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THE MINING LAW OF 1872

The law that time forgot

By Ted Williams

Fly Rod & Reel, March 2008



It was 1872. Ulysses S. Grant was in the White House, and it would be four years before the Sioux and Cheyenne sent George Custer to sing with the unseen choir. In an effort to promote westward expansion the federal government was frantically disposing of public-domain property. Building on the Homestead Act, not yet a decade old, Congress enacted the 1872 General Mining Law, a statute designed for pick-and-shovel prospectors that basically gave away the public's land and "hardrock" minerals — such as gold, silver and copper — to anyone staking a claim.

The astonishing thing about the 1872 Mining Law is that in 2008 it survives essentially unchanged, a testament to the political power and mendacity of the hardrock-mining lobby. A company or individual, foreign or domestic, can still acquire land and precious minerals belonging to all Americans for 1872 prices. That's \$2.50 an acre for an open-pit mine and \$5 an acre for a vein; but since we don't find veins of ore anymore, virtually all operations are open-pit. There's no limit to the number of claims a holder can stake, and claims can be held indefinitely. Unlike other extractive industries — which are assessed 8 percent to 16.7 percent of value for such public-domain resources as gas, oil, coal, phosphate, potash and timber — hardrock-mining businesses don't have to pay royalties. In 1989, when the Government Accountability Office reviewed just 20 hardrock-mining claims, it found that since 1970 the federal government had received about \$4,500 for lands valued at between \$13.8 million and \$47.9 million.

Nor do hardrock-mining companies always have to clean up their messes. They can just declare bankruptcy and bolt. Since 1977 the coal industry (not protected by the Mining Law) has contributed

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\$7.4 billion to a federal fund that will underwrite reclamation and detoxification of abandoned mine sites. But the federal government hasn't collected a cent for this purpose from hardrock-mining companies. This despite the fact that they have taken \$245 billion worth of minerals and left us with 500,000 abandoned mines (many of them Superfund sites) that belch acid and other poisons into 16,000 miles of stream, a mess that will cost taxpayers between \$50 billion and \$72 billion to clean up.

The hardrock-mining industry is far and away the worst polluter in America. Although it comprises only one-third of one percent of American industrial facilities, it contributes 46 percent of the industrial pollution. The Washington D.C.-based Environmental Working Group has identified 58 toxic chemicals spewed by hardrock-mining companies, including copper, cadmium, arsenic, cyanide, mercury and lead. And according to its analysis of a federal pollution database covering 650 priority pollutants from all US industries, 18 of the top 20 polluting facilities in 2001 were hardrock mines or hardrock smelters.

Almost a quarter of our nation, or some 270 million acres, is open to hardrock-mining claims; this public land is under the gun as never before due to soaring mineral prices on the world market. For instance, in just the past six years gold prices have doubled, and the global demand for nuclear fuel has spiked the price of uranium ore by a factor of 10. The Environmental Working Group reports an 80-percent increase in hardrock-mining claims in 12 Western states over the past five years, including 800 claims (most for uranium) within five miles of the Grand Canyon. Nationwide, there are 21,365 claims within 10 miles of national parks and other federally protected lands, 7,390 of them staked since 2003.



Although hardrock-mining is prohibited in national parks, nearby operations can devastate fish and wildlife habitat within them, as seen with the New World Mine debacle. So horrific would have been the damage done by this gold, copper and silver extraction to the trout of Yellowstone National Park that the Clinton administration saw fit to ransom them, paying \$65 million to Crown Butte Mines, a Canadian company, for its property interests.

According to the EPA, 40 percent of all Western headwater streams are being poisoned by abandoned mine waste — a statistic that naturally distresses Trout Unlimited. Chris Wood, TU's conservation VP, offers this: "There's nobody who thinks we shouldn't clean up acid-mine drainage, but we can't do it because the federal funds don't exist. We haven't collected a nickel from hardrock miners to clean up Western headwater streams. And where are all the native-trout strongholds in the West? They're all up in the headwaters on Forest Service and BLM [Bureau of Land Management] land — the backcountry roadless areas, many of which are riddled with abandoned mines. If these fish have any hope of persisting in a warming climate, we've got to make sure that those habitats are as secure as we can make them. But without funding it's not going to happen."

