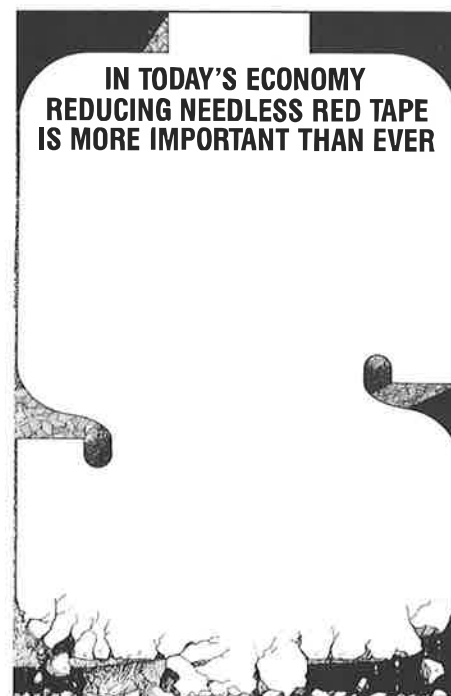


Application of federal mining regulations to construction of ancillary mining facilities on public land

by Joe Liebhauser



Constructing ancillary roads and power lines should be incidental to mining projects, not the stumbling blocks which delay production. Informed application of federal mining regulations under "3809" facilitate their timely construction on adjacent nonclaim public land.

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Introduction

This article discusses construction of facilities on federal lands, administered by the Bureau of Land Management, to support mining operations authorized under the 1872 mining law. Ancillary facilities, linear and areal, may be constructed on public lands, in support of

mining operations on federal claims, under the mining regulations at 43 CFR 3809.

Traditionally, the philosophy of many BLM field officials as well as utility companies, municipalities, and others has been that ancillary facilities on federal lands, in support of operations on underlying or adjacent mining claims, and not owned outright by the miner, require permitting under normal right of way, lease, or permit procedures. Due to numerous considerations, including budget constraints and staffing, right of way permits can typically require six months to one year from application to grant issuance. Obviously, quicker turn around is needed for many mining ventures. Ancillary roads, power lines, and the like should be items incidental to the mine, not the stumbling block which delays production.

Regulatory Opportunities and Constraints

First, let us dispel some myths about what is "required" by law and regula-

tion. We are addressing the providing of services over federal (BLM) lands in support of mining operations on federal mining claims; these operations are permitted under a mining **notice** (for less than 5 acres) or a mining **plan** (over 5 acres). The notice or plan is submitted to, and reviewed by BLM. By regulation, BLM must respond to a plan within a total of 90 days, assuming the miner provides all required information. This article does **not** address oil and gas or other leasable or salable mineral operations, only **locatable** minerals (e.g., gold, silver, moly, zinc, etc.) are under discussion. For the sake of brevity, we will use the term "plan" to also include "notice" henceforth.

Background

Utilities, local governments, and others involved in providing ancillary support facilities for mining operations in the western United States are often faced with time consuming and frustrating delays in securing rights of way and other occupancy authorizations on

public lands. These facilities may include access roads, power and telephone lines, water pipelines, communication sites, etc.

The volatility of the minerals market creates a situation which often results in frequent "boom and bust" cycles for the mining industry. A large part of new mining activity in the western states occurs on public lands for several reasons, including the economic attractiveness of operations under the 1872 law, as well as the simple fact that much of this land was not disposed of for agricultural and other pursuits because it is mineralized. Due to the nature of the mining business, and the need to realize returns on venture capital as quickly as possible, time-consuming mine start-up permitting can make an otherwise viable project unattractive to investors. Right into the 1980s, examples can be found in the West where mining ventures, some in the multi-million dollar class and employing hundreds of people, failed because commodity prices, from the initial planning stage to actual production, dipped below the level where operations were profitable.

