



Mining Committee Newsletter

Vol. 4, No. 2

August 2007

MESSAGE FROM THE CHAIR OF THE MINING COMMITTEE

Jonathan Kahn

Greetings and happy summer to all Mining Committee members. This summer newsletter is focused on developing issues primarily related to public lands and has been prepared with the input and involvement of both the Mining Committee and the Public Land and Resources Committee.

This summer my two years as chair of the committee are up, and I wanted to thank all of you who have become more involved in the committee for your interest and your help. Cynthia Chandley and Nancy Hawkins have been appointed to carry on as co-chairs of the Mining Committee and I am certain they will do a fabulous job. Please feel free to let them know if there are topics or issues you think the committee should be dealing with.

I also wanted to thank the editor of this and previous newsletters over the past two years, Joe Dawley, for his fantastic work.

Enjoy the rest of the summer and I hope to see you at the 15th Section Fall Meeting in Pittsburgh.

MESSAGE FROM THE CHAIR OF THE PUBLIC LAND AND RESOURCES COMMITTEE

Denise A. Dragoo

Welcome to the joint newsletter of the Section of Environment, Energy, and Resources' Mining Committee and Public Land and Resources Committee! Our committee is pleased to collaborate on this newsletter as Congress debates mining on the public lands under a bill recently introduced by Congressman Rahall. We also invite you to participate in the 15th Section Fall Meeting on Sept. 26-30, in Pittsburgh. We are co-sponsoring a Resources Hot Topics panel at the Fall Meeting. Topics include recent developments in sustainable mining, the new Forest Service planning rules, the Alaska Natural Gas Pipeline Project, and the offshore development of oil and gas resources. Also, the committee wishes to thank the following vice chairs who will again join me this year:

- Craig T. Donovan, Committee Newsletter;
- Kim Harb, Programs;
- Peter Schaumberg, Public Service;
- Jonathan D. Simons, Technology; and
- Jim Butler, *Year in Review*.

Please contact us if you are interested in participating on a committee teleconference, submitting an article, or contributing to *The Year in Review*. Contact information is provided at the Web site.

Enjoy the newsletter!

Mining Committee Newsletter
Vol. 4, No. 2, August 2007
Joseph M. Dawley, Editor

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**CONGRESS TAKES AIM AT
THE 1872 MINING LAW**

Jim Butler
Parsons Behle & Latimer

Congress is once again considering amendments to the 1872 Mining Law—the federal statute that provides the legal framework for exploration and acquisition of hard rock minerals such as lead, zinc, copper, gold, silver, and uranium on federally owned lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service. On July 26, the House Subcommittee on Energy and Mineral Resources opened hearings on H.R. 2262, a comprehensive rewrite of the U.S. mining laws sponsored by Congressman Nick Rahall of West Virginia.

Congressman Rahall, a long-time critic of the mining law, introduced his legislation on May 10, 2007, the 135th anniversary of the statute. In a press statement accompanying the introduction of H.R. 2262, Rahall said that it was “far past the time for responsible reform of the Jurassic Park of all federal laws.” Rahall’s rewrite of the mining law is based on the model provided by the federal Surface Mining Control and Reclamation Act (SMCRA), which governs development of coal resources on federal lands. Rahall has been seeking revisions to the mining law since the early 1990s. His proposals passed the House of Representatives in 1991 and 1993 but he failed to find common ground with the Senate. Now his seniority, coupled with the new Democratic majority in the House, has placed Congressman Rahall in a key position to push the legislation as chairman of the House Natural Resources Committee.

Changes to the mining law have been a frequent topic of Congressional consideration and action. Since 1872, many minerals, including coal and other energy minerals, have been removed from the general mining law and placed under leasing statutes. In 1976, the Federal Land Policy and Management Act (FLPMA) imposed new requirement for claim staking and recording and also imposed environmental regulation and reclamation requirements on mineral activities on public land. Mining on public land is also subject to environmental laws that apply generally to industrial

activities, including the Clean Water Act, Clean Air Act, Endangered Species Act, and the National Environmental Policy Act. But the underlying premise of the 1872 law remains unchanged: minerals on federal lands may be acquired by staking claims on lands that have not been closed to mining, and those minerals may be extracted and sold without any payment of royalty to the U.S. government.

While the lack of a royalty on the production of minerals from federal lands has been the driving force behind most of the legislative interest, Congressman Rahall's bill reaches far beyond financial issues. The key issues raised by H.R. 2262 are (1) the imposition of a royalty or tax on production of minerals from federal land, (2) designation additional federal lands as off-limits to mining, (3) creating a fund to reclaim or restore lands affected by historic mining operations, (4) ending the opportunity for mining claims to obtain a patent or full title to federal lands, and (5) imposing additional environmental standards and permitting requirements on hard rock mining activities. These issues were the focus of the July 26 Congressional hearing, which included witnesses from environmental groups, taxpayer watchdog groups, and various segments of the mining industry.

