

The Survival of a “Relic of Pioneer Days”:
The Political Economy of Mining Law “Reform”

Andrew P. Morriss, Roger E. Meiners and Andres Dorchak

Abstract

The Mining Law of 1872 has been under attack for more than a century. It is consistently derided as a giveaway to mining companies. In this paper we use public choice theory to discuss the primary reasons the law has been attacked and chipped away at over the years. Numerous special interests have attacked the law and the incentives of Congress and Administrations have differed over time. We explain why the law has not been abolished despite wide support for “protecting” federal assets by maintaining political control. As discussed in earlier works, we find the law to be a desirable way to transfer politically controlled resources to the private sector.

The Survival of a “Relic of Pioneer Days”:¹
The Political Economy of Mining Law “Reform”

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Years after the discovery of gold at Sutter’s Mill triggered the California gold rush, Congress established a comprehensive statute governing mineral resources on federal land. The General Mining Law of 1872² ratified two key principles derived from the customary mining law that applied to mining on public lands from 1848 to the late 1860s, and which have remained at the heart of American mining law ever since: (1) self-initiated free access to mineral resources on the public domain; and (2) fee simple title to the resources for the claimant.³

Almost immediately, interest groups began to seek changes to the Mining Law, at first primarily extension of deadlines but eventually including the withdrawal of particular resources and lands from the law’s coverage. The development of petroleum

¹ David Alberswerth, *The Mining Law: Time to Pull the Plug*, in Subcommittee on Mineral Resources Development and Production, Committee on Energy and Natural Resources, U.S. Senate, *Mining Laws of 1872 and 1989* (101st Congress, 2nd Session, 1991) (hereafter “1991 Senate Hearings”) at 253.

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² **CITE TO STATUTE**

³ We discuss the General Mining Law’s provisions in greater detail in Andrew P. Morriss, Roger E. Meiners, & Andrew Dorchak, *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, 34 ENVIRONMENTAL LAW 745 (2004). See also Andrew P. Morriss, Roger E. Meiners, & Andrew Dorchak, *Hard Rock Homesteads: Free Access & the General Mining Law of 1872*, ___ J. ENERGY & NAT. RES. L. ___ (2006).

led to major changes in how oil resources were privatized, partly in response to national security concerns. More recently, the politics of the environmental movement produced repeated, and thus far unsuccessful, assaults on the free access principle and efforts to restrict the rights granted claimants. These efforts continue today, with bills introduced in virtually every recent Congress to require mineral rights claimants to pay royalties, purchase limited rights at auction, or otherwise limit the access and form of title available.

In this Article we examine the history of these attempts and provide an institution-based account of how the General Mining Law came into existence and why the General Mining Law's core has remained unchanged since 1872. In Part I we describe how the free access principle became enshrined in the General Mining Law of 1872. Part II surveys the various "reform" efforts since 1872. Part III concludes with an assessment of the future of the General Mining Law.

I. Creating a Free Access Regime

The General Mining Law of 1872 offers prospectors a deal: find a valuable resource on federal land, invest in developing the resource, and the resource, and the land containing it, becomes yours (after payment of a small fee, to cover administrative costs), with a fee simple title and without any requirement to pay royalties on the mineral resources removed. The deal was attractive to quite a few prospectors: from 1867 to 2000, 3.3 million acres of public land became private land under the Mining Law's provisions.⁴

⁴ Marc Humphries and Carol Hardy Vincent, *Mining on Federal Lands* (CRS Issue Brief 89130) (2001). This amounts to only 1.5% of all federal land privatized under all land disposal laws, however. *Id.*

This process is regularly attacked as a “giveaway” of federal land and resources by Mining Law opponents.⁵

A. Creating the General Mining Law

The California gold rush produced enormous wealth. The first reliable numbers came well after the boom in 1870 and show that even this late, mining in California involved over \$20 million in capital, almost \$4 million annually in wages, and produced over \$8 million in annual output, respectively approximately 10, 5, and 5 percent of the 1870 totals in U.S. mining.⁶ This wealth, derived in large measure from nominally public lands, continued to attract attention in Washington, D.C. even after California’s admission as a state. From the late 1840s until the mid-1860s, Congress regularly debated different approaches to mining on public lands, including proposals to require sales of gold to the government at fixed rates, taxes on production, military seizure of the gold fields, and leasing arrangements. Until 1866, however, Congress did not succeed in addressing the western mineral claims, leaving mining interests in possession through customary miners’ law.

An important reason was that California’s 1850 entry as a state gave mining interests a presence in the Congress, limiting the ability of the rest of the states to redistribute California’s mineral wealth. In this endeavor, California was aided by strong connections between important figures in California and powerful politicians in Washington. For example, Missouri Senator Thomas Hart Benton’s son-in-law was California Senator John C. Fremont. Benton served in the Senate from 1821 to 1851 and

⁵ See Morriss, Meiners, & Dorchak, *Homesteading Rock*, *supra* note 3, at ___ (discussing opposition to the Mining Law); Morriss, Meiners & Dorchak, *Hard Rock Homesteads*, *supra* note 3, at ___ (same).

⁶ The totals include all forms of mining and so the percentages understate the contribution to total gold mining. Pennsylvania’s coal mines were the major other source of mining wealth.

in the House from 1853-1855.⁷ Although Fremont served in the Senate only in 1850 and 1851, the ties between Californians and powerful Washington figures like Benton were mutually beneficial.⁸ Moreover, during this time Congress was partially paralyzed by the pre-Civil War sectional conflict or focused on the war itself, distracting it from legislating on mineral rights.

