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SMCRA: It's Back In The News And That's Not Good News For Coal

by Thomas (Tim) C. Means and Sherrie A. Armstrong

The Surface Mining Control and Reclamation Act ("SMCRA") stands alone among environmental statutes because of its dual, competing goals: Congress enacted SMCRA to promote coal mining to provide the nation with an important source of fuel, while also minimizing mining's environmental impacts. In SMCRA, Congress also established a uniquely federalist regulatory scheme that sets forth certain national minimum standards, but allows states to establish their own regulatory programs which, if federally approved, allow the state to be the *exclusive* regulator of surface mining and reclamation operations on non-federal and non-Indian lands.

The Act's inherent tension between the economy and the environment, and its uneasy division of authority between the federal government and the states, was long a source of conflict, beginning with the Act's passage in 1977 after two prior presidential vetoes, and then followed by decades of rulemaking and enforcement litigation by various groups vying to tip the Act's balance in their favor. But as the 21st century dawned, the controversy surrounding SMCRA had quieted, with the Act and its implementing federal regulations becoming *de facto* settled law.

That changed with the Obama Administration, which has brought SMCRA back into the news by launching several initiatives seemingly aimed at reducing the use of coal. Many have deemed these initiatives to be part of a virtual "war on coal." These actions by the Administration and its environmental allies have substantially upset SMCRA's hard-won balancing act, with potentially devastating consequences for the coal industry.

Background

SMCRA's scheme of "cooperative federalism" provides a stark contrast to the more limited authority given to states under statutes like the Clean Water Act and the Clean Air Act. As the 4th Circuit has explained, "in contrast to other 'cooperative federalism' statutes, SMCRA exhibits extraordinary deference to the states"—either the federal government or the state is the regulator, but not both.

Under SMCRA, once OSM approves a state's regulatory program, that state becomes a "primacy" state with exclusive jurisdiction over surface coal mining and reclamation on non-federal and non-Indian lands. As multiple courts have held, when a state's program is approved, SMCRA's provisions and implementing regulations "drop out" and the federal government retains only a limited oversight role to ensure that the state is still complying with the approved state program.

But that system recently has been eroded by (i) efforts to increase federal "oversight" of state regulatory programs in order to ensure more aggressive environmental protections and (ii) active litigation by environmental non-governmental organizations ("ENGOs") attempting to "reinterpret" SMCRA to achieve their environmental protection objectives, as discussed below.

Expanded Federal "Oversight"

First, in an Inter-Agency Memorandum of Understanding ("MOU"), the heads of the EPA, Interior Department, and Army Corps of Engineers ("the Corps") announced the new Administration's concerns about surface mining in Appalachia and set forth their plans to do more to protect the environment from surface coal mining, particularly targeting mountaintop mining, without rulemaking or legislation. The federal government has carried out the MOU in three major ways to date.

1. OSM's Expanded Use of Ten Day Notices: *Farrell-Cooper Mining Company v. U.S. Department of the Interior*

As it promised to do in the MOU, OSM has expanded its interpretation and use of ten-day notices to overturn state permitting decisions and impose federal policy on state programs. SMCRA provides that, as part of the federal government's limited oversight authority in primacy states, OSM may issue a notice to the state giving it ten days to take enforcement action or show good cause for its failure to do so, such as by advising OSM that the state has determined that there is not, in fact, a violation. OSM may take action only after a state has failed either to institute its own actions or to demonstrate to OSM "good cause" for not doing so. If, within ten days, the state fails to respond in either of those two ways, then OSM is empowered to conduct an inspection and issue a notice of violation or cessation order to the permittee as necessary. But if the state *does* respond, OSM has no further enforcement role. As the D.C. Circuit held in a 1981 *en banc* decision, "Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary [of the Interior] plays no role." *In re Permanent Surface Mining Litig.*

Despite some occasional flip-flopping, OSM historically interpreted its ten-day notice authority in accordance with the D.C. Circuit's decision and did not use that authority to second guess or otherwise interfere with state permitting decisions or a state program. But in the MOU, the Secretary of the Interior pledged to determine how OSM could "remove impediments" to OSM's ability to "require correction of permit defects in SMCRA primacy states." And in November 2010, OSM Director Joseph Pizarchik did just that when he announced that he was changing OSM's historic interpretation and declared that OSM was in fact authorized to issue ten-day notices to remedy violations of *SMCRA's* permitting requirements regardless of whether those activities complied with a state program or a state SMCRA permit.

OSM has acted to enforce that policy nationwide, but its use in Oklahoma led to the first lawsuit challenging OSM's expanded interpretation. In Oklahoma, OSM issued ten-day notices to Farrell-Cooper Mining Company, claiming that Farrell-Cooper was not restoring lands to approximate original contour in accordance with federal requirements. Oklahoma responded to OSM that Farrell-Cooper's operations fully complied with the Oklahoma federally approved program and its permits and were not, therefore, in violation of applicable law. Yet OSM rejected the state's showing of "good cause" as arbitrary, capricious, or an abuse of discretion and issued NOVs to Farrell-Cooper ordering the company to cease its reclamation activities and submit a new reclamation plan to OSM, despite the fact that Farrell-Cooper had already completed 90% of its reclamation work.

Farrell-Cooper sued OSM, contesting the NOVs and arguing *inter alia* that OSM had no authority to issue NOVs in a primacy state where the state had determined that the permittee was in compliance with its state permit, effectively vetoing the state permitting decision. The State joined the company's suit, arguing that OSM had violated SMCRA's allocation of authority to the state by unilaterally overturning the state's permitting decisions. The court dismissed the case for lack of subject matter jurisdiction as a direct challenge to OSM's regulations that must be brought in the District of Columbia.

Farrell-Cooper's and Oklahoma's appeal to the 10th Circuit also was dismissed, but on different grounds. The appellate court determined that the case was unripe due to the pendency of administrative litigation contesting the NOVs.

2. EPA's Intrusion into SMCRA Permitting: *National Mining Association v. McCarthy*

Like OSM, EPA is seeking to broaden its control over state regulation of surface mining and reclamation. Congress gave EPA only a minor programmatic role under SMCRA, requiring its concurrence on any regulations promulgated by the Secretary that relate to air or water quality standards and on any aspects of a state program that relate to such standards. Otherwise, EPA has no lawful basis under SMCRA for further involvement in the regulation of surface coal mining and reclamation.

However, in the MOU, EPA, the Corps, and the Department of the Interior pledged to coordinate reviews of pending permit applications under the Clean Water Act and SMCRA. EPA thereafter inserted itself into SMCRA's permitting process through ostensibly non-binding "suggestions" set forth in a July 21, 2011 guidance document issued to EPA Regions III and IV. The guidance document is remarkable for EPA's unprecedented intrusion into SMCRA permitting and regulation, disregarding the clear limits Congress placed on EPA's role.

The regulated industry and primacy states, including West Virginia and Kentucky, soon discovered that the "suggestions" in the guidance document were binding mandates. They brought suit against EPA and won summary judgment in *National Mining Association v. Jackson*, invalidating the guidance under SMCRA, as well as the Clean Water Act and the APA. The court explained that SMCRA provides "only a limited role for EPA" and that "[i]t is . . . beyond the EPA's purview" to establish upland operational standards "or to attempt to specify to the Office of Surface Mining or the State SMCRA agency what constitutes an 'appropriate' best management practice." EPA may participate preliminarily on a programmatic level, but after submitting its written concurrence, EPA's role under SMCRA is over.

The ultimate outcome of that case on appeal will have wide-ranging implications for the coal industry, including SMCRA's balance between environmental regulation and the facilitation of coal mining. Accordingly, 11 states have filed an amicus brief in support of the plaintiffs on appeal arguing that EPA's guidance memorandum conflicts with principles of cooperative federalism, undermines state interests, and is part of a recent pattern of EPA improperly circumventing cooperative federalism principles in environmental statutes, including SMCRA, the Clean Water Act, and the Clean Air Act.

3. OSM Review of State Programs

OSM's usurpation of state regulatory authority has continued with changes to reclamation bonding programs in Appalachia, which may signal the beginning of broader changes for state regulatory programs in general. SMCRA requires reclamation bonds to ensure that mine reclamation is achieved in the event that the mine operator itself does not complete it. Only after an operator has met all of the permit and applicable regulatory program's reclamation requirements may the regulatory authority release the reclamation bond. Should the mining operator forfeit the bond, the regulator will use the bond to reclaim the site.