Royalties

Under current law, the federal government receives no direct financial payment from the production of hard rock minerals on federal land. Claimants must pay claim location and maintenance fees, some states impose taxes on all mineral production, and economic activity associated with mining is subject to normal income, property, and sales and use taxes, but no royalty payment is required. H.R. 2262 would impose an 8 percent royalty on the gross value of production of minerals from federal lands. Most major mining industry representatives have agreed that a royalty would be appropriate, but sharply disagree with Congressman Rahall's method for calculating the royalty payment. Mining interests argue for a royalty that varies based on profitability—a royalty on the “net” proceeds of mining, rather than the “gross” proceeds. Rahall's “gross proceeds” royalty is premised on the federal royalty applied to coal mining, but mining companies point to the extensive processing

costs that are incurred to turn ore in the ground in a saleable commodity, costs that are not generally incurred by coal producers. The other contested issue is how existing mining operations would be affected by the royalty. H.R. 2262 would impose an immediate royalty upon existing operations. Mining interests argue for transition or grandfather provisions which would allow current operations to continue under existing law. Mining companies argue that the additional expense associated with a royalty, particularly the 8 percent royalty on gross proceeds in the Rahall legislation, could force early closure of existing operations. Environmental and taxpayer watchdog groups generally endorse the 8 percent gross royalty, with some asking that the rate be raised to 12.5 percent to correspond with the royalty imposed on federal oil and gas operations.

Designating Additional Lands Off-Limits to Mining

Lands may be removed from claim location system of the 1872 Mining Law by either Congressional or administrative action. Lands that are currently closed to mining include national parks, wilderness areas, monuments, defense lands, and a long list of other smaller categories. Between one-quarter and one-third of lands in federal ownership have been closed to further mineral claims. H.R. 2262 would add new categories of lands to those automatically excluded from mineral development. The largest block of lands would be more than 50 million acres identified by the Forest Service as “roadless” areas in a 2001 Forest Service rulemaking. Other categories of lands that would be withdrawn from the mining law include designated Wild and Scenic Rivers, or lands under study for that designation, and lands designated as “sacred sites” in accordance with Executive Order 13007. Mining interests argue that closing large area of public land to mineral exploration and development will inevitably mean the loss of valuable economic resources and the jobs and taxes that would accompany economic development. H.R. 2262 would also prohibit the BLM and the Forest Service from approving mining permits for operations on preexisting claims in these withdrawn areas, which is likely to lead to takings claims if mining claimants are prevented from developing proven mineral resources.

Reclaiming Abandoned Mines

One legacy of the 1872 Mining Law is a substantial number of mining sites that have been abandoned with inadequate or incomplete reclamation. These sites range from uncovered shafts that require fencing or backfilling to avoid safety hazards, to large sites which require major reclamation or treatment of polluted surface or ground water. Witnesses at the July 26 hearing cited an Environmental Protection Agency (EPA) report which estimated the cost of unfunded reclamation at between \$20 and \$54 billion. Funding to address these sites is currently limited and, as a consequence, the pace of reclamation is slow. Most of the royalties collected under H.R. 2262 would be dedicated to a federal fund to be used to reclaim abandoned mines on federal land. Use of the royalties for this purpose is not controversial, though there is some disagreement about how the fund should be managed (whether by the federal or state governments) and how funding should be prioritized.

Patents

The 1872 Mining Law allows a mining claimant to obtain full title to the surface and mineral estate of the mining claims for a nominal fee if the claimant can meet certain legal requirements regarding the quality of the discovered mineral and the location and maintenance of the mining claims. This has been one of the most controversial aspects of the mining law. Studies by the General Accounting Office and others in the 1980s identified abuse of the patenting provisions—lands obtained for small payments under the mining law, and then turned into highly valuable nonmining uses such as ski resorts, hotels and housing developments. In 1994, Congress enacted a moratorium on further patenting under the mining law and no new patent applications have been accepted since that time. H.R. 2262 would permanently repeal the patenting provisions. An end to patenting is one of the principal objective of environmental groups, who oppose the loss of public lands into private ownership. Mining interests argue that some security of title in land and minerals is required before companies will make large investments in mines and processing facilities. In past Congressional debates, the mining industry has sought to retain the option to patent mineral lands, but to increase the

payment for such lands to the appraised market value, or to place restrictions on the postmining uses of the lands to avoid potential abuses.

