

Mining

Contributing editors

Michael Bourassa and John Turner



2017

GETTING THE
DEAL THROUGH 

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Mining 2017

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Mining industry

1 What is the nature and importance of the mining industry in your country?

Mining remains an important industry in the US, particularly for many individual states. Having started the year with relatively low metal and mineral prices, prices for particular metals, especially various of the precious metals, trended higher throughout 2016. Overall production remained strong as the estimated value of mineral raw materials produced at mines in the US in 2016 was US\$74.6 billion, a modest increase from the revised total of US\$73.4 billion in 2015. The estimated value of US metal mine production in 2016 was US\$23.0 billion, approximately 5 per cent less than that of 2015. Domestic raw materials and domestically recycled materials were used to process mineral materials worth US\$675 billion. Downstream industries consumed these mineral materials producing an estimated value of US\$2.78 trillion in 2016.

2 What are the target minerals?

In 2016, US production of the following mineral commodities (listed in decreasing order of value) was valued at more than US\$1 billion each: crushed stone, cement, construction sand and gravel, gold, copper, industrial sand and gravel, iron ore (shipped), lime, phosphate rock, salt, soda ash, zinc and clays (all types). The principal contributors to the total value of US metal mine production in 2016 include: gold (37 per cent), copper (29 per cent), iron ore (15 per cent) and zinc (7 per cent).

3 Which regions are most active?

The West is the most active producing region in the US. Eleven states each produced more than US\$2 billion worth of non-fuel mineral commodities in 2016, led by Nevada, Arizona and Texas. Once again, Nevada outpaced the other states, producing US\$7.65 billion predominantly in gold, copper, silver, and sand and gravel.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The US has a common law-based legal system both federally and throughout the states (with the exception of the state of Louisiana which has a civil law system). Today, however, mining in the US is governed primarily by a system of federal, state and local laws and regulations codified over a period of decades. Many such laws and regulations have undergone further development in the courts, and all of them remain subject to further judicial interpretation. Additionally, there are quasi-judicial bodies within many regulatory agencies that are empowered to make decisions about the meaning and effect of regulations. Therefore, one must always look not only to the applicable statute or regulation, but also to any judicial decisions (case law) or quasi-judicial administrative determinations affecting the statute or regulation.

5 How is the mining industry regulated?

The US mining industry is regulated at both federal and state levels. At each level, regulation is achieved primarily through laws (and the regulations underlying them), including laws concerning mineral tenure (under which mineral exploration and exploitation rights are acquired, held and exercised) and laws concerning mining operations (governing

the manner in which mining is conducted, including land use, environmental and health and safety regulations). Determining which laws apply in a given situation (federal, state or a combination) depends on ownership of the property.

Real property in the US may be owned by the federal government, a state or a private entity or individual. For any given property, the mineral rights (or mineral estate) and the surface rights (or surface estate) are distinct and separable property rights, and may or may not be owned by the same entity or individual (public or private).

Where mineral rights are federally owned, mineral tenure is regulated at the federal level. Likewise, tenure in respect of state-owned mineral rights is regulated at the state level. If a property's mineral rights are owned by a private entity or individual, acquiring those rights is a contractual matter between the private entity or individual and the mining company. If a private entity or individual owns the surface estate, accessing and using the surface is also a contractual matter (notwithstanding a common legal tenet that the mineral estate is 'dominant' over the surface estate). Mining operations on federal, state and private lands are all subject to regulation at both federal and state levels.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The General Mining Law of 1872 (General Mining Law) governs the process for acquiring and maintaining a right to develop and extract locatable minerals from mineral deposits discovered on federal lands. The Federal Land Policy and Management Act of 1976 (FLPMA) provides the legal framework within which mining rights acquired under the General Mining Law must be exercised in order to prevent undue and unnecessary degradation of federal lands. A key element of this legal framework is compliance with applicable environmental laws, beginning with the National Environmental Policy Act (NEPA), which requires federal agencies to evaluate the environmental impacts of major federal actions, including the permitting of mining activities on federal lands. Other key federal environmental statutes include the Federal Water Pollution Control Act (Clean Water Act), the Clean Air Act, the Endangered Species Act and the Comprehensive Environmental Response, Compensation and Liability Act (all as amended to date). Similar or corresponding legal regimes exist at the state level for mining on state and private lands.

The principal regulatory bodies responsible for administering the laws governing mining on federal lands are the US Bureau of Land Management (BLM) (an agency within the federal Department of Interior) and the US Forest Service (an agency within the federal Department of Agriculture). Other key federal agencies with potential regulatory authority over mining include the Environmental Protection Agency (EPA) and the US Army Corps of Engineers. To implement and enforce the laws under their purview, these agencies promulgate regulations containing detailed procedures, requirements and standards for compliance.