Kentucky and West Virginia have bond programs that provide an alternative to full-cost bonding, but, under pressure from OSM and ENGOs, each of those states has had to make changes to its programs, including:

- In 2010, the Government Accountability Office issued a report critical of reclamation efforts and financial assurances for reclamation in Kentucky, Virginia, and West Virginia (all primacy states) and Tennessee (a federal program state).
- OSM conducted Field Office reviews in Kentucky and West Virginia, the results of which were particularly critical of Kentucky's alternative bond system.
- Based on its Field Office review, OSM instituted Part 733 proceedings in Kentucky in 2012, beginning the process for substituting federal enforcement for Kentucky's program. In response, Kentucky overhauled its bond system to increase the amount of reclamation bonds, increase rates per acre, and establish an emergency state-wide bond pool.
- Successful ENGO litigation caused West Virginia to increase its special reclamation tax from to 14.4 cents per ton of coal mined to 27 and 9/10 cents per ton to treat discharges at bond forfeiture sites in accordance with state water quality standards and pursuant to Section 402 permit limits.

And there may be broader changes on the horizon that reach to the heart of state SMCRA programs. ENGOs filed a substantial Part 733 petition with OSM in June 2013, alleging that West Virginia is not properly implementing, administering, enforcing, and maintaining its program. They asked OSM to substitute federal enforcement for the entire state program. After reviewing the petitioners' nineteen allegations, OSM has identified five that warrant further evaluation. OSM will investigate how the state handles potential flooding risks, whether it issues SMCRA violations where Clean Water Act violations exist, how it evaluates selenium water pollution, how it conducts Cumulative Hydrologic Impact Analyses, and how it handles soil reclamation. OSM already has released a preliminary study in which it concluded that, where there is selenium impairment, the state accepts what OSM might consider to be merely a minimum amount of information to demonstrate that the mine is not contributing to the impairment. West Virginia has pledged to work with OSM in this investigation, which has the potential to lead to major changes in that state's program.

ENGO Litigation Against Regulations and Mine Operators

As the recent bond activity in West Virginia illustrates, environmental groups have also recently deployed SMCRA as a weapon in their own fight against the use of coal in the United States. Those groups have been major drivers behind efforts to enhance federal regulation of surface coal mining. Two examples of such significant cases highlight their efforts.

1. **The Stream Buffer Zone Rule: *National Parks Conservation Association v. Jewell* and *Coal River Mountain Watch v. Jewell***

In these two cases, ENGOs challenged OSM's revised Stream Buffer Zone Rule, which could further tip the scales against coal mining. Although SMCRA does not require a buffer zone around streams, OSM has historically provided such a buffer, minimizing, but not prohibiting, mining activities near streams. The revised Stream Buffer Zone Rule ("2008 Rule") was intended to clear up confusion over an earlier (1983) rule, set forth regulations to minimize the construction and design of valley fills, and revise the conditions under which mining operations could be conducted within the buffer zone to better conform with SMCRA's provisions. But ENGOs believe that the rule impermissibly liberalized the conduct of mining operations near streams.

Although the 2008 Rule was the product of more than five years of rulemaking, it was condemned as a midnight rush to judgment because it was issued weeks before the George W. Bush Administration left office. ENGOs have also claimed that

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the 2008 Rule violates SMCRA, the APA, the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act.

After those lawsuits were filed, President Obama's first Interior Secretary took the unprecedented step of publicly renouncing his own agency's rule. The Administration has since twice asked the court to vacate and remand the 2008 Rule without reaching the merits of plaintiffs' claims and without regard for APA rulemaking requirements. The National Mining Association intervened in that litigation and is now the only party defending the 2008 Rule and resisting the ENGOs' sue-and-settle tactics.

Meanwhile, although OSM published an Advance Notice of Proposed Rulemaking in 2009, announcing its intention to supersede the 2008 Rule, no proposed rule has been published. Although OSM's new rulemaking successfully delayed that litigation for several years, OSM's announcement that it will not issue a new rule until sometime in 2014 inspired the court to lift the stay. The plaintiffs are now vigorously prosecuting their respective challenges to the 2008 Rule. For its part, OSM continues to denounce the current rule, without attempting to rescind it under the APA.

2. Sovereign Immunity and Cooperative Federalism: *Montana Environmental Information Center v. Stone-Manning*

In another important case, ENGOs brought suit in federal court against the Montana state regulator, alleging that DEQ had violated SMCRA by performing inadequate Cumulative Hydrologic Impact Assessments ("CHIAs") and failing to properly determine whether proposed mining operations would cause material damage to the hydrologic balance. This case hinges on whether state law applies in a primacy state, the federal provisions having "dropped out" when the state's program was approved. If so, a state regulator is protected by the Eleventh Amendment from being sued in state court for allegedly failing to comply with state law.

A group of defendant-intervenors made up of coal owners, mine operators, and employee representatives joined DEQ in defending that case. The court dismissed the case on sovereign immunity grounds, reasoning that Montana had primacy and its state law governed mining and reclamation in the state, "[a] suit against [the Director of DEQ] would, in essence, be a suit against the State of Montana." The court also held in the alternative that the case was not justiciable because the ENGOs had challenged a non-discretionary duty not subject to a SMCRA citizen suit and because the case suffered from fatal standing and ripeness defects, including the failure to exhaust available administrative and state remedies.

On appeal, the ENGOs have argued that DEQ was not entitled to sovereign immunity from suit because SMCRA's provisions do not "drop out" when a state obtains primacy. Instead, they believe that state law is somehow "codified" as federal law when the state program is approved and published in the Code of Federal Regulations.

Conclusion

Now that the federal government and ENGOs have re-discovered SMCRA as a useful weapon against coal, SMCRA regulatory changes and ENGO litigation are likely to remain a central focus of environmental law for years to come, at least absent an administration whose priorities for coal differ significantly from the current one. That is not good news for coal.

(Editor's note: C&M represented the industry parties in several of the cases discussed in this article.)

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How Mining Companies Can Mitigate Risks and Protect Their Investments, Part 1: International Investment Agreements

by Jonathan (Josh) S. Kallmer

This is the first in a series of articles in The Mining Law Monitor regarding measures that mining companies can take to mitigate the risks of investing in challenging foreign markets. Future articles will address topics such as: the role of concession contracts and other agreements between mining companies and host governments; the significance of national mining laws and other domestic legal measures; and the value of government relations, public relations, and corporate social responsibility (CSR) tools in helping companies manage risks.

Introduction

Few other commercial enterprises face the types of regulatory and political risks that mining companies face when investing in challenging foreign markets. The often-seen crucible of financial, geological, and political pressures mean that mining companies need to do more than overcome their traditional business, scientific, and engineering challenges. Successful mining companies operating in challenging foreign markets seek to develop additional strategies to actively address and get out in front of the regulatory, policy, and geopolitical risks that foreign governments create for them. The topic of this article—**international investment agreements (or "IIAs")**—can be one of the most effective tools for mining companies to use to better manage the risks.

Because the horizon for mining investments is long-term—frequently decades-long—these operations can become captive targets for opportunistic regimes. The best geology is often located in some of the most politically difficult regions, such as Central Asia, Africa, and Latin America, a fact that creates a level of threshold uncertainty that firms in other sectors can more readily avoid by simply choosing to invest their capital elsewhere. Mining investments are always capital-intensive, involving enormously valuable physical assets. Moreover, the focus of the investment activity—minerals, ores, other natural resources—frequently have great emotional and political significance for local populations, putting the investing company in the position of possibly appearing as a threat to a country's patrimony and resource sovereignty. In short, investments in such markets come with significant political and country risk, which in turn fosters significant economic risk.

This article lays out what every board member and manager should know to help mitigate risk—namely, how IIAs can help address these serious risks, and what international law protections and remedies these agreements provide.

How International Investment Agreements Can Help

IIAs are government-to-government agreements—such as bilateral investment treaties (BITs) and the investment chapters of free trade agreements (FTAs)—that provide legally binding, privately enforceable rules regarding one country's treatment of companies from another country and their investments. IIAs typically protect a wide range of "investments" (such as companies, equity interests, debt instruments, contract rights, intellectual property rights, and licenses and permits) and apply to government action at both the national and sub-national levels. (In other words, Canada's obligations under its IIA extend to government actions carried out at the provincial level. For example, in 2008, the provincial government in Newfoundland and Labrador expropriated certain of the assets of U.S. company AbitibiBowater, conduct for which Ottawa was legally responsible.)

With some 3,000 IIAs in existence around the world, including many concluded by developing countries with significant mining sectors, these agreements are an indispensible element of the mining company's risk management toolkit. Although they have been around for more than half a century, only in the past decade have multi-national firms in various sectors come to realize how powerful IIAs can be in addressing political and regulatory risks. As discussed in greater detail below, savvy companies are using IIAs at an increasing rate each year to protect their investments in challenging foreign markets.

1. The Rights – Strong International Law Protections

IIAs provide internationally engaged companies with a broad range of legal protections when they invest in challenging foreign markets. As discussed below, many of these protections respond directly to the risks that mining companies most frequently face.

National Treatment and Most-Favored-Nation Treatment. Virtually every IIA includes obligations on governments to provide foreign investors with national treatment and most-favored-nation (MFN) treatment. This means that governments may not treat foreign companies or their investments less favorably than they treat their own companies and investments or those of a third country. For example, a government may not subject the mining subsidiary of a parent company in an IIA partner country to more stringent licensing or permitting requirements than it subjects its own mining firms or those owned by third-country investors.