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Montana's Cabinet Mountains Wilderness Area is an important sanctuary for grizzlies and bull trout, both listed under the Endangered Species Act. But neither this law nor the Wilderness Act of 1964 (which grandfathered hardrock mining there) can protect these imperiled species from the 1872 Mining Law. Sterling Mining Company plans to extract copper and silver by hacking a three-mile tunnel almost 1,000 feet below the surface, venting into the storied Clark Fork three million gallons of effluent every 24 hours. A 300-foot-high pulverized waste-rock dump would cover 340 acres of public land along Rock Creek, another world-famous trout stream and important bull trout spawning habitat. And all this would go down in a seismically active area that drains into Idaho's 82,088-acre Lake Pend Oreille, a trophy rainbow fishery and the fifth-largest natural freshwater lake in the US. TU's Public Lands Initiative staffers Russ Schnitzer and Rob Roberts wrote an excellent report examining what hardrock mining has done to America's best trout waters. Entitled "Settled, Mined, and Left Behind," it describes such insults to the earth as the Summitville gold mine in Colorado, a massive Superfund site excreting cyanide and other poisons, which has razed aquatic life from a 17-mile stretch of the Alamosa River (important habitat for waterfowl and whooping cranes) and devastated surrounding farmland dependent on the water for irrigation. When the mine's owner, Canadian-based Galactic Resources, Ltd., went bust in 1992 it simply walked away, leaving a mess that, although it probably can't ever be entirely cleaned up, so far has cost US taxpayers \$200 million.

Most FR&R readers have heard about the ongoing restoration of Montana's mine-blighted Blackfoot River by the Blackfoot Challenge, a group whose partners consist of 20 state and federal resource agencies, six local agencies, nine local foundations and corporations, 27 NGOs, eight schools and five communities. The work has been impressive and encouraging. But it isn't anywhere near complete, nor is it ever likely to be. And were it not for the 1872 Mining Law, virtually none of it would be necessary.

More than 100 abandoned mines still ooze bright-orange acid, and heavy metals such as arsenic and cadmium, into Blackfoot tributaries. And when the river swells with snowmelt its water mingles with waste-rock and tailings dumps, picking up more poisons. A 1975 flood blew out the 500-foot-long Mike Horse Mine tailings dam, causing a massive kill of browns, westslope cutthroats and brookies, and poisoning the river to the extent that 13 years later the abundance of cutthroats a year or more old was less than a quarter of what it had been before the event. Sixteen years after the spill stoneflies and brown trout 46 miles downstream still contained dangerous levels of cadmium. Fishery inventories conducted between 1990 and 2001 in 88 tributaries revealed significant degradation in 83.

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Similar restoration, spearheaded by TU, is underway in the high country of the Gunnison National Forest on Colorado's Upper Arkansas River. But, again, the work isn't anywhere near complete, there is no apparent end to it, and it wouldn't be necessary if the law had required hardrock miners to reclaim and detoxify watersheds, and to invest in environmental safeguards. The watershed is honeycombed with abandoned gold and silver mines, including Asarco and Newmont's California Gulch mine outside Leadville, a major Superfund site. And it is festooned with toxic waste rock and tailings, all sending a witch's brew of acid and heavy metals into the system. Despite all this pollution the river had produced trophy brown trout during the late 20th Century. But diminishing flows and the resultant concentration of poisons reduced aquatic insects and stream cover to the point that, in 2001, the state was obliged to strip the river of its "Gold Medal" designation.

Enlightened members of Congress and the executive branch have been trying to reform the Mining Law for decades. On the Senate floor Sen. Dale Bumpers (D-AR) used to cry out "Poor ol' Uncle Sucker! Poor ol' Uncle Sucker!" as he read off long lists of public lands that were sold for a song to hardrock-mining companies. In the executive branch no one fought harder to bring hardrock mining out of the 19th Century than Bruce Babbitt, interior secretary during the Clinton administration. "Why am I giving \$10 billion of the . . . assets owned by American citizens to a company that's not even an American company?" demanded Babbitt. It was a good question.

Traditional abuses of the Mining Law included purchases of public land for \$2.50 or \$5 per acre by parties who claimed they were after minerals but who actually developed the land or sold it at fair market value. That pretty much ended in 1994, however, when Congress imposed a funding moratorium (continually renewed since then) on processing applications for land purchases ("patents") by hardrock miners. Although this applied only to new patents that hadn't gotten very far in the application process and although all hardrock miners were free to stake claims and to mine without actually owning the property, the moratorium saved public lands worth billions of dollars.

But the moratorium was a Band-Aid. Since then, and before, all legislative attempts to reform the Mining Law itself have been torpedoed by the powerful mining lobby and the legislators it finances — most notably Sen. Harry Reid (D-NV), now majority leader and whose campaigns, according to the non-

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partisan Center for Responsive Politics, have been underwritten by mining interests to the tune of \$270,00 since 1989.