In a short-lived effort to amend its regulations governing the process for developing resource management plans to guide future uses of public lands pursuant to FLPMA, including uses such as mining, the BLM promulgated the Resource Management Planning Rule on 12

December 2016. Issued in the final weeks of the Obama administration, the rule was repealed in the early weeks of the Trump administration pursuant to a statute called the Congressional Review Act of 1996 (CRA), which gives the US Congress a limited period of time after a rule has been issued to nullify it.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

Industry Guide 7, adopted and administered by the US Securities and Exchange Commission (SEC), governs the classification system for reporting reserves in the mining sector. Industry Guide 7 limits disclosure in SEC filings to proven or probable reserves. To be 'proven' or 'probable' reserves, the SEC requires that a detailed feasibility study demonstrate that a mineral deposit can be mined profitably at a commercial rate.

On 16 June 2016, the SEC proposed rules to completely replace its disclosure requirements for mining properties, including Industry Guide 7, with the goal of modernising and aligning the disclosure requirements with current international standards. The proposed rules would rescind Industry Guide 7 in favour of mining property disclosure requirements in a new Regulation S-K, Subpart 1300. The period for accepting public comments by the SEC has closed; a final rule has not been published. Although the mandate to comply more nearly with international standards is an important one, the mining industry would like to see certain revisions made to the proposed rules, which the Trump administration may eventually accommodate.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Government control of mining rights varies depending on ownership of the minerals underlying a property. Virtually all minerals (or mineral rights) in the US were originally owned by the federal government. Over the course of the past 150 years, mineral rights in many locations (particularly in the eastern half of the US) have been transferred through myriad federal land grants and other mechanisms to both the states and private parties. With respect to federally-owned mineral rights (other than mineral rights pertaining to leasable minerals (such as coal and oil shale) or salable minerals (such as sand and gravel)), the General Mining Law provides a system by which private US citizens (including US companies) can 'locate' mining claims. The process does not transfer ownership of the minerals themselves (such ownership passes only after the minerals have been severed from the land), but rather gives the claim holder a right to develop and extract the minerals. Other systems exist at the state level enabling private parties to acquire mining rights for state-owned minerals. These systems vary from state to state, but often involve some form of leasing. For privately owned minerals, mining rights (or even the mineral rights themselves) may be acquired like any other private property right, leased, bought and sold according to contract and property law.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency that collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Some limited information and data are publicly available to private parties that wish to engage in mining activities. For example, the BLM keeps federal land conveyance records in its offices around the country, and it maintains several online records systems (LR2000 and GeoCommunicator) that contain information on topics such as land and mineral title, federal mining claims and federal land parcel mapping (including Public Land Survey System data). However, there is little if any technical data in any of these records.

No single regulatory agency is responsible for collecting mineral assessment reports or other technical data from private parties. The BLM, the US Forest Service and various state agencies do collect such information from time to time as required by the mining regulations they are charged to enforce. As a general rule, however, any such information that contains or constitutes trade secrets or proprietary and confidential business information, including geological and geophysical information, is not made available to the public. Such information usually must be purchased from the party that owns it.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The General Mining Law allows private parties free access to open public lands to prospect for minerals. Upon making a discovery of a valuable mineral deposit, the prospector may 'locate' (or stake) a mining claim on the deposit according to a specific location procedure; provided, a mining claim may be located only by US citizens or those who have declared their intent to become US citizens. The holder of a valid mining claim (sometimes referred to as an 'unpatented mining claim') is entitled to develop and extract the mineral deposit associated with the claim, and is protected against challenges by the US and other private parties to the claim holder's rights.

The General Mining Law also provides a process to 'patent' mining claims, through which the federal government grants the claim holder fee title (full private ownership) to the mineral property. In 1994, however, the US Congress imposed a moratorium on any new mineral patent applications. This leaves unpatented mining claims as the primary method by which new mining rights may be acquired on federal lands.

A valid mining claim cannot be established in the absence of a discovery of a valuable mineral deposit. The General Mining Law does not specify the meaning of 'valuable mineral deposit,' but two definitional rules have evolved through administrative agency (US Department of Interior) and judicial decisions, as follows:

- the 'prudent man rule,' which determines value based on whether, 'a person of ordinary prudence would be justified in the further expenditure of his labour and means, with a reasonable prospect of success in developing a valuable mine'; and
- the 'marketability rule,' which requires a claimant to demonstrate a reasonable prospect of making a profit from the sale of minerals from the claim or group of contiguous claims.