Fair and Equitable Treatment. In addition, under almost all IIAs, governments must give fair and equitable treatment to foreign companies' investments, which generally means affording due process in judicial and administrative proceedings and protection from arbitrary or capricious government treatment. So, if a foreign gold mining company developed a mine in an IIA partner country in full accordance with the law of that country, but after two years the government were to revoke the company's permits without providing an opportunity for judicial or administrative review, the company might have a valid claim that the host government failed to provide it fair and equitable treatment.

Full Protection and Security. A government must also provide foreign companies' investments with full protection and security, which means that it must offer a reasonable level of police protection and law and order to ensure the investments' physical security. Thus, the government of a country experiencing civil unrest must take reasonable measures to prevent damage to a mine owned by a company headquartered in a country with which it has an IIA. Indeed, the full protection and security obligation arguably extends beyond physical protection to some notion of "legal" protection, creating duties on governments to ensure certain levels of regulatory stability and certainty.

Expropriation. A government may not expropriate or nationalize foreign companies' investments without paying compensation. This includes "indirect" expropriations, such as punitive tax measures that effectively deprive a company of the ability to run its business. For example, a mining company with a subsidiary in an IIA partner country that is forced to pay "fines" for infractions of various environmental regulations equal to 200 percent of its annual revenue could have a claim that such a measure is an indirect expropriation for which it is entitled to compensation.

Transfers. Most IIAs guarantee the right of free transfers of investment-related funds into and out of the country. This is a critical right for mining companies, who often need to move large amounts of money both into a market, to finance the establishment of an operation, and out of a market, to repatriate profits and redistribute operating capital around a global corporate structure.

Performance Requirements. Some IIAs provide that governments may not mandate that foreign companies or their investments meet certain types of performance requirements, such as requirements to use a certain amount of "local content," transfer technology to domestic companies, or purchase or use locally developed technology. For example, the investment provisions of the United States' FTA with Peru provide that neither country may:

> impose or enforce any requirement or enforce any commitment or undertaking:
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> . . .
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
>
> . . . [or]
>
> (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory.

This can be an important protection for mining firms, as many governments may require the hiring of local employees or provision of know-how to state-owned mining firms as a condition of investment.

Umbrella Clause. Many IIAs also contain an umbrella clause, which essentially acts to import into the IIA any obligation to a foreign investor that a host government has taken on separately. In other words, a government must comply with its contractual obligations to companies of their IIA partners and their investments; a failure to do so is a breach of the IIA *as well as* of the contract. So, if a host government were to breach a term of a concession contract that it had signed with the local subsidiary of a parent mining company of an IIA partner (*see* Riveira/Tallent article "Yours, *Mine*, or Ours? Mitigating the Risks of Resource Nationalism" in this issue), the parent company may be able to pursue relief under both the IIA and the contract itself. An umbrella clause could therefore allow a mining company to bring international arbitration directly against a host government for a breach of a concession agreement, as well as pursuing any separate remedy that the concession agreement provides, such as, for example, recourse to local courts.

2. The Remedy – Binding International Arbitration

Of course, strong legal protections mean little in the absence of effective mechanisms for enforcing them. Fortunately, IIAs allow foreign companies to take governments to binding international arbitration for alleged breaches of the agreement. "Investor-State arbitration" is an extremely powerful tool for companies to enforce their IIA rights, for many reasons. First, it is **direct** – a company can take a government to arbitration without having to persuade its own government to espouse or otherwise support its claim. Second, it is **independent** – arbitrators are typically selected by both parties and hearings occur in a neutral international setting, both of which protect

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the company from the uncertainty of domestic court systems. Third, it is **flexible** – under most IIAs, the company generally has the ability to choose the arbitration institution and rules, which gives it further influence over the process. Finally, it is **enforceable** – awards against host governments are generally enforceable in countries that have signed international agreements relating to the enforcement of foreign arbitration awards, such as the New York Convention.

In addition, companies may be able to use one or more IIAs to seek relief in a given country. In particular, some IIAs allow companies to pursue investor-State claims against a host government even if the company invests only indirectly into the host country through its third-country investments (*i.e.*, through subsidiaries) (provided the company owns or controls both the third-country subsidiary and the host-country subsidiary that has been harmed by the government). Similarly, in some cases a parent company can initiate an investor-State claim through a subsidiary in another country that itself has an IIA with the host country (provided the third-country subsidiary owns or controls the host country subsidiary). For example, about a decade ago, American media magnate Ronald Lauder used a subsidiary that he had established in the Netherlands to pursue an IIA claim against the Czech Republic. (Many companies route their overseas investments through intermediate affiliates in the Netherlands to gain the protection of that countries significant network of investor-friendly IIAs.)

How Mining Companies Should Use IIAs

IIAs can be powerful tools for mining companies to ensure that they are treated fairly, enjoy a level regulatory playing field, and can enforce their rights in difficult foreign markets. Companies need to think carefully, however, about how best to deploy these agreements in order to achieve their business objectives. In some circumstances, governments have so significantly harmed a company and shown so little inclination to modify their treatment that it may be in a company's commercial interest to pursue investor-State arbitration through to an award. Yet, in many cases, especially for mining companies that have made long-term, capital-intensive commitments to a foreign market and wish to operate there for decades, it may be in a company's business interests to use its IIAs rights and protections more subtly and indirectly. Indeed, for every investor-State case that goes through to completion, there are several instances where companies have used IIAs as leverage to negotiate with the host government and cause it to change its behavior more quickly and less expensively. For example, in the AbitibiBowater example described above, the investor was able to use the possibility of an arbitration claim under the investment provisions of the North American Free Trade Agreement as an inducement for the Harper government to settle with it

With this in mind, mining companies would be well-served to incorporate consideration of their IIA rights into every aspect of their overseas investment activity. For example, a company needs to conduct thorough analyses of potential IIA protections before it enters a market. Similarly, if it has chosen a market that it wishes to enter, it might benefit from structuring its investment into that market through a third country that has a strong IIA with that country. (As noted, the Netherlands is frequently a popular choice.) In addition, once established in a market, that company should ensure that it fully understands the treaty rights of which it can avail itself in the event of a dispute with the host government. Then, to the extent that differences emerge with the government over the terms of the company's investment, the company may be able to use its IIA rights as helpful leverage in seeking favorable negotiated resolution with authorities. And, finally, if the worst happens and a dispute cannot be avoided, a company can rely on the strong, binding, enforceable protections of IIAs to pursue relief directly from a host government. There is no need for a company to inform or obtain the approval of its own government; IIAs are binding international law obligations of governments to foreign investors. Under the dispute settlement provisions of IIAs described above, investors can directly pursue arbitration against governments of the countries in which they are investing.

Conclusion

In an increasingly uncertain global business environment, IIAs can help companies ensure that they are treated fairly, enjoy a level playing field, and can enforce their rights in difficult foreign markets. IIAs should be an important element of mining companies' business strategies throughout their investment activities, from their initial evaluations of the legal and political risks of investing in various markets, to decisions about how to structure their operations, to how they navigate local regulatory and policy hurdles, and, finally, to their efforts to constructively and effectively resolve disputes with governments that do arise.

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Yours, Mine, or Ours? Mitigating the Risks of Resource Nationalism

by Ashley R. Riveira and Kassi D. Tallent

Mining companies have undoubtedly faced a new wave of resource nationalism over the past several years. In fact, Ernst & Young ranked resource nationalism as the number one risk facing mining and metals companies worldwide for 2011-2012 and for 2012-2013, and as the number three risk for 2013-2014.

On the other hand, a mining company's recognition that resource nationalism poses a major threat to its operations or investments does not necessarily translate into that company developing strategies to address the problem. Instead, there is a tendency for mining companies to perceive resource nationalism as a monolithic phenomenon resulting from circumstances that are largely unpredictable, unavoidable, or both: for example, general political or social instability, or a desire to increase government revenues at times of rising commodity prices. As a result of this perception, mining companies often assume that standardized, broad-brush solutions—such as purchasing political risk insurance or implementing high-level government and community relations campaigns—are the best or only means of dealing with the threats posed by resource nationalism.

Although these general risk-mitigation strategies certainly have an important role to play in investment protection, mining companies should not assume that resource nationalism is merely a function of market cycles, populism, or social inequality or unrest. At its core, resource nationalism stems from a sense of ownership of the land, the subsoil, and their natural products. Unfortunately, the questions of (i) who has (or ought to have) property rights in the natural resources necessary for mining; (ii) when such rights arise; (iii) what their scope may be; and (iv) how they are to be balanced, are often fraught with ambiguity or contention. Depending upon the circumstances, competing claims to ownership may be credibly espoused by the State as an institution; by subnational administrative units such as provinces; by indigenous groups; by local landowners; and, of course, by mining companies.

