The Problems of Litigating Hardrock Mining

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Abstract

This paper will use the recent Gold King Mine Spill as a starting point for a much broader discussion, a discussion about the problems associated with regulating and litigating hardrock mining. In particular, many political scientists have noted the rise of "adversarial legalism," which uses the courts to enforce and implement federal policies, often through citizen suit provisions. Citizen suits, contained within the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act (better known as the "Superfund" law), have become a very common way to deal with issues of polluted waterways. These suits allow ordinary citizens to sue for enforcement of the laws without having to demonstrate personal injury in the same manners as normally required in non-environmental tort suits.

Notwithstanding some of the successes of these citizen suits, this uniquely American way of implementing policy is not the best approach for resolving an environmental issue as widespread as hardrock mining because citizen initiated litigation individualizes conflict rather than considering broader, national solutions to an issue. Instead, we should consider ways to fund cleanups through a reclamation fund as Congress has done with coal mining, and we should also consider Good Samaritan legislation, which combats the strict liability laws that surround hardrock mining cleanup. As it stands, environmental liability laws deter private and state cleanup of mines because these parties fear they will be held responsible for the entire cost of cleanup should anything go awry.

Introduction

On August 5, 2015, the Environmental Protection Agency (EPA)—attempting to clean the Gold King Mine in Silverton, Colorado—inadvertently triggered the release of over three million gallons of contaminated water into Cement Creek, which feeds into the 162-mile Animas River. That plume of heavy-metal laden, acidic water turned the Animas into an alarming orange shade. As the plume moved further downstream, into the San Juan River crossing into New Mexico, it brought national attention to Durango, Silverton, and the environmental issues surrounding the number of abandoned or inactive mines in Colorado. Ultimately, the disaster affected waterways in Colorado, Utah, New Mexico, and the Navajo Nation.

The disaster that communities along the Animas River have seen will almost certainly happen again in various places in the west. Abandoned mines are a serious issue that have gone largely overlooked nationally. The Bureau of Land Management estimates that there are nearly 500,000 abandoned mines across the U.S. In the west, there are roughly 161,000 abandoned hardrock mines across 12 western states and Alaska. 33,000 of them reportedly leak contaminants into nearby lands and waterways.[1] More than that, the EPA estimates that the

leakage from these mines impact 40 percent of western waterways. In Colorado alone, state health officials report that 230 identified abandoned mines have contaminated about 1,645 miles of state waterways.[2]

It is difficult for government or government agencies to force cleanup of abandoned, unowned mines. Citizen suits provisions, contained in the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act (better known as the "Superfund" law), have become a very common way to deal with issues of polluted waterways. Essentially, these suits allow ordinary citizens to sue for enforcement of the laws without having to demonstrate personal injury in the same manners as normally required in non-environmental tort suits (Tuhus-Dubrow 20015, 153).

While these citizen suits offer a partial solution to enforce EPA regulations and federal law, they are by no means the best approach to resolving an issue this widespread. Instead, citizen initiated litigation—often termed private enforcement litigation (Farhang 2010, 3-4)—individualizes conflict rather than considering broader, national solutions to an issue (Melnick 1983). The judiciary and litigation is a useful venue only when the executive and legislative branches cannot resolve these abandoned mine environmental issues.

Given the widespread existence of these abandoned mines, other visible disasters like the Gold King Mine spill will occur. Consequently, the purpose of this paper—and its place within this edited volume—is to use the Animas River spill as starting point for a broader discussion about the litigation engendered by the Clean Water Act, and how this tactic—because of its individualizing effect—is not the best way to prevent these disasters from happening in the future. More widespread reform, especially changes concerning legal liability and creating funds for cleanup—would prove more effective. The Good Samaritan Cleanup of Orphan Mines Act[3]

and the Hardrock Mining and Reclamation Act[4] are some of the better solutions put forth thus far, recognizing the issues over legal liability for cleanup and the lack of funding. In particular, the requirement that mining companies or private environmental groups take on responsibility for others' previous damages is hindering cleanup, not helping it. The Superfund and the Clean Water Acts are keeping both mining companies and state governments from active reclamation of abandoned sites, and thus the threat of another Gold King mine spill will continue to loom over the West.

