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What is a Mining Right?SM©

A mining right is a powerful, and not commonly understood, concept that is all too often watered down by agency regulatory interference and exacerbated by the lack of knowledge from most of the mining community in the 21st century. This right to mine is an action also referred to as a "right of self-initiation". This right to mine is an action (prospecting and extraction), as distinguished from idle ownership. Very few people understand the difference between a right (granted by Congress under statute) as distinguished from a permit (granted by an agency through regulation). Ones right to choose to actively engage in mining stems from the 1866 and 1872 mining law grant from Congress (codified at 30 U.S.C. sections 22-54).

As an example, the Forest Service is a creature of an act of Congress charged with the responsibility and stewardship of the National Forests and the Dept. of Interior was charged by Congress to manage the rest of the public lands. The miner or miners operating under the Mining Act should operate on a level playing field just as the Forest Service relationship with the BLM and Park Service. Have you ever heard of the Forest Service telling the BLM that they cannot do their job? In other words, can the Forest Service tell a miner he cannot mine on land open to mineral entry? The answer is no. Can they ask to help mitigate the surface impacts? Yes (according to the 9th circuit court), so long as their actions do not unreasonably prohibit, hinder, or clash with the miner's property right to mine (see 30 U.S.C. § 612(b)). The same interaction can apply to State agencies and their interplay with the miner on federally managed lands if the state agency has a memorandum of understanding with the federal surface management agency such as the U.S. Forest Service (see 16 U.S.C. § 559g(c)).

If the miners were to organize into mining districts. As they did in the past, they could promulgate regulations just as any other federal agency and regulate themselves under customary practices provided by the federal mining law.

What is a Discretionary Agency Action?

In short – a state or federal agency action and its associate approval that is optional. In other words the agency has the authority to grant a go ahead or deny it. Why is this "discretionary" agency action language so important? Answer, because environmental laws only apply in this setting. Namely the National Environmental Policy Act (NEPA-federal), the Endangered Species Act (ESA), Council for Environmental Quality Act (CEQA-state), and the Clean Water Acts. More importantly, is the miner subject to discretionary agency action in a true permit scenario? The answer is no unless the miner willingly consents to it in writing thereby waiving an unlawful jurisdiction by the agency. The miner has the right to mine, therefore rendering any other agency relationship to one of non-discretionary advisement and notice, which is a large distinction from a discretionary permit. This distinction is very important in light of the ongoing CA Dept. of Fish & Game (DFG) and Karuk litigation. Apparently the mining community has forgotten the important points in the Karuk v. Forest Service case where the tribe had lost and has now overcome namely because the miners failed to point out to the court (in the DFG cases) and

fully understand the power of the mining right and the fact the DFG's relationship with the miner is non-discretionary in character, that by definition should not admit to a permit system. A permit system has been allowed to exist by the willing consent of the permittees. Those individuals dredging under the Federal mining law upon federally managed lands open to mineral entry are exempt from a permissive system such that DFG regulates whereas recreationalist dredgers and those on private and State lands are not.

The Court stated in Karuk v. Forest Service 379 F.Supp.2d 1071 at 1094 (N.D. Cal. 2005):

"…mining operations take place pursuant to the General Mining Law and the Surface Resources Act, which confers a statutory right upon miners to enter certain public lands for the purpose of mining and prospecting. This distinction is significant, as it differentiates mining operations from "licenses, contracts, leases, easements, rights-of- way, permits, or grants-in-aid," which are permissive in nature. Last, Plaintiff has not identified any sufficiently analogous case law that supports its argument that the Forest

Service's "discretion" to determine what constitutes a "significant surface resource disturbance" is the type of "discretionary control" over the NOI process that invokes the ESA.

In fact, although Plaintiff vigorously argues that any act requiring "discretion" invokes the ESA, it is well-established that not every agency action triggers the consultation requirement of Section 7(a)(2) of the ESA. As the Ninth Circuit has made clear:
Within the limits prescribed by the Constitution, Congress undoubtedly has the power to regulate all conduct capable of harming protected species. However, Congress chose to apply section 7(a)(2) to federal relationships with private entities ***only when the federal agency acts to authorize, fund, or carry out the relevant activity.***
Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir.1995) (emphasis added)."

And at 1095 the court stated:

"Finally, pursuant to Marbled Murrelet, the Court finds that Plaintiff's generalized challenge to the "discretionary" nature of the Forest Service's implementation of the NOI review process is insufficient to invoke the ESA. Although, here, the Forest Service engaged in an interactive process with the miners prior to the start of the 2004 mining season, which process involved a discussion of the types of activities that would be considered a significant disturbance of surface resources, this process is most properly considered the type of "advisory" conduct that does not trigger the ESA. Marbled Murrelet, 83 F.3d. at 1074. Indeed, as the Ninth Circuit stated in Marbled Murrelet:
Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 [of the ESA] simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loathe to contact the [agency] for fear ****1103*** *of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled, and protection of threatened and endangered species would suffer. Id. at 1074-75.*

Here, Plaintiff has not established that the NOIs are "permits" that are "authorized" by the Forest Service. Nor has Plaintiff established that the Forest Service's initial consultation process with the miners is a federal action that triggers the ESA."

