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Guest Commentary

Commentary: Mining law is once again under attack

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AP file

In this May 9, 2008 file photo, a male sage grouse fights for the attention of female sage grouse southwest of Rawlir

Among the many onerous restrictions imposed under the Greater Sage Grouse Approved Resource Management Plans (ARMP's) is the not so subtle, back door attack on the 1872 General Mining Law (as amended) of the United States.

The most egregious of these restrictions directly instigated by the ARMP's is that of the proposed mineral withdrawal. The invoking of a mineral withdrawal based upon a species that did not need to be listed is an attempt to set a precedent providing new powers to federal agencies that are already way out of control. Historically, a mineral segregation and subsequent mineral withdrawal were conducted in situations where there was a bonafide public interest or for national security. Examples include bombing ranges, areas to be flooded by dams, areas to be reclaimed from the desert to productive agricultural purposes, and more recently, areas to be withdrawn for wilderness as provided for by Congress under such laws as the Wilderness Act.

This currently proposed mineral withdrawal represents a significant precedent in that a bird that was not deemed necessary for listing under the Endangered Species Act as threatened or endangered can purportedly justify such an extreme measure. This underscores the duplicitous motive for this highly suspicious and likely subversive action.

Moreover, within the State of Nevada, there are 2.8 million acres proposed for withdrawal. BLM's LR-2000 database for Nevada shows the total statewide surface disturbance of mineral exploration and development as of January 2014 was 191,374 acres. This is 6.8 percent of the 2.8 million acres proposed for withdrawal. This disturbance total for the entire State includes significant acreage that is outside of sage grouse habitat. Why is this hugely disproportionate reaction even being considered? This too, underscores an evident hostility towards the General Mining Laws of the United States.

Everyone needs to be reminded that one of the fundamental purposes of the Mining Law is to secure domestic sources of metals that are vital to National Security. Moreover, it is achieved by the recognition of proprietary rights of the private entity in the mineral value in the ground. It is only through this fundamental recognition of

common law private rights that the industry of a free people achieves this basis of National Security. Why is this fundamental contribution to our society and civilization so arbitrarily undermined?

That the Mining Law is being deliberately undermined, indeed with the intent of evisceration, is evident in the rhetoric emanating from the federal agencies. We hear that all current claims in the area of mineral withdrawal will be subjected to a mineral examination process with the intent to declare these claims invalid. For a bird that did not need to be listed.

The mineral examination process used to be applied when an application for patent was submitted by the claim owner to establish fee title to the surface estate. Now it will be used for the opposite purpose, that of denying the proprietor his investment in the claims. Where there is no valid public purpose for a withdrawal.

We hear talk that only “valid existing rights” will be recognized. We are told that only those claims with a deposit that can demonstrate economic viability on the date the segregation is published can survive. In this case September 24, 2015.

Are we to believe that ALL economic variables are to be frozen in time in the evaluation of mineral potential? Commodity prices, fuel prices, labor costs, technological practices, interest rates – in short, all the economic variables that comprise an investment decision to go into production are to be ignored moving forward? And that the discovery has to have already been developed to the advanced extent that such an investment decision can be made?

It takes years to develop and delineate a discovery to such an extent, thanks in significant part to onerous regulations also designed to impede economic activity. But a deposit of recognizable potential that is in this long process and cannot rise to the level as yet of an economic deposit will be discarded and invalidated as not rising to the stated high bar of “valid existing rights”?

We hear of the prudent man test as defined in Castle v. Womble. We hear of the "marketability test" imposed by the Department of the Interior. These case decisions and solicitors opinions were made in the eras before the patent moratorium in 1993. These determinations were to apply to patent applications or areas of mineral withdrawal for a valid public purpose. They do not apply to a bird that was not deemed necessary to list as an endangered or threatened species. So, why the hostility to the Mining Law?

Can it be that the Mining Law represents the last non-discretionary vestige of recognized private rights in the public lands? To whom is this deemed so bad then, apparently necessitating an all out assault on this law?

History of Mining Law

The history of the Mining Law is well known. Upon the cognizance of a private entity, be it the classic individual prospector, or sizable exploration entity; a claim can be staked on public land with the purpose of exploring for mineral value. The claim is staked where there is knowledge suggesting the potential of a mineral deposit. One does not frivolously go through the effort, time, and cost to establish such a claim. One does not wait until an "economic " discovery has been made before fully perfecting these claims in the field and to file with the County Recorder. The prospector perfects in the field and files the claims to guarantee the recognized right to explore the potential. Moreover, this potential is a property right that can be marketed under lease or sale of the claims. There is a century and a half of practice and precedent recognizing this right.