The marketability rule was developed and nearly always applied by the Department of Interior within the context of disputes between a mining claimant and the US (as opposed to a dispute between a mining claimant and a competing claimant), but US courts have not strictly adhered to this distinction and have applied both tests in deciding controversies between rival claimants.

After a mining claim has been located, the claimant must record a notice or certificate of location with the proper BLM office within 90 days of the date of location. A similar filing must also be made at the local county recorder's office within a time frame specified under state law (usually 90 days from the date of location, although shorter periods may apply in some states).

In certain circumstances annual assessment work may be performed to maintain an unpatented mining claim. In most cases, however, mining claims are maintained by payment of annual maintenance fees to the BLM.

The process of acquiring mining rights to state-owned minerals varies from state to state, but mineral leasing systems are commonly used. The acquisition of privately owned mining rights (whether acquiring the minerals themselves or the right to exploit them) is a matter of contract with the mineral owner.

11 What is the regime for the renewal and transfer of mineral licences?

Mining claims on federal lands are maintained on an annual basis by payment of maintenance fees to the BLM (or, in some cases, performing a certain amount of assessment work each year). Such claims are freely transferable without the requirement of government approval,

although transfer documents must be filed with the proper county and BLM offices within 90 days.

The regime for renewal and transfer of mining rights to state-owned minerals varies from state to state, but notice and approval requirements often apply. Mining rights in respect of privately owned minerals may be transferred according to applicable state contract and property laws.

12 What is the typical duration of mining rights?

A mining claim on federal lands may continue indefinitely if it is supported by a discovery of a valuable mineral deposit and is properly maintained through required annual maintenance fees or assessment work. A claim is subject to forfeiture to the US for failure to follow claim location requirements, failure to prove a valid discovery or failure to pay annual maintenance fees or perform annual assessment work.

The duration of mining rights to state-owned minerals varies from state to state. Mining rights are commonly granted by lease for a finite term (eg, five years), subject to renewal for additional terms or to continuation for the duration of mineral production. State mining rights may be subject to termination for a variety of reasons, such as failure to make rental payments, violation of state regulations or lease requirements or failure to commence or to continue diligent exploration or mining operations.

Mining rights in respect of privately owned minerals, including those acquired by patent from the federal government, continue indefinitely as the property of their owner, and may be freely leased, traded or sold.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a business entity organised under the laws of any state is considered a US citizen. Otherwise, there is generally no distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected under US law, including the requirements of due process. Mining rights holders may seek protection of their interests in the independent judicial system of the US, either in federal or state courts (and sometimes after required administrative proceedings at the regulatory agency level) depending on the identity of the parties and the nature of the dispute. Foreign arbitration awards are freely enforceable in the US by virtue of the New York Convention, incorporated into US law under Chapter 2 of the Federal Arbitration Act.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

The holder of a valid mining claim has the 'exclusive right of possession and enjoyment' of the surface area within the boundaries of the claim, subject to a number of important qualifications. First, the claimholder's uses of the surface are limited to exploration, mining and processing and uses reasonably incident thereto. In addition, the claimholder's surface rights are subject to the federal government's right to manage and dispose of vegetative resources and other surface resources not reasonably required for mining and to other uses by the United States and persons authorised by the United States that do not materially interfere with the claimholder's mineral operations. Finally, the claimholder's use of the surface is subject to compliance with federal surface management regulations that emphasise advance planning for surface resource protection and surface reclamation.

The nature and extent of surface rights on state lands varies from state to state, but requirements for multiple use accommodation, surface resource protection and surface reclamation akin to those on federal lands may be expected in most jurisdictions. Privately owned surface rights are a matter of private contract (surface use agreement),

but typically involve surface damage payments, environmental indemnities and reclamation guarantees in favour of the surface owner.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

No government or state agency in the US has a right to participate in mining projects. There is no specific local listing requirement, though mining claims on federal lands may be located and held only by US citizens (including business entities organised under the laws of any state) or those who have declared their intent to become US citizens.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There is no provision in US law dealing specifically with government expropriation of mineral rights. Federal, state and local governments in general may take private property for a public purpose through their power of eminent domain, but the property owner must be afforded due process of law and paid just compensation.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are several categories of protected state and federal lands where mining may be heavily regulated if not entirely prohibited. On federal lands, mining claims may not be located in areas closed to mineral entry by a special act of Congress, regulation or public land order. These areas, 'withdrawn' from mineral entry, include without limitation national parks, national monuments, tribal reservations, military reservations, scientific testing areas, most reclamation project areas of the Bureau of Reclamation and most wildlife protection areas managed by the US Fish and Wildlife Service. Mining claims are also prohibited on land designated by Congress as part of the National Wilderness Preservation System or designated as a wild portion of a Wild and Scenic River. Federal land withdrawn for power development may be subject to mining claim location only under certain conditions. Categories of protected state lands must be determined on a state-by-state basis, but may include, for example, wildlife management areas, state parks, scientific and natural areas and recreation areas.

