

FEDERAL LEGISLATIVE AND REGULATORY UPDATE

Nevada Mining Association
2008 Annual Meeting
September 6, 2008

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Mining for a Minerals Dependent World

December 1 - 5, 2008

John Ascuaga's
Nugget Casino Resort
Gardena Gardens (Reno), Nevada

Northwest Mining Association's 114th Annual Meeting,
Exposition and Short Courses



HR 2262 – The Hardrock Mining and Reclamation Act of 2007

- Introduced May 10, 2007 – on the 135th anniversary of the Mining Law
- 3 hearings: July and October in Washington DC; August in Elko NV
- Committee mark up on October 23, 2007
- Floor debate and vote on November 1, 2007
- Passed 244-166 with 3 Democrats voting no and 24 Republicans voting yes (Dave Reichert from Seattle was only western Republican to vote yes)

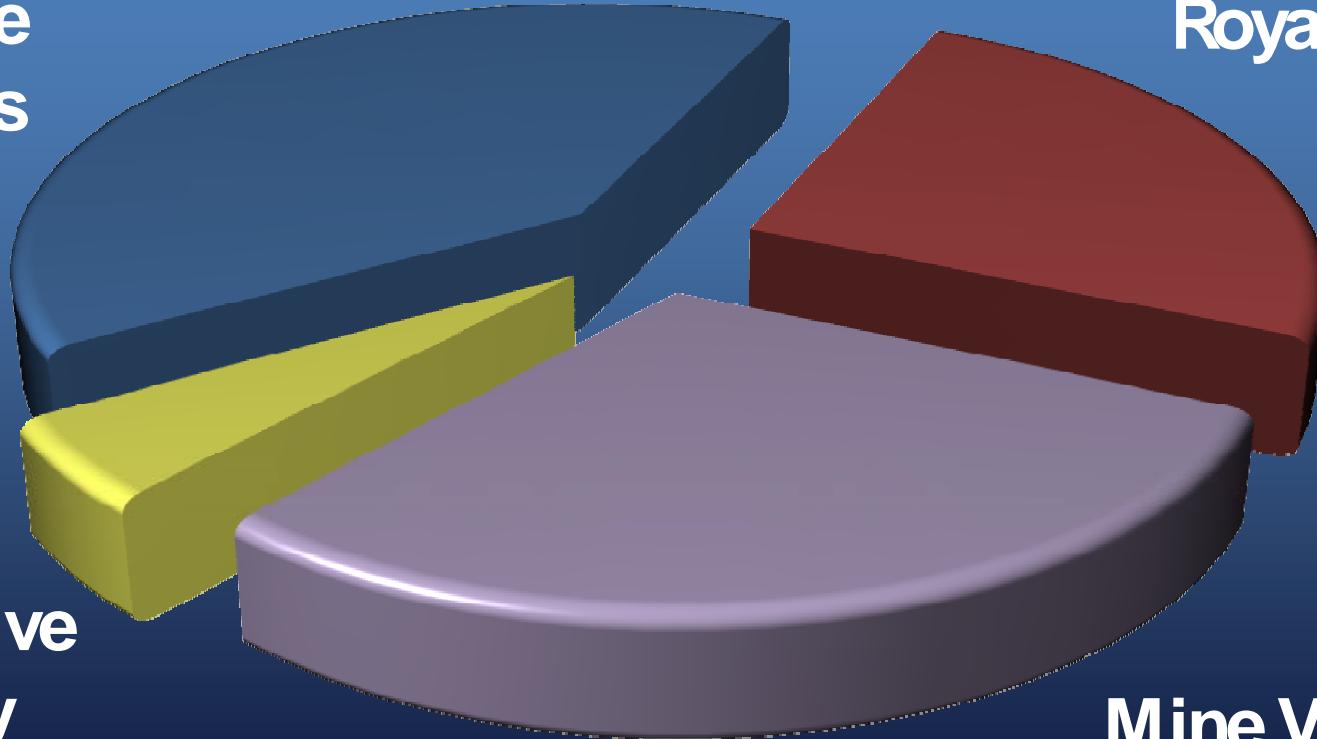
Here's What's Wrong with H.R. 2262

Eliminates
Land
Tenure
Rights

Retroactive
Royalty

Prospective
Royalty

Mine Veto
Provisions

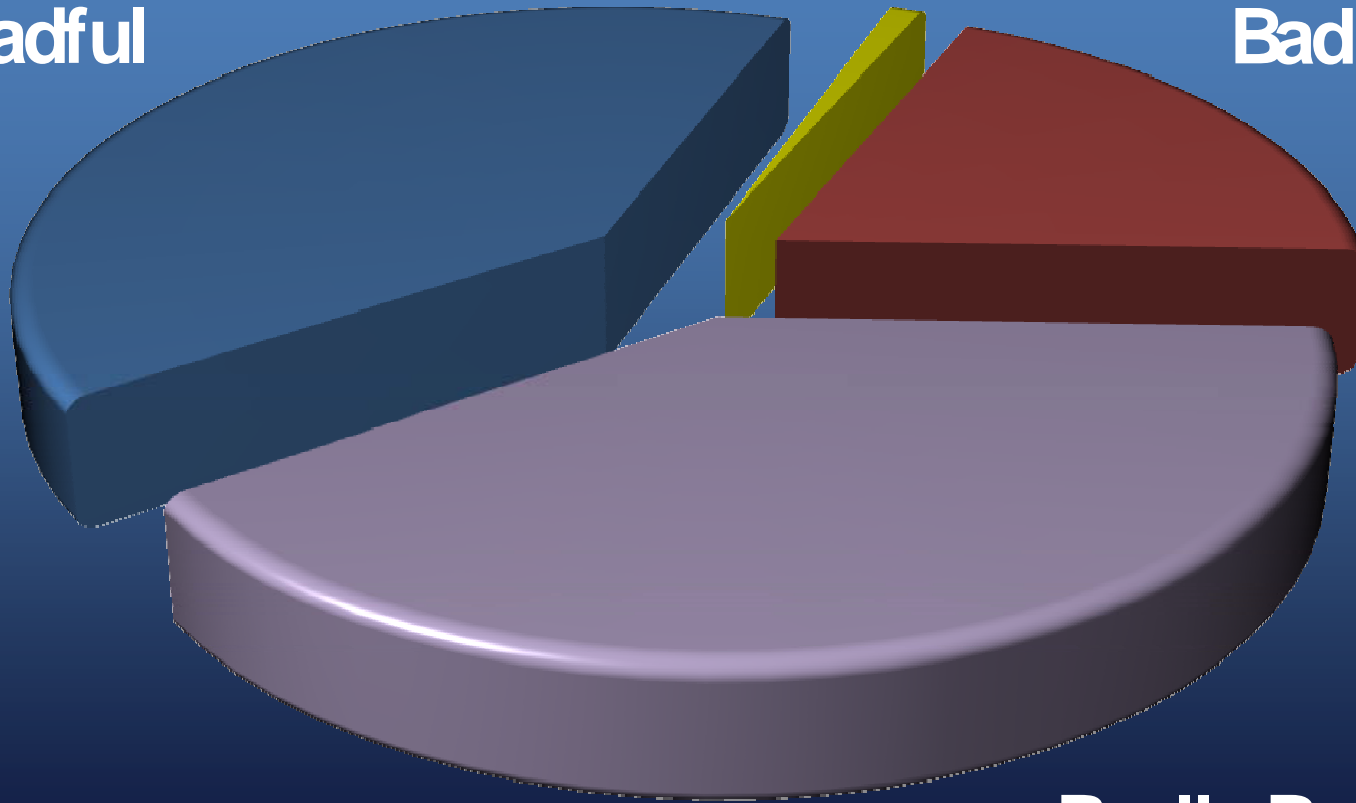


H.R. 2262 Misery Index

Simply
Dreadful

Potentially
Tolerable

Bad



Really Bad

Top 10 problems with HR 2262

1. Mine veto #1 (§ 301(2); 304(c)(B))

- *Allows Secretary to deny an operations permit to a project that otherwise complies with all environmental laws & regulations if the Secretary determines that the operation will cause undue degradation to public lands & resources*
 - *Undue degradation defined as “irreparable harm to significant scientific, cultural or environmental resources on public lands that cannot be effectively mitigated.” (§2(a)(19))*
 - *Essentially codifies John Leshey’s SIH opinion*