Additional Federal Environmental Standards

The environmental impacts of mining on public lands are governed by regulations adopted by the BLM and Forest Service, by federal and state environmental laws, and by state reclamation laws. Following the SMCRA model, H.R. 2262 would impose a single, federal, comprehensive environmental regulatory system on all hard rock mining activities on federal lands. The environmental title of H.R. 2262 includes some of the most controversial provisions in the bill. The mining industry argues that existing federal and state laws and regulations adequately protect environmental resources and that the “one size fits all” approach in SMCRA and the Rahall bill is inappropriate for the wide variety of minerals, mines, mining techniques and environments involved in hard rock mining. The BLM has also questioned the need for these provisions. At the July 26 hearing, the Deputy Director of the BLM testified that the environmental and permitting provisions of H.R. 2262 were “unnecessary” and “would only complicate” administration of BLM’s existing regulatory program. Critics of the mining industry point to sites where existing environmental regulations have failed to prevent environmental problems, including violations of water quality standards. Environmental groups support the Rahall approach, which includes not only uniform environmental standards but also enhanced enforcement of the environmental provisions, such as administrative penalties, criminal penalties, permit suspension, and expanded citizen suit provisions.

Prospects for Further Congressional Action

Another legislative hearing is scheduled for Elko, Nevada, on Aug. 21. Congressman Rahall has indicated that H.R. 2262 may move to markup as early as September and then to the House floor before the end of the year. As yet, there has been no action in the Senate, but if legislation passes the Senate, it is likely to be far more limited than the Rahall bill. Sen. Larry Craig (R. Idaho), has been a key player in prior mining

law debates and was the lead off witness at the House hearing. He promised to cooperate with the House on the legislation, but urged Congressman Rahall to send the Senate a much more “practical” bill if he expected fair consideration of the House-passed measure.

Another key player is Senate Majority Leader Harry Reid of Nevada. Nevada is the nation’s largest producer of minerals from federal lands (measured in value) and ranks among the top gold producing regions in the world. Mining is also Nevada’s second largest industry. In past Congressional debates, Reid has been an ally of the mining industry and has sought to moderate some of the changes proposed by Rahall and others. Reid and Rahall have already met to discuss the issue and both have pledged a cooperative discussion of the proposed legislation. However, it is unlikely that Reid would accept many of the elements of H.R. 2262, including the 8 percent gross royalty and the SMCRA-based environmental regulations. Unless a compromise can be reached, it is unlikely that the current effort to rewrite the mining law will fare any better than its many predecessors.

THE FUTURE OF MINING ON PUBLIC LANDS: A CRITICAL LOOK AT PENDING REFORM LEGISLATION

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From Sutters Creek to the Silent Spring, mining in the United States produced the raw materials that made American prosperity possible. The novel concept that minerals in the ground belonged to whomever found them on the public land inspired countless prospectors to finance development of the resource with sweat equity.

Externalizing social costs was elemental to success. Over time labor laws took hold of the industry as did health and safety demands, and finally environmental and resource protection parameters emerged.

Where once it was assumed that scarring the earth, pumping waste into the air or water, or putting workers

at risk of life or limb was sound practice; America’s mining industry evolved to conform with a social standard that was not conceived of when gold dredges and hydraulic mining were introduced.

The contemporary suite of imposts with which all must comply have forced the domestic hardrock mining industry to internalize many of these social costs. Simultaneously, technological developments have permitted the search for needed minerals to remain vital despite governmental oversight. Now previously undetectable deposits can be mined without undue degradation or danger.

America is dependent upon a steady stream of raw materials being converted into the everyday hardware of life. From the hundred pounds of copper in each hybrid engine to the climate-controlling gold film on energy-efficient office building windows to the mercury coating in the fluorescent tubes, the domestic and global demand for minerals continues to expand. While historic abuses of the environment must be redressed and on-going regulatory costs must be borne, compromising domestic mineral production puts life-style wants at risk and renders us vulnerable to aggressive external challenges.

Every decade efforts are initiated in the United States Congress to “reform” the General Mining Law. Well-intentioned people who do not seem to fathom the intricacies of converting rock into metal propose statutory hurdles to extractive operations. It is trite to riddle critics about where to source needed commodities if not from the public domain. It is suicidal, however, to assume that domestic miners cannot be run to the ground. Most recently, Rep. Nick Rahall of West Virginia sponsored legislation to address some of the perceived deficiencies in the present law. The following discussion evaluates some of the proposals in H.R. 2262.

Patenting

Patenting mining claims on vacant and unappropriated public lands vests the locator with an unassailable fee interest in real property. Initially the premium due the United States for such fee interest was set at a

reasonable amount; however, through inflation that charge has become relatively trivial. Rather than adjusting the fee to reflect contemporary standards, H.R. 2262 would eliminate patents altogether.

Patents accomplish the twin objectives of reducing the real estate holdings of the sovereign while enhancing the citizen's security of tenure. As a practical matter, the hurdles that have been placed on locators on public lands by and since the passage of the Federal Land Policy and Management Act (FLPMA), has diminished the absolute number of new federal mining claims substantially. Further, since 1994 the Congress has repeatedly enacted moratoria on the expenditure of appropriated funds for processing most patent applications. Accordingly the elimination of patents from the General Mining Law is only marginally relevant.