Therefore, in order to effectively understand and mitigate the risks of resource nationalism, mining companies should take the time to study the particular legal, social and cultural approaches to: (i) the ownership of natural resources; and (ii) the acquisition and protection of property rights in their target jurisdictions before making significant capital investments there. The goal of this exercise should be to identify any ambiguities or deficiencies in the relevant property rights that may be acquired by the company, as well as any potential areas of conflict of interest with the State and/or other interested parties. In some cases, potential deficiencies and conflicts can be effectively addressed through ex-ante agreements. To the extent that such agreements cannot be negotiated, the company can then make an informed decision whether to proceed with its planned mining project, and about which additional risk-mitigation measures—such as, for example, structuring its investment to provide recourse to investment treaty arbitration (*see* Kallmer article "How Mining Companies Can Mitigate Risks and Protect Their Investments, Part 1: International Investment Agreements" in this issue)—it ought to adopt.

The present article is intended to provide a brief introduction to the relationship between ownership of natural resources, property rights and resource nationalism. Part I addresses some different approaches to the ownership of *in situ* minerals. Parts II and III then explore the risks posed to mineral ownership and investments in light of resource nationalism as expressed at both national and local levels, respectively.

Ownership of In Situ Minerals

In order to determine how resource nationalism is likely to manifest itself in relation to a given project, mining companies must first consider the basic issue of who owns the *in situ* minerals. (For purposes of this article, the term "*in situ* minerals" refers to minerals as found in their natural state in the earth, but excludes sand, gravel, aggregate and other substances that are the target of quarrying operations.) Quite often, incidents of resource nationalism arise out of misunderstandings or disagreements over this basic issue.

1. Public vs. Private Ownership Regimes

In general, all mining regimes can be divided into two categories: those in which some or all *in situ* minerals can be subject to private ownership; and those in which *in situ* minerals are considered property in the public domain. The private ownership regime is related to the notion that original ownership of land conveys ownership over the subsoil and its products, sometimes referred to as the principle of *cuius est solum, eius est usque ad coelum et ad inferos* (whoever owns the soil, it is theirs up to heaven and down to hell).

Although private ownership of *in situ* minerals by landowners was widespread in Europe until at least the period of the French Revolution, and was exported across the territories of the former British Empire, it has now largely been phased out in the major mining jurisdictions. In some jurisdictions, such as Australia and New Zealand, limitations on private ownership have been implemented over time, through future reservations to the State, and without any outright prohibition. Similarly, in India, ownership of *in situ* minerals is not absolutely vested in the State, as recently affirmed by a landmark Supreme Court decision upholding claims to subsoil minerals raised by a group of hereditary landowners in Kerala. As a practical matter, however, almost all subsoil minerals in these various jurisdictions have now been reserved to the State, regardless of surface ownership. The only major jurisdiction in which private ownership has not been specifically limited is the United States.

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ALTHOUGH THE PUBLIC OWNERSHIP SYSTEM IS NOW THE NORM INTERNATIONALLY, IT IS IMPORTANT TO POINT OUT THAT IN MANY COUNTRIES THE SYSTEM IS STILL RELATIVELY UNTESTED

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Obviously, it is important for mining companies to determine whether any *in situ* minerals they hope to exploit in their target jurisdictions are capable of being subject to private ownership, as this will have a significant impact on both their ability to acquire mining rights and the scope of those rights. In most jurisdictions, absolute ownership of subsoil minerals will be vested in the State on behalf of the people, and the State will consequently be prohibited (often as a matter of constitutional law) from divesting ownership of those minerals to any private party. However, as discussed further below, the State is generally permitted to grant rights of use to private parties in relation to these minerals in order to serve the needs of the public interest, and may expropriate and lease surface lands to the mining company in order to effectuate these rights of use. In public ownership systems, it is imperative that mining companies understand the scope of the rights of use that may be granted by the State, and the precise circumstances under which these rights can be obtained and maintained.

2. The Significance of Local Stakeholders in Public Ownership Regimes

Although the public ownership system is now the norm internationally, it is important to point out that in many countries the system is still relatively untested. In South Africa, for example, the State was not legally deemed to be the owner of subsoil minerals until 2002, breaking with a long tradition of private ownership. In that country, the switch to a public ownership regime was implemented with the aim of redressing historical disenfranchisement of the local black population.

Furthermore, the transition to a public ownership regime—even when formally undertaken long ago—does in some cases continue to give rise to complex conflicts between the State, mining companies, and local communities. In Ghana, for example, ownership of the surface land as well as the subsoil and its minerals had long been vested in the local communities in accordance with native customary law, which continued to apply with few modifications during the British colonial period. Furthermore, mining is viewed as a cultural patrimony for certain of the country's primary ethnic groups. The abrupt assumption of ownership and control of minerals by the State following independence was out of step with these traditions, contributing to a proliferation of illegal mining activities and to increased conflicts between the local population and mining companies exercising rights legally granted by the State.

In the Philippines, some form of public ownership of *in situ* minerals has formally existed for centuries. However, since the restoration of full democracy in 1986, local communities and provincial governments have been at the forefront of a series of challenges to the Philippine State's efforts to attract and permit foreign mining investment, which is perceived as being contrary to traditional land use rights and to local prerogatives.

As these few examples demonstrate, mitigating the risks of resource nationalism in public ownership regimes requires not only an understanding of how the State's ownership of *in situ* minerals is to be balanced against the mining company's rights of use, but also how it may conflict with the perceived rights and interests of the relevant subnational constituencies.

Mitigating the Risk of Resource Nationalism by the State

Georgius Agricola's 1556 treatise, *De Re Metallica*, cautioned that a miner should never be ignorant of the law, in order "that he may claim his own rights … that he may not take another man's property and so make trouble for himself, and that he may fulfil his obligations to others according to the law."

Over 450 years later, waves of European colonialism have come and gone, the Iron Curtain has risen and fallen, and the development of international norms has brought the rights of indigenous groups and the protection of the environment to the forefront of governmental consciousness. Against the backdrop of these momentous changes, the search for mineral wealth has taken mining companies into ever more diverse and remote corners of the world, embroiling them in an increasingly complex array of legal and social issues.

In the midst of this complexity, the importance of legally defined property rights is greater than ever. The scope of the property rights that may be acquired by mining companies in relation to their mining activities, and the obligations they will owe to the State and to third parties in relation to those rights, is subject to significant variation and should be the subject of close attention. Nevertheless, the legal protection of these property rights, as an institution, is essentially universal. Indeed, in almost all jurisdictions around the world, the protection of property rights is enshrined in the Constitution or in a higher-order legal norm as a fundamental obligation of the State—and serious questions should be raised about the suitability as an investment destination of any jurisdiction where this is not the case. Furthermore, the acquisition of property rights is often the touchstone for access to international investment protection regimes, and the gateway to international dispute resolution.

The practical implication of this is that the boundaries of a company's property rights under the local law generally also provide the boundaries of permissible actions by the State or private parties, *vis-à-vis* that company's mining operation. Importantly, these boundaries apply not only to the State's application of the existing legal framework (for example in an administrative process), and to its enforcement of that framework *vis-à-vis* third parties (for example by preventing encroachment onto land required for the mining company's operations), but also to the State's adoption of changes to that framework. Thus, while the State generally has broad discretion to exercise its legislative prerogatives in the manner best suited to the public interest—which may or may not be in the interest of the mining company—it also has a superseding obligation not to revoke or refuse recognition to a vested property right unless it makes payment of appropriate compensation.

In view of the foregoing, the acquisition of property rights should be seen as the lodestar for any strategy aimed at minimizing the risk of resource nationalism as manifested through action or inaction by the State. Foremost among the relevant property rights are the rights in the target minerals, which, as noted above, will generally need to be acquired from the State in the form of administrative, judicial, or sometimes contractual entitlements. Furthermore, the mining company will also need to acquire rights in any auxiliary resources and project components that are required to carry out its operations, including surface land, water, roads and railroads, electricity, *etc*. These rights may need to be obtained through entitlements from the State or from third parties.

Finally, the mining company should consider what rights it has in any future revenue to be earned from its operations. While many local laws (as well as international law) place limitations on the State's right to interfere with future revenues in such a way as to render the mining company's property rights valueless, such laws do not ordinarily provide an entitlement for the company to make a certain return on its investment. On the other hand, certain rights in this regard can be obtained through agreement with the State.

(See below for a representative, but not exhaustive, list of issues that should be considered in relation to the acquisition and definition of property rights by the mining company—and in turn the scope of the State's right to intervene in the company's operations.)

Mitigating the Risk of Resource Nationalism by Subnational Constituencies

As set out above, the acquisition of property rights is essential to protect against resource nationalism by the State, since the State is ordinarily bound to respect property rights granted in accordance with its own laws. On the other hand, the local population does not always accept the legitimacy of these laws, particularly where their own claims to land and mineral use may pre-date the existence of the State itself. In this context, the position of indigenous populations (or at least the recognition of indigenous rights by the State) becomes particularly important. For instance, the indigenous population may understand that the land and natural resources belong to the resident community as a whole rather than being subject to ownership by private individuals or the State. Or, as occurs in Canada, the State may recognize indigenous surface rights but assert overriding national rights over the minerals as necessary.