And at 1075 the court stated:

"*Forest Service's acceptance of four notices of intent (NOI) to conduct mining operations in a National Forest, on basis that the operations were not likely to cause a significant disturbance of surface resources, did not constitute a "federal action" within the meaning of the Endangered Species Act (ESA) and thus did not violate its duty under ESA to comply with consultation requirements; miners were all private entities, Service's review of the NOIs did not amount to an authorization, mining operations were authorized by statute rather than merely permissive, and Service had no discretionary control over the NOIs process. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § § 402.02, 402.03. Emphasis added*

State law under CEQA also is defined as to only apply to discretionary projects as quoted from section 21080 of the Public Resource code:

CALIFORNIA CODES PUBLIC RESOURCES CODE SECTION 21080-21098

21080. *(a) Except as otherwise provided in this division, this division shall apply to* ***discretionary*** *projects proposed to be carried out or approved by public agencies…"*

The Federal code states at 50 CFR § 402.03 (Applicability)
"Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."

Unfortunately in June of 2012, the 9th Circuit (en banc) ruled in Karuk v. Forest Service (681 F.3d 1006) that the Forest Service is exercising discretion in processing an NOI ignoring 30 years of precedent and standing the rule of law on its head. This 9th Circuit ruling erroneously means that there is no significant difference between a decision not to act and an affirmative authorization. In holding that a miner's submission of an NOI triggers section 7 consultation under the ESA, the majority discourages miners from discussing their proposed activities with the Forest Service to voluntarily reduce their impact on the environment, and rather encourages miners to make their own determination that their activities are not likely to "cause significant disturbance of surface resources," 36 C.F.R. § 228.4(a), and thus no NOI need be filed. This is not the first time the 9th Circuit has created law out of thin air and ignored the U.S. Supreme Court.

The U.S. Supreme Court in 2007 clarified the meaning of "discretionary agency action" in Home Builders v. Defenders of Wildlife 127 S.Ct. 2518 at 2534 where they stated:

" *Agency discretion presumes that an agency can exercise "judgment" in connection with a particular action. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); see also Random House Dictionary of the English*

Language 411 (unabridged ed.1967) ("discretion" defined as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice"). As the mandatory language of § 402(b) itself illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.

This history of the regulation also supports the reading to which we defer today. As the dissent itself points out, the proposed version of § 402.03 initially stated that "Section 7 and the requirements of this Part apply to all actions in which there is Federal involvement or control,"48 Fed.Reg. 29999 (1983) (emphasis added); the Secretary of the Interior modified this language to provide (as adopted in the Final Rule now at issue) that the statutory requirements apply to "all actions in which there is discretionary Federal involvement or control,"51 Fed.Reg. 19958 (1986) (emphasis added). The dissent's reading would rob the word "discretionary" of any effect, and substitute the earlier, proposed version of the regulation for the text that was actually adopted.

In short, we read § 402.03 to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is required by statute to undertake once certain specified triggering events have occurred. This reading not only is reasonable, inasmuch as it gives effect to the ESA's provision, but also comports with the canon against implied repeals because it stays § 7(a)(2)'s mandate where it would effectively override otherwise mandatory statutory duties."

A miner operating under the Mining Law statute has a non-discretionary agency "advisory" relationship. A miner cannot be legally tortured into a CEQA, NEPA or ESA scenario. The law also, as the Supreme Court ruled, "stays" the application of the ESA "where it would effectively override otherwise mandatory statutory duties" like (for the purposes of this discussion) the Mining Law.

Can The Agencies Regulate Us Miners Operating Under the U.S. Mining Law?

The answer is yes in many cases – so long as the agency regulatory authority over the miner does not become prohibitive. If the miner can work out a reasonable agreement, i.e. contract generally through an "informational", then all is well. If not, then the miner can complain to the surface management agency through written administrative complaint or the appeal process and assert that the agencies actions are unreasonable, material interfering, prohibitive, and why, pursuant to 30 U.S.C. § 612(b) (see also U.S. v. Curtis-Nevada Mines 611 F.2d 1277 at 1285). Agency actions can often amount to prohibitions that impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes (see 30 U.S.C § 26). To reinforce this point, in South Dakota Mining Assoc. v. Lawrence County 155 F3d 1005 (8th Cir. 1998), at 1011 the court stated: "…*government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character."* Emphasis added.

And at 1010 the court stated:

"…County ordinance is preempted because it conflicts with federal law. Specifically, we address whether the ordinance conflicts with the Federal Mining Act because it stands as an obstacle to the

accomplishment of the full purposes and objectives of Congress embodied in the Act. Granite Rock, 480 U.S. at 581, 107 S.Ct."

Generally speaking, when this prohibition scenario occurs, the agency is usually violating their own rules and federal statute. Miners must press the agencies and the courts with this question: **Where do the mining rights end Under the Mining Acts 30 U.S.C. § 22 – 54) and the regulatory obligations begin?** And in the case of the Forest Service: **What is significant surface resource disturbance?** The distinction between "reasonable regulation" and "prohibition", offers locators an avenue to resist the application of rules that severely impact upon their operations, but the miner must assert unreasonableness at the outset and pursue those objections through agency and judicial review processes. And, as in other instances, intricate semantic arguments seldom prevail if an ordinary, common sense interpretation is available.

At this point it is recommended that the miner contact Public Lands for the People to help step one effectively through the process and in order to challenge the problem agency in a lawful manner.

There are many more cases that make reference to the distinction between a right under the mining law and a permissive system, but miners will lose cases unless this concept is fully understood and exercised. It is fair to say the miner does not have an unfettered right to mine irrespective of substantive environmental consequences - as was pointed out in the infamous 1884 Sawyer decision that banned hydraulic mine debris.

Presently, it is this writer's opinion that environmental laws were written not to apply to non-discretionary agency advisements that encompass mitigation recommendations too commonly misunderstood and accepted as a permit system of today.

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