California did not wait to put its stamp on mining law. Its legislature adopted provisions recognizing customary claims and attempted to restrict the activities of foreign miners (through exclusionary taxes aimed at Chinese miners, for example). California politicians appear to have understood that the prosperity created by mining created wealth worth more than the rents available from attempting to tax the mines. California's aggressive legitimization of miners' property rights helped secure them against expropriation by the national government.

The discovery of mineral resources elsewhere in the west also boosted mining interests' ability to influence Congress. The vast silver deposits in Nevada such as the Comstock Lode caused a boom that led that territory to statehood in 1864.

When Congress finally acted, it chose the free access approach. In 1866, Congress passed the Mining Law of 1866, which first gave explicit federal approval to free access to lode deposits on federal land.⁹ "The 1866 law was drafted primarily by [Nevada] Senator Stewart, who made his career as a mining lawyer on the Comstock Lode and

⁷ Biographical Directory of the United States Congress, 1774-Present, "Thomas Hart Benton," <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000398> (last visited July 10, 2006).

⁸ **DISCUSS LAND CLAIMS.**

⁹ 14 STAT. AT LARGE 251 (1866). Stephen D. Alfers, Randall E. Hubbard, and Christopher Hayes, Coping with Mining Law Reform. 37 ROCKY MTN. MINERAL LAW INSTITUTE 12-13 (1991) ("The chief significance of the 1866 law was that it was the first congressional declaration that the mineral lands of the United States were to be free and open to exploration and occupation for mining.")

represented the interests of the lode miners.”¹⁰ He had been a prominent lawyer, including serving as attorney general, in California from 1850 until he moved to Nevada in 1860.¹¹ The law provided that “the mineral lands of the public domain, both surveyed and unsurveyed,” are “to be free and open to exploration and occupation by all citizens of the United States, and those declaring their intention to become citizens, subject to such regulations as may be prescribed by law,” and “subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.”¹² The 1866 law was followed by the Placer Act in 1870,¹³ which provided free access to placer deposits.

The two statutes were consolidated into the General Mining Law of 1872, which “corrected some of the deficiencies” in the two earlier statutes and “codified and defined the tenure system under which mining was to be conducted on public lands.”¹⁴

It made the standards of the early mining camps, priority, possession and diligent development, the tests of validity of a claim. It imposed its own test, discovery, on claimants. Congress had made a policy statement that the proper method of alienation of mineral lands was to be through entry and exploration, with title (in the form of as patent) to be granted only after a discovery was proved and a minimum amount of development work performed.¹⁵

Why would Congress ratify a “giveaway” of resources under its control? By the time Congress acted, the mineral interests in the West were well established and wealthy

¹⁰ Alfery, et al., *supra* note 9, at 12-13

¹¹ Biographical Directory of the United States Congress, 1774-Present, “William Morris Stewart,” <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000922> (Last visited July 10, 2006).

¹² **GLC Rep. 1866, 386**

¹³ Act of July 9, 1870, ch. 235, 16 Stat. 217, (1870),

¹⁴ Alfery, et al., *supra* note 9, at 12-14.

¹⁵ Alfery, et al., *supra* note 9, at 12-14.

and able to protect themselves politically. Together with strong support from western politicians, including not only California and Nevada's congressional delegations but the territorial delegates from mineral rich territories like Montana, Idaho, Colorado, and Dakota, Westerners had some clout in Congress. The Congresses that adopted these three statutes were dominated by radical Republicans.¹⁶ California interests were prominently represented by Republican John C. Fremont.¹⁷

The establishment of free access and fee simple title as the primary underpinnings of American mining law grew out of a combination of the experience with alternatives which weakened their appeal, frontier conditions which allowed the establishment of property rights based on customary law, and the rapid establishment of mineral claims holders as a powerful interest group with representation in Congress through California's immediate statehood. The initial success of the western mineral rights holders in gaining recognition of their property rights did not mean that other interests would abandon efforts to obtain a share of the wealth. We now turn to the efforts to "reform" the Mining Law.

II. Efforts at "Reform"

Our framework for analyzing "reform" proposals relies on an interest group-based analysis. That is, we ask who the winners and losers were from proposed changes. There are undoubtedly sincere proponents of both change and the status quo who do not perceive their positions as rooted in self-interest. Ideological positions in favor of

¹⁶ In 1866 the Senate had 39 Republicans out of 54 members and the House 136 of 193. In 1870, the Senate had 62 Republicans out of 74 members and the House 171 out of 243. In 1872, the Senate had 56 Republicans out of 74 members and the House 136 out of 253.

¹⁷ Fremont briefly served as a candidate for the Radicals in the 1864 presidential election before withdrawing. **CITE**. As a general in the Civil War he issued a proclamation freeing slaves in Missouri in 1861, which was later rescinded by President Lincoln. **CITE**.

“national security,” “development,” or “the environment” may shape the debate over proposals, but we contend that the results of the political process are more directly related to the interest groups involved.

A. Understanding the “Reform” Agenda

The first thirty five years of the General Mining Law saw only minor changes to its provisions. Most of these were temporary extensions of time to conduct the required work on claims during economic depressions (1893,¹⁸ 1894¹⁹) and war (1898²⁰). The Supreme Court resolved several minor points concerning mineral property rights, holding there was no right of dower in 1896²¹ and clarifying issues concerning extralateral rights²² and the surface form of locations.²³ Lands in Oklahoma were exempted from the Mining Law several times, apparently in ignorance of the existence of oil and gas reserves and to facilitate homesteading.²⁴ After the turn of the century, however, the rise of the conservation movement and the increasing importance of petroleum created the first significant movements to modify the General Mining Law. As federal land policy increasingly shifted from disposal to management, more broad-based assaults on the General Mining Law also began to appear. Here we review the evolution of opposition to the General Mining Law through the history of both the successful and unsuccessful attempts to alter it.