Top 10 problems with HR 2262

2. Mine Veto # 2 - Withdrawal petitions by states, political subdivisions and Indian Tribes (§202)

- To protect specific values that are important, including watersheds, scenic vistas, cultural, historic, wildlife habitat and similar values
- Includes religious and cultural values for Indian Tribes (sacred sites)
- **Requires** the Secretary to grant the withdrawal petition unless the Secretary finds that it is against the national interest to grant the petition

Top 10 problems with HR 2262

3. Mine Veto # 3 - Codifies the Leshy Ancillary Use Opinion by requiring a valid mining claim, valid mill site or valid tunnel site in order to have any rights under the Mining Law (§302(a)(1) & §304(a)(1)(A) & (B))
 - No Mining Law rights to use claims without a discovery or unclaimed public land open to mineral entry
 - Must obtain permission from the Secretary under FLPMA's right of way provisions and pay FMV for the use of those lands

Top 10 problems with HR 2262

4. Mine Veto # 4 - Eliminates security of title and tenure needed to attract investment capital by:
 - Eliminating the Mining Law's section 22 right to access, occupy, use, prospect, explore, discover, mine, process, reclaim (and uses reasonably incident thereto) federal lands open to mineral entry, with or without a claim
 - Requiring lands to be open to location at the time the permit is issued
 - Making the patent moratorium permanent as of September 30, 1994, without providing any replacement mechanism for security of tenure

Top 10 problems with HR 2262

5. Mine Veto # 5 - Massive withdrawals of public land from mineral entry (§201(b))
 - All Wilderness Study Areas
 - All Areas of Critical Environmental Concern
 - All Wild & Scenic Rivers; potential Wild & Scenic rivers (pursuant to the Wild & Scenic Rivers Act); rivers eligible for Wild & Scenic designation pursuant to the Act
 - 58.5 million acres identified in the Clinton Administration Roadless Rule
 - Plus *de facto* withdrawals by requiring compliance with applicable land use plan

Top 10 problems with HR 2262

6. No life of mine permits and uncertain permit renewals (§304(d))
 - 20 year permit with one 20 year renewal if in compliance with this Act
 - Mandatory review every 10 years (§304(g))
 - Quarterly inspections required (§503(a)(2))
 - Temporary cessation of operations may not exceed a continuous period of 5 years (§2(18)); requires Secretary approval if exceeds 180 days and not permitted in original permit (§304(f))
 - Exploration permits limited to a maximum of 10 years (§303(f))

Top 10 problems with HR 2262

7. New and duplicative environmental standards (Title III) that are vague, ambiguous and inconsistent with current federal and state environmental laws (*solutions in search of problems*)
 - Backfilling may be required (§307(b)(5))
 - Reclamation plan must demonstrate that 10 years following mine closure no treatment of surface or ground water will be required to meet with water quality standards at the point of discharge (§304(c)(H))

Top 10 problems with HR 2262

8. 4% gross royalty on existing operations with commercial production; 8% gross royalty on all other claims (§ 102)

- *Serious takings implications with respect to valid mining claims with a discovery of a valuable mineral deposit*
- *Result in the premature closure of many existing mines*
- *Many mines in the development stage will not be built*

Top 10 problems with HR 2262

9. Buffer zones near National Parks and Monuments (§309) and National Conservation System Units (§513(c))
 - **Shall** deny permits that will impair (National Parks & Monuments) or adversely impact resources or values for which conservation unit was established
 - Includes wildlife, scenic assets, water resources, air quality, acoustic qualities and **“other changes that would impair a citizen’s experience at a National Park or Monument”**
 - National Conservation System Unit defined to include Wilderness Areas, National Trails, National Wildlife Refuges, National Conservation Areas, National Recreation Areas, National Parks & Monuments & National Wild & Scenic Rivers
 - *De facto* withdrawals with possible takings implications

Top 10 problems with HR 2262

10. Unnecessary & harsh enforcement mechanisms (§506)

- Assumes all miners are scofflaws (severe criminal penalties for knowingly violating the Act or conducting mineral activities without a permit)
- Broad citizen suit provisions (§504)
 - Adding even more delays to permitting time lines
 - Does not preclude citizen suits when an administrative enforcement action has been filed
- SMCRA-style applicant violator system (§305)
 - Broad definitions of “affiliate” and “control” (§2(a)(1) & (6))
 - Could bar permits for the most minor violations to which no notice of violation has been issued

HR 2262 will:

