble, salt, slate, umber, uranium, etc.) and metallic minerals including copper, gold, lead, nickel, silver and zinc. Locating these mineral deposits entitles the locator to certain possessory interests:

2 See, e.g., 43 CFR Sections 3000.0-5 to 3936.40 (Bureau of Land Management minerals management regulations).

3 30 USC Sections 21 to 54 and Sections 611 to 615, as amended.

a unpatented mining claims, which provide the locator with an exclusive possessory interest in surface and subsurface lands, and the right to develop the minerals; and

b patented mining claims, which pass title from the federal government to the locator, converting the property to private land. However, a mining patent moratorium has been in place since 1994 and no new patents are being issued.

The Federal Land Policy and Management Act of 1976 (FLPMA)[4] governs federal land use, including access to and exercise of GML rights on lands administered by the US Bureau of Land Management (BLM) and the US Forest Service (USFS). The FLPMA recognises 'the Nation's need for domestic sources of minerals'[5] and provides that the FLPMA shall not impair GML rights, including, but not limited to, rights of ingress and egress.[6] However, the FLPMA also provides that mining authorisations must not 'result in unnecessary or undue degradation of public lands'.[7] More generally, the BLM and the USFS have promulgated extensive regulations governing mineral development on public lands.[8]

The NEPA[9] requires federal agencies to prepare an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment. Mining operations on federal lands or with a federal nexus generally will involve an EIS or a less intensive environmental assessment examining environmental impacts. The NEPA process will involve consideration of other substantive environmental statutes.

The United States Securities and Exchange Commission (SEC) regulates mineral resources and reserves reporting by entities subject to SEC filing and reporting requirements. The SEC's reporting classification system is based on the SEC's 1992 Industry Guide 7, which provides for declaration only of proven and probable reserves. On 31 October 2018, the SEC adopted amendments to modernise the property disclosure requirements for mining registrants that more closely align with current industry and global regulatory practices and standards, including the committee for Reserves International Reporting Standards. Under the new rules, Guide 7 has been replaced with a new subpart of Regulation S-K that, among other new requirements aimed at protecting investors, requires mining registrants to disclose both mineral resources and mineral reserves and to support all disclosures with a technical report prepared by qualified persons with mining expertise. The SEC adopted a two-year transition period with the initial compliance year beginning on or after 1 January 2021, but registrants may voluntarily comply immediately.

III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS

i Title

In the United States, land generally can be severed into surface and subsurface estates, creating a split estate for which the surface and mineral rights can be held by different parties. The ability to sever the unified estate depends on land ownership. Federal land mineral interests are regulated by federal law and title cannot be transferred to private citizens until

4 43 USC Sections 1701 to 1787.

5 43 USC Section 1701(a)(12).

6 43 USC Section 1732(b).

7 43 CFR Section 3809.411(d)(3)(iii); see also 43 USC Section 1732(b).

8 See, e.g., 43 CFR Sections 3000.0-5 to 3936.40; 36 CFR Sections 228.1 to 228.116.

9 42 USC Sections 4321 to 4370m-12.

the minerals have been severed. Under the GML, locatable mineral claims may be patented, transferring title to the locator, but there has been a patent moratorium in place since 1994. Unpatented GML claims provide the locator with exclusive possessory surface and mineral interests, but the locator does not obtain title to the mineral estate. Ownership of state-land minerals is controlled by state law and varies by state. State laws generally are similar to federal laws, in that title remains with the state until the minerals are severed pursuant to statutory procedures. Severance of private land estates is governed by state law, and generally private citizens are free to split their surface and mineral estates.

Once the mineral estate is severed and enters the private market, title to the minerals can be bought, sold, leased or rented as a matter of contract law, subject to reservations in the severance document and applicable laws. The federal government, particularly in the western United States, may have reserved the mineral estate to itself when it transferred ownership of the surface lands to private citizens or state governments, which could affect the surface owners' ability to alienate the minerals.

ii Surface and mining rights

The process for developing locatable minerals rights on federal lands under the GML involves:

a discovery of a 'valuable mineral deposit', which under federal law means that a prudent person would be justified in developing the deposit with a reasonable prospect of developing a successful mine, and that the claims can be mined and marketed at a profit;
b locating mining claims by posting notices and marking claim boundaries;
c recording mining claims by filing a location certificate with the proper BLM state office within 90 days of the location date and recording pursuant to county requirements;
d maintaining the claim through assessment work or paying an annual maintenance fee; and
e additional requirements for mineral patents (as mentioned above, there is a moratorium on patents).