The United Nations estimates that there are more than 370 million indigenous peoples spread across 70 countries worldwide. Through law, custom, or a combination of the two, these indigenous peoples often have a claim of ownership

List of Issues to Consider Regarding Scope of Property Rights

1. Are there any conditions imposed on who can hold mining rights?
   - Is there a local ownership requirement?
   - Is the State entitled to a participation interest?
2. What sort of entitlement is necessary, if any, to explore for minerals in the target area?
   - Is there priority in acquisition of the entitlement based on date of application?
   - Does this entitlement confer exclusive rights upon the holder?
   - What is the duration of the entitlement? Can it be extended and, if so, under what circumstances? Are the circumstances clearly stated in the law?
3. Is there a separate entitlement for exploration and mining, or are they unified? If the entitlements are separate, what is the specific relationship between them?
4. What are the conditions to acquire a license or concession to mine a deposit? Are the conditions defined in the law? Are they objective?
5. Does the law set limits on the area of mining concessions, regardless of the size of the discovered deposit?
6. Does the right to mine include all minerals that may be discovered, or is it limited to certain minerals? Can mineral rights over the same area be co-existent?
7. Does the State maintain a reliable cadastre recording the mineral rights of third parties? What is the effect of registration of mineral rights in the cadastre?
8. Do the entitlements granted by the State confer a right of surface access?
   - How does the law deal with the rights and obligations of third party surface owners?
9. Are there any legal limitations on mining as a use of the land?
   - Restricted or protected areas?
10. Does the law, license or agreement address the issue of the miners' rights to install and maintain required infrastructure? Do they address rights of access to transportation routes, water, electricity, and other resources, whether public or private?
11. Does the State retain any control over the minerals once they are extracted?
    - How does the law deal with processing, transport, export and marketing rights?
    - Does the law require the minerals to be beneficiated locally?
12. Can the mining rights be subject to encumbrance? Are they transferable?
13. Are there conditions that must be met in order for mining rights to be maintained, *e.g.*, minimum work obligations or fee requirements?
    - Are there requirements as to when extraction of minerals must begin? Is time for development activities adequately accounted for?
14. What specific limitations are imposed upon the exercise of exploration and mining rights, *e.g.*, environmental and health and safety requirements, *etcetera*?
    - Which specific permits are required? Are the conditions and timelines for obtaining these permits clearly stated in the law?
15. What are the grounds for revocation of mining rights? Are they clearly stated in the law?
16. To what extent can rights be acquired to limit actions by the State in respect of future mining revenues, *e.g.*, does the law provide for rights to exemptions or stabilization of taxes or royalties under certain circumstances?
    - What are the conditions to acquire such rights? Are they clearly stated in the law?
17. To the extent that the scope of the property rights conferred on the mining company under the law or under the standard State contract is ambiguous or deficient, can these ambiguities and deficiencies be addressed in a more detailed mining or investment agreement with the State?
    - Does the mining company have the right to submit disputes under any such agreements to international arbitration?

to land and natural resources that are also potential sources of mining development. Even where indigenous peoples' claims of ownership are not formally recognized by the State, a mining company's failure to understand and address these claims exposes it to significantly increased risks of resource nationalism.

Claims of indigenous peoples to rights over land and natural resources can arise in a number of different contexts, including:

- Where they have legally recognized ownership or control over the land and natural resources in the form of treaties, land claim agreements, or tribal reserves;
- Where they are occupants or users of land and natural resources (either as customary owners or as people whose customary lands are elsewhere);
- Where they have traditionally used the land and natural resources for activities such as hunting, trapping, artisanal mining, or fishing;
- Where the land contains or may contain sites, objects, or natural resources of cultural significance to them; and
- Where their community's social, economic, or physical environment will be negatively affected by mining activities.

(See sidebar for a discussion of how national and international law are increasingly recognizing the rights of indigenous populations to limit the acquisition and exercise of mining rights.)

In view of the potential for conflicts to arise in relation to the assertion of rights over land or resources by indigenous communities, mining companies wishing to develop or operate projects on or near land customarily utilized (whether or not legally owned) by indigenous peoples should take additional measures to mitigate the risk of resource nationalism over and above those that it adopts *vis-à-vis* the State, whether or not they are required by law. There are important ethical and financial motivations for mining companies to ensure the effective management of their relationships with indigenous communities. From an ethical perspective, indigenous land is often the primary source of food, medicine, and shelter for the community, and may be considered as a physical representation of the community's culture and identity. Mining projects therefore have the potential to significantly

International and National Responses to Indigenous Peoples' Assertion of Rights Over Land and Natural Resources

The Indigenous and Tribal Peoples Convention (Convention 169), which was adopted on June 27, 1989, is an International Labour Organization Convention and one of the most important operative international laws guaranteeing the rights of indigenous peoples. Convention 169 is legally binding for those States that have ratified it and recognizes indigenous peoples' right to self-determination, while setting standards for national governments regarding indigenous peoples' right to land as well as economic and political rights.

Building upon the principles of Convention 169, the United Nations General Assembly adopted the Declaration for the Rights of Indigenous Peoples (UNDRIP), on September 13, 2007, which also sets out the individual and collective rights of indigenous peoples, including rights to culture, identity, language, employment, health, education and other issues. In contrast to Convention 169, UNDRIP is not legally binding, although it reflects obligations of States under other sources of international law, such as customary law and general principles of law. Although ILO Convention 169 and the UN Declaration were negotiated at different times by different bodies, they are mutually reinforcing and compatible in their focus on the need for national legislation to provide protection of indigenous rights.

Of specific interest to the mining industry, both the ILO Convention and the UN Declaration provide that indigenous peoples should have the legal right to be consulted on projects affecting their land and natural resources, which may include the right to say "no" to proposed mining activities.

At the international level, these instruments have been accepted by multilateral development agencies, NGOs, and prominent members of the investment community. For example, in August 2011, the International Finance Corporation (IFC) released a revised Sustainability Framework requiring its clients to obtain the free, prior, and informed consent (FPIC) of indigenous peoples under certain circumstances, including the exploitation of natural resources on lands traditionally owned by or under the customary use of indigenous peoples.

At the national level, States are establishing formal recognition of indigenous peoples' rights at varying levels in the legal framework—although typically in a manner that is less expansive than the formulation set forth in Convention 169 and the UNDRIP. For instance, Australia's national legislation requires explicit consent by traditional landowners as a pre-requisite for a mining project to proceed (although the State can override a "no" decision if the project is determined to be in the national interest). Other States mandate consultation with indigenous peoples as a part of the regulatory permitting process, with varying degrees of commitment by the State to ensure that consent is obtained (*e.g.,* Canada, Peru, Columbia, Papua New Guinea, Chile, South Africa, and the Philippines).

Although national legislation on this subject covers a broad spectrum, the trend appears to be moving toward a clearer recognition of indigenous rights to consent to minerals projects and the imposition of consultative requirements on the part of the extractive industry.

impact the livelihood and culture of indigenous populations and care should be taken to minimize these disruptions.

From a financial perspective, poor relations with an indigenous community can result in tangible financial consequences for the company, such as litigation, delays, vandalism, negative publicity and risk to corporate reputation, or even the ultimate termination of the project.

Thus, in any context where indigenous rights could be become relevant, mining companies should proactively seek out and consult with the indigenous communities from the outset of the potential project by engaging in a comprehensive and inclusive dialogue with all elements of the affected community, including women and youth.

In this consultation, the company should seek to communicate the company's long-term and short-term plans and to discover:

- any conflicts that may arise with respect to who owns the land and natural resources;
- what steps may be taken to mitigate/avoid adverse affects of the proposed mining project on the indigenous community;
- any unique indigenous knowledge about the local environment (*e.g.,* location of sacred lands, valuable traditional knowledge and experience in how to manage the local environment in a sustainable manner); and
- the nature of any economic and community benefits that can be offered to indigenous communities, such as training, employment, bidding opportunities on service and supply contracts, literacy programs, educational scholarships, health clinics, *etc*.

Where warranted, mining companies should consider negotiating Community Development Agreements (CDAs) on the basis of their consultation with the relevant indigenous communities. These agreements are increasingly being used as a key mechanism for defining the obligations of mining companies *vis-a-vis* impacted communities and are mandated in a number of countries as part of the regulatory consultation process (*e.g.,* Papua New Guinea, Chile, South Africa).

Unfortunately, resolving tensions between the claims of indigenous peoples and the rights of mining companies is complex and time-intensive for all involved, especially where national legislation does not yet adequately address the issues. Nevertheless, as previously indicated, the best way to mitigate the risk of resource nationalism is to define conflicting rights at the outset on a mutually acceptable basis, and it remains incumbent upon mining companies to attempt to do so whenever possible.