¹⁸ 28 Stat. 6

¹⁹ 28 Stat. 114

²⁰ 30 Stat. 651

²¹ *Black v. Elkhorn Mining Co.*, 163 U.S. 445 (1896)

²² *Del Monte Mining & Milling Co. v. Last Chance Co.*, 171 U.S. 55 (1898)

²³ *Walrath v. Champion*, 171 U.S. 293 (1898). Congress modified the Court’s resolution in the later case in 1898. 30 U.S.C. 23 (1934) **FIX TO STAT CITE. EXPLAIN BRIEFLY.**

²⁴ *See Oklahoma v. Texas*, 258 U.S. 574, 600-601, 42 S.Ct. 406, 416 (1922) (discussing history of agricultural designation of lands in Oklahoma and tracing it to an 1891 statute.)

Understanding the evolution of this opposition requires consideration of the broader context of federal land policy. Three issues shape the political contours of federal land management disputes. First, federal lands lie almost exclusively west of the Mississippi. Approximately 55% is in the western continental United States and an additional 36% is in Alaska and Hawaii, leaving under 9% spread across the North East (0.2%), North Central (2.9%), South Central (2.9%), and South Atlantic (2.2%) states.²⁵ Even within the west, states vary considerably in the percentages of their territory that is federal land. For example, the Bureau of Land Management and U.S. Forest Service manage 43% of Arizona land, 45% of California, 27% of Montana, 80% of Nevada, and 50% of Wyoming.²⁶

Disputes over federal land generally and over mining in particular thus have a strongly regional flavor. States with large bodies of federal land have a strong interest in continuing the General Mining Law's privatization of valuable portions of that land, whether for mining or for other purposes, because it increases the amount of land available for state taxation and subject to state authority.²⁷ States without large bodies of federal land (or without significant mineral deposits) have a strong interest in federalizing the value of mineral deposits on federal land, since that would increase the resources available to them through the federal treasury at little cost to their residents.

Second, there is a larger political dispute between those favoring extractive industries and those seeking to halt what they view as environmentally destructive land

²⁵ General Services Administration, Federal Real Property Profile (2003, Figure 11, available at www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/Annua_%20Report_%20FY2003-R2-ogp_R2M-n11_0Z5RDZ-i34K-pR.doc (last visited July 24, 2006).

²⁶ National Research Council, HARDROCK MINING ON FEDERAL LANDS Table 1-1 at 18 (1999).

²⁷ One indication that this is the case is that western states tend to follow different policies with respect to mineral deposits on state lands, using leases for example, to capture a portion of the revenue from the mineral rights rather than allowing free access.

uses and to restrict development of public lands. This conflict includes disputes over leases of federal land for ranching, water rights disputes, establishment of national monuments, and other management conflicts. Changing the Mining Law is an important political goal for the opponents of extractive industries generally because mining is a highly visible extractive use and because the Law has often been successfully used by developers to privatize federal land for non-mining purposes. Thus on top of the regional debate there is also a development-preservation debate.²⁸

Third, the debate over the control of some mineral resources is related to national security issues. For mineral resources which play a major role in weapons systems (e.g. uranium) or are otherwise seen as critical (e.g. oil), the military and its political supporters often favor preserving and controlling supplies derived from American territory and retaining federal ownership.

These three issues overlap in different ways, making different coalitions possible with respect to specific proposed “reforms” of the General Mining Law. It is our contention that the various waves of proposed and successful amendments to the statute are best understood through an analysis that centers on the interest groups involved in these issues. Next we describe proposed and successful changes to the Law using this interest group framework.

B. Limits, 1909-1964

The first comprehensive assault on the General Mining Law appears to have been a 1914 address to the New York meeting of the American Institute of Mining Engineers

²⁸ This, of course, overlaps with the regional analysis in many dimensions. Preservation values are “cheaper” to hold in states where economic activity is not reduced by restrictions on federal land use, making senators and congressmen from the east able to hold these values with lower political costs.

by mining engineer Horace Winchell.²⁹ He gave nine major reasons why the law needed an overhaul. Three of his reasons concerned technical legal doctrines (the apex rule,³⁰ inconsistent rules for placer and lode claims limiting challenges to claims,³¹ and the lack of a central registry of claims³²) that do not relate to the free access, self-initiated award of property rights and so need not concern us further here.

However, three of Winchell's complaints centered on his contention that the law was technically inappropriate for the wider range of minerals being claimed and the new techniques used. Winchell argued that the law had been written for the relatively rich deposits of gold and silver found in the early mineral rushes and was inappropriate for lower grade deposits of minerals.³³ He made similar claims concerning its application to coal and petroleum³⁴ and to new substances "either not known to exist or not considered as valuable minerals in 1872" including "radium-bearing minerals, phosphates, potash and other salts, rare earths and similar products."³⁵ As we shall see, Congress agreed with Winchell in part and eventually withdrew several minerals from the Mining Law's coverage, including oil and potash.³⁶

Winchell also argued that the Law was flawed because it gave too little protection to mining interests. He objected to the inability to appeal to the courts from some administrative decisions³⁷ and he objected to the discovery requirement. He contended

²⁹ Horace V. Winchell, "Why Mining Laws Should Be Revised" American Institute of Mining Engineers, NY meeting (1914). **FULL CITE**

³⁰ Winchell, *supra* note 29, at 652-658.