The Mineral Lands Leasing Act of 1920[10] provides US citizens with the opportunity to obtain a prospecting permit or lease for coal, gas, gilsonite, oil, oil shale, phosphate, potassium and sodium deposits on federal lands. The process for obtaining a permit or lease involves filing an application with the federal agency office with jurisdiction over the affected land. Depending on the type of permit or lease applied for, applicants may be required to:

a pay rent;
b file an exploration plan;
c pay royalties based on production; or
d furnish a bond covering closure and reclamation costs.

These permits and leases are often subject to conditions and stipulations directed at protecting resource values.

iii Additional permits and licences

Additional permits and licences required to conduct mining activities may include:

a a mine plan of operations;

10 30 USC Sections 181 to 287, as amended.

b a reclamation plan and permits;
c air quality permits;
d water pollution permits (pollutant discharge elimination system permit, storm water pollution prevention plan, spill prevention control and countermeasure plan);
e dam safety permits;
f artificial pond permits;
g hazardous waste materials storage and transfer permits;
h well-drilling permits;
i road use and access authorisations;
j right-of-way authorisations; and
k water rights.

iv Closure and remediation of mining projects

The FLPMA requires the BLM and the USFS to prevent 'unnecessary or undue degradation' of public lands.[11] Casual-use hardrock mining operations on BLM lands that will result in no or negligible surface disturbance do not require any reclamation planning. Notice-level exploration operations requiring less than five acres of surface disturbance must meet BLM reclamation standards and provide financial guarantees that the reclamation will occur.[12] Plan-level operations require a plan of operations that includes a detailed reclamation plan.[13] BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and revegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat.[14] Mining in BLM wilderness study areas additionally requires that surface disturbances be 'reclaimed to the point of being substantially unnoticeable in the area as a whole'.[15]

Mining activities on national forest lands must be conducted 'so as to minimise adverse environmental impacts on National Forest System surface resources'.[16] Operators must take measures that will 'prevent or control onsite and off-site damage to the environment and forest surface resources', including erosion control, water run-off control, toxic materials control, reshaping and revegetation where reasonably practicable, and rehabilitation of fish and wildlife habitat.[17]

State laws may also include closure and reclamation requirements, including, for example, water and air pollution controls, recontouring and revegetation, fish and wildlife protection and reclamation bonding requirements. Mining projects can often address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

11 43 USC Section 1732(b).
12 43 CFR Sections 3809.320 and 3809.500(b).
13 43 CFR Sections 3809.11 and 3809.401.
14 43 CFR Section 3809.420.
15 43 CFR Section 3802.0-5(d).
16 36 CFR Section 228.1.
17 36 CFR Section 228.8(g).

IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS

i Environmental, health and safety regulations

NEPA is the principal environmental law implicated by mining on federal lands. NEPA requires federal agencies to take a 'hard look' at the environmental consequences of federal projects before action is taken. An agency must prepare an EIS for all major federal actions significantly affecting the quality of the human environment. An agency may first prepare an environmental assessment to determine whether the effects are significant. If the effects are significant, the agency must prepare the more comprehensive EIS. If the effects are insignificant, generally the agency will issue a finding of no significant impact, ending the process. NEPA does not dictate a substantive outcome; however, the analysis generally requires consideration of other substantive environmental statutes and regulations, including the Clean Air Act,[18] the Clean Water Act[19] and the Endangered Species Act.[20] NEPA is administered by the federal agency making the decision that may significantly affect the environment.

The Clean Air Act regulates air emissions from stationary and mobile sources. The Clean Water Act regulates pollutant discharges into the 'waters of the United States, including the territorial seas'.[21] The Clean Air Act and the Clean Water Act are administered by the Environmental Protection Agency, the US Army Corps of Engineers and states with delegated authority. The Endangered Species Act requires federal agencies to ensure their actions are not likely to jeopardise the continued existence of any threatened or endangered species, or to destroy or adversely modify designated critical habitat, and prohibits the unauthorised taking of such species. The US Fish and Wildlife Service and National Marine Fisheries Service administer the Endangered Species Act.

