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In a country where each biennial Congress enacts approximately 200-300 statutes, the primary law regulating the mining industry has remained largely unchanged for 136 years. Back in 1872, Yellowstone National Park was established as the nation's first national park, the Metropolitan Museum of Art opened in New York City, George Westinghouse patented the air brake, suffragist Susan B. Anthony was fined $100 for trying to vote in the presidential election, Karl Marx was orating against capitalism in Amsterdam and Jesse James and his gang robbed yet another bank in Columbia, Kentucky. In the same year, President Ulysses S. Grant signed the General Mining Act of 1872 which authorizes and governs prospecting and mining for economic minerals on certain federal lands.

While numerous statutes and regulations have been promulgated since 1872 that affect and regulate mining on federal lands, much of the basic structure of the General Mining Act has remained unchanged. But is change necessary? Is change inevitable? Recent action on Capitol Hill indicates that there is widespread and continuing support among lawmakers to reform the 136-year old mining law. On November 1, 2007, the United States House of Representatives passed the Hardrock Mining and Reclamation Act of 2007 (H.R. 2262). Sponsored by Representative Nick Rahall (D-W.Va.) and co-sponsored by 62 other Members of Congress, H.R. 2262 passed the House of Representatives by a vote of 244-166. H.R. 2262 is an expansive reformation of the General Mining Act, and includes provisions applicable to mining claims, millsite claims and tunnel site claims located on, before or after such date as H.R. 2262 would be enacted.

While H.R. 2262 and its approach to mining reform has many hurdles to clear before it becomes law, it is a powerful portend of the type of mining reformation that will likely make its way onto the President's desk for signature. H.R. 2262 contains many provisions that are troubling, loosely drafted and arguably unnecessary. In particular, there are two significant and controversial provisions that may re-appear in ultimately-enacted mining reform legislation and that could fundamentally affect the economics of mineral exploration and production on federal lands: the new gross income royalty and the citizen suit provision.

H.R. 2262 imposes an 8% gross income royalty on all minerals, mineral concentrates and products derived from minerals produced from any claim located under the general mining laws. The term "gross income" is defined by incorporating the detailed definition of gross income in Section 613(c) of the Internal Revenue Code of 1986, and potentially applies to income

earned not only in the extraction of ores or minerals from the ground (or from prior mining waste and residues) but from treatment processes and transportation of ores or minerals. The gross income royalty would apparently not allow a deduction for mining production costs. The gross income royalty rate is reduced to 4% for mining operations on federal land that are subject to an existing operations permit and that are producing valuable locatable minerals in commercial quantities on such date as H.R. 2262 would be enacted. In addition, the new royalty provision includes detailed record keeping and reporting obligations imposed upon the claim holder, operator, transporter and/or other persons involved in developing, producing, processing, transporting, purchasing or selling locatable minerals, concentrates or derived products. H.R. 2262 affords the Secretary of the Interior the authority to audit royalty records and to impose interest and penalties for underreporting the value of production subject to the royalty. H.R. 2262's large gross income royalty, as opposed to a profit-based or post-production cost royalty, could significantly affect the long-term economic sustainability of the mining industry in the United States.

H.R. 2262 also creates a private cause of action for citizens to commence a lawsuit against "any person," including the Secretary of the Interior and the Secretary of Agriculture, in the federal courts of the United States to enforce compliance with H.R. 2262, any regulations promulgated in accordance with H.R. 2262, or any exploration or operation permits issued under H.R. 2262. In addition, "any person" is authorized to sue the Secretary of the Interior or the Secretary of Agriculture for an alleged failure to perform an act or duty (including promulgation of regulations) that is required by H.R. 2262. A successful private litigant may recover all of his or her costs of litigation, including attorney and expert witness fees. The citizen suit provision requires 60 days advance notice to the alleged violator and the applicable federal agency, unless the violation constitutes an imminent threat to the environment or to the health or safety of the public. What constitutes an "imminent threat" is undefined, and such a determination could be subject to considerable disagreement and litigation.

While citizen suit provisions are found in numerous other federal laws such as the Comprehensive Environmental Responsibility Compensation and Liability Act ("CERCLA"), the H.R. 2262 citizen suit provision provides would-be plaintiffs with much broader authority to pursue private causes of action. For example, Section 310(d)(2) of CERCLA limits citizen suits when a federal agency "has commenced and is diligently prosecuting an action . . . ." to require compliance, but CERCLA does not specify a venue for such enforcement action. Using conspicuously different language, Section 504(b)(2) of H.R. 2262 only bars a citizen suit against a private party if the relevant federal agency "has commenced and is diligently prosecuting a civil or criminal action in ***a court of the United States*** to require compliance." (Emphasis added.) This subtle but significant difference in statutory language could open the door to H.R. 2262 citizen suits against miners despite ongoing administrative enforcement actions that are not "in a court of the United States." A citizen suit provision such as is contained in H.R. 2262 could encourage frivolous lawsuits from mining opponents, significantly increase litigation costs and cause unnecessary delays for mining operations.

On January 24th, the Senate Energy and Natural Resources Committee held a hearing on mining reform, and signaled an unwillingness to accept the expansive overhaul detailed in H.R. 2262. Senators on the Committee appeared to recognize that while the 1872 Act is indeed aged, numerous other laws and regulations effectively regulate the mining industry. As explained by Senator Pete Domenici (R-N.M.), the Ranking Member of the Committee, "I believe the Senate should start from a clean slate on its own bill, taking a thoughtful and balanced approach to reforming the Mining Law—changes which would affect hardrock mining in New Mexico and around the country. . . . Clearly, amending this law for the first time in more than a century will be a complex issue that will require compromise and hard work." Similarly, Senator, and presidential hopeful, Barack Obama, has voiced support for mining reform, but opposes H.R. 2262 as too burdensome on the industry and as possibly leading to the loss of mining jobs in numerous states.

It is not surprising that in an age of iPhones and space tourism, lawmakers are revisiting a law that was first enacted when the James-Younger gang was robbing trains and shooting-it-out with the Pinkertons. Mining federal lands today is just as vital as it was when President Grant signed the General Mining Act of 1872. Any reformation to the mining law should be narrowly drawn and carefully drafted to ensure that mining on federal lands in the United States remains economically feasible and logistically practicable. While H.R. 2262 may never make it out of the Senate, it has clearly set the table for reforms that may be quite difficult to swallow by the mining industry. In this season of political change and posturing, it is unclear what portions of H.R. 2262 will be included in any enacted mining reform legislation; but there is little doubt that industry, lawmakers and those opposed to mining on federal lands have many months of dueling ahead.

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