Royalties

Commodities are sold on a global market. Few seek to know the source of the zinc found in the penny in their pockets or the silver found on contacts in their computers. Those who separate metal from rock are motivated to do so at the lowest attainable cost. Because metallic minerals are often found in disseminated deposits, it is not uncommon for the mineralization to be concentrated in the center of a deposit while the periphery becomes increasingly dilute. Where that is the case, the quantity of recoverable material from any given source is proportionate to the profit derived from that material. Conversely, the higher the cost of recovery, the more low-grade material will be left behind. Royalties promote waste.

Critics of the General Mining Law argue that the absence of a royalty from hardrock mining operations on federal lands allows miners to remove and sell minerals from the public lands without payment. The argument fails to credit the contribution derived from making the material available at all. The economic pie gets larger as commodities are introduced into commerce. Domestically that presupposes the availability of reasonable profits. Globally, the trade-off for not paying a royalty to the sovereign translates into funds being available to internalize social costs. The

simple paradigm is that a nation can have a safe and environmentally acceptable mining industry that does not pay substantial royalties to the government, or an industry that is not responsive to social demands. A producer that cannot make a profit cannot exist in a free economy.

H.R. 2262 demands a socially responsible industry that pays a royalty equal to 8 percent of the gross production. This is analogous to taxing a bank on deposits. A royalty of this magnitude ensures that most mining on public lands in the United States cannot be profitable.

Special Places Closed to Mining

Representative Rahall's bill calls for mining claims to be evaluated for suitability of other uses before mining can be permitted. Special places such as recreation areas and sacred sites could be foreclosed to mining irrespective of the potential of a mineral deposit. Since mineable deposits are rare, the trade-off between using a given parcel for mining and for some other preclusive use goes to the availability of the commodity and its global price.

Inarguably, some lands should not be mined; however, the easier it is to preclude mineral recovery in a given location, the greater the concomitant costs of recovering needed commodities elsewhere. The General Mining Law is a land tenure act. In the past, dedicating special places such as Conservation System Units in Alaska has been worthy of separate legislation. The Rahall bill fails to recognize that mining is a transient use; therefore, after reclamation, a mined-out site becomes available for most other uses.

Environmental Regulation

The draft legislation commissions the Bureau of Land Management (BLM) to ensure mining operations comply with a detailed list of mandates. In the past, this responsibility has been effectively handled through regulation. As recently as 1998, 43 C.F.R. 3809, *et seq.*, was promulgated to implement FLPMA. While there may have been some omissions, for the most part these regulations are comprehensive.

A significant difference between propounding administrative detail by regulation rather than by statute is that the entities charged with implementing the mandate can take into account practical considerations. The administrative process has the benefit of extensive, direct input from the general public. Legislative enactments rarely have that luxury. The Rahall bill would be substantially improved by leaving regulatory action to the agency charged with implementing Congress' mandate.

For instance, the bill expands the concept of the "environment" to include "public health, and public safety" which the secretaries of Agriculture and the Interior, as appropriate, are required to protect "from undue degradation;" however, public health and safety issues are outside the scope of what is generally deemed to be the land management portfolio of either department.

The bill requires a claimholder to apply to the appropriate secretary for a discretionary, conditional permit authorizing non-casual mineral activities on a mining claim and then goes on to enumerate what the application should contain, including (1) site characterization data; (2) an operations plan; (3) a reclamation plan; (4) monitoring plans; (5) long-term maintenance plans, to the extent necessary; and (6) such other documentation as is necessary to ensure compliance with applicable federal and state environmental laws and regulations. It is well within the scope of the existing authority of the BLM and the Forest Service to require most, if not all of these plans.

In addition, the bill specifies that the application must contain details in twenty-one information categories, including violations of environmental or mining laws by the applicant or an affiliate within the preceding five years; all forfeitures or revocation of any mining bonds or permits by an applicant or an affiliate; all permits ever issued under the Surface Mining Control and Reclamation Act (SMCRA) or FLPMA; the type and method of mineral activities proposed; the anticipated starting and termination dates of each phase; maps; facilities; soils and vegetation; topography; and water supply intakes and surface water bodies; biological resources; measures to exclude fish and wildlife; predisturbance monitoring of groundwater; an

assessment of cumulative impacts on the hydrology; a description of the monitoring and reporting systems; accident contingency plans; compliance with any land use plans; cumulative impacts; evidence of financial assurance; site security; information on soils and geology; a copy of the applicant's required public notice; and such other environmental baseline data as the secretary may require.

Although a regulatory agency may have a legitimate need for all of this information in some cases, all of this information may not be useful in every application. Mom and pop placer operations on remote creeks in Alaska probably cannot afford the cost or time to make such submissions, yet their intrusion on an affected creek will be marginal at worst.