The Federal Mine Safety and Health Act[22] requires the Mine Safety and Health Administration (MSHA) to inspect all mines each year to ensure safe and healthy work environments.[23] The MSHA is prohibited from giving advance notice of an inspection and may enter mine property without a warrant.[24] MSHA regulations set out detailed safety and health standards for preventing hazardous and unhealthy conditions, including measures addressing fire prevention, air quality, explosives, aerial tramways, electricity use, personal protection, illumination and others.[25] MSHA regulations also establish requirements for testing, evaluating and approving mining products, miner and rescue team training programmes, and notification of accidents, injuries and illnesses at a mine.[26]

Currently, there are no specific mining sustainable development regulations. However, issues of socioeconomic impact, cumulative effects and environmental impact often are addressed during a NEPA review.

18 42 USC Sections 7401 to 7671.

19 33 USC Sections 1251 to 1388.

20 16 USC Sections 1531 to 1544.

21 33 USC Section 1311(a); 33 USC Section 1362 (defining 'navigable waters').

22 30 USC Sections 801 to 966.

23 30 USC Section 813.

24 ibid.

25 See, e.g., 30 CFR Sections 56.1 to 56.20014 (safety and health standards for surface metal and non-metal mines).

26 30 CFR Sections 5.10 to 36.50, 46.1 to 49.60, 50.10.

ii Environmental compliance

Mining projects on federal lands, or that otherwise have a federal nexus, will likely have to go through some level of NEPA environmental review. State laws may also require an environmental analysis. Where analysis is required by different agencies, it may be possible to pursue an agreement between the agencies to allow the operator to produce one comprehensive environmental review document that all agencies can rely on.

There is no statutory deadline for federal agencies to complete their NEPA review. Small mine project reviews may take more than a year to complete. Larger project reviews usually take even longer. Third parties may sue the federal agency completing the review to ensure that the agency considered all relevant factors and rationally related the decisions made to the facts found. Prosecuting the litigation would extend the project approval time, and if the agency loses, additional time would be required for the agency to redo its flawed NEPA analysis. In some instances where mines were proposed in especially sensitive areas, it has taken decades to obtain approval.

iii Third-party rights

The United States contain numerous reservations comprised of federal lands set aside by treaty or administrative directive for specific Native American tribes or Alaska native peoples. Tribal reservation title generally is held by the United States in trust for the tribes and the US Bureau of Indian Affairs administers the reservations. Alaska native lands are owned and administered by Alaska native corporations. Mineral development within the tribal reservations and Alaska native lands requires negotiation with the appropriate administrator.

Tribal cultural interests are considered through NEPA, the National Historic Preservation Act (NHPA)[27] and the Native American Graves Protection and Repatriation Act (NAGPRA).[28] NEPA analysis will include social and cultural impacts and may require tribal consultation. Section 106 of the NHPA requires federal agencies to draw up inventories of historic properties on federal lands and lands subject to federal permitting, and to consult with interested parties and the State Historic Preservation Office.[29] NAGPRA imposes procedural requirements that apply to inadvertent discovery and intentional excavation of tribal graves and cultural items on federal or tribal lands.

iv Additional considerations

Not all federal lands are open to mineral entry, including national parks, national monuments, most Reclamation Act project areas, military reservations, wilderness areas, and wild and scenic river corridors. Project proponents should research mineral access when considering exploration activities on federal lands.

Federal mining laws do not require community engagement or corporate responsibility. Those projects that require NEPA review, however, will be subject to public notice and comment requirements, and the review will involve consideration of the project's cultural, societal and economic impacts. State laws may impose a 'public interest' standard for projects

27 54 USC Sections 300101 to 307108.

28 25 USC Sections 3001 to 3013.

29 54 USC Section 306108.

requiring state approval. For example, mining operations that require state water rights may need to show that the use of the water is in the public interest, which may include consideration of wildlife, fisheries and aquatic habitat values.

V OPERATIONS, PROCESSING AND SALE OF MINERALS

i Processing and operations

US mining laws do not restrict or limit imports of mining equipment or machinery. If the equipment has dual military-civilian use, it is on the Commercial Control List and may be licensable by the Department of Commerce pursuant to the Export Administration Regulations.[30]

Foreign employees are governed by general US immigration laws and are required to obtain a work visa or other authorisation. A limited number of visas are available for skilled workers, professionals and non-skilled workers, but these workers must be performing work for which qualified US workers are not available.[31]

ii Sale, import and export of extracted or processed minerals

There are no restrictions or limitations on the sale, import or export of extracted or processed minerals, unless deemed a national security risk by the US Department of Homeland Security or State Department.