The prudent man will expend his time and resources in his perception of this potential in his claims. This is a private investment. If he is wrong, there will come the day to declare "deep enough" and the prudent man will move on in accordance with applicable reclamation laws. The claims will be abandoned. If he is correct, further investment of private capital and time will be invested to explore for and to develop a discovery. The discovery of promising mineral is a sequential staged affair that takes time. One must be continuously applying the prudent man rule and making repeated decisions of whether to continue to make the investment of more time and resources.

Commonly, there comes the time the prudent man must approach other entities to enter into, invest, and participate in the ongoing exploration and development activity. The prudent man must be able to guarantee possession of a common law private property right in order to attract additional investment under contract in this potential. This is the right to continue to explore.

This right is jeopardized when the sovereign entity behind the public lands, be it state or federal, chooses to shoot itself in the foot, and attempts to set a precedent that arbitrarily claims the power to remove this common law private property right at an arbitrary whim. This is what this precedent represents by invoking a mineral withdrawal based upon a bird that was not deemed necessary to list as threatened or endangered. The Mining Law is under a full scale back door assault with this "non-listing" Trojan Horse.

Consider this. When an individual has data enough to present to a possible investor and convince that entity to come in as a partner under terms that guarantees to that partner an agreed upon proportion of right to the mineral value or to the potential of mineral value that is demonstrated, a contract can be entered into. A contract that is based upon a recognized common law property right. This has been the custom and precedent upheld in the 143 years since the Mining Law was passed. Unpatented mining claims have been leased, bought, and sold for years based on this recognition.

And consider further. Under these new terms being applied to mineral examinations, what if an individual or a company (they have the same rights) should be well advanced in the definition of a discovery? They have encountered some significant intercepts with drilling of a potentially economic deposit. Significant investment is attracted to further explore the potential size of the deposit. Currently it is unknown if the grade and extent of the deposit is well defined enough to say whether it will be an economic deposit under current market conditions. The paramount factors will be the size and grade of the deposit. Grade is king, but volume is paramount. So the strategy of continued investment will be in drilling to determine the extent of the deposit. Right now, the internal continuity and grade of the deposit, although important, is not as important as establishing the size for which geologic understanding and current exploration results may suggest as potential.

In the good faith strategy of drilling to determine the extents of the discovery, the spacing may be very wide. At this stage the wide spaced drilling in the known area of the discovery may not muster the geostatistical certainty to satisfy regulatory standards to qualify the deposit as being sufficiently measured to withstand the economic parameters of the so-called “marketability test.” The volume may be too small. At this stage, the decisions for capital investment must be based upon the potential volume at the grades indicated by initial discovery. The volume must be ascertained. Therefore wide spaced step out drilling that is for the purpose of determining the extent of the deposit is called for at this stage.

This process can take years, because the regulatory obstacles get ever more arbitrarily restrictive. What once took 3-5 years to develop a discovery to reach feasibility is now extended to the 10-year range. The ability to forecast economic parameters on which to base investment decisions becomes ever more tenuous.

And then let us now posit, as is currently demonstrated with this non listed sage grouse ARMP foolishness, that suddenly, without notice, the mineral developer is subject to a newly defined restrictive definition of the mineral examination process. Indeed, the federal agencies waited until December 10, 2015 to release a document called the Greater Sage Grouse Mineral Segregation and Proposed Withdrawal FAQ’s. This document outlines many newly defined and extremely restrictive criteria for valid existing rights. Under these new restrictions, the results of any further drilling you conduct will not be admissible after the date of the arbitrary mineral withdrawal.

The following is quoted from the question regarding an already existing Plan of Operations in the FAQ’s: “It is important to note that further exploration after the segregation date to obtain a physical exposure of a valuable mineral deposit will not support valid existing rights.” And yet in a public press release, the BLM says that an existing Plan of Operations may move forward. How accommodating but how deceptive. If new data is not admissible, why would anybody invest further resources into developing the discovery?

Sagebrush Focal Areas

Between the 2014 Draft EIS and the 2015 Final EIS for the Greater Sage Grouse, newly fabricated criteria known as Sagebrush Focal Areas were concocted and then used as dubious criteria for mineral withdrawal. With this imposition the mineral developer with a discovery is caught blindsided by this illegal activity. So, given that, let's say the mineral examination goes forward. Had the mineral developer known, the drilling strategy may have been different. It may have focused upon in-fill drilling the known discovery to satisfy mineral examination of "marketability". But also desperately would have expanded a normally prudent program of step out drilling to determine the extent of the deposit. This will have served not only to recklessly cause additional disturbance, but greatly increase potentially reckless costs to the project. This is the typical result of government overreach, that of increased "environmental damage" and costs to the private sector. Apparently all by design.