Conclusion

Resource nationalism is a complex phenomenon, but that does not mean that mining companies cannot adopt targeted strategies to mitigate the risks that it may pose for their projects. By carefully considering the acquisition and scope of property rights in relation to the planned mining project, as well as any competing claims of ownership that may be espoused by the State or by third parties, mining companies can more effectively anticipate and weather the impacts of resource nationalism across regions, and in all market cycles.

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Recent Developments in Whistleblower Retaliation Cases Under the Mine Act

by Willa B. Perlmutter

Pretty much every U.S. mine operator these days is aware—too aware, really—of the increasingly aggressive stance that the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), has taken toward mine safety enforcement in recent years pursuant to the Federal Mine Safety and Health Act ("Mine Act"). Equally problematic for a growing number of operators is the increase in so-called discrimination litigation before the Federal Mine Safety and Health Review Commission ("Commission") pursuant to § 105(c) of the Mine Act, ostensibly to protect self-proclaimed whistleblowers from retaliation by their employers. In 2012, for example, MSHA filed with the Commission a record number of requests for temporary reinstatement (indeed, more than double the number in any previous year) and discrimination complaints on behalf of miners. Indeed, MSHA has recently taken to what at times seems like crowing about its growing discrimination docket, as though it sees itself as the only thing standing between what it perceives to be noble but beleaguered safety crusaders and a legion of scofflaw operators all too willing to tolerate an unsafe work environment while trampling the rights of its workforce.

This article will address two recent developments in Mine Act discrimination litigation: (i) the status of temporary reinstatements after the Secretary concludes no violation of §105(c) has occurred; and (ii) a mine operator's right to seek reimbursement of money paid to a complainant in lieu of wages under an economic reinstatement agreement.

Overview

The broad outlines of how a discrimination case proceeds should be familiar to every operator out there: a miner files a complaint with MSHA alleging that he was retaliated against for engaging in some legally protected, safety-related activity, whether it be making a safety complaint, refusing to work under conditions he believed were unsafe, or participating in proceedings under the Mine Act. MSHA investigates the complaint. If the miner claims he was fired for engaging in protected activity and MSHA finds that the complaint was "not frivolously brought," MSHA asks the Commission to temporarily reinstate the miner to his former position while MSHA completes its full investigation and decides whether the miner's rights really were violated. Although the operator can challenge the miner's right to temporary reinstatement, such challenges are rarely successful because the "not frivolously brought" standard, as it has been interpreted by the Commission, sets such a low bar for MSHA and the miner to cross that it is effectively meaningless.

If the mine operator does not want to bring the complaining miner back to the job site while the case is proceeding, it can agree to "economic reinstatement," which effectively means that the company agrees to pay the miner to stay home until the miner is no longer entitled to temporary reinstatement. If MSHA decides that the miner's rights were indeed violated, it will file a complaint with the Commission (the so-called "merits case") to vindicate those rights. If, however, after further investigation, MSHA finds that no violation occurred, it notifies the miner and the operator of its finding, at which point the miner has the right to file his own complaint with the Commission to seek relief from the alleged retaliation.

Dissolution of Temporary Reinstatement

The question often arises: what happens when MSHA obtains temporary reinstatement on a miner's behalf only to conclude, after further investigation, that the miner's complaint of discrimination lacks merit? Until recently, the law was somewhat unsettled. For many years, a Commission rule required temporary reinstatement to be dissolved if MSHA found the complaint of discrimination lacked merit. In 2006, however, MSHA persuaded the Commission revise its rule to eliminate the automatic dissolution provision, on grounds that temporary reinstatement *must* remain in place even if MSHA subsequently decided that there was no merit to the complaint and abandoned the miner's cause. According to MSHA's reading of the Mine Act, if the miner brought his own case, the operator was simply stuck employing him (or at least paying him) until the bitter end: it either had to keep the miner on the job or pay him to stay home until a final order was entered in the case, a process that could take a year or more to resolve (due in no in small part to the miner's disincentive to cooperate in getting the matter scheduled for a prompt hearing). In subsequent administrative litigation, the Commission confirmed that its rule change was intended to codify MSHA's radical policy position.

Fortunately, in two recent U.S. Court of Appeals decisions, the Commission's change of policy (adopting MSHA's interpretation of the statute) was rejected and its former practice (of dissolving temporary reinstatement when MSHA finds that the discrimination complaint lacks merit) restored. In *North Fork Coal*, the Sixth Circuit Court of Appeals held that temporary reinstatement does not continue after MSHA determines that a miner's complaint lacks merit. In that case, a miner was fired for alleged disciplinary issues. He brought a discrimination complaint and MSHA obtained temporary economic reinstatement for him. MSHA subsequently decided not to proceed and the administrative law judge ordered the miner's temporary reinstatement dissolved. The miner challenged the judge's ruling on appeal and, in a split decision, the Commission reversed the ruling. North Fork appealed to the Sixth Circuit.

Applying general principles of administrative law, the court of appeals decided that the statutory language of the Mine Act was unclear as to whether temporary reinstatement should survive MSHA's decision not to bring a merits case on behalf of a miner alleging discrimination. Since the law was ambiguous, the court had to find the "most reasonable interpretation."

In so doing, the court gave *some* deference to MSHA—but not *absolute* deference, because MSHA's interpretation was offered in litigation, an informal medium, rather than through notice-and-comment rulemaking. Looking at the language of the Mine Act and its legislative history, together with MSHA's 27-year acceptance of the Commission's previous practice of dissolving temporary reinstatement after a finding of no discrimination, the court held that that "the most reasonable interpretation of the Mine Act is that the order of temporary reinstatement dissolves when the Secretary determines that no violation has occurred."

Less than three months later, the Seventh Circuit joined the Sixth in holding that temporary reinstatement ends after MSHA decides not to pursue a merits case on a miner's behalf. In *Vulcan Construction Materials*, after MSHA found that the miner's discrimination complaint lacked merit, Vulcan asked the administrative law judge to dissolve the economic reinstatement that had previously been ordered at MSHA's request. Echoing the position it had taken before the Sixth Circuit in *North Fork* (which at that point had not yet been rejected by the appeals court), MSHA objected. The judge agreed with MSHA and declined to dissolve the reinstatement. On appeal, the Commission affirmed the judge's decision, the Commissioners taking the very same positions they had in the *North Fork* case.

Vulcan appealed. After an in-depth review of the positions historically taken by MSHA and the Commission, the court got to the heart of the matter. Unlike their colleagues on the Sixth Circuit Court of Appeals, the judges on the Seventh Circuit panel concluded that the Mine Act was not ambiguous at all, and that Congress intended for temporary reinstatement to be tied to MSHA's advocacy on behalf of the complaining miner, such that it should terminate with the termination of MSHA's involvement. The Seventh Circuit did not end its analysis there, though. Even though it was not necessary to its holding, the court held that MSHA's position was entitled to *respect* but not to *deference* because it was not arrived at pursuant to MSHA's rulemaking authority and was, simply, a position in litigation. The appellate decisions in *North Fork* and *Vulcan* effectively carve the Commission's original (pre-2006) practice into the bedrock of Mine Act law: once MSHA makes a finding of no discrimination, the previously ordered temporary reinstatement dissolves as a matter of law.

Issues Relating To Reimbursement

Okay, so it is clear that once MSHA decides that the operator had not violated § 105(c) of the Mine Act as alleged, temporary (or economic) reinstatement must come to an end. But what happens if MSHA takes the miner's merits case and *economic* reinstatement continues for the duration of the litigation (which could be months or years), but ultimately MSHA and the miner lose the case? Is the mine operator entitled to reimbursement from the miner for the months or years that it paid him to stay home? (This is not an issue where the miner was temporarily reinstated since, in that case, the operator presumably had the benefit of the miner's labor.)

Generally, the answer is "no." According to the Commission, "if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim."

Two recent cases, however, call into question whether monies paid to a miner that, in the final analysis, were not deserved, are truly beyond recoupment by the operator. In *Hildreth v. Teck Alaska*, after the parties agreed to economic reinstatement, MSHA concluded there had been no discrimination after all and declined to file a complaint on the miner's behalf. It told the miner of its decision but somehow neither MSHA nor its lawyers in the Office of the Solicitor of Labor thought to notify the operator, who continued to pay the miner even after his economic reinstatement should have come to an end. By the time the operator found out, it had already paid the miner almost $10,000 more than it would have had it known that he was no longer entitled to economic reinstatement. What's more, the miner had already spent the money.

