

Mining 2019

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Mining

2019

Contributing editors**Michael J Bourassa and Alison Lacy****Fasken**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



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Contents

Introduction	5	Ghana	104
Michael J Bourassa Fasken		Michael Edem Akafia, Kimathi Kuenyehia Sr and Sefakor Kuenyehia Kimathi & Partners, Corporate Attorneys	
Project development: how to get started	9	Greenland	114
Alison Lacy Fasken		Peter Schriver Nuna Law Firm	
Mining in Japan	12	India	122
Hiroyasu Konno and Yoshiaki Otsuki Nishimura & Asahi		Neeraj Menon and Karthy Nair Trilegal	
Latin America overview	14	Mexico	131
Florencia Heredia Allende & Brea		Enrique Rodríguez del Bosque RB Mexico-Law	
Angola	19	Mozambique	141
João Afonso Fialho and Ângela Viana VdA Legal Partners		João Afonso Fialho and Ângela Viana VdA Legal Partners Guilherme Daniel Guilherme Daniel & Associados	
Argentina	29	Myanmar	151
Florencia Heredia and Agostina L Martinez Allende & Brea		Khin Cho Kyi Myanmar Legal Services Ltd	
Brazil	41	Peru	159
Cláudio Guerreiro, Luiz André Nunes de Oliveira, Carlos Maurício Ribeiro and Rodrigo Leite Moreira Vieira Rezende Advogados		Fernando Pickmann Dentons	
Canada	52	Philippines	168
Michael J Bourassa and Alison Lacy Fasken		Patricia A O Bunye Cruz Marcelo & Tenefrancia	
Chile	65	South Africa	180
Rodrigo Muñoz U Núñez, Muñoz & Cía Ltda		Peter Leon and Patrick Leyden Herbert Smith Freehills South Africa LLP	
Democratic Republic of the Congo	73	Sweden	190
Olivier Bustin and Matthieu Le Roux Vieira de Almeida		Peter Dyer and Pia Pehrson Foyen Advokatfirma	
Ecuador	81	Thailand	200
Cesar Zumarraga and Juan Fernando Larrea Tobar ZVS		Ratana Poonsombudlert, Nuanporn Wechsuwanarux and Sawanee Gulthawatvichai Chandler MHM Limited	
Finland	91	United Kingdom	211
Pekka Holopainen and Panu Skogström Kalliolaw Attorneys Ltd		Richard Blunt, Susie Davies and Ruchika Patel Baker McKenzie	

United States **220**

John D Fognani and Christopher J Reagen
Haynes and Boone, LLP

Uzbekistan **230**

Bakhodir Jabborov
GRATA International Law Firm

Zambia **239**

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MINING INDUSTRY

Standing

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

Minerals continue to be a foundation to industry in the United States, contributing to the US economy at several stages including extraction, processing and manufacturing. In 2018, the estimated value of mineral raw materials produced at mines in the US was US\$82.2 billion, a 3 per cent increase from the revised total of US\$79.7 billion in 2017. Domestic raw materials and domestically recycled materials were used in 2018 to process mineral materials worth US\$766 billion. Downstream industries consumed these mineral materials, producing an estimated value of US\$3.02 trillion in 2018.

Target minerals

2 | What are the target minerals?

US metal mine production contributed \$25.9 billion to the US economy in 2018, with gold (33 per cent), copper (31 per cent), iron ore (16 per cent), and zinc (9 per cent) being the principal contributors. Industrial mineral production in the US continued to play a large role in the US economy in 2018 with crushed stone (30 per cent), cement (20 per cent) and construction sand and gravel (15 per cent) comprising the majority of the US\$56.3 billion in value.

Regions

3 | Which regions are most active?

Production of mineral commodities in the United States is most active in the western and midwestern states. Twelve states each produced more than US\$2 billion worth of non-fuel mineral commodities in 2018, led by Nevada, Arizona and Texas. Nevada continues to outperform other states, producing US\$7.88 billion predominantly in copper, gold, lime, silver and sand and gravel. Most of US metal mine production value is generated by the western states, which produce approximately four times more value than the midwestern states.

LEGAL AND REGULATORY STRUCTURE

Basis of legal system

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

The United States has a common law-based legal system both federally and throughout the states (with the exception of the state of Louisiana that has a civil law system). Today, however, mining in the United States 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. In many cases, state and local laws may be more stringent than federal laws and should be carefully evaluated depending upon the location of any particular mining project.

Regulation

5 | How is the mining industry regulated?