³¹ Winchell, *supra* note 29, at 663.

³² Winchell, *supra* note 29, at 662-663.

³³ Winchell, *supra* note 29, at 645-648.

³⁴ Winchell, *supra* note 29, at 659-661.

³⁵ Winchell, *supra* note 29, at 661-662.

³⁶ **CROSS REFERENCE**

³⁷ Winchell, *supra* note 29, at 658-659.

that the law “discourages prospecting and the discovery and development of new mines” because

the discovery of mineral deposits is no longer an incident of a summer vacation. The prospector of the future must possess more expensive equipment, greater technical knowledge, and a larger exchequer, and his operations must perforce be conducted through shafts, tunnels, and drill holes, in some instances taking years of diligent and well-directed effort. The requirement of a discovery before location and antecedent to the granting of any exclusive possessory title is therefore not only irksome and deterrent of results in practice, but wrong in principle.³⁸

Finally he argued that the law was deficient because it failed to require development of claims patented.³⁹

Winchell’s complaints are significant because they reflect a sense that the law as administered gave too little protection to miners. Not surprisingly for an address to an association of mining engineers, Winchell argued for “improvements” that would benefit mining interests by eliminating the discovery requirement, expanding appeals, and increasing mining on claimed land. His analysis suggests two divisions among interest groups over the operation of the Mining Law: the applicability of it to “new” resources such as oil and the security of the title provided as discovery increasingly required more substantial investment.

For most mineral deposits, Western interests were aligned in support of application of free access and fee simple title. Western states’ economies generally

³⁸ Winchell, *supra* note 29, at 648-652.

³⁹ Winchell, *supra* note 29, at 663-664.

benefited from the economic activity mining produced, mining interests benefited from lower costs, and Western state governments received tax revenues from the increase in economic activity associated with mining. The opponents of free access and fee simple title, who generally advocated leases, auctions or royalties, would have been from eastern states that would prefer that mineral resources generate federal revenue in which they could share. The benefit of a change to any particular eastern state, however, was relatively small compared to the benefit of maintaining the status quo for western states. Given the power to block change given to strong regional interests by the rules of the U.S. Senate, the maintenance of the overall status quo was to be expected.

Two major changes occurred in this period. First, the Pickett Act of 1910 gave the president authority to withdraw land from coverage under the Mining Law. Second, the Mineral Leasing Act of 1920 withdrew several fertilizer and fuel minerals from the Mining Law's coverage. How did these limitations come about?

In 1906, President Roosevelt withdrew from the Mining Law's coverage 66 million acres of land likely to contain coal and oil deposits, using asserted presidential authority to do so.⁴⁰ His successor, President Taft, also withdrew 4.5 million acres of oil lands in Wyoming and California. These withdrawals were controversial assertions of presidential power,⁴¹ and were resolved through the Pickett Act,⁴² which settled the question in favor of allowing withdrawals of land.⁴³ The withdrawals were of lands with

⁴⁰ Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternative to the 'Shift to Retention' Thesis*, 39 NAT. RES. J. 649, 730 (1999).

⁴¹ William E. Colby, *Mining Law in Recent Years*, 33 CAL. L. REV. 368, 375 (1945). See *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (upholding authority of the president).

⁴² Pub. L. No. 61-303, 36 Stat. 847 (1910),

⁴³ **EXPAND THIS SECTION A BIT.**

fuel mineral deposits (or likely to have them). We thus turn to the larger question of the withdrawal of those minerals from coverage.

The withdrawal of oil and gas from the Mining Law, however, occurred as a result of a change in interest group alignments brought about by two changes in the oil market. Until 1900, the primary use for oil was to produce kerosene for lighting. Gasoline was originally “the portion of crude petroleum too volatile to be included in kerosene. The first refiners had no use for it and often dumped an accumulation of gasoline into the creek or river that was always nearby.”⁴⁴ After 1900, demand generated by the growing automobile industry,⁴⁵ transformed gasoline into a highly valued commodity.⁴⁶ Oil began to be used in naval vessels as well and by the end of World War I, national security concerns became an issue.⁴⁷ Compounding the concerns were the application of wartime price controls and government allocations efforts, which caused supply problems.⁴⁸

The close cooperation between oil companies and the government during the war taught the companies that influencing government policy was lucrative.

The newly organized trade associations remained a prominent part of the postwar economy. Business leaders, especially those who had worked in Washington, had

⁴⁴ JAMES G. SPEIGHT, *THE CHEMISTRY AND TECHNOLOGY OF PETROLEUM* (3rd ed. 1999) at 567.

⁴⁵ Some early automobiles, such as the Stanley Steamer, ran on kerosene but by 1890 gasoline-powered cars were on the scene. WILLIAM L. LEFFLER, *PETROLEUM REFINING IN NONTECHNICAL LANGUAGE* (2000) at 4. U.S. auto sales doubled “approximately every two years” between 1900 and 1916. YVETTE TAMINIAU, *ROOM FOR MANEUVER* (2001) at 57.

⁴⁶ U.S. Department of Commerce, Office of Domestic Commerce, *United States Petroleum Refining: War and Postwar* (Industrial Series No. 73) (1947) at 14 (“Demand for gasoline arising from the increased use of the automobile was the principal force behind the increasingly complicated refining technology and larger percentage conversion of crude oil to gasoline.”).