Any person who may be adversely affected by the proposed mineral activities may request a public hearing to be held in the county in which the mineral activities are proposed. After a public hearing, the secretary must formally determine whether the application is complete; whether the proposed reclamation is likely to be accomplished by the applicant; whether the land can be returned to a productive use; whether the area is open to location; whether the applicant has obtained all necessary federal, state, and local permits; whether the cumulative impacts to human health, water resources, wildlife habitat, and other natural resources will not cause undue degradation; whether the applicant has given adequate financial assurance; whether there will be no undue degradation of natural or cultural resources; whether the applicant nor any affiliate is ineligible to receive a permit; and whether ten years following mine closure, treatment of surface water or groundwater will be required. Permits cannot be issued for more than ten years at a time, must be reviewed every three years and are subject to modification by the secretary.

Permit applications must be accompanied by an indexed fee equal to the anticipated cost to the secretary of reviewing, administering, and enforcing it; however, rather than defraying such costs, the fee is to be deposited in the Abandoned Locatable Minerals Mine Reclamation Fund.

Abandoned Mines

The bill properly establishes an Abandoned Locatable Minerals Mine Reclamation Fund to be administered by the Office of Surface Mining Reclamation and Enforcement in which all receipts from fees, royalties, penalties, and other sources collected under this act are to be deposited.

The secretary is directed to maintain an inventory of abandoned locatable minerals mines on federal lands, use money in the fund for the reclamation and restoration of land and water resources adversely affected by past mineral activities, and deliver an annual report to the Congress on the progress in cleanup of such sites.

The bill also establishes a Locatable Minerals Community Impact Assistance Fund. This fund provides public services to political subdivisions that are socially or economically impacted by mineral extraction activities conducted under the general mining laws.

These two funds could be useful in redressing a number of problems generated by historic mining operations in some locations; however, because of the chilling effect on potential miners of other provisions of this bill, it is extremely unlikely that there will be sufficient revenue generated for the funds to make a substantial difference either in the area of reclamation or community impact.

Administrative Provisions

Finally, the bill directs the secretary to inspect every operation on public lands every calendar quarter or at the request of any person who believes he may be adversely affected by mineral activities and provides for substantial civil penalties for anyone who fails to comply with any environmental proscriptions. Depending on the location and size of the operation, quarterly visits to many operations may be unduly expensive and wholly unnecessary. Such judgments ought to be within the discretion of the secretary based on need.

H.R. 2262 is Too Little Too Late

To the extent that this proposed legislation is intended to foster and protect an environmentally sound mining industry on public lands, it is destined to be unsuccessful. There simply are too few major new mining operations planned for development on public lands in the United States to justify the effort. Between existing regulatory demands and judicial review, the domestic mining industry has essentially turned away from the General Mining Law.

The need to reclaim abandoned mine lands remains; however, this bill will not successfully fund such a program. To the extent that the Rahall bill would create two new unfunded bureaucracies—one to oversee and enforce the detailed environmental provisions and one to audit the royalty provisions—it calls for unwarranted appropriations. To the extent that it would protect the environment, it adds virtually nothing to the law.

Undoubtedly, if the existing law is not changed there will be occasional conflicts between entities that would bring valuable deposits on public lands into production and those who regard the location inappropriate or the operating plan unsound; however, the experience of the industry in recent years makes it clear that the weight of local opposition and governmental scrutiny already constitutes a significant deterrent. H.R. 2262 is, at this point, merely makeweight.

***ABA Section of Environment, Energy,
and Resources***

**15th Section Fall Meeting
Sept. 26-29, 2007
Pittsburgh**

PLAN TO ATTEND!

**See www.abanet.org/enviro/
for details**

TEN QUESTIONS REGARDING CO-TENANCY OF THE MINERAL ESTATE

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Under the general common law of co-tenancy, each of the co-owners of property has an absolute right to occupy the “whole” of the co-owned property. This concept is known as an “undivided interest in real property” and has been embraced in both English and American law.

Despite its deep roots, the theory of co-tenancy is not without flaws and unanswered questions. Naturally, conflicts arise among co-tenants regarding how best to utilize their jointly-owned property. In the context of jointly-owned natural resources, conflicts are often exacerbated as a result of the substantial effects the extraction of minerals can have. When there is a disagreement among co-tenants regarding whether to extract minerals from the property, the law struggles to strike a balance between the competing interests of each co-owner and the general policy of promoting the efficient development of natural resources. This article will address several of the most popular conflicts and how they are resolved under the law of various states in simply ten questions of co-tenancy.