The US mining industry is regulated at federal, state and local levels. At each level, regulation is achieved primarily through enabling 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 local or a combination) depends on ownership and location of the property.

Real property in the United States 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 commonly understood and applied legal tenet that the mineral estate is 'dominant' over the surface estate). Mining operations on federal, state, local and private lands are all subject to laws and regulations that exist at all three levels depending upon location of the mining project.

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, the Resource Conservation and Recovery Act (RCRA) 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, which may be more stringent than federal requirements. As always, the regulatory requirements promulgated under each statute must also be evaluated and addressed.

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.

Mining regulation in the United States has been in a state of flux since the beginning of the current presidential administration in early 2017. Changes to laws, regulations, agency policies and guidance documents, and even the organisational structures of some agencies such as the BLM, have all been on the table for the oft-stated objective of reducing regulatory burdens, delays and costs in order to promote increased mineral development across the United States. Republican party leaders in the US Congress have pursued this objective with mixed results through proposed legislation, including most notably their successful use in early 2017 of a statute called the Congressional Review Act to nullify a number of regulations hastily issued in the waning days of President Obama's administration that industry advocates found objectionable (eg, the BLM's 'Planning 2.0 Rule' and the Office of Surface Mining Reclamation and Enforcement's 'Stream Protection Rule'). Other significant efforts to reduce government regulation and oversight of the mining industry (among other industry sectors) are occurring at multiple regulatory agencies where, as part of the executive branch of government, President Trump exercises a greater degree of policymaking control than his allies in Congress, who must contend with opposition party resistance and legislative checks and balances. Of course, executive control notwithstanding, changes to agency rules and policies must wend their way through various stages of administrative procedure and public process, and, in many instances, face legal challenges in the courts if promulgated without notice or public review and participation. Examples of significant policy initiatives include proposed changes by the BLM to defer to states regarding resource management plans (RMPs) and priorities that could affect more than 80 per cent of greater sage-grouse habitat and proposed revisions by the White House Council on Environmental Quality to regulations and policies aimed at streamlining environmental reviews under NEPA.

Classification system

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

The US Securities and Exchange Commission (SEC) adopted final rules in 2018 that modernise the decades-old mining property disclosure requirements found in Industry Guide 7. Under the new rules, US companies and foreign private issuers that file reports with the SEC will be required to disclose mineral resources, mineral reserves, and material exploration results for material mining operations. By adopting a materiality standard and removing or revising requirements that arguably disadvantaged US mining registrants when compared to international mining companies, the SEC has aligned its rules with industry and global practices as embodied by the Committee for Mineral Reserves International Reporting Standards. The required summary disclosures of mining operations and individual mining properties deemed material to the registrant's business or financial condition are intended to provide investors with a more thorough understanding of the registrant's mining properties and improve the comparability between various mining property disclosures.

Although the final rules are presently in force, the SEC has adopted a two-year transition period so that full compliance is not required until the first fiscal year for a registrant beginning on or after 1 January 2021. Industry Guide 7 will remain effective until all registrants are required to comply with the final rules (located in a new subpart 1300 of Regulation S-K), at which time the Industry Guide 7 will be rescinded.

MINING RIGHTS AND TITLE

State control over mining rights

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 United States 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 United States) have been transferred through myriad federal land grants and other mechanisms to both the states and private parties. With respect to federally owned minerals (other than mineral rights pertaining to leasable minerals, such as coal and oil shale, or saleable 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.

Publicly available information and data

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 which 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). Additionally, the US Geological Survey manages a data system that contains a collection of reports describing metallic and non-metallic mineral resources. 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.

Acquisition of rights by private parties

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 United States 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 United States (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 with issues of surface ownership always to be considered.

Renewal and transfer of mineral licences

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 of transfer.

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.

Duration of mining rights

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 United States 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 lease payments, violation of state laws or 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.

Acquisition by domestic parties versus acquisition by foreign parties

- 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.

Protection of mining rights

- 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 United States, 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 United States by virtue of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, incorporated into US law under Chapter 2 of the Federal Arbitration Act.

Surface rights

- 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 as well as 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.

Participation of government and state agencies

- 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 United States 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.

Government expropriation of licences

- 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.

Protected areas

- 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

Duties, royalties and taxes payable by private parties

- 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 or undertaken 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 United States 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 requirements of each separate state where mining is conducted should be separately evaluated.

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 United States 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 or

credits. What, if any, efforts may be made by the Trump administration and Congress to modify the system of federal taxes that may directly impact mining remains to be determined.

Tax advantages and incentives

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 United States. 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.

Tax stabilisation

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 United States, 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.