The first myth to fall is that the plan of operations can only cover mining and support operations within the boundaries of the claim. The regulation of 43 CFR 3809.0-5(f) defines mining operations as:

"(f) 'Operations' means all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto, whether on a mining claim **or not**, including but not limited to the construction of **roads, transmission lines, pipelines, and other means of access for support facilities** across federal land subject to these regulations." (Emphasis added.)

In other words, mining operations included in a mining plan may occur on federal lands on or off of the actual mining claim. This includes ancillary and support facilities.

Another myth we need to lay to rest is that ancillary facilities, on or off the mining claim, require a separate authoriza-

tion beyond the 1872 mining law if they are owned by anyone other than the miner. Actually, the regulations make no requirements as to ownership of facilities; as long as their sole use is for support of the mine, they need not be considered a commercial use of public lands requiring separate authorization. In essence, the facility provider (utility, county, etc.) as a "vendor" becomes an assignee to the interest in the public lands which the claimant acquired by the act of locating (staking) the mining claim or claims. This interest includes construction of facilities required to support the mine.

The logic that a firm, such as a utility, **must** secure a right of way grant over public land for sole use of a mine, because it is making a commercial non-mining use, is in error. This logic followed to conclusion would mean that, for example, a contractor constructing the mine office would need a right of way or use permit to enter public land and make a commercial use thereon. However, all of these facilities constructed under the mining law and regulations **must** be for **exclusive** use of the mine. Any nonmining use constitutes a violation of Public Law 167 (Act of July 23, 1955) and the regulation at 43 CFR 3712.1(b):

Due to the nature of the mining business, and the need to realize returns on venture capital as quickly as possible, time-consuming mine start-up permitting can make an otherwise viable project unattractive to investors.

"(b) The locator¹ of an unpatented mining claim subject to the Act is limited in his use of the claim to those uses specified in the act, namely prospecting, mining, or processing operations and uses reasonably incident thereto. He is forbidden to use it for any other purpose such, for example, as for filling stations, curio shops, cafes, tourist, or fishing and hunting camps. . ."

As an illustration, let us assume we have a hypothetical line three miles long, beginning at point "A," running one mile to point "B," one mile more to

point "C," and finally one more mile to point "D." All is public land except for a 10-acre tract at point "C." Point "A" is a power substation, point "B" is a stockman's well, point "C" is a house, and point "D" is a mine. The mine wants electrical service, and includes an analysis of a power line route (along our line) in its plan, which is approved by BLM in 30 days. The utility secures an easement over the private land at point "C" and builds the power line with no further authorization from BLM. So far, all is okay. However, the utility then provides service drops for the well at "B" and the house at "C." At that time, the line from "A" to "C" is no longer for the sole use of the mine, and a right of way grant from BLM is required. The portion from "C" to "D," however, may remain without a right of way, since its sole use remains for the mining venture. Also, ancillary facilities **within** the mine, such as crew quarters, company store, etc., on patented, millsite, or mining claims also qualify as a mining use.

The **primary** advantage of using these provisions is **time**. After construction under the mining plan, an ancillary facility should generally be able to be placed under a right of way grant with minimal paperwork. A prudent utility or municipality would be well advised to

eventually secure a standard right of way, whether or not nonmining customers are anticipated, since the ancillary facility owner enjoys no rights of its own, but only as an assignee of the mine. Over time, should the mine close, fail, or should the mining claims lapse or become invalid, the facility ends up being on public land without authorization. Still, the time advantages during facility construction under the "3809" mining plan can be significant, with minimal risks to the utility or agency. Any financial risks can usually be addressed in the contract for the ancillary service (see Mining page 44)

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and stability on the part of the leader because there is always a degree of uncertainty as to outcome; conflicts regarding goals, priorities and values; and criticism, though sometimes unjustified and uninformed, of the leaders' decisions and resulting outcomes.