⁴⁷ Subcommittee on Mineral Resources Development and Production, Committee on Energy and Natural Resources, U.S. Senate, *Mining Laws of 1872 and 1989* (101st Congress, 2nd Session, 1991) at 35 (“The 1920 Mineral Leasing Act . . . was passed in 1920 after the United States had fought the great war in which oil powered ships and other vehicles had played a vital role.”); CARL J. MAYER & GEORGE A. RILEY, *PUBLIC DOMAIN, PRIVATE DOMINION* (1985) at 169 (Oil lands policy after war “met the needs of a powerful official constituency, the American military.”)

⁴⁸ ROBERT L. BRADLEY, JR., *OIL, GAS, AND GOVERNMENT: THE U.S. EXPERIENCE* 223-229, 633-635 (1996).

caught a new vision of what could be done by economic planning and business-government cooperation. A new breed of public administrators, skilled in the techniques of wartime control, were more prone to reject competitive values and stress the goal of a planned economy.⁴⁹

The wartime experience also created new players in energy regulation debates in the form of oil trade associations organized to lobby for industry favors in Washington.⁵⁰

In 1920, Congress passed the Mineral Leasing Act,⁵¹ which withdrew fuel and fertilizer minerals (coal, phosphate, oil, oil shale, gas, and sodium) from the General Mining Law. This withdrawal was the result of a coalition between military interests and energy companies. The military's interest is straightforward - it wanted to ensure that domestic reserves of fuel resources were available to it.

The oil companies' interest is not as obvious. Two factors favored removal of fuel minerals from their point of view. First, a primary concern of energy companies during this period was over-production. From the Standard Oil trust through the 1930s, the dominant concern of the energy industry in the United States was limiting production to keep prices high.⁵² Discoveries of new fields and antitrust efforts by the federal government threatened each effort to keep prices high by limiting production. Removing fuel minerals from the Mining Law would allow oil companies to work with the government to control the entry of new supplies from federal land. For coal, existing

⁴⁹ ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 10 (1995).

⁵⁰ 2 BRADLEY, *supra* note 48, at 1114 (World War I experience "mellowed" industry concerns about regulation).

⁵¹ 41 Stat. 437 (1920).

⁵² See Andrew P. Morriss & Nathaniel Stewart, *Why Does Gasoline Cost So Much? (and Why It's Going to Cost More): Paying the Price for Fragmented Markets and Regulation*, Working Paper (2006) at ___.

suppliers in the eastern coal regions benefited from limiting competition from new sources of coal on government land.

Second, because oil and gas flowed under the earth, a well on one plot could easily pull oil from a reservoir larger than the surface plot with the well. Overdrilling reduced recovery, the rule of capture threatened a tragedy of the commons, and, again, the problem of “excessive” production loomed. Oil states began to consider and implement mandatory conservation measures such as pooling and unitization.⁵³ Removing federal lands from the Mining Law allowed larger, more technically efficient tracts to be leased without the concern that another prospector might drill a well into a pool already being exploited. That this played a role can be seen by the later refusal of the Secretary of the Interior to issue permits for drilling to reduce supply.⁵⁴

Removing these minerals also did not threaten the hard rock interests in the West. Since most oil supplies were located in the Midwest and East at this time, there was little reason for western hard rock interests to object to the removal of them from the Mining Law.

Why were potash and the other fertilizer minerals withdrawn? Partially due to the same concerns for national security. Potash was withdrawn from the Mining Law in a 1917 statute due to “the urgent need of making potash available for war purposes.”⁵⁵

NEED SOMETHING ON WHY FERTILIZER INCLUDED

Additional minerals were also withdrawn and added to the Mineral Leasing Act, including sulfur (in Louisiana),⁵⁶ chlorides, sulphates, carbonates, borates, silicates, nitrates of potassium⁵⁷

⁵³ See Morriss & Stewart, *supra* note 52, at ___.

⁵⁴ Colby, *supra* note 41, at 377.

⁵⁵ Colby, *supra* note 41, at 376. 40 Stat. 297.

Finally, there continued to be various extensions of deadlines for mineral rights holders during World War I⁵⁸ and the Depression.⁵⁹ Mineral lease deadlines were also extended repeatedly.⁶⁰ Other minor changes were also made.⁶¹

C. Wilderness and Mining, 1955-1976

Beginning in the mid-1950s and continuing through the 1970s, the major conflict over the Mining Law was restricting its application to lands with recreational value. As the West opened to greater tourism, wilderness advocates sought to limit the ability of miners to privatize western land. With the Multiple Use Mining Act in 1955,⁶² the government withdrew “common variety” minerals such as gravel from the Mining Act. This withdrawal was an important limit on the General Mining Law, for the common variety minerals made most land vulnerable to privatization. The 1955 Act also expanded federal authority over other uses of unpatented claims. Interest groups favoring wilderness preservation began to persuade land agencies to restrict mining, timbering, and other economic activities on public lands.⁶³

The growing success of the environmental movement in the 1960s prompted a Public Land Law Review Commission in 1964,⁶⁴ the brainchild of Colorado Democratic Congressman Wayne Aspinall.⁶⁵ Because he chaired the House Interior Committee,

⁵⁶ 47 Stat. 401 (1932)

⁵⁷ 44 Stat. 1057 (1927)

⁵⁸ 40 Stat. 243, 343 (1917); 41 Stat. 279, 354 (1919)

⁵⁹ 47 Stat. 290 (1932); 48 Stat. 72 (1933); 48 Stat. 777 (1934); 49 Stat. 1238 (1936);

⁶⁰ 42 Stat. 159 (1922); 44 Stat. 922 (1927); 45 Stat. 252 (1928); 47 Stat. 445 (1932); 49 Stat. 674 (1935);

⁶¹ 47 Stat. 140 (1932) (clarified that did not apply to lands earlier disposed of by states); 48 Stat. 1185 (1934) (same); Multiple Mineral Development Act, 30 USC 521 (1955 statute that allows mining claims and mineral leases on same land, resolves conflicts)

⁶² 30 USC 601-603, 611-15.