Carried interest

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. Similarly, no states in the United States allow for such entitlement.

Transfer taxes and capital gains

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.

Distinction between domestic parties and foreign parties

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

The United States 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 United States, 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

Principal 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 United States. Principal business structures include corporations, limited liability companies, limited partnerships and certain forms of joint venture.

Local entity requirement

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 United States. 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.

Bilateral investment and tax treaties

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 United States 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, but mining projects are not typically structured around any such treaty. Note, as of the date of writing, the United States, Canada and Mexico have signed the United States-Mexico-Canada Agreement (USMCA), which will replace the North American Free Trade Agreement (NAFTA), but the USMCA is not yet effective as approval by Congress remains pending.

The United States has also entered into tax treaties with most of its major trading partners. 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 United States. 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 United Kingdom, Canada and Mexico.

FINANCING

Principal sources of 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 United States, given that the United States 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 over the past

several years. Financings of mining deals in the United States through equity sources (domestic or foreign exchanges, private placements and initial public offerings) and debt financings (investor or commercial bank loans and bonds), are still occurring though at a less frequent rate over the past several years. The fact is that less capital funding is being raised through the domestic securities market exchanges in the United States in contrast to exchanges in Canada and London. 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 have mandated certain disclosure obligations related to the mining industry. For years, Regulation S-K and Industry Guide 7, published by the SEC, has required publicly traded companies to disclose information regarding proven and probable mineral reserves. Recently, these requirements were amended in a final rule adopted by the SEC to require, among other things, that a mining registrant with material mining operations disclose certain information in its SEC-related filings with regard to mineral resources in addition to mineral reserves. Although the new rule has been promulgated and is in force, the SEC effected a two-year transition period to achieve full compliance until the first fiscal year beginning on or after 1 January 2021. Until then, Industry Guide 7 will remain effective. Note, that the SEC has never mandated the use of National Instrument 43-101, the standard utilised in Canada.

Direct financing from government or major pension funds

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

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

Security regime

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 just like any other asset or real property. Often, the approval of the grantor or lessor of the mining interest may be required, whether that party is the federal or state government or a private party.

RESTRICTIONS

Importation 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. However, given recent efforts pertaining to the Trump Administration's focus on tariffs related to imported goods to the United States, increased attention should be devoted to the possible placement of tariffs, particularly with regard to machinery and equipment from China. According to the Department of Commerce, which would otherwise have authority and

control over any import restrictions, the United States 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.

Standard conditions and agreements

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 United States 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 United States, 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.

Mineral restrictions

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 characterize export or import of minerals or metals to be a national security risk, but such sweeping authority has not yet been exercised.

Import of funds restrictions

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 United States 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 United States (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

Principal applicable environmental laws

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 United States along with state

counterpart requirements and programmes that in many instances are required to be no less stringent than the federal requirements and programmes. Local requirements in certain jurisdictions may also apply. Among the primary federal programmes that regulate environmental matters pertaining to the mining industry are the following:

- 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 threatened or endangered 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 by removal or remediation);
- Toxic Substances Control Act (regulation of risky chemicals);
- Rivers and Harbors Act (impact to rivers);
- 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 and 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;
- the Mine Safety and Health Administration (MSHA); and
- the Occupational Safety and Health Administration (OSHA).

As always, environmental requirements in states and local jurisdictions in which mining activity is undertaken should be specifically researched and evaluated. Often, states have counterpart programmes to those that exist at the federal level that are mandated to be no less stringent than federal requirements.

Environmental review and permitting process

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 United States 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 the project is on or even adjacent to federal land. If so, NEPA is triggered by significant federal action requiring a detailed and time-consuming environmental analysis regarding whether the project will individually or cumulatively have a significant

effect on the human environment. That analysis can be required in the form of an environmental assessment and/or a full-blown environmental impact analysis. 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 government and public 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 alter, delay or even kill mining projects.

Closure and remediation process

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 federal agencies, such as the BLM and the US Forest Service, which in most respects are similar to state-mandated requirements. All states in which mining occurs 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 or surety 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 federal Comprehensive Environmental Response Compensation and Liability Act as amended or state counterpart statutes that exist in some states where mining is conducted. Such remediation cannot only be quite costly but can also take years to accomplish with the desire and expectation for ultimate sign off by regulatory agencies at the state and federal levels.

Restrictions on building tailings or waste dams

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 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 United States, 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 the federal Resource Conservation and Recovery Act (RCRA), as amended, and its state counterpart statutes and regulations.