When the company asked the administrative law judge to order reimbursement, the judge wrote that "the novel issue presented … is whether and to what extent Hildreth can be compelled to repay Respondent for temporary economic reinstatement payments that Hildreth received and spent despite his knowledge of MSHA's finding of 'no discrimination … .'" After acknowledging the general rule that an operator could not recoup sums paid pursuant to an economic reinstatement agreement, the judge looked to the common law of unjust enrichment—what happens when someone mistakenly makes a payment to a recipient who was not entitled to receive it. In this case, the judge found, the miner knew he wasn't supposed to get the money, but he took and spent it anyway. The judge netted out the taxes withheld on the miner's behalf and a small sum that was correctly paid before MSHA found the miner's complaint lacked merit and arrived at the sum of $4,739.97 as the miner's liability for the unjust enrichment. Strangely, though, the judge then said that if the miner won his case, any back pay he was awarded would be reduced by that amount but that if he lost, the judge would "then decide whether restitution to [the operator] remains appropriate after reviewing all relevant factors." In a footnote, the judge also took MSHA and its lawyer to task for what he called "the sloppy handling of this case," blaming them in the first place for the overpayment that the miner knowingly accepted.

While the *Hildreth* decision might be distinguished as addressing a unique circumstance, operators should take note of a comment made by the Commission in an Order denying a stay pending review in *United Mine Workers of America o/b/o Franks and Hoy v. Emerald Coal Resources*. There, the Commission suggested it may be open to allowing an operator to recover undeserved payments. Following a finding of discrimination after a trial on the merits, the operator was ordered by the administrative law judge to pay the complaining miners back pay, with interest, for the time they had been wrongfully suspended. The operator sought review by the Commission and asked the Commission to stay the judge's order while the appeal was pending (so it would not have to pay the miners until its appeal was decided). The Commission considered whether operator satisfied the legal standard for a stay, which includes (among other factors) whether the operator would suffer "irreparable harm" if the stay was not granted. The Commission denied the stay, partly because it did not believe the operator would be "irreparably harmed," since "'[E]conomic loss does not, in and of itself, constitute irreparable harm' … , and in any event *Emerald can seek reimbursement from the two miners in the event the Commission overturns the judge's decision*." (Emphasis added.) It is hard to know whether or how, but this seemingly off-the-cuff statement could herald a significant change in the right of a mine operator who wins a discrimination case to recoup moneys paid to a miner pursuant to an economic reinstatement agreement.

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The MSHA Regulatory Agenda—an Active Year Ahead in 2014

by Edward M. Green

As we enter into the second year of President Obama's last term, he is faced with a divided Congress that remains inhospitable to many of his Administration's objectives. With crucial mid-term elections capping the year, many observers (including the author) predict that there will be a heightened emphasis on executive branch action, unencumbered—to the extent possible—by the Congress.

With regard to mine safety and health regulations, the seeds for increased activity can be found in the MSHA portion of a list of all the Department of Labor ("DOL") rulemakings as described in the Fall 2013 Executive Branch-wide Regulatory Agenda ("RA"). This RA was released on November 26. However, the White House Office of Management and Budget ("OMB") directive seeking information for the RA is dated August 7, and the mandated deadline for submissions by MSHA and other agencies was August 29. Thus, information in the RA may be dated. Nevertheless, it provides a snapshot in time and is a useful overview of MSHA's docket of pending rulemakings. In addition to the November 26 publication of the Fall 2013 RA, in the Federal Register for January 7, 2014, the General Services Administration's Regulatory Information Services Center published a lengthy "Introduction to the United Agenda of Federal Regulatory and Deregulatory Actions." With regard to MSHA rulemakings, this document essentially repeated the information of the Fall 2013 RA. Finally, as will be described below, on January 8, MSHA's long-pending rules on proximity detection systems for mobile machines in underground mines disappeared from the RA—the first regulatory movement of the new year. No official reason was given for this action.

The Spring 2014 RA should be released around the Memorial Day Holiday. By that time, it is likely that some of the rulemakings described and summarized below will have advanced on the road toward completion.

Description of the Rules

Although the rationale is unclear, some of these rulemakings are viewed as more important than others. Thus, the RA lists the DOL MSHA-related regulatory priorities, divided into the following somewhat artificial and bureaucratically described categories:

1. **MSHA/Plan/Prevent/Protect Initiatives**

   a. Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines;

   b. Proximity Detection Systems for Mobile Machines in Underground Mines;

3. **MSHA Risk Reduction Initiatives**

   a. Lowering Miners' Exposure to Coal Mine Dust, including Continuous Personal Dust Monitors;

   b. Regulatory Actions in Response to Recommendations Resulting From the Investigation of the Upper Big Branch Explosion;

   c. Respirable Crystalline Silica Standard; and

4. **MSHA Regulatory Review / Burden Reduction Initiative**

   a. Criteria and Procedures for Proposed Assessment of Civil Penalties (Part 100).

Summary of DOL-MSHA Regulatory Priorities—The Hidden Hand of OIRA

Set forth below is a summary of the status of these key rulemakings. At the center of all of these proceedings (as well as all executive branch agencies' rulemakings) is a relatively little known, small, and secretive organization in OMB called the Office of Information & Regulatory Affairs ("OIRA"). Virtually all rules developed by agencies like MSHA must be sent for review and approval by OIRA before the agency can send them to the Federal Register for publication as either proposed or final regulations. Theoretically, OIRA is supposed to examine rulemakings to determine their adherence to and harmonization with a variety of executive orders ("EO"), such as EO 12,866, "Regulatory Planning and Review." From a policy perspective, OIRA appears to this long-time observer to effectively carry out that mission; but it also serves as a political clearing house for the Obama Administration (and previous Administrations, going back to that of President Ronald Reagan). For example, prior to the 2012 presidential election, there is little doubt that OIRA simply held up most politically controversial "hot potato" rulemakings from further activity, including some of the MSHA regulations described below. Furthermore, the workings of OIRA are so opaque that any outside examination of its analyses and the timing of completion of its work on any given rulemaking is no more than educated guesswork of the movements of this "hidden hand." These summaries, therefore, include the publicly posted date when (if applicable) the rule was sent to OIRA for review. Once sent, however, the hidden hand controls movement. Thus, this author's best judgment as to the accuracy of any projected Federal Register publication date is included.

Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines

Proposed in the Federal Register of August 31, 2011, the comment period closed on November 14, 2011. Even though the issue is a favorite of MSHA Assistant Secretary Joe Main, for over two years, finalization of these rules languished. However, the RA now projects publication of a final rule in February 2014. With posting to OIRA having taken place on January 8 (as noted above), it's likely that the February 2014 projection for a final rule is realistic. As for what the rules will require, that remains to be seen since the specific contents of the final regulations will not be known until they appear in the Federal Register. We do know that one of the major flaws in the 2011 proposal was that available proximity detection systems did not have the precision to stop within the very specific distance from a miner in the "red zone," as was mandated by the proposed rule. That is not to say these available systems could not otherwise perform effectively. Indeed, since the 2011 proposal, a number of underground coal mine operators have voluntarily equipped their continuous miners with proximity detection systems. Whether such voluntary efforts will conform to the final regulation is unknown. Public statements from Assistant Secretary Main have shed little, if any, light on the issue. On the one hand, in his end-of-year summary of mining fatalities for 2013, Assistant Secretary Main said that of the 20 coal mine fatalities that occurred last year, four fatalities could have been prevented with proximity detection systems. On the other hand, he also said that as of December 2013, more than 380 proximity detection systems had been installed on continuous mining machines (287) and on other mobile equipment (100).

Thus, once published as a final rule, its requirements will have to be studied very carefully.

Proximity Detection Systems for Mobile Machines in Underground Mines

Related to the above, a request for information ("RFI") on proximity detection systems for *mobile machines* in underground mines was published in the Federal Register on February 1, 2010, and the comment period on that RFI closed on April 2, 2010. A proposed rule had been under review at OIRA since September 16, 2011 (two weeks after the continuous mining machine rule was published in the Federal Register). The scope of this mobile machine proposal was confusing. At various times, MSHA described its coverage as mobile machines in all underground mines—both coal and metal-nonmetal mining. At other times, the scope seemed to be limited to underground coal mines. Whatever may have been the coverage of these to-be-proposed rules, the reasons for delay by the hidden hand of OIRA were unknown. The RA projected publication of this rule as a proposal in May 2014. That date has now been made moot by the above-noted January 8 disappearance of this item from the RA. No official explanation has been given for the disappearance of this rulemaking from the current postings; however, at least one trade press report stated that MSHA will revise this package "to make refinements consistent with technological advances." It will be most interesting to see whether these "technological advances" also show up in the continuous mining machine proximity detection system final rules.

Lowering Miners' Exposure to Coal Mine Dust, including Continuous Personal Dust Monitors

Proposed in the Federal Register on October 19, 2010, the comment period on the rulemaking closed on June 20, 2011. Certainly the most complex and controversial rulemaking of Joe Main's tenure as MSHA chief (as evidenced by a thirteen-hour public hearing at MSHA headquarters in February 2011), the proposal is founded on the notion that a nationwide epidemic of new cases of coal workers' pneumoconiosis ("CWP") exists in younger coal miners, despite the fact that mandatory health standards for exposure of coal miners to respirable coal mine dust have been in effect since 1971.