- Eliminate the certainty and security of tenure required to invest in mineral exploration and mine development
- Increase America's reliance on foreign sources of minerals--Severely weakening America's national and economic security
- Export tens of thousands of high paying family wage level jobs & bring about the economic destruction of rural communities

HR 2262 will:

- Leave very little public land open to mineral entry
- Virtually eliminate exploration and mining on federal public lands
- Confiscate investments (mine veto) and take private property without just compensation in violation of the 5th Amendment leading to hundreds of takings lawsuits

The Administration

- November 1 – The Office of Management & Budget (OMB) issues strong Statement of Administration Policy (SAP) in opposition to H.R. 2262 that includes a veto threat related to the takings implications of the bill
 - NWMA provided Minority staff (who in turn provided it to OMB) a legal memorandum prepared by a former DOI Deputy Associate Solicitor concluding that applying a royalty to valid mining claims with a discovery of a valuable mineral deposit (including existing operations) would violate the 5th Amendment's protection against taking private property without just compensation

The Senate

- Three Senate Energy and Natural Resources Committee hearings have been held
 - September 2007 informational hearing
 - January 2008 oversight hearing on royalties and environmental regulations
 - March 2008 oversight hearing on Uranium & AML issues
 - NWMA Trustee Debbie Struhsacker testifies on AML issues on behalf of NWMA
- Majority Leader Reid, Ch. Bingaman, R. M. Domenici and a majority of the committee do not see H.R. 2262 as a starting point for Senate legislation
 - Criticized by
 - Sen. Reid
 - Sen. Domenici
 - Sen. Craig
 - Sen. Obama

The Senate

- Committee staff and Sen. Reid's staff met with representatives of the mining industry, obstructionist groups & environmental groups in an effort to write a Senate bill with broad support before Easter recess.
 - Major issues in discussions with Senate staff
 - Royalties
 - Gross v net
 - Amount
 - Transition—who pays
 - Elimination of patenting with a new security of tenure provision—tied to payment of claims maintenance fee
 - Environmental provisions
 - Earthworks and Pew continue to push, but less traction among Members and staff than previously

The Senate

- Mine Veto/Right to Say No
 - The deal killer
- Abandoned Mine Cleanup
 - All about \$\$\$\$ for an AML Fund
 - Increase in Claims Maintenance Fee
 - Reclamation fee
- Other issues:
 - Uranium—locatable or leasable
 - Financial assurance requirements
 - Water quality & water quantity issues -- tie water quality to bond release
 - Additional protections for National Parks & Monuments
 - A process to determine which lands should be open to mineral entry
 - Permit (possibly a 3809 or 228 Plan of Operation) and possible permit time limits (term plus as long as producing -- similar to oil & gas)
- Effort stalls when obstructionist groups insist on a discretionary mine veto and decide that the political environment may be more favorable in 2009

The Senate

- Sen. Feinstein introduces S. 2750, The Abandoned Mine Reclamation Act of 2008
 - Essentially the royalty provisions of H.R. 2262 without the environmental provisions, withdrawals and mine veto language
 - Includes higher claim and location fees and adds .3% reclamation fee on all hardrock production
 - No hearings have been held
- Sen. Cantwell (D-WA) issues statement supporting many of the provisions in H.R. 2262, circulates a “Dear Colleague” letter that attracts only 10 signatures and promises to introduce a bill
- **No Senate Committee action to date**

NWMA's Involvement

- Retained Ron McMurray of the Livingston Group to represent NWMA in Washington DC
- I have made sixteen trips to Washington DC since May, 2007 meeting with Members and/or their staffs
- Testified on AML issues in the House & Senate
- Held two fly-ins (October 2007 and January 2008), meeting with Senators Reid, Bingaman, Craig, Tester & Barrasso and Representatives Rahall, Costa, Young, Pearce, Sali, McMorris-Rodgers, Heller, Salazar, the staffs of several other Members and both majority and minority staffs of the authorizing committees
- On the January fly-in, NWMA members met with 19 of the 23 offices of Senate members of the Energy and Natural Resources Committee
- Strong relationship with senior DOI officials

NWMA's Involvement

- Participating in National Mining Association's Mineral Policy Task Force working group that is drafting legislative language industry can support – ensuring that all NWMA members from the prospector and smallest companies to the exploration and junior mining sector to the major producers to the vendors and suppliers have a seat at the table and a voice in the outcome
- Provided input to both majority and minority senate committee staff
- Will continue to be involved in Senate and House until we have a bill