To give an idea of the impact of hardrock mining on my community and the Animas River, Figures 1 and 2 reveal the immediate impact of the disaster. Figure 1 shows before and after photos of the river, while Figure 2 reveals a broader picture of several miles of the river with its orange toxic plume.

[Insert Figure 1: Before and After Photos of Animas River Spill, August 2015][5]

[Insert Figure 2: An Overview of the Animas River Spill, August 2015][6]

The Advantages and Disadvantages of Adversarial Legalism

According to Jeb Barnes and Thomas Burke (2015, 1), litigation is a central feature of American politics; it has played a crucial role in the struggle over civil rights, abortion, tobacco regulation, electoral redistricting, reforming criminal justice, making society more accessible to those with disabilities, and cleaning up the environment, to name some policy areas. Indeed, commenting on 1830s America, Alexis de Tocqueville observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one” (de

Tocqueville [1834] 2003, 315). Contemporary political science has expanded on this idea, supporting de Tocqueville's observations empirically as well as considering the consequences of this peculiar American phenomenon (Silverstein 2009; Kagan 2001; Burke 2002; Melnick 1983, 1994; Barnes and Burke 2012). A "litigation state" (Farhang 2010) pervades the United States as a way to enforce compliance of federal and state laws. Thus, the use of private litigation to achieve public policy goals has been well-documented.

Some maintain that a legalistic culture—typically dubbed "adversarial legalism"—encourages legal action over disputes better settled by other governmental actors (Kagan 2001; Melnick 1983); that social movements use and are affected by their efforts to create policy victories through law and courts (Epp 2010; McCann 1994); and that elected officials—in creating statutes—incentivize and affect litigation behavior (Farhang 2010; Burke 2002). Still others have centered more on the work of court actors themselves and their judicial power to create policy change (Frymer 2003; Feeley and Rubin 1998). These so-called private enforcement regimes—statutory regimes in which private plaintiffs bring enforcement actions—occur across a broad swath of policy areas (Farhang 2010). These regimes are all based on the same general idea: allowing individuals to enforce the law through courts, often with provisions for attorney fees to be recouped by successful plaintiffs or allowances for damages in multiples of the actual harm caused. Recently, political scientists have taken interest in these regimes, arguing that they are important examples of state power as expressed through the legal state (Frymer 2003).

The use of adversarial legalism falls into two categories, those that see it as positive and those that see it as detrimental to governance. Some scholars, most prominently, Gerald Rosenberg (2008) find that the over-reliance on law and courts to enforce social policies diverts

interest groups and social movements with limited time and resources from more consequential and legitimate modes of political advocacy, like grassroots mobilizing and lobbying.[7] Moreover, the use of litigation and the pursuit of legal rights takes broad political grievances and political rights and places them into narrower, legalistic categories (Silverstein 2009, 69). In contrast, others, like Jeb Barnes and Thomas Burke (2015, 15), maintain that most of the criticisms against adversarial legalism do not withstand empirical scrutiny. Despite the debate, the evidence generally points to the positive aspects of adversarial legalism, or, at the very least, that litigation has proven effective in reaching political outcomes since elected officials are often glad to have political disputes between "disgruntled interests" settled by the courts (Barnes and Burke 2015, 3; Graber 1993; Kagan 2001; Burke 2002; Lovell 2003; Farhang 2010).

Therefore, we certainly have a sense of how plaintiffs turn their claims into results, we also have a great deal of knowledge about the consequences of adversarial legalism. Relatively absent in the conversation about adversarial legalism, however, is a discussion about *why* the system works this way, *how* we got here, and *which* areas of American society are best left to adversarial legalism.[8] More than that, when private actors become enforcers of U.S. policy and wielders of state capacity, it is necessary to evaluate the use of this state capacity. If Congress is using private litigation as a means of building state capacity, then studies of private enforcement regimes and citizen suits take on a central role in the story of American state-building. Scholars working the American Political Development tradition have also recently noted the "porous boundaries" between state and non-state actors throughout the Progressive Era of statebuilding (Nackenoff 2014, 132, Balogh 2009). We have continued to see non-state actors, like citizens, advance the central state's capacity through these citizen suits into the 21st century.