iii Foreign investment

As discussed above, the GML and the Mineral Leasing Act (MLA) require that mining rights acquired under those statutes be held by citizens of the United States, or associations of such citizens, or a corporation organised under the laws of the United States, or of any state or territory thereof. Under the MLA, citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.[32] Due to the statutory language and BLM's implementing regulations, a domestic corporation – not a limited liability company, master limited partnership or other association – must appear in the ownership chain between the mineral lessee and the alien company or person. While the GML does not specifically mention corporate eligibility, the requirement of proof of citizenship refers to a corporation organised under the laws of the United States or any State or Territory thereof and an association of persons unincorporated. These requirements have generally been interpreted to mean that for a corporation, it is the jurisdiction of formation that determines its citizenship, but for unincorporated associations such as partnerships and limited liability companies the entity is disregarded, and the association's members need to satisfy the citizenship requirement. The interest in mining claims by a person or entity not qualified by citizenship is voidable by the United States, rather than void, and such defects may be corrected by conveying the interest to a qualified holder.

30 15 CFR Sections 730.1, 774 Supp. No. 1.

31 8 USC Section 1153(b)(3)(C).

32 30 USC Section 181; and see, e.g., 43 CFR Sections 3472.1-1 – 3472.1-2 for coal.

Most state governments do not prohibit foreign ownership of real property as long as such entities properly register to do business in the state. However, the laws of the state jurisdictions in which the property is located should be reviewed before an alien company acquires real property in the United States or a company that owns real property.

Foreign investments are subject to US national security laws. The Committee on Foreign Investment in the United States, for example, is an inter-agency committee chaired by the Secretary of the Treasury that has authority to review foreign investments to protect national security and make recommendations to the president to block the same.[33] The President may exercise this authority if he finds that the foreign interest might take action that impairs national security, and other provisions of the law do not provide the president with appropriate authority to act to protect national security.[34]

VI CHARGES

i Royalties

There are generally no royalties levied on the extraction of federally owned minerals, with the exception of fuel minerals and others governed by the Mineral Leasing Act. Many states, however, charge royalties on mineral operations on state-owned lands and taxes that function like a royalty on all lands, such as severance taxes, mine licence taxes or resource excise taxes. These functional royalties can differ depending on land ownership and the minerals extracted.

ii Rental and holding fees

Locatable minerals claimants must pay an annual maintenance fee of US$165 per claim in lieu of performing assessment work required pursuant to the GML and the FLPMA.[35] Failure to perform assessment work or pay maintenance fees will open the claim to relocation by a rival claimant as if no location had been made.[36] Certain waivers and deferments apply.

Leasable minerals permittees and lessees must pay annual rent based on acreage. The rental rates differ by mineral and some rates increase over time.[37] Prospecting permits automatically terminate if rent is not paid on time; the BLM will notify late lessees that they have 30 days to pay.[38]

iii Tax considerations

There are no federal taxes specific to mineral extraction (see above regarding state mining taxes as functional royalties). General federal, state, county and municipal taxes apply to mining companies, including income taxes, payroll taxes, sales taxes, property taxes and use taxes.

Federal tax laws generally do not distinguish between domestic and foreign mining operators. However, if a non-US citizen acquires real property, the buyer must deposit 10 per

33 50 USC Section 4565.
34 50 USC Section 4565(d)(4).
35 43 CFR Sections 3834.11(a), 3830.21.
36 43 CFR Section 3836.15.
37 43 CFR Section 3504.15.
38 43 CFR Section 3504.17.

cent of the sale price in cash with the US Internal Revenue Service as insurance against the seller's income tax liability. The cash requirement can be problematic for a cash-strapped buyer that may have purchased the mine property with stock.

There are no federal tax advantages or incentives specific to mining.

iv Duties

There are no federal duties on minerals extraction.

v Indemnification

State laws may also include closure and reclamation requirements, including water and air pollution controls, recontouring and revegetation, fish and wildlife protection, and reclamation bonding requirements. Mining projects often can address both federal and state requirements through a single closure and reclamation plan and financial guarantee.

Federal and state laws generally require financial guarantees prior to commencing operations to cover closure and reclamation costs. These reclamation bonds ensure that the regulatory authorities will have sufficient funds to reclaim the mine site if the permittee fails to complete the reclamation plan approved in the permit.

VII OUTLOOK AND TRENDS

US mining operations have not been immune from the economic disruptions of the covid-19 pandemic. However, mining has been designated as one of 16 critical infrastructure sectors identified by the US Department of Homeland Security's Cybersecurity and Infrastructure Agency, citing the mining industry's role in critical manufacturing and the production of medical equipment. As such, mining operations have not been subject to state and local business closure requirements. Nevertheless, mining companies must consult with such governments to ensure compliance with workplace requirements.