⁶³ Mark B. Lambert, *Public Lands Commissions: Historical Lessons and Future Considerations* (M.S. thesis, University of Montana, 2003) at 38-39.

⁶⁴ 78 Stat. 982 (1964).

⁶⁵ Lambert, *supra* note 63, at 39.

which he had enormous leverage as he was able to keep the proposed Wilderness Act from the House floor.⁶⁶ Environmental groups agreed to the Commission as the price of getting the Wilderness Act released.⁶⁷ Aspinall controlled the commission by giving it a majority of members appointed by Congress, assuming the chairmanship, and appointing one of his staff as the Commission's chief of staff.⁶⁸ Only four of seventeen Congressional appointees came from east of the Mississippi.⁶⁹

The Commission's final report, *One Third of the Nation's Land*, was issued in 1970 and reflected Aspinall's preference for economic uses over wilderness.

The commission advocated a policy of "dominant use" over "multiple use," the latter described by the commission as having "little practical meaning as a planning concept or principle." In the commission's view, "public lands should be zoned for the particular use for which they are most suited," and that use, being the dominant use, would take precedence over any other use in land-use planning and allocation processes. This theme was alarming to environmental interests because the report clearly states that "mineral exploration and development should have a preference over some or all other uses on much of our public lands." Other general themes include provisions for clarifying the conflicting mandates and directives contained in public land law, and, of course, permeating the entire report is an emphasis on the need for Congress to "assert its constitutional authority by enacting legislation reserving unto itself exclusive

⁶⁶ Lambert, *supra* note 63, at 40-43.

⁶⁷ Lambert, *supra* note 63, at 42-43.

⁶⁸ Lambert, *supra* note 63, at 43-46.

⁶⁹ Lambert, *supra* note 63, at 95 (listing members).

authority” over the majority of affairs associated with the management of the public lands.⁷⁰

Environmentalists rejected the report and its recommendations, however, and its impact was ambiguous.⁷¹ The Wilderness Act,⁷² the quid pro quo of the Commission, had a major impact, reducing the land subject to the General Mining Law.⁷³

One of Aspinall’s errors was to attempt to micro-manage land policy from Congress. By making a claim for almost complete control over public lands policy, Aspinall drove the executive branch into the arms of the environmentalists, for it would not have served executive interests to yield to congressional authority.

The environmentalists also won the battle for the ultimate reform of the public land laws, with the 1976 Federal Land Policy and Management Act (FLPMA),⁷⁴ not only endorsing the multiple use management concept that Aspinall had opposed but again reducing the Mining Law’s coverage.⁷⁵

The gradual erosion of the Mining Law from 1955 to 1976 reflected the growing interest in preservation of federal lands. From a regional point of view, the battleground first shifted to federal agencies where western interests had less leverage than they did in Congress. Although the environmental groups initially seemed to have been out-manuevered by Aspinall, they succeeded in limiting the Mining Law by allying with the executive branch in pursuit of expanding executive discretion.

⁷⁰ Lambert, *supra* note 63, at 47 (notes omitted).

⁷¹ Lambert, *supra* note 63, at 50-51.

⁷² 78 Stat. 890 (1964).

⁷³ **STATISTICS**

⁷⁴ 30 Stat. 2743 (1976).

⁷⁵ **STATISTICS**

Their success was due to three differences with prior criticisms of the Mining Law. First, they did not attempt to eliminate the statute, only to reduce its scope. By working on the margin, they undercut the defenders' ability to mobilize western interests by lowering the stakes. Second, the critics linked the issue to larger questions of federal land management, which mobilized other interest groups concerned with federal lands (recreational users, businesses, agriculture, and timber) and not necessarily sympathetic to mining interests, dividing the western regional political coalition. Third, the critics were able to enlist executive branch agencies against the western Congressional coalition, broadening support for changes.

D. Environmentalism and Mining, 1976-2006

Since the 1970s, there have been regular attacks on the free access and fee simple title provisions of the Mining Law. John Leshy, author of the leading anti-Mining Law book and former Department of Interior Solicitor General, notes that "reform" bills that changed these aspects of the statute were regularly introduced through the 1970s.⁷⁶ Similar proposals for a leasing system have been regularly introduced since the 1990s. These proposals have been unsuccessful in Congress.

The most significant changes to the Mining Law came from Department of Interior regulations introduced in the closing weeks of the Clinton Administration.⁷⁷ Under the FLPMA, the Secretary of Interior has expanded powers over the surface impacts of hard rock mining. Although the initial regulations did little more than codify then-current practices and require miners to comply with generally applicable

⁷⁶ JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 196 (1987).