Yet, given that these suits and adversarial legalism "individualizes interests" (Barnes and Burke 2015, 15), citizen enforcement of environmental standards are not the best way to solve these national problems. Congress's use of private citizens to expand and enforce federal laws has helped contribute to the kind of environmental blight seen with the Gold King Mine spill. In the first place, the General Mining Law of 1872, an attempt to expand the U.S. westward and to settle territory, gave rise to the ubiquity of mining out west, and these abandoned mines are now endangering citizens and ecosystems of the west. To remedy some of these environmental problems over a century later, Congress passed the Clean Water and Superfund Acts that, again, gave power of citizens to help expand and wield central state capacity. Ultimately, in the context of environmental regulation, citizen suits are not an effective way to remedy problems that should be recognized as nation-wide, problems like the status of abandoned mines in the west.

How Citizen Litigation Works

Through litigation, citizens play an important role in enforcing the nation's environmental laws. Sixteen of the U.S.'s chief federal environmental laws detail provisions by which citizens can sue as "private attorney general" to ensure compliance or to hold governmental agencies to perform their mandated duties (May 2004, 53). These so-called federal citizen suits allow "any person" to "commence a civil action on his own behalf" against either "any person" who violates the law's provisions or against the U.S. Environmental Protection Agency (EPA) for failing "to perform any act or duty. . . which is not discretionary" (May 2004, 53).[9]

Congress first created the citizen suit provision in its 1970 version of the Clean Air Act, and then placed a similar provision in the Clean Water Act in 1972. Since then, it has reauthorized citizen enforcement in nearly every major piece of federal environmental legislation

(Abell 1995, 1959). The federal courts have come to see citizen suits as "a deliberate choice by Congress to widen citizen access to the courts as a supplemental and effective assurance that [environmental laws] would be implemented and enforced."[10] Congress, too, envisioned that citizens would play a key role in enforcement (Abell 1995, 1960).[11] Studies have shown that citizens have come to play a "surrogate enforcement role" than the supplementary role envisioned by Congress. Thus, with the rise of private enforcement, the Clean Water Act has become the most "popular tool" of citizen action (Abell 1995, 1960).[12] From 1973 to 2002, citizens accounted for more than 1,500 reported federal decisions in civil environmental cases. And from 1993 to 2002, federal courts issued opinions, on average, 110 civil environmental cases per year. Of these 110 cases, 83 are citizen suits, roughly 75 percent (May 2004, 54).

Despite the recent frequency of these citizen suits, private enforcement of laws have a long history. Until the nineteenth century in England, the majority of criminal prosecutions came from private citizens because public prosecutors and police forces did not exist (Landes and Posner 1975, 2). While the U.S. does not have as strong a tradition of private enforcement of criminal statutes, these kinds of statutes have existed in the U.S. since the First Congress passed six such laws. Private enforcement continues to play an important role in criminal statues such as the False Claims Act, which dates back to the Civil War period and is the federal government's primary litigation tool to combat fraud against the government (Abell 1995, 1961). Private enforcement of laws typically gave citizens a personal financial stake in the judicial outcome, but citizen suit provisions in environmental law do not have comparable personal compensation for successful prosecution. Instead, citizen suits in environmental law serves as a public good: plaintiffs seeking civil penalties under the Clean Water Act are paid solely to the United States Treasury.