Babbitt reformed the Mining Law as much as he could as interior secretary. Citing an existing provision in the Federal Land Policy and Management Act that proscribes "unnecessary and undue degradation of public lands," he instructed the BLM to deny hardrock mining in environmentally sensitive areas. Previously, the BLM, Forest Service and the American public had believed there was no recourse, that miners had a property right on the public domain.

Enter the administration of George W. Bush. At the behest of the hardrock lobby and Sen. Reid and his allies — especially Senators Larry Craig (R-ID), Conrad Burns (R-MT) and Frank Murkowski (R-AK) — the Bush team promptly reversed most of Babbitt's regulatory reforms, including specific standards for protecting water quality. So now the only hope is to bring the 1872 Mining Law into the 21st Century through legislation.

Never has the opportunity been riper. Democrats control Congress. Burns and Murkowski are gone; Craig's airport men's room caper has rendered him politically impotent; and Reid, seeing himself surrounded and increasingly unfriended, has recently been making noises about reform that sound almost reasonable. Suddenly, it's not just the enviros complaining. After twice voting the best friend the Mining Law ever had into the White House, sportsmen — even some of the most conservative — finally get it. Educated and led by the brightest of their numbers — from TU, the National Wildlife Federation and the Theodore Roosevelt Conservation Partnership, who call themselves "Sportsmen United for Sensible Mining"—they are increasingly in the faces of their elected officials.

Perhaps the main reason sportsmen are finally engaged is a dead-on-arrival bill offered in 2005 by Mining Law acolyte, ardent privatizer and then-Congressman Richard Pombo (R-CA) that would have lifted the moratorium on patenting by empowering the secretary of interior to sell off public land and resources, including national parks, wildlife refuges and wilderness areas — not just for mining but for anything, even condos. This got hunters and anglers focused on the Mining Law more effectively than Sportsmen United for Sensible Mining could ever have hoped to. "We owe Pombo a debt of gratitude," remarks TU's Chris Wood.

Rep. Nick Rahall (D-WV), then ranking member and now chair of the House Resources Committee, called Pombo's scheme "a raid on America's public lands and our natural resources heritage of almost unparalleled proportions." Rahall, who for years has been frustrated in his valiant efforts to reform the Mining Law, at last has a great shot with his Mining Reform Bill (H.R. 2262), which he introduced this past May with Energy and Mineral Resources Subcommittee Chairman Rep. Jim Costa (D-CA) and which was approved by the House on November 1. The legislation (vehemently opposed by the Bush administration) would do away with the notion that hardrock mining on public land is a property right, and instead would regulate it like grazing, logging or any other multiple-use activity.

H.R. 2262 would require royalties of 4 percent of net revenues on existing mines and 8 percent on new mines. A third of the revenue would go to assist impacted communities, two-thirds to underwrite abandoned-mine cleanup. The bill would outlaw patents submitted after the 1994 moratorium and bar mining in "areas of critical environmental concern," such as the 58.5 million acres in the national forest system defined by the Clinton administration as "roadless," watersheds of wild and scenic rivers, and wilderness study areas. And a mine could not get a permit unless the reclamation plan demonstrated "that 10 years following mine closure, no treatment of surface or ground water for carcinogens or toxins

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will be required to meet water quality standards at the point of discharge."

Finally, there's a new dynamic in the industry with the proliferation and influx of foreign and multinational mining companies (of the five corporations producing nearly 90 percent of the nation's gold, only one is American). These days there's no longer a bunch of US-based companies telling Congress what to do.

What's more, a clean brand image is desperately sought by the jewelry industry, the biggest market for gold and a passionate advocate of Mining Law reform. Customers of, say, Tiffany's don't want trout blood on their necklaces, rings and bracelets. And, led by Tiffany & Co. CEO Mike Kowalski, the industry has come up with a set of principles that define responsible gold mining. It calls them the "Golden Rules." May all who care about fish and wildlife now prevail on Congress to render the Golden Rules moot.

And may voters and legislators come to understand that the 1872 Mining Law is a phenomenon that has no parallel in the history of this nation — a relict, as fascinating as it is destructive, as if mastodons foraged in Midwest green fields. It is time to assign all of its abusive provisions permanently to our past and, thereby, to provide respectability and responsibility to what, by law, has been a rogue industry working against the public good.