Central to the proposal would be: (1) imposition of a 1.0 mg./m.^{3} respirable coal mine dust standard (in lieu of the current 2.0 mg./m.^{3} standard); (2) as measured over a single full shift (as opposed to the current system of averaging measurements taken over a series of shifts); and (3) use of new technology to measure exposure (the continuous personal dust monitor), as opposed to the current gravimetric sampler. The proposal has been roundly and exhaustively opposed by the industry on the grounds (among others) that no nationwide epidemic of CWP exists, and that only some "hot spots" of chronic lung disease (most likely silicosis) have been identified in the Southern Appalachian Region. Further, the industry maintains that it would be technologically and economically infeasible for mine operators to comply with the proposed rule. Concerns about feasibility have also led to quiet opposition by the United Mineworkers' of America ("UMWA").

As for the status of this rulemaking, after over two years of being hidden in the workings of the bureaucracy (including in the run-up to the 2012 presidential election), a final rule was sent over to OIRA on August 21, 2013. Previously projected to be published in the Federal Register as final in December, that goal was missed. With both industry and the UMWA opposed to the rule as proposed, and in spite of the fact it is central to Joe Main's legacy as the key part of his campaign to "STOP BLACK LUNG NOW," whether it will be finalized anytime soon is uncertain. Previous efforts to reform the respirable coal dust rules—by Davitt McAteer in the waning days of the Clinton Administration, and by Dave Lauriski in the first term of President George W. Bush—foundered in the face of industry and UMWA opposition. One would have thought the third time would have been the charm, but the current proposal managed to garner intense opposition from both coal mine operators and miners, despite the fact of consensus among all stakeholders that the current rules are outmoded and in need of reform—and even a consensus among the UMWA and some coal mine operators on a framework for reform (a framework largely ignored by MSHA).

Regulatory Actions in Response to Recommendations Resulting From Investigation of the Upper Big Branch Explosion

Based on MSHA's accident report of the April 2010 Upper Big Branch Mine Explosion, MSHA's recommendations for regulatory actions would appear to be in line for a Request For Information ("RFI") to be published in the Federal Register seeking data, comments, and information on issues relating to rock dusting, ventilation, mine examinations, certified persons, and MSHA-approved instructors. Publication in the Federal Register is projected for March 2014. This date would appear to be in the ballpark.

Respirable Crystalline Silica

Projected to be published in the Federal Register as a proposed rule in June 2014, we can expect a proposed permissible exposure limit ("PEL") of 50 µg/m³, identical to the new silica standard proposed by OSHA on September 12, 2013 (after years of review by OIRA). Demonstrating intra-departmental collaboration, MSHA maintains it will use OSHA's work on the health effects of occupational exposure to crystalline silica and OSHA's risk assessment—a dubious foundation in this author's view. The MSHA rule will cover both surface and underground coal and metal-nonmetal mines. However, it is unlikely to be proposed in the Federal Register in 2014. It may not even reach OIRA review next year because it appears to be so strongly reliant on the OSHA proposed silica rulemaking, which is very controversial and is likely to remain open for comment until at least mid-2014.

Criteria and Procedures for Proposed Assessment of Civil Penalties

Also projected for publication in the Federal Register this past December as a proposed rule, it has been under review at OIRA since December 2, 2011. Touted as a rulemaking to improve the efficiencies of MSHA's efforts to assess civil penalties and facilitate resolution of enforcement issues, it remains to be seen as to whether those purposes can be achieved. The last revision of Part 100 in March 2007 was similarly touted by then-MSHA chief Richard Stickler, but proved to be a wolf in sheep's clothing. This proposal could be on track for publication before the end of the year.

A Word about Refuge Alternatives

Although not listed as a regulatory priority, the RFI for Refuge Alternatives is included as an entry in the MSHA RA. Mindful, as noted at the outset, that the information in the RA may be dated, in the case of this RFI that is certainly the case. With the publication in the Federal Register this past December 6 of an extension of the RFI's comment period until June 2, 2014, to allow interested parties time to review new NIOSH research raising significant questions about the effectiveness of the currently deployed fleet of inby portable refuge alternatives in underground coal mines, the stage is set for a very important and controversial effort, likely to be front and center in 2014, and for some time thereafter.

This complex issue will be addressed more fully in a future issue of The Mining Law Monitor, but by way of brief background, among the provisions of the MINER Act, enacted in June 2006, following the January 6, 2006 Sago Mine Explosion, was a congressional mandate that MSHA conduct a refuge alternative rulemaking. The resulting regulations, promulgated on December 31, 2008, require the deployment of underground coal mine refuge alternatives for use by miners who might be trapped and unable to escape in an emergency.

Technology-forcing in nature, these regulations were controversial to begin with; they became even more controversial in 2013 for two reasons. First, the breathable air, air monitoring, and harmful gas removal components of grandfathered refuge alternatives were required to be upgraded to enhanced MSHA performance specifications and to be then approved by MSHA by the end of 2013. That proved to be such a formidable task that, as we begin the new year, significant portions of this mandate remain to be completed. Second, and more importantly, around mid-year, NIOSH began briefing MSHA leadership, coal mine operators, refuge alternative vendors, and the UMWA that studies NIOSH was carrying out indicated serious doubts about the efficacy of grandfathered refuge alternatives in connection with their ability to: (1) purge carbon monoxide from the ambient atmosphere of refuge alternatives; and (2) control ambient temperatures and humidity should miners have no choice but to enter a refuge alternative. These problems go to the very heart of the ability of the presently deployed fleet of portable inby refuge alternatives to allow miners who might enter them to survive for the requisite 96 hours in the current rule.

All of this came to a head just after the federal shutdown in October 2013, with the National Mining Association ("NMA") seeking an emergency rulemaking to allow MSHA, NIOSH, and the private sector to work on resolution of these problems. MSHA rejected the NMA request, but it is clear that these existential refuge alternative issues will have to be addressed and resolved. Work on these problems promises to be a highlight of MSHA's regulatory agenda in 2014.

Déja Vu All Over Again—Health Effects of Diesel Exhaust

Finally, although the issue is unlikely to be front and center in 2014, the question of the health effects of diesel exhaust bears mentioning as worthy of readers' attention. One of the most contentious issues of the Bill Clinton MSHA Regulatory Agenda, mandatory health standards dealing with the exposure to diesel exhaust of both underground coal miners, and underground metal-nonmetal miners were finalized by then MSHA Assistant Secretary Davitt McAteer, as "midnight rules" on January 19, 2001—the very last day of the Clinton Administration. The underground metal-nonmetal mine industry, especially, resisted imposition of these rules. Over time, however, with the introduction of emission control filter technology, increased use of low-sulfur diesel fuel, and (most importantly) a turnover of the fleet of diesel-powered equipment to newer, cleaner engines, compliance with these standards was largely achieved.

One residual of that epic struggle remained in play, however. Known as the NIOSH/National Cancer Institute Diesel Exhaust in Miners Study (the "NIOSH/NCI DEMS Study"), beginning in the early 1990s, NIOSH and the NCI undertook epidemiological and nested case-control studies of the miners working at eight underground nonmetal mines around the US. For reasons too lengthy to relate in this article, the results of the NIOSH/NCI DEMS Study failed to be published in peer-reviewed journals until March 2012, following which the United Nations' International Agency for Research on Cancer ("IARC") found diesel exhaust to be a known human carcinogen. The DEMS Study and the IARC finding have, in turn, renewed interest in the public health effects of diesel exhaust by the US EPA, which has commissioned the Health Effects Institute ("HEI") to hold a Diesel Exhaust Epidemiology Workshop this coming March in Boston. Following that Workshop, the HEI's Diesel Epidemiology Panel will begin work on a report (likely to be completed in 2015), which will serve as the basis for an EPA determination as to whether or not quantitative risk assessment of the public health effects of diesel exhaust should be carried out.

NIOSH has also alerted both MSHA and OSHA to the March 2012 DEMS peer-reviewed and published studies. As of this writing, NIOSH has also finalized a letter to the miners who participated in the DEMS to alert them to the risks of exposure to diesel exhaust. To its credit, NIOSH has worked cooperatively with interested DEMS mine operators on the substance and timing of this DEMS notification letter.

Diesel exhaust is not currently an item on the MSHA RA. The issue, however, bears very careful watching.

Conclusion

In short, 2014 portends to be an active year for MSHA rulemakings. We may see a bit of a lull as the mid-term elections approach; but then it can be expected the pace will quicken and pick up throughout 2015. Especially in 2015 and the presidential election year of 2016, key factors in the pace of MSHA rulemakings will be President Obama's status as an increasingly "lame duck," the political makeup and control of a new 114th Congress, and the dynamics of the 2016 presidential campaign. What "midnight rules" can be expected to be finalized on January 19, 2017 by the outgoing Obama Administration remain to be seen, but it is entirely possible that the hidden hand of OIRA will push one or more of the MSHA RA topics discussed above to the forefront.

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