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Mining Law

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BOOK REVIEW

THE MINING LAW: A STUDY IN PERPETUAL MOTION

JOHN D. LESHY

Resources for the Future: Washington, D.C. 1987. Pp. 370,
Appendices, Notes.

In this fine analysis of the twisted and tortured development of government management of hard rock mining on federal public lands, Arizona State law professor John Leshy provides a clear road map showing the various routes that begin with the Mining Act of 1872 and lead to the very different Mining Act of 1872 in 1988. As Leshy so clearly points out, the old Act is a hoary beast, vaguely constrained over its 116-year life by inadequate government regulations, transformed by indirect government constraints, and itself misshapen in response.

Today the Mining Act of 1872 is arcane, dangerous, and relatively obscure to all except mining companies and aficionados of public lands. Large scale open pit mining of low-grade ore bodies characterizes what is left of the hard rock mining industry in this country and poses the most direct and tangible threat to the integrity of our public lands. Leshy succeeds in showing how administrative regulations, court decisions, and largely indirect Congressional changes surrounding the 1872 Act have transformed the original Act to fit, more or less, today's radically different mining activities on federal public lands viewed in radically different ways.

For example, in particularly illuminating chapters, Leshy shows how relatively recent federal environmental laws, like NEPA, the Clean Air and Water Acts, and the Wilderness Act, have sucked some of the life out of the 1872 Act's original free access principles. As a result, the modern hard rock miner has considerably less discretion to initiate mining on the Federal public domain than the 1872 miner had and the Federal owner has much more regulatory power than it had in 1872.

Leshy is equally effective in showing how judicial and administrative changes in the law of discovery began to reflect changes in the hard rock mining industry on the Federal public domain as early as the 1890s. These judicial and administrative changes became so ossified that they failed to keep up with further, more radical changes in this century. Hard rock mining on the Federal public domain was left in the lurch. It is loosely connected to the original statute and it is a poor reflection of actual mining practices as well.

Indeed, *The Mining Law: A Study in Perpetual Motion* succeeds best in those chapters, which form the heart of Leshy's book, in which he samples discrete developments in what he calls the "common law" of

statutory mining under the 1872 Act. A separate chapter on the decline between 1872 and 1987 of the basic principle of self-initiated, free access for hard rock miners to the Federal public domain helps immensely to clear away some of the tangled complication of the Act as presently administered. Similar samples dealing with the problems of multiple mining claims, with the sometimes unseemly intervention of the courts and the executive in parts of the 1872 Act that were hopeless, and with the historic problems in reforming the law, all help to provide a "current picture of the Mining Law in operation" which Lesly shows so well, otherwise "is blurred and shadowy." *The Mining Law* brings into sharp and useful focus the "host of quixotic, inadvertent devices" that make up the current law of hard rock mining on the public domain.

Still *The Mining Law* suffers slightly from the virtue of its approach. Lesly's topical approach—taking on one area of mining law from 1872 to the present, and then moving to another area for the same period—sometimes makes the Act as a whole hard to understand. Additionally, there is little effort here to place hard rock mining in the more general context of federal land management where it belongs. Lesly constantly compares the 1872 Act's continued handling of hard rock mining on the Federal public domain to the 1920 Mineral Leasing Act's alternative for specified fossil fuels. Beyond that, however, Lesly offers no detailed comparisons in handling other Federal public land resources that might show how strange the 1872 Act's free access principles are in the 20th century.

Finally, despite Lesly's intent to aim this book at a wider audience, the book will appeal primarily to lawyers. Lesly approaches the Act structurally rather than narratively despite the fact that he suspected "there was a good story here, one that might be useful for its own sake." The story does not emerge from Lesly's analysis, however, the parts of the Act and their development do emerge. In addition, Lesly laces the otherwise elegantly composed prose with the peculiar talk of lawyers. Laypersons may be baffled by phrases like "(t)he better reading (of a case) is probably that the decision is bottomed on the savings clause itself" but lawyers should feel right at home. What Lesly really means when he writes that "the parameters of possible compromise have been so exhaustively plumbed" is anybody's guess, but lawyers will have an easier time with the inapposite metaphors.

Despite these relatively minor cavils, *The Mining Law: A Study in Perpetual Motion* fills an important gap in our understanding of hard rock mining on the Federal public domain. Over the years, the government and other interested parties have produced a bewildering array of studies of the 1872 Mining Act in operation. Most have had their obvious axes

to grind. *The Mining Law* is the most complete, the most readable, and the most neutral of these analyses. Leshy does not pick sides in the push and pull between large mining corporations, small scale miners and environmentalists. Instead, in his conclusion, Leshy can only wonder wistfully how an Act that is so unsuited to everyone's current interest in hard rock mining on the Federal public domain survived for so long. *The Mining Law: A Study in Perpetual Motion* provides its own explanation.

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