

THE MINING LAW  
REVIEW

EIGHTH EDITION

Editor  
Erik Richer La Flèche

THE LAWREVIEWS

THE MINING LAW  
REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd  
This article was first published in October 2019  
For further information please contact [Nick.Barette@thelawreviews.co.uk](mailto: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

Gavin Jordan

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Janina Godowska

SUBEDITOR

Simon Tyrie

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK  
© 2019 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at September 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-83862-063-9

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

# ACKNOWLEDGEMENTS

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

EAST AFRICAN LAW CHAMBERS

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

FALCON & HUME INC

GENI & KEBE

HERBERT SMITH FREEHILLS

HOLLAND & HART LLP

HOLLAND & KNIGHT

JPAB– JOSÉ PEDRO AGUIAR-BRANCO ADVOGADOS

LEXIM ABOGADOS

LIEDEKERKE WOLTERS WAELEBROECK KIRKPATRICK SCRL

MAYER BROWN

PINHEIRO NETO ADVOGADOS

RSM BOGARÍN Y CÍA SC

SION ADVOGADOS

STIKEMAN ELLIOTT LLP

TIAN YUAN LAW FIRM

VIEIRA DE ALMEIDA

VHG SERVICIOS

# CONTENTS

PREFACE.....	v
<i>Erik Richer La Flèche</i>	
<b>Part I</b>	<b>Mining Law</b>
Chapter 1	ANGOLA..... 1
	<i>João Afonso Fialho and Ângela Viana</i>
Chapter 2	AUSTRALIA..... 13
	<i>Jay Leary and Geoff Kerrigan</i>
Chapter 3	BRAZIL..... 26
	<i>Alexandre Sion</i>
Chapter 4	BURKINA FASO..... 38
	<i>Alban Dorin</i>
Chapter 5	CANADA..... 52
	<i>Erik Richer La Flèche, David Massé and Jennifer Honeyman</i>
Chapter 6	CHINA..... 62
	<i>Xiong Yin, Jie Chai and Yanli Zhang</i>
Chapter 7	COLOMBIA..... 76
	<i>José Vicente Zapata, Daniel Fajardo and Estefanny Pardo</i>
Chapter 8	DEMOCRATIC REPUBLIC OF THE CONGO..... 88
	<i>Aimery de Schoutheete, Thibaut Hollanders and Edwine Endundo</i>
Chapter 9	ECUADOR..... 97
	<i>Rodrigo Borja Calisto</i>
Chapter 10	GUINEA..... 106
	<i>Stéphane Brabant and Bertrand Montebault</i>

Chapter 11	IVORY COAST .....	119
	<i>Emma France</i>	
Chapter 12	MEXICO .....	130
	<i>Alberto M Vázquez and Rubén Federico García</i>	
Chapter 13	MOZAMBIQUE.....	147
	<i>João Afonso Fialho and Ângela Viana</i>	
Chapter 14	PERU.....	156
	<i>Daniel Palomino</i>	
Chapter 15	PORTUGAL.....	167
	<i>Joana Silva Aroso and Olinda Magalhães</i>	
Chapter 16	SENEGAL.....	178
	<i>Mouhamed Kebe</i>	
Chapter 17	SOUTH AFRICA .....	188
	<i>Estelle (Bester) Hayes and Jeandri Cloete</i>	
Chapter 18	TANZANIA .....	202
	<i>Thomas Mibayo Sipemba</i>	
Chapter 19	UNITED STATES .....	217
	<i>Karol L Kaballey and Erica K Nannini</i>	
<b>Part II</b>	<b>Capital Markets</b>	
Chapter 20	BRAZIL.....	231
	<i>Carlos Vilhena and Adriano Drummond Cançado Trindade</i>	
Chapter 21	CANADA.....	239
	<i>Erik Richer La Flèche, David Massé and Jennifer Honeyman</i>	
Chapter 22	UNITED KINGDOM .....	249
	<i>Kate Ball-Dodd</i>	
Appendix 1	ABOUT THE AUTHORS.....	263
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	275

# PREFACE

I am pleased to have participated in the preparation of the eighth 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, world macro-economic conditions remain generally good for the mining industry as a whole. Economic growth continues, albeit at a slower pace, and the demand for minerals is steady, even rising in the case of precious metals and rare earths. But will this Goldilocks scenario continue?

The world appears to have entered an environment where well-established economic laws no longer apply. Rising private debt and government deficits, negative or miniscule interest rates in all time scales, low inflation bordering on deflation, lower unemployment levels in many economies, all appear to coexist amiably without adverse consequences. This runs counter to economic orthodoxy and more and more experts question aloud whether this is sustainable.