The first fundamental and popular question under the general law of co-tenancy is must all co-tenants consent to the extraction of minerals from jointly-owned property? What if a conflict arises among co-tenants regarding whether or not they desire the minerals to be extracted at all? As in all property matters, the law on this issue varies from state to state; however, there is at least one constant. Courts have been willing to say that reasonable use of the surface estate to develop the oil and gas estate is permitted.

In the “rule of reasonable surface use” many courts have recognized that although the estates remain distinct and jointly owned, severed minerals cannot be developed without access being given to the surface estate. Therefore, courts have recognized that a mineral owner has the right to use the portion of the surface estate that is reasonably necessary to develop

the severed mineral interest. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550 (Col. 1995), citing *Rocky Mountain Fuel Co. v. Heflin*, 148 Colo. 415, 421, 366 P.2d 577, 580 (Col.1961); cf. *Frankfort Oil Co. v. Abrams*, 159 Colo. 535, 413 P.2d 190 (Col. 1966).

In Kentucky, unless the right is expressly limited by the terms of the lease or severance conveyance, an owner of the minerals has the right to use and occupy so much of the surface as may be **necessary and reasonably convenient** in the exercise of its rights to operate the facilities and market the oil and gas, even to the preclusion of any other surface possession. *Lindsey v. Wilson*, 332 S.W.2d 641 (Ky. 1960). Therefore, the debate focuses upon what is considered to be “reasonable use.”

A second popular question in this area of the law is must the mineral owner gain consent from **each** of the co-tenants before extracting the minerals? What if a company only receives the consent of one of many co-tenants and several of the others disagree with the decision to develop the minerals? Again, the answer differs from state to state.

The majority rule allows a single co-tenant to extract the minerals without the consent of all of the co-tenants. The rationales given for the majority rule are the following. First, oil and gas must be removed in order to be “enjoyed,” and exploration and extraction is not waste or misuse of the mineral, but rather, the proper use of the property. *See*, William C. Hurt and Gregory B. Jordan, *Co-Ownership: the Problem it Creates for the Oil and Gas Producer*, 6 EMLF 16 (1985).

Second, due to the fugacious nature of oil and gas, co-tenants must be able to protect their interests by extracting the oil and gas from their property. *See*, *Burnham v. Hardy Oil Co.*, 147 S.W. 330 (Tex. Civ. App. 1912), citing *Dabney-Johnston Oil Corp. v. Walden*, 52 P.2d 237, 246 (Cal. 1935).

Third, requiring consent from all co-tenants would give the fractional interest owner too much control over his other co-tenants. *See*, *Dabney-Johnston Oil Co. v. Allen*, 52 P.2d 237, 246 (Cal. 1935).

The minority rule holds that extraction of the oil and natural gas by a co-tenant without obtaining consent from all other co-tenants constitutes waste. *See*, William C. Hurt and Gregory B. Jordan, *Co-Ownership: the Problem it Creates for the Oil and Gas Producer*, 6 EMLF 16 (1985). The rationale given for the minority rule is that the removal of minerals constitutes the continuing destruction and/or waste of the mineral estate and a co-tenant should not be permitted to change or alter the estate without the consent of all of the co-tenants. *Chosar Corp. v. Owens*, 370 S.E.2d 305 (Va. 1988).

Long-standing Kentucky law has held that a co-tenant is not a trespasser when developing co-owned minerals and has the right to drill on commonly-owned property without the consent of the other co-tenants. *Petroleum Exploration Corporation v. Hensley*, 284 S.W.2d 828 (Ky. 1955). In addition, the highest court in Kentucky noted that a lessee of a co-tenant has the authority to develop the jointly-owned oil and gas subject only to the rights of the other co-tenants to receive an accounting of the royalties, or to demand a division of the minerals thus mined from the premises. *York v. Warren Oil & Gas Co.*, 229 S.W. 114 (Ky. 1921).

Through its common law, Pennsylvania has adopted the majority rule. In *McIntosh v. Ropp*, 82 A. 949, 955 (Pa. 1912), the Pennsylvania Supreme Court observed, “owing to the fugacious nature of oil and gas, and to their ability to be diverted by operations upon adjoining lands, it is peculiarly necessary that co-tenants should not be unduly restricted in the enjoyment of such properties.” *Id.*

More recently, the Pennsylvania Superior Court has stated, “[a]nother special rule relating to the mineral estate is that a tenant cannot restrain a co-tenant with an undivided interest in the land from realizing the value of the estate by producing or consuming the underlying minerals and such right is only subject to an accounting to his fellow co-tenants.” *Lichtenfels v. Bridgeview Coal Company*, 496 A.2d 782 (Pa. Super. 1985).