The new restrictions also say each claim must undergo the validity tests with those that fail being declared invalid. There has been considerable precedent in the patenting process that contiguous claims can be in support of each other in aggregate value to the project.

But also, let us look at the definition of reserves and resources. It is well established practice that under public stock exchange reporting requirements there are definitive guidelines for the reporting of reserves and resources for an entity selling stock in their company as a publicly traded entity. There are strict definitions of the resource classification for which a mineral resource or reserve can be marketed. When a deposit has been classified as a reserve, it has met both the strict criteria of demonstrating geologic continuity as defined by the level of development work, as well as the test of current economic criteria. This is saying that these mineralized tons in the ground currently can be extracted at a profit. Another deposit may contain a similar resource, but valuating parameters may differ rendering it currently uneconomic. It may have been technically developed to the same standard as the economic deposit but it can only be characterized as a resource. The point here is that the former would constitute "valid existing rights" under the GRSG ARMP's and the latter would not. So, a potentially significant resource of the future is considered "invalid", "null and void" and is off limits as a strategic resource to the United States? Insanity.

This alone can be considered absurd in the policy of United States national interest. Economic parameters always change. But worse is the immediate damage done to the proprietors of the claims containing discovery. Having invested significant private resources into the once guaranteed ownership of a mineral value or the potential of that value, each proprietor is stripped of his investment and of any potential resource he may have in those claims. This is called a lose, lose situation.

And consider this. Companies in whose investment interest are traded publicly on highly regulated stock exchanges can sell stock based upon resources. The definitions of reserves versus resources are very carefully defined under stock exchange reporting laws. But under these publicly codified definitions, resources can be considered as an asset to the company upon which stock can be sold to the public.

I will repeat this point. The stock of a company with a mineral resource that is not yet economically viable can be sold as a privately owned asset to the public under stock exchange laws. And those resources can be held by unpatented mining claims in the United States. Many, many, many a company has sold stock as a public company, and many, many, many mergers and acquisitions have been performed upon this basis where the entities involved have “only a resource”. This resource is an asset of the company. A resource that could now be negated under these new mineral examination guidelines being promulgated under these sage grouse management plans. This constitutes a taking.

There is another aspect of this current mineral withdrawal and its new rules for mineral examination. There has been much talk of “physical exposure” needing to be demonstrated in order to establish valid existing rights. And that a discovery needs to have a demonstrable connection to a “physical exposure” on the surface. This is absolutely absurd. Every exploration geologist worth his salt knows that for decades now the search has been on for buried or blind deposits. Many deposits have been found and mined that were covered with post mineral cover of sediments or volcanic flows. By definition, there is no surface physical exposure. The rules acknowledge that drill core can constitute physical exposure, but still has to be tied to the surface “seam”. Absurd, and never recognized in the history of United States mining.

There also has been much talk about the need for continuity of mineralization on a controlling structure. Every geologist in hard rock mining knows that in the case of narrow high grade veins, the ore will occur in pinch and swell shoots and may not be tied by continuous mineralization. Every geologist in hard rock mining knows that there can be post mineral faulting that can separate ore that was on a known continuously mineralized structure. Many a lost extension of a known orebody has been found with on-going exploration where laterally, vertically, or both offsets have broken that continuity that is allegedly needed for “valid existing rights”. Every geologist in hard rock mining knows that with the large porphyry deposits, there is no single controlling structure, hence the term disseminated deposits.

In short, the “rules” outlined in the Proposed Withdrawal FAQ’s have either been crafted by completely incompetent bureaucrats or are deliberately acting in hostility towards the mining industry and the Congressionally passed mining laws. Or both. The Proposed Withdrawal FAQ document is here directly quoted: “The government may assess the validity of any mining claim at any time until patent is issued, regardless of whether the subject lands are segregated or withdrawn from mineral entry.”

This statement is wrong in that we already know that a patent moratorium has been in effect since 1993. But with this statement, if allowed to stand, no claims and no project is safe from the application of these egregious new guidelines of mineral examination. This will devastate investment in a critical backbone industry of America.

The Congressionally passed Mining Laws encourage the exploration for, and the mining of strategic mineral resources. Strategic means that these laws are in the interest of National Security. These proposed mineral withdrawals based upon no valid public purpose are essentially paramount to treason.

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