⁷⁷ See generally Andrew P. Morriss, Roger E. Meiners, & Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations, and Mining*, 55 *ADMINISTRATIVE LAW REVIEW* 551 (2003).

environmental laws and rules, the key was that the statute opened the door to more substantial regulations. Perhaps anticipating this, the opposition to the FLPMA in the Senate came entirely from western senators.⁷⁸

By broadening the scope of the federal government's involvement in mining, the FLPMA made mining regulation of interest to a broader community. In particular, the Secretary of Interior's regulatory powers under the FLPMA were available to interest groups opposed to mining and privatization of public lands, something which was not possible before under the Mining Law's exclusive focus on disposing of mineral resources located on federal land.

The FLPMA left many important terms undefined. This created a politically valuable authority in the Secretary of the Interior, whose definitions would affect the direction of public lands policy.⁷⁹ Interior has a broad set of responsibilities, individual industries, such as the mining industry, were left in a poor position to compete for control of the Department.

The mining industry's ability to resist attacks on the Mining Law is ultimately dependent upon the design of the United States Senate, whose rules magnify the ability of a few senators to block actions of the majority, and so to protect vulnerable minorities.⁸⁰ This is particularly important for mining interests, since there is a majority coalition of eastern states willing to redistribute the federally controlled resources in western states to

⁷⁸ See CHARLES WALLACE MILLER, JR., SACRED COW IN THE AMERICAN WEST: THE ORIGIN, EVOLUTION, ADMINISTRATION, AND IMPACT OF FEDERAL HARDROCK MINING LAWS AND POLICIES (1990) (unpublished Ph.D. dissertation; The Union Institute) at 365-366 (noting 78-11 vote in the Senate and that mining state senators in the West constituted the opposition.)

⁷⁹ LESHY, *supra* note 76, at 196 (noting that as a result of pressure from environmental groups, agencies "set their lawyers off to search for the authorities" to justify regulatory action and, unsurprisingly, found authorities.).

⁸⁰ Lisa O. Monaco, *Comment, Give The People What They Want: The Failure Of "Responsive" Lawmaking*, 3 U.CHI. L. SCH. RT. 735, 748 (1996) ("the Congress, particularly the Senate, is governed by rules which make it easier to block legislation than to enact it . . .")

gain revenue and to satisfy their constituents' interest in what is touted as pro-environmental legislation. Only through the efforts of western senators, for example, was the industry able to hold back the Clinton Administration's willingness to sacrifice western interests for environmental regulatory measures popular in the more populous eastern states.⁸¹

As environmental pressure groups began to focus their efforts on federal land policy, the FLMPA sec. 3809 regulations came under increasing attack. In addition, the General Accounting Office issued a series of critical reports on the Mining Law and BLM's regulations beginning in the mid-1980s.⁸² Some GAO reports were requested by Mining Law opponent Congressman Nick Rahall (D-WV) as part of his campaign to change the Mining Law,⁸³ and others by other opponents of the Mining Law.⁸⁴

The Clinton Administration initially favored legislative changes to the 1872 Law.⁸⁵ Clinton appointed several well-known advocates of changes to important positions at Interior, including Secretary Bruce Babbitt,⁸⁶ solicitor John Leshy, and Jim

⁸¹ See, e.g., Tom Kenworthy and Paul Overberg, How the mountain west was won by the GOP, USA TODAY (October 28, 2002) 2002 WL 4736347 (attributing shift to GOP to environmental policies of Clinton Administration and influx of migrants from California).

⁸² See, e.g., General Accounting Office, Public Lands: Interior Should Ensure Against Abuses from Hardrock Mining (GAO/RCED-86-48) (1986); General Accounting Office, Federal Land Management: Limited Action to Reclaim Hardrock Mine Sites (GAO/RCED-88-21) (1987); General Accounting Office, Federal Land Management: An Assessment of Hardrock Mining Damage (GAO/RCED-88-123BR) (1988); General Accounting Office, Federal Land Management: The Mining Law of 1872 Needs Revision (GAO/RCED-89-72) (1989).

⁸³ See, e.g., General Accounting Office, Federal Land Management: An Assessment of Hardrock Mining Damage (GAO/RCED-88-123BR) 1 (1988) (letter from James Duffus, Associate Director of the GAO, to Congressman Rahall, reporting on GAO's investigations done at his request); General Accounting Office, Federal Land Management: The Mining Law of 1872 Needs Revision (GAO/RCED-89-72) 1 (1989) (letter from J. Dexter Peach, Assistant Comptroller General of the GAO, noting that report done in response to Rahall's request) and MILLER, *supra* note 68, at 388 (noting Rahall had requested GAO report on mining law).

⁸⁴ See General Accounting Office, Federal Land Management: Limited Action to Reclaim Hardrock Mine Sites (GAO/RCED-88-21) 1 (1987) (noting report requested by Rep. Mike Synar (D-OK)).

⁸⁵ Patrick Garver and Mark Squillace, *Mining Law Reform – Administrative Style*, in PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW FORTY-FIFTH ANNUAL INSTITUTE at 14-5 (1999).

⁸⁶ Quoted in T.H. Watkins, *Hard Rock Legacy*, 197(3) NATIONAL GEOGRAPHIC 76 (March 2000).

Baca, head of BLM.⁸⁷ Babbitt proposed an agenda that involved major changes to the 1872 Law: including ending patenting of mining claims and requiring royalties for the federal government.⁸⁸ During the 103rd Congress, mining law bills passed both the House⁸⁹ and Senate.⁹⁰ The House bill, steered by Rep. Rahall, favored environmental pressure groups' and Babbitt's positions; the Senate bill was more favorable to the industry's position. In the conference committee, efforts to reconcile the bills fell short as both eastern environmental interests and western mining interests refused to accept a compromise in an election year.⁹¹

The 1994 elections changed the political calculus substantially, giving control of both houses to the Republicans more sympathetic to mining interests' views of free access and the undesirability of further regulation. The Republican majority included mining legislation in the 1995 Budget Bill⁹² but the Administration rejected the changes on the grounds that they did "little or nothing to fix the problems posed by the current law."⁹³ After President Clinton vetoed that bill, legislative efforts to change the Mining

⁸⁷ Garver and Squillace, *supra* note 85, at 14-5.