Gold and other precious metals have greatly benefited from this novel economic environment and are experiencing a renaissance as a hedge against the unknown. This in turn has led to some headline-grabbing M&A activity among major gold miners as they seek to replenish reserves.

Trade frictions have also played a role in improving circumstances for some minerals. For example, China has implied that exports of its rare earths could be curtailed for non-economic reasons, leaving the US, Japan and Europe to take inventory of discovered resources and funding new exploration.

All this to say that the mining industry is likely to be affected unevenly as the next 12 months unfold.

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 2019



Part I

MINING LAW

# UNITED STATES

*Karol L Kaballey and Erica K Nannini*<sup>1</sup>

## 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

---

<sup>1</sup> Karol L Kaballey is of counsel and Erica K Nannini is an associate at Holland & Hart.

(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**

Notable developments in the legal and regulatory landscape for the US mining industry include President Trump's efforts to repeal and replace the prior administration's 'Clean Power Plan' with the 'Affordable Clean Energy' (ACE) rule, which the US Environmental Protection Agency (EPA) finalised in June 2019. The ACE rule directs US states to take the initiative as to how to regulate power plant emissions, but establishes emissions guidelines for states to limit carbon dioxide at coal-fired power plants. This, along with the Trump administration's recent decision to lift a moratorium on coal sales from public lands, could result in a long-range increase in coal mining activity. The Trump administration has continued efforts to define critical minerals, which began in 2017 through Executive Order 13807 in an effort to reduce US vulnerability to critical mineral supply disruptions. As part of this effort, the US Department of Commerce recently released a report entitled 'A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals', which outlines the following goals: improve the ability of the advanced technology, industrial and defence manufacturing sectors that use critical minerals to adapt to emerging mineral criticality issues; reduce risks for US businesses that rely on critical minerals; create a favourable US business climate for production facilities at different stages of critical mineral supply chains; and support the economic security and national defence of the United States. Additionally, the EPA and Army Corps of Engineers have proposed a revised waters of the US (WOTUS) definition pursuant to the prior administration's 2015 WOTUS rule, which dictates the waters that are federally regulated under the Clean Water Act. Renewed efforts to impose federal royalties on both new and established US hard rock mining operations were introduced in the legislature. The United States also saw an increase in tariffs imposed on significant Chinese imports in 2018 and early 2019, and, in turn, China imposed increased tariffs on US exports, with many mineral commodities subject to these increases. However, recent negotiations suggest that the increased tariffs may be reduced or lifted. President Trump's imposition of 25 per cent tariffs on imported steel and 10 per cent on imported aluminium has seen winners and losers with a temporary boost for domestic producers, but supply chain disruptions and increased prices for metals consumers.

Effective 1 July 2019, the Bureau of Land Management (BLM) issued a final rule to adjust location and maintenance fees for federal unpatented mining claims, mill sites, and tunnel sites. Under the new rule, for new claims and sites located on or after 1 September 2019, location fees will increase from US\$37 to US\$40. For maintenance year 2020, the annual claim maintenance fees will increase from US\$155 to US\$165 per claim for each lode claim and US\$165 for each 20 acres or portion thereof for each placer claim. Mining claimants

who timely paid claim maintenance fees for the 2020 assessment year, relying on the fee in effect immediately before the adjustment was made, will be given an opportunity to cure any payment deficiencies without penalty upon notice from the BLM. Locators also will have an opportunity to cure deficient location fee payments until 31 December 2019.

The US Geological Survey reports that, in 2018, US mines produced an estimated US\$82.2 billion raw mineral materials – up 3 per cent from the revised total of US\$79.7 billion in 2017. The US\$82.2 billion worth of nonfuel minerals produced by US mines in 2018 is made up of industrial minerals, including natural aggregates and metals. The estimated value of US industrial minerals production in 2018 was US\$56.3 billion – up about 7 per cent from the revised value in 2017. However, the United States experienced a decrease in the value of metal production in 2018, with an estimated value of US\$25.9 billion – 4 per cent less than in 2017. The decrease is attributed to lower average metal prices and lower production of many metals. The primary contributors to the total value of metal mine production in 2018 were gold, copper, iron ore and zinc. Up from 11 US states in 2017, 12 US states individually produced more than US\$2 billion worth of non-fuel mineral commodities in 2018. These states were Nevada, Arizona, Texas, California, Minnesota, Florida, Alaska, Utah, Missouri, Wisconsin, Michigan and Wyoming.