Recent Developments

- Pew & Earthworks continue to push Mining Law Reform in the media
- Grand Canyon Watershed Protection Act (H.R. 5583) to withdraw AZ strip from mineral entry
- Grand Canyon Withdrawal Resolution by House Natural Resources Committee
 - Secretary Kempthorne has refused to comply
- July 21, 2008 GAO report on state royalties on hardrock mining and trends in mineral imports & exports
 - Shows multiple types of royalties & rates among the states

Recent Developments

- In July, Pew provides Senate Staff with a document entitled “Hardrock Mining in the West: The Pollution Persists”
 - An attempt to discredit NWMA’s testimony at the March 12 Senate hearing and NWMA’s white paper “The Environmental Provisions in the House Mining Law Bill (H.R. 2262) Are Solutions in Search of a Problem”
 - Alleges that serious environmental problems left by hardrock mining operations are not just problems of the past
 - However, all of the environmental problems cited by Pew are at mines developed prior to the enactment of modern environmental laws or during the infancy of mining regulations and bonding requirements

Recent Developments

- NWMA, after exhaustive research of each mine cited in the Pew document, prepared and provided to Senate Staff a rebuttal entitled “Hardrock Mining in the West: The Rest of the Story”
- Rebuttal demonstrates the inconvenient truth that the AML problem is about historic, pre-regulation mines and that today’s comprehensive environmental laws and regulations combined with current financial assurance requirements assure that today’s mines will not become tomorrow’s abandoned mines
- Rebuttal will be posted on NWMA’s website next week

Recent Developments

- July– DOI Inspector General (IG) issues report, “Abandoned Mine Lands in the Department of the Interior,” critical of BLM & NPS efforts to clean up AMLs
 - Based on 45 site visits and interviews with agency staff, the IG infers serious safety and environmental problems at AML sites
 - Although BLM strongly disagreed, the report concludes that DOI has “put the public’s health and safety at risk by not addressing hazards posed by abandoned mines on federal lands.”
 - Discusses funding shortfalls, but silent on sources of funds
 - Estimates costs in billions without supporting data

Prospects for Further Action

- Most believe Mining Law Reform is dead for 2008
 - CR or appropriations strategy unlikely
 - Sen. Feinstein chairs Interior Appropriations subcommittee
- Next Congress
 - Likely reintroduction and passage of something like H.R. 2262
 - Retirement of key Western Senators (Domenici; Craig; Allard) & possible defeat of Sen. Stevens
 - Two Udalls or Pearce & Schaffer?
 - Sen. Murkowski likely will be Ranking Member of Senate Energy & Natural Resources Committee
 - New Administration and Secretary of the Interior
 - Majority Leader Harry Reid is in cycle in 2010

Other Federal Legislation

- National Landscape Conservation System Act (S. 1139 & H.R. 2016)
 - Codifies Sec. Babbitt's national park-like internal BLM management of national monuments, WSA, Wild & Scenic Rivers, national conservation areas, National Trails System & any area designated by congress for management for conservation purposes
 - Stated purpose is to increase public awareness of the importance of these lands and to highlight the BLM's conservation of these areas and their cultural, historical, scientific, and ecological significance to the Nation
 - Threatens access to lands open for mineral entry and other public land uses
 - Increase permitting burdens
 - Referenced in "buffer zone" provision of H.R. 2262
 - Significant grassroots opposition
 - Currently included in Senate Omnibus Lands bill, but may be removed because of opposition from many western and southern Senators

Other Federal Legislation

- Senate Omnibus Lands Bill (S. 3213)
 - Includes numerous new Wilderness Areas and 90 other federal lands and parks bill
 - NLCS is the most controversial provision
 - Currently does not include Public Lands bills for Lyon, Mineral & Esmeralda counties
- Clean Water Restoration Act (S. 1870 & H.R. 2421)
 - Purpose is to legislatively overrule two Supreme Court decisions (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*) and *Rapanos v. U.S.*) that limited the coverage of the Clean Water Act (CWA)
 - Would expand coverage of the CWA from “navigable waters” to “waters of the United States” giving USEPA & USACOE control over virtually every stream, ditch, pond and puddle in the U.S., preempting state and local jurisdiction over land and water resources