⁸⁸ Garver and Squillace, *supra* note 85, at 14-6.

⁸⁹ H.R. 322, 103rd Congress (1999).

⁹⁰ S. 775, 103rd Congress (1999).

⁹¹ Garver and Squillace, *supra* note 85, at 14-7.

⁹² See Balanced Budget Act of 1995, H.R. Conf. Rep. 104-350 (November 16, 1995), sec. 5371-5382. Clinton cited the proposed revision of the mining law as one of the reasons for his veto. See William J. Clinton, Transcript of Radio Address (November 4, 1995) 1995 WL 15155406 (The budget "allows a giveaway of mining rights to companies at a fraction of their worth. Just recently, a law on the books since 1872 that I am trying hard to change forced the Government to sell minerals worth \$1 billion to a private company for \$275. That is taxpayer robbery, and it's going to keep right on happening under the Republican budget.")

⁹³ Statement of the Hon. Bruce Babbitt, Secretary, Department of the Interior, in Hearing Before the Subcommittee on Forests and Public Land Management of the Committee on Energy and Natural Resources, United States Senate, 105th Congress, 2nd Session (April 28, 1998) [hereafter "1998 Hearings"] at 23. See also *Id.* at 26 ("frankly, we would prefer no legislation on environmental regulations to [the bills in the Senate].")

Law died and the administration turned to administrative means to achieve its policy objectives.⁹⁴

The politics of mining law change in the Clinton-Gore Administration were straightforward. Environmentalists were an important part of Clinton's base of support, while he had little hope of gaining significant support in the West among those inclined to favor mining. The administration regularly attempted to gain support in the East among urban voters concerned with "the environment" through its public lands policies. For example, the creation of several national monuments in Utah without consulting with state officials on their boundaries was widely seen as a political maneuver to gain support in the east.⁹⁵ Increasing environmental regulations on mining would cost Clinton and Gore little, while helping with their overall strategy of promoting environmental issues in the 1996 campaign.

Western senators, on the other hand, had little incentive to bargain with the administration, since the existing mining law offered mining interests more than they were likely to retain in any compromise. By blocking change, Western senators could deliver more to their constituents in the mining industry than they could by negotiating with the administration. Thus, neither side had an incentive to bargain. As we have described elsewhere, the result was that the administration turned to rulemaking to

⁹⁴ Garver and Squillace, *supra* note 85, at 14-7 - 14-8. Some legislative efforts did continue, but did not produce successful legislation. *See, e.g.*, Opening Statement of Hon. Frank H. Murkowski (R-AK), 1998 Hearings, *supra* note 93, at 1 ("For the past 9 years, there has been an extensive, ongoing effort within the Congress to reform [the Mining Law.]")

⁹⁵ *See* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002) (describing controversies).

change the terms of mining claims, while congressional opponents used budget riders to attempt to block the regulations.⁹⁶

III. Conclusion

Today the General Mining Law of 1872 is one of environmental pressure groups' favorite whipping boys. It has taken a sustained beating from scholar-activists including John Leshy, assorted politicians, and a wide range of interest groups. Like the Energizer® Bunny, however, it keeps on going. Elsewhere we have argued that one explanation for the Mining Law's persistence is its solution of important incentive problems involved in mineral rights.⁹⁷ In this paper, we have argued that another important part of the explanation lies in the type of interest group coalition necessary to change the Mining Law.

The Mining Law's survival is almost wholly due to the combination of the powerful regional coalition that supports its existence and the structure of the Senate, which enables that coalition to limit attacks on its interests. The hardrock mining industry presents a classic example of an industry vulnerable to majoritarian oppression. Concentrated in a few sparsely populated (and so politically weak) states, with large assets tied to specific locations, long time lines for projects, and the target of politically

⁹⁶ See Morriss, Meiners, & Dorchak, *Between a Hard Rock*, *supra* note 77. In the closing days of the administration, BLM issued final section 3809 regulations (65 Fed. Reg. 69,998 (2000)), literally on "the last day that they could be published and still become effective before the end of the Clinton Administration." James Butler, *Mining on Federal Lands Current Issues – Changes to BLM's 3809 Regulations*, SG039 ALI-ABA 167, 177 (2001). These regulations were only a small part of an overall push by the administration to issue last minute regulations. Carol M. Cannon, *The Long Goodbye*, NATIONAL JOURNAL (January 27, 2001), 2001 WL 7181605. As Prof. John J. Pitney summarized it "Clinton was far more active at the end than other Presidents." *Id.*

⁹⁷ See Morriss, Meiners & Dorchak, *Homesteading Rock*, *supra* note 3; Morriss, Meiners & Dorchak, *Hard Rock Homesteads*, *supra* note 3. See also Morriss, Meiners, & Dorchak, *Between a Hard Rock*, *supra* note 77.

popular “pro-environmental” regulations and other administrative actions, the industry is in a difficult position.

It has been successful in defending the Mining Law thus far when the opponents of the Mining Law make a frontal assault on the statute. It has been less successful when the statute’s opponents find ways to build bridges to interest groups in other areas.

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