In contrast, Virginia appears to follow the minority rule. In the prominent case of *Chosar Corp.*, *supra*, the Virginia Supreme Court observed, “consenting co-

tenants had no right to remove coal from the common property without the consent of all co-tenants.” *Id.* at 308. Further, in the case of tenants in common, the court held that no tenant may change or alter the common property to the injury of his co-tenants without their consent. *Id.*

West Virginia also follows the minority rule and holds that removal by a co-tenant or oil and gas without the consent of his fellow co-owners constitutes waste; thus, such co-tenant is liable for an accounting to his fellow co-owners. *South Penn Oil Co. v. Haught*, 78 S.E. 759 (W. Va. 1913).

A third popular question under the law of co-tenancy is if a co-tenant opts not to join a lease for the extraction/production of the minerals, is he/she bound by its terms? Must a non-consenting co-tenant comply with the lease in effect or may they enter into a lease with another company?

If one seeks to extract the minerals in a state which follows the majority position (which allows a lease to be executed based upon less than one hundred percent of the interest in the mineral estate), the co-tenants who do not join the lease are **not** bound by its terms. Instead, they may enter into a separate lease agreement with another company for the same property and the same purpose.

This concept was addressed in Kentucky in the case of *York v. Warren Oil & Gas Co.*, 229 S.W. 114 (Ky. 1921). In *York*, the highest court of Kentucky stated, “[h]ad the son, who owned the other one-half undivided interest in the land, leased it to another company, both companies would have enjoyed the privilege of entering upon and using the surface of the lands while drilling for oil and gas to the same extent as their grantors could have done, each respecting the prior location and improvements of the other, and accounting to the co-tenants for their respective interest in the oil and gas produced.” *See*, *York*, 229 S.W. 114 at 116. Thus, essentially a “race is on” between the co-tenants to obtain a permit and begin the extraction of the minerals before the other.

Under Kentucky law, if a co-tenant consents to the terms of a lease and allows an extraction to occur, he/

she must receive an accounting from the producing party. The duty to account among co-tenants is succinctly stated in the following quote: "...the common law in this jurisdiction is that one is liable to his co-tenants for any rents and profits he collects from the joint property." *Howell v. Bach*, 580 S.W.2d 711 (Ky. Ct. App. 1978). In fact, if a formerly non-consenting co-tenant subsequently affirms the lease, he/she too may share in the royalties paid to the co-tenant/lessor. *See, Enterprise Oil & Gas Co. v. National Transit Co.*, 33 A. 687 (Pa. 1896).

At this point, the fourth question in co-tenancy becomes, what constitutes an accounting? Once again the answer is, it depends. Different measurements may be used for an accounting in different situations. For example, In *New Domain Oil & Gas Co. v. McKinney*, 221 S.W. 245 (Ky. 1920), the Plaintiff believed it had leased one hundred percent of the interest in the property and based on that assumption, removed the minerals. The court held that the co-tenant, whose interest later appeared, was entitled to receive **only** her proportionate share of the royalty for the period of time in which the company was unaware of her existence. However, the court reasoned that from the date of the lawsuit going forward, the co-tenant was entitled to receive a portion of the oil and gas produced minus expenses. *See, id.*

Further, in a situation in which all co-tenants consent to the terms of a lease, the Kentucky Court of Appeals has ruled that one co-tenant cannot enter into an agreement to receive a higher royalty payment than the others. In such a case, a co-tenant receiving a higher royalty must share the higher royalty amount with his/her co-tenants in proportion to ownership interests. *See, Howell v. Bach, supra.*

A fifth common question in co-tenancy is what is the relationship between it and the concept of waste? The basic definition of "waste" with regard to mineral extraction varies from state to state. For example, in Tennessee, "waste" is defined as "physical waste" as that term is generally understood in the oil and gas industry. It includes (A) underground waste caused by the inefficient, excessive, or improper use or dissipation of reservoir energy; and (B) surface waste caused by the inefficient storing, locating, spacing, drilling,

equipping, operating, or producing of oil wells or gas wells in a manner causing or tending to cause unnecessary or excessive surface loss or destruction of oil and gas. *See, TENN. CODE ANN. § 60-1-101.*

In Virginia, "waste" is defined as (i) physical waste; (ii) the inefficient, excessive, improper use, or unnecessary dissipation of reservoir energy; (iii) the inefficient storing of gas or oil; (iv) the locating, drilling, equipping, operating, or producing of any gas or oil well in a manner that causes a reduction in the quantity of gas or oil ultimately recoverable from a pool; (v) the production of gas or oil in excess of transportation or marketing facilities; (vi) the amount reasonably required to be produced in the proper drilling, completing, or testing of the well from which it is produced, except gas produced from an oil well or condensate well pending the time when with reasonable diligence the gas can be sold or otherwise usefully utilized on terms and conditions that are just and reasonable; or (vii) underground or above ground waste in the production or storage of gas, oil, or condensate. *See, VA. CODE ANN. § 45.1-361.1.*

Further, with regard to the issue of co-tenancy, in jurisdictions which have adopted the minority rule, requiring the consent of all co-tenants before the extraction of minerals may occur, doing so without the consent of all of the co-tenants is considered to be waste. *See, Smith v. United Fuel Gas Co.*, 166 S.E. 533 (W. Va. 1932); *see also, Chosar Corp. v. Owens*, 370 S.E.2d 305 (Va. 1988).