HEALTH AND SAFETY, AND LABOUR ISSUES

Principal health and safety, and labour laws

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 federal Mine Safety and Health Act is the primary authority governing health, safety and labour issues in regard to the mining industry in the United States. To carry out the provisions of 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.

Management and recycling of mining waste

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?

New methods and approaches to improve mine waste management practices continue being developed to reduce the adverse impact of both mining operations and mine closures that require planning for both the storage and long-term stabilisation of mining waste. 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. 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 located 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.

Use of domestic and foreign employees

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 applies to foreign employees working in mining activities in the United States. 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 United States. However, the increased tensions surrounding US Immigration have caused issues recently for those with specialised skills seeking work visas.

SOCIAL AND COMMUNITY ISSUES

Community engagement and CSR

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?

Corporate social responsibility initiatives in the United States continue in their progression from compliance exercises into a form of stakeholder and community engagement. Although the United States 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 United States 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 United States are openly seeking to improve relationships with local communities, the wider society, and various constituent groups to align stakeholder and company values.

Rights of aboriginal, indigenous or disadvantaged peoples

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 United States holds legal title to Indian lands in trust 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 United States Bureau of Indian Affairs 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. Mining projects continue to face increased scrutiny by US indigenous groups where those projects are developed on land considered to have significant religious or cultural value to Indian tribes. 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.

International law

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

The United States 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 and should be evaluated on a case-by-case basis.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

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 in excess of US\$10,000 in any one year. 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.

Non-US companies have been the target for many of the most high-profile prosecutions under the Foreign Corrupt Practices Act (FCPA) as the anti-bribery provisions of the FCPA extend to foreign companies and individuals for acts in the United States. The energy sector was a focus of FCPA enforcement in 2018, as the US Department of Justice (DOJ) and the SEC brought actions against some of the largest energy companies in Latin America. For example, *Petróleo Brasileiro SA (Petrobras)* marked one of the largest FCPA settlements in history, agreeing to pay \$1.78 billion to US and Brazilian authorities in fines and penalties.

Foreign legislation

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

The United States 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 United States do not pay particular attention to any specific foreign anti-bribery or corruption legislation.

Disclosure of payments by resource companies

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 United States is no longer a member of the EITI as of 2 November 2017. Owing to the widely varied nature of ownership interests in natural resources in the United States (eg, private, federal, state and tribal), forcing universal participation across the United States was determined by the US Department of the Interior to be too difficult to administer. Having joined in 2011, the United States created a public data portal to document natural resource revenues from federal lands, managed by the US Office of Natural Resources Revenue, which includes detailed information on taxes collected from oil, gas, coal, wind and geothermal operations on federal lands and how such revenues are distributed. Despite its withdrawal, the United States has stated its continued commitment to the ideals of transparency enshrined in the EITI Principles and the EITI Standard as well as fighting corruption in the extractive industries sector. Since 2017, the extent of the disclosures and practical implications of the EITI withdrawal remain unclear.

FOREIGN INVESTMENT

Foreign ownership restrictions

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, foreign ownership is permitted of stock in corporations that own or control mining claims, and US mining laws generally allow for foreign 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 United States (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 Committee on Foreign Investment in the United States (CFIUS) in order to identify and address any national security concerns that may 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, the CFIUS may impose conditions on the transaction to mitigate such risks. The Foreign Investment Risks Review Modernization Act of 2018 (FIRRMA) expands the jurisdiction of the CFIUS to add new types of covered transactions and broadens the ability of the CFIUS to review transactions. In certain circumstances, the CFIUS may refer the case to the President of the United States for action, including suspending or prohibiting the transaction in very limited circumstances.

INTERNATIONAL TREATIES**Applicable international treaties**

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

The United States is a party to numerous international treaties of general application that address or relate to foreign investment in the United States, but no 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 person 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 United States. The President is charged with the responsibility to make the decision.

Because of its proximity to both Canada and Mexico, two treaties that have traditionally been a particular focus of the United States are the NAFTA and the Trans-Pacific Partnership Agreement (TPPA). The Trump administration has withdrawn the United States from the TPPA, and recently negotiated the new USMCA investment treaty to replace NAFTA. Although President Trump has signed the USMCA, as have the leaders of Canada and Mexico, the United States Congress has yet to ratify the it. Significantly, like the NAFTA, the new USMCA prohibits expropriation or nationalisation of projects across international borders and provides a methodology for redress and compensation. In any event, new developments in regard to the future cross-border relationships with both Canada and Mexico are expected and should be further investigated and evaluated.

The logo for Haynesboone, featuring the name in a lowercase, serif font.**John D Fognani**

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