Citizen enforcement of the Clean Water Act has become popular because it does not impose any restriction on the types of violations for which citizen plaintiffs may sue. And the limitations on citizen that it does pose are not much of an obstacle to citizen litigation. The Clean Water Act details two limitations: First, before suing, a citizen must file a note of intent to sue, which details the alleged violation. Second, a citizen cannot sue if the EPA or the state has begun "diligently prosecuting" a civil or criminal action in court.[13] In practice, however, these two limitations are "essentially toothless," leaving "citizen plaintiffs basically unchecked to exercise executive, prosecutorial authority as a 'private attorney general'" (Abell 1995, 1963-64). The question remains, though, why have citizen suits proliferated over time? That is, how have courts become so involved in environmental protection? The answer to this question is connected to the history and centrality of courts in environmental protection.

Court Involvement in Environmental Protection

Judicial opinions often provide the foundation upon which we discuss natural resource management and protection today. A sampling of federal judicial rulings demonstrates the importance of court-enforced environmental regulation: government can regulate the use of private property within certain parameters; citizens are often able to legally challenge agency actions that may harm the environment; agencies need to seriously consider reasonable alternatives to proposed actions when told to do so; the National Environmental Policy Act (NEPA) is not a "paper tiger" and its procedural obligations are to be taken seriously; and that the "plain intent" of Congress in enacting the Endangered Species Act (ESA) "was to halt and reverse the trend toward species extinction, whatever the cost" (Nie 2008, 141).[14] The judiciary's role has become so pronounced in environmental regulation in the U.S. because, as Melnick concludes, "we distrust centralized bureaucracy, so we rely heavily on state and local agencies. But we expect these agencies to respect the basic rights of Americans and to meet minimum

national standards. So we subject these agencies to substantial regulation by federal agencies. Because we do not trust these federal agencies, either, we demand judicial oversight" (Melnick 2004, 103).

Courts have become a central player in environmental oversight largely because of the Administrative Procedures Act (APA) of 1946. Suffice it to say that the APA was a compromise between President Roosevelt's administration who wanted to give bureaucratic agencies vast rulemaking power subjected to little judicial review and Republicans and many in the American Bar Association who wanted agencies to engage in the more time-consuming case-by-case adjudication subjected to strong judicial review (Melnick 2004, 91). The APA created two forms of agency action: "notice and comment rulemaking" where agencies act like a legislature promulgating general rules; and "formal adjudication" where agencies act more like a judicial body deciding on a particular case. Courts must approve regulations created by notice and commenting rulemaking unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[15]. In this case, the APA authorizes the judicial review of agency actions. While deference to agencies is most common, courts still examine the quality of an agency's reasoning. Whether courts use the more probing "hard look" standard or the more corporate deferential "Chevron" inquiry,[16] courts attempt to ensure that agencies' decisions are based on an administrative precedent and are sensible (Nie 2008, 141).[17]

More than that, as noted above, many environmental laws provide citizen suit provisions, enabling interested parties to sue agencies and/or private companies believed to be violating the law. These provisions and the APA are designed to supplement governmental enforcement of environmental laws. Most of these provisions are patterned after section 304(a)(2) of the Clean Air Act authorizing "any person" to sue the administrator of the EPA "where there is alleged a

failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[18]

An expansive view of the rule of standing also helps explain the centrality of the judiciary in environmental litigation. Indeed, a growing number of parties have gained wider access to the courts following historic decisions. For example, *Scenic Hudson* (1965)[19] granted environmental organizations standing to challenge a license to construct an electric generating system on Storm King Mountain in New York's upper Hudson Valley. Similarly, *Sierra Club v. Morton* (405 U.S. 727, 1972) held that standing goes beyond economic harm, and it could be granted if environmental interests showed an aesthetic or ecological harm. Consequently, the judiciary has become quite receptive to environmental claims (Nie 2008, 142).