Consolidations continue to define the mining industry as evidenced by the recent activity among two major US precious metals producers. After Barrick Gold Corp.'s acquisition of Randgold Resources Ltd and Newmont Mining Corp.'s acquisition of Goldcorp Inc., the resulting companies subsequently entered into a historic joint venture, combining large portions of their US Nevada assets in what is touted to result in the world's largest gold-producing operations. The joint venture, owned 38.5 per cent by Newmont Goldcorp and 61.3 per cent by Barrick Gold with Barrick as operator, emerged after Newmont rejected Barrick's takeover bid.

## **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.<sup>2</sup> 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).

---

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

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)<sup>3</sup> 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:

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

The National Environmental Policy Act (NEPA)<sup>9</sup> 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.

---

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

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 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 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<sup>10</sup> 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;
- 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.<sup>11</sup> 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.<sup>12</sup> Plan-level operations require a plan of operations that includes a detailed reclamation plan.<sup>13</sup> BLM reclamation standards include saving topsoil for reshaping disturbed areas, erosion and water control measures, toxic materials measures, reshaping and revegetation where

---

10 30 USC Sections 181 to 287, as amended.

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.

reasonably practicable, and rehabilitation of fish and wildlife habitat.<sup>14</sup> 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’.<sup>15</sup>

Mining activities on national forest lands must be conducted ‘so as to minimise adverse environmental impacts on National Forest System surface resources’.<sup>16</sup> Operators must take measures that will ‘prevent or control on-site 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.<sup>17</sup>

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.

## **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,<sup>18</sup> the Clean Water Act<sup>19</sup> and the Endangered Species Act.<sup>20</sup> 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’.<sup>21</sup> 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.

---

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).

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’).



The Federal Mine Safety and Health Act<sup>22</sup> requires the Mine Safety and Health Administration (MSHA) to inspect all mines each year to ensure safe and healthy work environments.<sup>23</sup> The MSHA is prohibited from giving advance notice of an inspection and may enter mine property without a warrant.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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.

## **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 natives. 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)<sup>27</sup> and the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>28</sup> NEPA analysis will include social and cultural impacts and may require tribal

---

22 30 USC Sections 801 to 966.

23 30 USC Section 813.

24 *id.*

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.

27 54 USC Sections 300101 to 307108.

28 25 USC Sections 3001 to 3013.

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.<sup>29</sup> 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 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.<sup>30</sup>

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.<sup>31</sup>

### **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 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

---

29 54 USC Section 306108.

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

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

ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.<sup>32</sup> 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.

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.<sup>33</sup> 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.<sup>34</sup>

## **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.<sup>35</sup> 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.<sup>36</sup> Certain waivers and deferments apply.

---

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

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.

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

### **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 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**

The US minerals industry is showing an overall positive trend in production of raw mineral materials, despite the decrease in the value of metal production described herein. The US Geological Survey reported select mine reopenings and found that increased construction activity resulted in increased prices and production of some industrial minerals, especially those used in infrastructure, oil and gas drilling operations, and construction. Despite Trump administration efforts to boost coal mining, the US Energy Information Administration projects that US coal production will decline by 72 million short tons – a 9 per cent decrease – in 2019, and that the decline will continue through 2020. The decline is attributed to the projection that both exports and domestic consumption are expected to weaken more than they already have, with US coal consumption reaching a 39-year low of 687 million short

---

37 43 CFR Section 3504.15.

38 43 CFR Section 3504.17.

tons in 2018. Decreasing consumption reflects increases in the share of electricity generation from other energy sources, particularly from natural gas and renewables. As a result, US coal companies likely will continue to look to foreign markets such as India and China.

The minerals industry will continue to experience volatility related to tariffs and trade policies pursued by the Trump administration. Although unsuccessful to date, members of the US Congress routinely introduce legislation to overhaul the GML to impose federal royalties on locatable minerals and to transform the location system to a leasing system. After a year marked by Newmont's acquisition of Goldcorp, Barrick's acquisition of Randgold, and the resulting companies' historic joint venture combination of US assets, the trend toward consolidations to achieve efficiencies and synergies in the mining industry is likely to continue.

# ABOUT THE AUTHORS

## **KAROL KAHALLEY**

*Holland & Hart LLP*

Karol 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**

Denver Tech Center  
6380 South Fiddlers Green Circle  
Suite 500  
Greenwood Village  
Colorado 80111  
United States  
Tel: +1 303 290 1600  
Fax: +1 303 290 1606  
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 978-1-83862-063-9