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The US mining industry is not exempted from taxes and does not enjoy any type of tax holiday when new projects are commenced whether by domestic or foreign parties. Taxes may be imposed at the federal, state and local levels, although there is no federal tax specific to minerals extraction. Nothing at the federal level of government requires a private party mining on federal lands to pay duties, taxes or royalties as such, although federal mining claims are subject to payment of annual maintenance fees. In general, however, private parties conducting mining in the US must address the full panoply of taxes, including, without limitation, federal and state income taxes, state severance taxes (where applicable), ad valorem property taxes, sales taxes, use taxes, payroll taxes and the like. State income taxes and respective rates vary among the 50 states, with certain states not imposing any income tax at all.

The federal and state income taxes tend to be profit-based since numerous deductions and credits can often be applied to reduce tax liability. Note, however, that the US imposes an alternative minimum tax designed to extract a minimal amount of income tax, even if tax liability might otherwise be reduced due to certain deductions. What, if any, efforts may be made by the Trump administration and Congress to modify the system of federal taxes remains to be determined.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

No specific tax advantages or initiatives exist for private parties carrying on mining in the US. Private parties carrying on mining activities have the same opportunity as other taxpayers to utilise applicable deductions and credits to reduce taxes in association with mining activities.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

Tax stabilisation and related agreements are oftentimes offered in developing nations. In the US, however, no legislation exists at the state or federal level to provide for tax stabilisation for mining activities. Similarly, no tax stabilisation agreements are authorised by US law regardless of whether the mining party is domestic or foreign.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

No entitlement exists under US law for the government at any level to obtain a carried interest or a free carried interest in mining projects.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of a mining licence is not subject to any transfer tax or capital gains tax as such at the federal level. States may apply a transfer tax or fee for such a transfer, and accordingly the individual state where the mining rights are located or the transaction is structured should be evaluated on a case-by-case basis.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

The US does not distinguish between domestic and foreign parties in regard to the payment of taxes pertaining to mining activities. Generally, tax rates, deductions for business expenses, available credits and the like apply equally to domestic and foreign parties. Note, however, that the Federal Foreign Investment in Real Property Tax Act of 1980 (Internal Revenue Code, section 1445) was enacted to ensure that foreign sellers pay taxes on the sale of real property in the US, which has been defined to include mining properties. In any such transaction, tax withholding is determined on the basis of whether participating parties are domestic or foreign. Generally, a foreign party that sells or distributes a US real property interest must withhold tax equal to 35 per cent of the gain it recognises on the sale. A domestic corporation must deduct and withhold a tax equal to 10 per cent of the total amount realised by a foreign person on disposition of their property before 17 February 2016 (15 per cent thereafter).

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Private parties have significant flexibility in choosing business structures to carry on mining activities in the US. Principal business structures include corporations, limited liability companies, limited partnerships and certain forms of joint venture.

26 Is there a requirement that a local entity be a party to the transaction?

There is no requirement for a local entity to be a party to a mining transaction in the US. However, mining claims on federal lands may be located and held only by US citizens (including US business entities) or those who have declared their intent to become US citizens.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

Foreign entities are generally comfortable relying on the laws and court systems within the US to protect their contract and property rights and do not commonly structure their US mining operations through bilateral investment treaties. In certain circumstances, a foreign entity might take advantage of a multilateral investment treaty (such as the North American Free Trade Agreement (NAFTA) among the US, Canada and Mexico), but mining projects are not typically structured around such treaties. Note that NAFTA may be subject to renegotiation as announced by the Trump administration.

The US has entered into tax treaties with numerous foreign countries. Under these treaties, residents of foreign countries may be taxed at a reduced rate, or be exempt from US taxes, on certain items of

income they receive from sources within the US. These reduced rates and exemptions vary among countries and among specific items of income and therefore must be evaluated on a country-by-country basis. Examples of tax treaties on which foreign entities often rely for tax relief in connection with their US mining operations include treaties that the US has made with the UK, Canada and Mexico.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

Specific financing requirements or investment directives do not exist as such pursuant to mining laws in the US, which operates as a free market economy. Mining endeavours are funded through a multitude of conventional and alternative financing mechanisms with no specific roadmap for success. From a conventional standpoint, equity and debt alternatives are typically used, whether through private or public sources, but these alternatives have been more difficult to achieve in a depressed mining market. Financings of mining deals through equity sources (domestic or foreign exchanges, private placements and initial public offerings) and debt financings (investor or bank loans and bonds), are still occurring though at a less frequent rate over the past few years. The fact is that less capital funding is being raised through the domestic securities market exchanges in the US. More recently, creative alternative structures of financing are being increasingly utilised, including convertible bond debt, royalty financings, off-take arrangements and streaming mechanisms, which offer less dilution than equity at depressed prices.