Other Federal Legislation

- Clean Water Restoration Act (continued)
 - Would remove commonsense regulatory exemptions specifically important to the mining industry, such as waste treatment systems, which are typically used to meet water quality standards.
 - Opposed by a coalition of resource industries including mining, business groups, private property rights organizations, state municipal water districts
 - Scheduled mark-up in House Transportation & Infrastructure Committee when Congress reconvenes. House and Senate leadership would like to schedule floor votes before Congress adjourns to campaign
 - Contact your delegation to oppose this legislation

Regulatory Update

- USFS 228 rulemaking (Bonded Notice)
 - USFS equivalent of BLM's 3809 Notice-level exploration
 - Waiting on publication of final rule
 - Problems with OMB over "significance" of the rule and no EIS
- ESA § 7 Consultation rulemaking
 - Could significantly streamline the inter-agency consultation process by redefining key terms, allowing the action agency to take the "first cut," and setting new time limits on informal consultation
 - Deems as inappropriate consultations on a remote agency action involving contribution of GHG emissions to global warming because not possible to link emissions to impacts on a specific species
 - Comments due September 15, 2008
 - NWMA will file comments supporting the proposal

Judicial Update

- *Lands Council v McNair*
 - An 11-0 *en banc* 9th circuit decision admitting the 9th circuit had erred in its review of agency decisions under the “arbitrary & capricious” standard of the Administrative Procedures Act
 - USDA Undersecretary Mark Rey called it “the most important decision involving a Forest Service environmental case in the last two decades.”
 - “Review under the arbitrary and capricious standard ‘is narrow and [we do] not substitute [our] judgment of that of the agency.’”
 - It is not a proper role for a federal appellate court to act as a panel of scientists that instructs the Forest Service, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, or orders the agency to explain every possible scientific uncertainty
 - National Forests are not set aside for non-use

Judicial Update

- *Lands Council v McNair* (continued)
 - NEPA is a procedural statute and provides no substantive rights. None of NEPA's statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS.
 - The court is “not free to impose on the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”
 - “This approach respects our law that requires us to defer to an agency’s determination in an area involving a high level of technical expertise. We are to be most deferential when the agency is making predictions, within its [area of] special expertise, at the frontiers of science.”
 - The agency is not required to accept the expert opinions offered by project opponents

Judicial Update

- *Navajo Nation v USFS* (Arizona Snowbowl case)
 - In 2005, the USFS approved Arizona Snowbowl's proposal to make artificial snow with reclaimed waste water. Several Indian tribes appealed claiming the mountain is sacred and using reclaimed waste water violated the Religious Freedom Restoration Act (RFRA). A federal district court affirmed the USFS decision, but a 3 judge panel of the ninth circuit reversed
 - The ninth circuit reheard the case *en banc* and in August 2008, by an 8-3 majority, reversed the 3 judge panel holding that "[G]iving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone."

Judicial Update

- *Navajo Nation v USFS (continued)*
 - “It necessarily follows that the Plaintiffs in this case, despite their sincere belief that the use of recycled wastewater on the Peaks will spiritually desecrate a sacred mountain, cannot dictate the decisions that the government makes in managing “what is, after all, *its* land.”
- Roadless rules
 - On August 12, 2008, U.S. District Judge Clarence Brimmer once again held that the Clinton Roadless Rule violated NEPA and the Wilderness Act of 1964 and issued a national injunction against implementation of the rule.
 - Judge Brimmer had previously invalidated the rule in 2003

Judicial Update

- In 2006, a U.S. magistrate judge in San Francisco invalidated the Bush State Petition Rule and reinstated the Clinton Rule even though none of the parties requested reinstatement and a higher ranking federal judge had invalidated the Rule
- In his 2008 decision Judge Brimmer stated: “The Northern California district Court, by way of a Magistrate Judge, surreptitiously re-instituted the 2001 Roadless Rule, even though this Court had previously ruled that it was promulgated in violation of NEPA and the Wilderness Act.”
- Judge Brimmer’s decision has been appealed to the 10th circuit and Magistrate LaPorte’s decision is on appeal to the 9th circuit

Judicial Update

- The USFS has told the field to do nothing that might violate either injunction and has asked both courts to lift their injunctions
- Legislation is pending in the Senate and House that would codify the Clinton Rule
- Although neither rule applies to Mining Law activities, it will make it more time consuming and expensive to build roads in inventoried roadless areas and may require intervention by the Chief's office