Procedures involved in a high-quality decision

- Identify the decision to be made and determine what makes it important (implications for future, impact on others, high self interest.)
- Define the desired outcomes in terms of values, goals, priorities, payoffs.
- Make a complete search of alternative choices that could achieve the desired end.
- Evaluate and compare the outcomes for each alternative in terms of probability and cost.
- Recognize information gaps; engage in research and development; gather additional sources of information, to aid in effective comparison of alternatives.
- Choose the best course of action.

- Implement the decision.
- Establish contingency plans.
- Evaluate the results of action, paying particular attention to how the decision was arrived at so that future decision making can be improved.
- Communicate openly to those affected by the decision and those who will implement the decision.

Examples of poor decision making

- Ignorance of the elements of a good decision.
- Lack of confidence; fear of exposing the decision to review.
- Status quo mind set. Change is viewed as a threat to vested interests; gamesmanship of self interest, a hidden agenda rather than acting on conviction, honesty and accountability.
- Selecting an adequate choice but not looking for the best.
- Failure to search adequately for all possible courses of action.
- Responding to fires; reacting to crises rather than engaging in preventive planning.
- Failure to define decision making process adequately — failure to assign responsibility.

Conclusion

Decision making requires preparation, planning, and hard work. It requires of the decision maker the willingness and the courage to make mistakes and to be held accountable.

The benefits of effective decision making are many and need not be left to the few. Participate in your Association's decisions. Let your voice be heard. Attend local and regional meetings. Fill out and return the ballot. Write to your elected officers and to headquarters staff regarding your concerns, plans and even criticisms. Learn as much as possible about your association and your profession so that your opinions will be informed and well expressed. Get to know your leaders and be an informed voter. Choose strong leaders. Become a leader.

Making decisions helps us grow in our ability to make sense out of reality. We become aware of our values and priorities by thinking, feeling and believing in our ability to decide — to take action. When we participate in the decision-making process we develop self confidence in our power to put order and control in our environment.

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by indemnifying the builder in some way in the event the mine fails.

To protect the ancillary facility owner, it is generally advisable to secure an easement from the claimant over his claims. In the event of transfer of the claims, the facility owner secures some protection against the prior interest of the claimant. Also, the utility or agency should be aware that approval of a mining plan does not necessarily allow use of public land held by **other** claimants. On pre-1955 claims, permission from the claimant must generally be secured independent from BLM authorization. Post-1955 claim crossings not held by the claimant to be served can usually be approved by BLM. Again, it behoves the utility or agency to secure easements from the claimant, for long-term protection. Some governmental agencies may have little protection since it may be illegal for them to hold mining claims or

assignments of partial surface rights to mining claims.

Conclusion

Although the regulations are straightforward on this issue, reaction to ancillary facility construction under "3809" may vary between BLM field offices. Any BLM office can supply additional information on mining plan requirements, and any project to take advantage of this procedure must be coordinated early on with the mining claimant and should be discussed with BLM. Again, remember that the application of this procedure is limited to facilities intended for the **exclusive** use of a mining claimant on federal lands. Further, construction of an ancillary facility under a "3809" mining plan should be viewed in most cases as an expedient not a long-term substitute for a standard right of way under the Federal Land Policy and Management Act (FLPMA) or other authority.

Finally, this article has limited its dis-

cussion to BLM administered land. Another large land block, the National Forests, operates under similar guidance. However, because major mines on National Forest lands are not as common as on BLM land, and because of numerous small differences between the agencies' application of the 1872 mining law, the Forest Service procedures are not covered here. Further, the regulatory guidance for Forest Service mining claims at 36 CFR 252 is very general. Unlike BLM, the Forest Service prefers to make its rules in agency **manual** form, rather than promulgate regulations. However, any U.S. Forest Service geologist or district ranger should be able to answer your questions, or you may do your own research in 36 CFR 252 and the U.S. Forest Service Manual. (IRWA)

Footnotes

1. For our purposes, the phrase "or assignee" could be added here.