Careful consideration of US securities laws in regard to mine financings is essential along with the regulatory requirements imposed by the SEC, which has mandated certain disclosure obligations related to the mining industry. For instance, Industry Guide 7, published by the SEC, requires publicly traded companies to disclose information regarding proven and probable reserves. However, the SEC has not mandated the use of National Instrument 43-101, the standard utilised in Canada. Note, however, that the SEC proposed rules in 2016 to replace Industry Guide 7, but those proposed rules have not yet been promulgated.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

No government or regulatory agency in the US provides direct financing to mining projects. No US law or regulation allows or authorises such financing. Pension funds are neither expressly authorised nor prohibited from investing in mining projects. In the US, in contrast to Canada, pension fund financing of mining projects is not a common occurrence.

30 Please describe the regime for taking security over mining interests.

Typically, mining interests may be used as security or collateral and can be mortgaged and pledged. Often, the approval of the grantor or lessor may be required, whether that party is the federal government or a private party.

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

Currently there are no particular restrictions as such in regard to the importation of machinery and equipment or services required in connection with mining exploration and extraction activities, but in the future import tariffs may be affected by the Trump administration on some or all imports, which is a matter to be determined in 2017. According to the Department of Commerce, which would otherwise have authority and control over any import restrictions, the US itself is still the world's largest producer of mining and construction equipment and machinery. Note, however, that a merchandise processing fee may be assessed in particular states and accordingly the state in which exploration and extraction occur should be separately researched and considered.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

No particular set of standard conditions or agreements is predominant in the US in regard to equipment supplies. FIDIC contracts are often referred to as the international standard, though both FIDIC and Orgalime forms may be used. Whether conditions or agreements are more friendly to the supplier or buyer is typically a negotiated contract matter in the US, given the country's emphasis on free market principles. No basis currently exists on which to predict any US trend regarding dispute resolution of equipment supply agreements, given that the matter ultimately depends on the nature of and terms and conditions in applicable agreements.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

As a general rule, currently no restrictions exist in regard to the export or sale of metallic minerals. Certain restrictions may be placed on and apply in regard to the export or sale of critical and strategic minerals by certain US federal executive departments as the matter is continually being evaluated in Congress. The US Department of Homeland Security and the State Department clearly possess authority to characterise export or import of minerals or metals to be a national security risk, but such sweeping authority has not yet been exercised.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Currently, no restrictions exist in regard to the import of funds for exploration and extraction activities or the use of proceeds from the export or sale of minerals. However, the export of funds from the US is subject to laws of general application that are administered by, among others, the Department of the Treasury and the Department of Homeland Security. It is also conceivable that certain financings from imported funds may be subject to review by the Committee on Foreign Investment in the US (CFIUS), which is the federal body responsible for reviewing and investigating foreign direct investment and any related potential impact on national security. The Department of Homeland Security is a member of CFIUS.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

Numerous federal environmental statutory requirements and programmes apply to mining in the US along with state counterpart requirements and programmes. Among the primary federal programmes that regulate environmental matters pertaining to the mining industry are the following:

- the NEPA (comprehensive interdisciplinary approach for major federal actions);
- Federal Land Policy and Management Act (degradation of federal lands);
- Surface Mining Control and Reclamation Act (coal operations);
- Clean Air Act as amended (air quality standards);
- Federal Water Pollution Control Act and Clean Water Act (protection of surface water);
- Safe Drinking Water Act (drinking water quality and underground injection);
- Resource Conservation and Recovery Act as amended (solid and hazardous waste control);
- Endangered Species Act (protection of animals and plants);
- Migratory Bird Treaty Act (protection of species of birds);
- Comprehensive Environmental Response, Compensation and Liability Act as amended (hazardous substance release and site clean-up);
- Toxic Substances Control Act (regulation of risky chemicals);
- Rivers and Harbors Act (impact to rivers);
- the Indian Mineral Development Act of 1982 (mining on Native American land);

- National Historic Preservation Act (historic sites and landmarks); and
- Federal Mine Safety Health Act of 1977 (promote mine health & safety).

Some of the federal agencies with authority over mining include, without limitation, the following:

- the EPA;
- the BLM;
- the US Forest Service;
- the US Army Corps of Engineers;
- the Bureau of Indian Affairs (BIA);
- the Bureau of Reclamation; and
- the Mine Safety Health Administration (MSHA).