In all states examined, whatever the definition of waste, it is prohibited. For example, in Kentucky under KY. REV. STAT. ANN. § 381.390, if a co-tenant commits waste, he shall be liable to his cotenants jointly or severally for damages. In Pennsylvania, pursuant to 58 PA. STAT. ANN. § 404, the waste of oil and gas is prohibited. In Tennessee, the production or handling of crude petroleum oil or natural gas in such a manner to result in waste is prohibited. *See, TENN. CODE ANN. § 60-1-102.* In Virginia, several statutes comprise Virginia's prohibition against waste: *See, VA. CODE ANN. §§ 45.1-361.15; 45.1-361.27; 45.1-381.* Last, in West Virginia, W. VA. CODE § 37-7-2 states that if a co-tenant commits waste, he shall be liable to his cotenants for the damages.

A sixth question arises—are co-tenants liable to their co-owners for waste? Yes, in fact, depending upon the state, co-tenants have either a statutory or common law right to institute waste proceedings against their fellow co-tenants. In Kentucky, KY. REV. STAT. ANN. § 353.320 states that a waste proceeding may be initiated by any one or more parties who have a present or contingent interest in the land or estate or interest therein. In Pennsylvania, the courts are reluctant to interfere in the relationship among co-tenants. However, Pennsylvania courts have awarded damages for and enjoined co-tenants from committing waste. *See, Brotherton v. Christ*, 40 Luz.L.R. 411 (Pa. Com. Pl. 1949).

In Tennessee, although upon review there does not appear to be a definitive case on point, the case of *Barber v. Westmoreland*, 601 S.W.2d 712 (Tenn. App. 1980) intimates that a co-tenant may be held liable for waste. In Virginia, if any tenant of land commits waste, he shall be liable to any party injured for damages. The case of *Chosar Corp. v. Owens*, 370 S.E.2d. 305 (Va. 1988) makes it clear that this definition includes co-tenants.

What about lessees? If a company leases a piece of property from a co-tenant, are they liable to the other co-tenants for waste? The answer to this seventh question is yes in several states. The lessee of a co-tenant steps into the shoes of the co-tenant and therefore, obtains the rights and privileges of a co-tenant. Because co-tenants are liable to one-another, then the lessee of a co-tenant becomes liable for an accounting to his other co-tenants. *See, York v. Warren Oil & Gas Co., supra.; see also, Chosar, supra.*

The eighth question then becomes, what are the damages for waste? In certain circumstances an injunction may be appropriate to prevent the commission of waste. *See, Chosar, supra.* Injunctive relief against a co-tenant may be appropriate where the injury caused by one co-tenant to another is material, continuing, and not adequately remedied by damages.

Pennsylvania courts have been reluctant to enjoin co-tenants from committing waste. Instead, Pennsylvania

has embraced the theory that an injunction among co-tenants is not ordinarily granted to prevent waste, unless such waste is “malicious” or “destructive” *Brotherton v. Christ*, 40 Luz.L.R. 411 (Pa. Com. Pl. 1949).

Of course, monetary damages may also be appropriate. In all of the states examined, actions for trespass, nuisance, and intentional wrongdoing result in monetary damages being sought and received.

Ninth, how are these monetary damages measured? Generally, the measurement for the tort of waste is the diminution of value to the estate as a result of the waste, i.e. the value of the mineral in the ground. *Cecil v. Clark*, 39 S.E. 202 (W. Va. 1901). In jurisdictions in which the extraction of the oil and gas by one co-tenant is considered waste, damages are generally measured by an accounting of the profits and receipts received by one co-tenant resulting in a proportional division of those receipts being given to the non-consenting co-tenants.

The West Virginia Supreme Court has held that a co-tenant who had committed waste by taking gas out of the ground without the consent of their fellow co-tenants was required to account for his/her proportional share of the royalties received. *Smith v. United Fuel Gas Co.*, 166 S.E. 533 (W. Va. 1932). However, enhanced damages are also available under certain circumstances in which the waste is committed wantonly. In fact, a cotenant may be liable for up to three times the actual damages. *See, W. VA. CODE ANN. § 37-7-4; see also, KY. REV. STAT. ANN. § 381.400.*

Thus, the tenth and final question is, what is the underlying supposition of this area of the law that results in the myriad of legal issues? The answer—that two people are physically able to occupy the same piece of property at the same time. This inherent supposition violates the fundamental principles of physics. However, this article attempts to clear up some potential issues that arise as a result of this long-standing legal theory. If you have any questions or comments, please feel free to contact the authors in Lexington, Kentucky.