The US continues its effort to increase domestic mining and processing of strategic minerals. In 2019, US production of critical rare-earth mineral concentrates increased by over 44 per cent, making the US the largest producer of rare-earth mineral concentrates outside of China. The American Critical Minerals Exploration and Innovation Act, now moving through Congress, would allocate more than US$2 billion over a 10-year period to research and development of strategic minerals and would streamline the mine permit review process. The legislation comes on the heels of several efforts during the Trump administration to focus US critical mineral policy. Executive Order 13817 directed implementation of the critical mineral policy to: (1) identify new sources of critical minerals; (2) increase activity at all levels of the supply chain, including exploration, mining, concentration, separation, alloying, recycling and reprocessing critical minerals; (3) ensure that miners and producers have electronic access to the most advanced topographic, geologic and geophysical data within the US territory to the extent permitted by law; and (4) streamline leasing and permitting processes to expedite exploration, production, processing, reprocessing, recycling and domestic refining of critical minerals.

In early 2020, the US and China made some progress in resolving their bilateral trade war. The 'phase one deal' had included some favourable provisions for mining. China's State Council Customs Tariff Commission announced a list of 79 products that would be excluded from retaliatory Chinese tariffs from 19 May 2020 through to 12 May 2021, including

rare earth ores, silver and gold ores and concentrates, and some nickel and aluminium alloy products. However, negotiations remain stalled amid the tensions surrounding the covid-19 pandemic and China's assertion of authority over Hong Kong and US retaliatory sanctions.

The uncertainties caused by tense trade relations and the covid-19 pandemic are further complicated by the impending 2020 US elections, which could have a significant impact on the mining industry. If Republican Donald Trump is re-elected, he is likely to continue to push a pro-fossil fuel, deregulation, nationalistic trade agenda. If Democratic party presumptive nominee Joseph Biden is elected, he has proposed spending US$2 trillion over four years to significantly increase the use of clean energy in transportation, electricity and building sectors and eliminate carbon pollution from the power sector by 2035. Biden's plan also includes investments in nuclear energy. Increased interest in infrastructure development is favoured by both parties. Regardless of the outcome, US mining producers are poised to meet anticipated needs for minerals and metals including aggregates, steel, aluminium, copper, nickel, rare earths, lithium, vanadium and zinc. Additionally, the US Geological Survey reported that increased construction activity in 2019 resulted in increased prices and production of some industrial minerals.

Finally, the US Energy Information Administration (EIA) reported that in 2019, coal consumption in the US decreased by nearly 15 percent and annual energy consumption from renewable sources exceeded coal consumption for the first time since the nineteenth century, reflecting a continued decline in the amount of coal used for electricity generation over the past decade. The EIA projects that trends in coal production in the US could range from flat to continuing declines through to 2040.

Appendix 1

ABOUT THE AUTHORS

KAROL L KAHALLEY

Holland & Hart LLP

Karol L Kahalley has been an attorney on mining and Native American law with the firm of Holland & Hart LLP in Denver, Colorado for over 20 years. As a leading expert on US mining law, mineral royalties and tribal law, Ms Kahalley has successfully represented clients in acquiring mineral properties and developing mining operations throughout the United States, including on federal, state, private and tribal lands. Her work includes hard rock minerals, oil and gas, oil shale, potash, uranium, coal, rare earth minerals, aggregates and geothermal resources. She is a recognised expert on the creation and interpretation of mineral royalties.

Ms Kahalley has been a lecturer and has published numerous articles for the Rocky Mountain Mineral Law Foundation. She is an adjunct professor at the University of Denver College of Law in international mining law and policy.

ERICA K NANNINI

Holland & Hart LLP

Erica Nannini is an associate in the energy, environment and natural resources practice group of Holland & Hart LLP in Reno, Nevada. Ms Nannini advises clients in the natural resources and mining industries on a range of disputes and regulatory issues involving public lands. Ms Nannini also works on a variety of other regulatory issues, including public utilities, water law and renewable resource project development.

HOLLAND & HART LLP

555 17th Street, Suite 3200
Denver, CO 80202
United States
Tel: +1 303 290 1060
kkahalley@hollandhart.com

5441 Kietzke Lane, Suite 200
Reno, Nevada 89511
United States
Tel: +1 775 327 3000
eknannini@hollandhart.com

www.hollandhart.com

an LBR business

ISBN 978-1-83862-481-1