As always, environmental requirements in states and local jurisdictions in which mining activity is undertaken should be evaluated. Often, states have counterpart programmes to those that exist at the federal level.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The environmental review and permitting process for a mining project in the US is somewhat dependent on the state in which it occurs and also whether the project is located on private, state or federal land. Typically, however, the process is highly complex, time consuming and expensive. The process for a mining project may also be made more difficult and time consuming if NEPA is triggered by significant federal action requiring a detailed environmental analysis regarding whether the project will individually or cumulatively have a significant effect on the human environment. If so, any mining project will be substantially delayed while environmental impacts and reasonable alternatives are considered in the context of either an environmental assessment or an environmental impact statement. A lead agency with primary authority over the NEPA process will coordinate with numerous other federal and state agencies to oversee the process, coordinate comments and ensure public review and input. The process is measured in years and not months and can lead to various legal challenges during the course of the effort that can substantially delay or even kill mining projects.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

For the most part, the closure and remediation process for a mining project is guided and determined as a matter of state law during the permitting process, with potentially stringent reclamation and financial assurance requirements that must be met in some form during and at the end of the mining project. The exception, of course, relates to mining projects on federal lands that must meet requirements imposed by the BLM and the US Forest Service, which in most respects are similar to state-mandated requirements. Most states require reclamation of mined areas to facilitate closure, re-vegetation and restoration of areas that have been adversely impacted and to ensure control of water runoff and rehabilitation of impacted land areas and natural habitats. Federal and state laws also typically allow several different alternatives to be met in providing financial assurance designed to ensure the availability of funds for ongoing work or future work to be undertaken either by the mining party itself or by the government, including performance bonds, insurance arrangements, letters of credit, trust funds and cash collateral. Some flexibility is provided through such alternatives to ensure adequate funds are available for reclamation of impacted areas and natural resources. Mining projects may also be required to undertake more than reclamation and may have to meet more rigid and expensive requirements to fully remediate sites in appropriate circumstances pursuant to the Comprehensive Environmental Response and Compensation Act as amended. Such remediation cannot only be quite costly but can also take years to accomplish with the expectation for ultimate sign off by a regulatory agency at the state and federal level.

38 What are the restrictions for building tailings or waste dams?

The construction and care of tailings or waste dams are a relatively new phenomenon in the overall history of US mining activity. Unlike

Update and trends

Throughout 2016, opposition to the Dakota Access Pipeline by Indian tribes gained significant public exposure. Given the momentous attention, future energy and mining projects likely will be subject to greater scrutiny by US indigenous groups where those projects are developed on land considered to have significant religious and cultural value to Indian tribes.

On 30 January 2017, the President of the United States, soon after his inauguration, issued an Executive Order directing agencies, among other things, (i) to identify at least two existing regulations to repeal for every new regulation proposed or issued, and (ii) to promulgate regulations during fiscal year 2017 that, together with repealed regulations, have combined incremental costs of \$0 or less, regardless of benefits. The present effect of this Executive Order on the mining industry is unclear at this time, though it could have significant future impacts.

Already, however, the Trump administration's impact on the mining industry has manifested itself in other ways. In particular, the administration was instrumental in quickly dismantling three 2016 initiatives of the Department of Interior, including one secretarial order and two newly promulgated rules, that were of particular interest to the industry.

First, by order dated 15 January 2016, the former Secretary of the Interior had initiated a comprehensive review of the federal coal leasing programme to identify and evaluate potential programmatic reforms. The order placed a moratorium on the issuance of new coal leases during the review. On 29 March 2017, the new Secretary of the Interior appointed by President Trump halted the programmatic review and overturned the coal lease moratorium.

The two Department of Interior rules were the Resource Management Planning Rule, issued by the BLM on 12 December 2016 (effective 11 January 2017), and the Stream Protection Rule, issued by the Department's Office of Surface Mining Reclamation and Enforcement on 20 December 2016 (effective 19 January 2017). The Resource Management Planning Rule amended regulations concerning the process for developing plans to guide the future uses of federal lands under FLPMA, including uses such as mining. The Stream Protection Rule amended regulations governing surface coal mining operations.

Both rules, promulgated in the final weeks of the Obama administration, were repealed in the early weeks of the Trump administration (Resource Management Planning on 27 March 2017, and Stream Protection on 16 February 2017) pursuant to the CRA. The act gives the US Congress a limited period of time after a rule has been issued to disapprove the rule by joint resolution (ie, a resolution approved by both House and Senate). If signed by the President (or not otherwise stopped by presidential veto), the disapproval resolution becomes law, rendering the rule nullified and prohibiting the issuance of any 'substantially similar' rule without subsequent legislative authority.

Finally, as previously reported, the mining industry has for years requested the issuance of rules governing mine property disclosures to parallel or follow international standards. In June 2016, the SEC issued a proposed rule to address the matter that was designed to dismantle and replace Industry Guide 7. Whether or not the proposed rule will be promulgated and issued will depend on its further evaluation by the Trump administration.

dams utilised for impounding water, which may ultimately be drained depending on structural integrity, a tailings dam must be designed to impound material safely in perpetuity, which requires careful consideration of seismic and hydrologic events. MSHA conducts periodic inspections of tailings dams, authorising its enforcement personnel to conduct inspections to evaluate and address relative hazards and to penalise poor operational controls.

In the US, despite MSHA's authority and presence, state regulators have the primary responsibility and authority to oversee construction and management of tailings or waste dams. Any applicable requirements or standards for such dams would be at the state level, for the most part, including professional qualifications for anyone in charge of operation and management of dam waste, inspection requirements, installation of alarms and emergency drills and evacuation procedures. Many states have promulgated regulations that classify dams by their hazard potential in terms of serious hazard to public health or serious damage to property. Typically, dams may not be constructed, operated, enlarged, repaired, altered, removed from service or abandoned without express approval of the pertinent state agency. Those dams with the highest hazard are most strictly regulated, with professional design criteria, specific construction standards and strict maintenance procedures, including monitoring. States have authority to inspect, adopt regulations and issue orders, invoke injunctive or judicial action to enforce against unsafe dams or dams that present an imminent hazard or threat to life or property and to take supervisory control of the dam's operation. For high-hazard dams, emergency action plans within certain states may be invoked in the event of dam failure. Additional, detailed state standards may be imposed on facilities that treat, store and dispose of hazardous waste pursuant to Resource Conservation and Recovery Act (RCRA) and its state counterpart statutes and regulations.

Health & safety, and labour issues

39 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal source of authorities addressing health, safety and labour issues in regard to the mining industry in the US is the federal Mine Safety and Health Act. Pursuant to the Act, the Mine Health and Safety Administration regulates the health and safety of mining operations and activities, with broad-based authority over miner health and safety, mine working conditions, training programmes, complaints of discrimination and prevention of accidents, injuries and illnesses, among

other things. The Administration also possesses significant enforcement, inspection and corrective action authorities, which can result in substantial fines and even mine suspension or closure. Additionally, the states in which mining occurs have their own counterpart legal and regulatory authorities over mine health and safety.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

The management and recycling of mining waste products may very well be regulated as solid or hazardous waste pursuant to restrictive requirements imposed by the federal RCRA as amended. The Act imposes certain statutory and regulatory restrictions on recycling of wastes, even if beneficial. The RCRA programme may be managed either by EPA or by a state with delegated authority to manage the solid and hazardous waste programme. In such instances, a requirement may exist to obtain a federal or state permit to conduct waste recycling, including the exploration and exploitation of mining waste products.

Those seeking to explore and exploit mining waste products in tailings ponds or waste piles should first familiarise themselves with the legacy liabilities that may be associated with such units, before seeking to obtain any form of management or ownership control over them. Unless the ponds and piles have been abandoned, they may be otherwise owned and controlled by the same owners of the mine and related properties that were associated with them during periods of active mine operations. Consequently, title may be held in private parties or possibly even the federal or state government, requiring approval from such owners for access to and control over the waste products in the form of a lease, licence or direct acquisition. Assumption of legacy liabilities should always be carefully considered and evaluated.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

US law does not impose specific restrictions or limitations on the use of domestic or foreign employees in connection with mining activities. Generally applicable US immigration law may apply to foreign employees working in mining activities in the US. Subject to certain limitations and requirements, which should always be evaluated in advance, highly skilled and specialised foreign citizens may qualify for temporary visas to work at mining operations in the US.

Social and community issues**42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?**

Although the US does not have laws mandating corporate social responsibility, certain aspects of the mining industry are subject to public engagement and disclosure requirements, particularly when developing federal minerals. Many mining projects in the US are subject to environmental review under the NEPA, which mandates that federal agencies study the environmental impact of certain mining projects. Further, corporations engaged in mineral development in the US are openly seeking to improve relationships with local communities, the wider society, and various constituent groups to align stakeholder and company values.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

Generally, aboriginal or indigenous rights impact the acquisition or exercise of mining rights when those rights are located on Indian lands. Indian reservations are federal lands set aside by treaty or administrative action for the occupancy and use of specified Indian tribes. The US holds legal title to Indian lands for the benefit and use of the Indian owners, and the federal government has undertaken to protect tribal treaty rights, lands, assets and resources. The BIA administers the federal trust responsibility and any agreement to develop minerals held in trust for Indian beneficiaries must be approved by the Secretary of the Interior. Unlike the federal supervision applicable in the lower 48 states, Alaskan Natives have title to the surface and subsurface estates and directly control their mineral assets.

Laws designed to protect cultural resources, cultural items, sacred sites or historic properties may also affect mining rights. When permitting certain mineral development projects, federal agencies will also consider environmental justice issues, a policy that seeks to prevent placing an unequal share of the burdens of hazardous waste and other potentially harmful impacts on disadvantaged populations.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

The US is a party to many international treaties, conventions or protocols of general application that in some way relate to and impact CSR globally. The breadth and impact of any general international agreement on the mining industry and related CSR issues varies significantly. For example, the North American Free Trade Agreement between the US, Canada and Mexico requires equal treatment between citizens of the party nations and provides investors with various protections including fair and equitable treatment.

Anti-bribery and corrupt practices**45 Describe any local legislation governing anti-bribery and corrupt practices.**

The primary statute that expressly criminalises corruption of US federal public officials, which prohibits both making and receiving either bribes or gratuities, is title 18 of the United States Code (USC), section 201. Additionally, title 18 USC, section 666 applies when governmental or other entities receive federal programme benefits of over US\$10,000. The Hobbs Act targets public corruption by criminalising extortion. Although no federal statute specifically prohibits private commercial bribery, federal prosecutors may use existing laws such as the mail and wire fraud statute to prosecute such acts. As interpreted and enforced by US authorities, the anti-bribery provisions of the Foreign Corrupt Practices Act can extend to foreign companies and individuals for acts in the US.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

The US has signed and ratified a number of significant treaties related to the fight against corruption. However, given the strength and reach of US anti-corruption laws, companies operating in the US do not pay particular attention to any specific foreign anti-bribery or corruption legislation.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The US joined the EITI in 2011 and has created a public data portal to document natural resource revenues from federal lands. The portal includes detailed information on taxes collected from oil, gas, coal, wind and geothermal operations on federal lands and how such revenues are distributed. Owing to the widely varied nature of ownership interests in natural resources in the US (eg, private, federal, state, tribal), forcing universal participation across the US is considered too unwieldy to administer. Participation of the US is limited to federal lands.

Foreign investment**48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?**

Mining claims on federal lands may be located and held only by US citizens or those who have declared their intent to become US citizens. For this requirement, a business entity organised under the laws of any state is considered a US citizen. Generally, there is no prohibition in regard to foreign ownership of stock in corporations that own or control mining claims, and US mining laws generally allow for foreign

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investment through a business entity organised pursuant to endemic state laws. No foreign ownership restrictions as such apply in respect of state- or privately owned mineral interests.

More generally, certain tax withholding requirements may apply in transactions involving transfers of real property interests in the US (including mineral interests) by a foreign person.

Additionally, a transaction of any sort (including a mining transaction) that could result in control of a US business by a foreign person is subject to scrutiny by the federal inter-agency CFIUS in order to identify and address any national security concerns that arise as a result of the transaction. If a covered transaction presents national security risks and other provisions of law do not provide adequate authority to address the risks, CFIUS may impose conditions on the transaction to mitigate the risks. In certain circumstances CFIUS also may refer the case to the president for action, including possibly suspending or prohibiting the transaction. In September 2012, for example, a CFIUS determination led President Obama to block a Chinese-owned company from building four small wind farm projects near a US Navy installation.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

The US is a party to numerous international treaties of general application that address or relate to foreign investment in the US, but no such treaties address investment in the mining industry per se. It is important to keep in mind, however, that foreign investment, particularly in this day and age, is subject to US national security laws and related government scrutiny. For example, the CFIUS reviews foreign direct investment and any related potential impact on national security. 'Covered transactions' are reviewed and evaluated to determine if any resultant control of a US business by a foreign entity could have or pose a national security risk, whereupon the committee has authority to require changes to mitigate risk and, ultimately, recommend the suspension or prohibition of the transaction to the President of the US.

Because of its proximity to both Canada and Mexico, two treaties that have traditionally been a particular focus of the US are the NAFTA and the Trans-Pacific Partnership Agreement (TPPA). The Trump administration has withdrawn the US from the TPPA, and recently also announced the intention to renegotiate NAFTA. Significantly, both agreements prohibited expropriation or nationalisation of projects across international borders and provided a methodology for compensation (see *Glamis Gold v United States* as an example of a major mining arbitration pertaining to NAFTA). In any event, new developments in regard to the future cross-border relationships with both Canada and Mexico are expected and should be further evaluated.

Getting the Deal Through

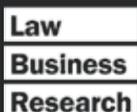
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