Statutory ambiguity, too, requires the courts to play a central role in enforcement and compliance.[20] While some laws "breathe discretion at every pore," many also contain standards and binding obligations that are judicially enforceable.[21] Such ambiguity contributes to an American culture of "adversarial legalism." As shown by Kagan (2001), the U.S. model of policy making, implementation, and dispute resolution is characterized by frequent appeal to adversarial legal contestation. This is due to a number of factors, including the nature of American laws that are comparatively complex, vague, and indeterminate. Kagan also shows how American political culture demanded a more active government in the 1970s, "one that would enforce nationwide standards of justice and of security from harm," but Americans still maintained their distrust of centralized political authority, a combination that explains the ubiquity of court-based enforcement in the U.S. (Kagan 2004, 26-27).

Many scholars note that litigation, alone, is "politically inadequate" (Nie 2008, 143). As natural resource scholar Martin Nie concludes, "It often serves as a shield, or defense

mechanism, rather than a sword or offensive weapon" (Nie 2008, 143). Thus, some more sweeping legislative changes, rather than the much slower and individualized judicial process, could offer some better solutions. Before a discussion of solutions, though, we must examine some of the problems that confront western states seeking to remedy the legacy of hardrock mining.

Legacy of Hardrock Mining and Its Problems

The western United States experienced extraordinary mineral development in the late 19th and early 20th centuries, and for most of this period there were few expectations about environmental safeguards. Ginny Brannon, director of the Colorado Division of Reclamation Mining and Safety, noted that Colorado had only minimal environmental regulations governing mining until 1977.[22] In 1891, the federal government only had two restrictions on opening a mine: provide adequate ventilation and do not employ people under the age of 12.[23] That was it. There were no inspections and certainly no environmental standards. State regulations were equally sparse. Pollution simply wasn't a major concern in the era when Gold King—and thousands of other now-abandoned mines—operated. The 1872 General Mining Law, which still governs hardrock mining, sought to encourage westward expansion, but created an array of "unintended consequences of unrestrained environmental pollution" (Bakken 2008, 36).

But with the heightened consciousness of environmental costs of mining in the 1960s, the EPA began to regulate mining in the 1970s, as part of the Clean Water Act. So modern mines are required to plan for treating any water degraded by mining. The Clean Water Act, as detailed above, also made provisions for citizen suits to enforce the standards of the federal law. However, abandoned mines are sites where minerals or ores were extracted before these Clean Water regulations, and more importantly, these mines likely do not have owners who can be held responsible for the mining activities that occurred there. When Colorado—the site of the Gold

King Mine spill—last prepared a list of priority abandoned mine restoration projects in 2012, it had a list of only seven mines. The cost to repair and maintain each of those ranged from $50,000 to upwards of $1 million, based on figures from the Water Quality Control Division of Colorado Department of Public Health and Environment.[24]

Yet abandoned mine are spread across Colorado. The state has a whole branch under its Department of Natural Resources called the Inactive and Abandoned Mine Reclamation Program. The head of the branch, Bruce Stover, said the state has been working for years to address the issue of pollution from approximately 22,000 abandoned mines. Stover said the branch tries “to go in and characterize which mines are the worst offenders. Is it this drain over here, is it that waste pile over there? And we try to do projects that incrementally chip away at the overall problem.” With this method, Stover claimed it would take “decades” to clean up just three-quarters of the mines leaking hazardous materials.[25]

Part of the problem is that there is not nearly enough money to pay for cleanups. Colorado estimates that it spends $5,000 to deal with each problem area within a mine. Since the state has 10,818 locations that pose safety hazards, like open mine shafts, in addition to its 4,670 environmental threats, addressing these issues will eventually cost around $80 million—the state’s annual budget for it is $2 million.[26] Stover notes that, without owners, there is no responsible party to pay. "It's a huge problem in Colorado because these are old, abandoned active mines and they don't have any owners and they are just draining." And so we are left wondering who pays for cleaning up mines without owners? Funding for cleanup often comes from the EPA and other federal sources. The program that administers water reclamation projects, Colorado's Nonpoint Source program, planned to use $1 million from the EPA for fiscal year 2015 "for implementation projects that restore impaired waters." And Colorado's Division

of Mine Safety and Regulation gets about $2 million for mine safeguarding work from the Surface Mining Control and Reclamation Act.[27] But as Stover said, "The state doesn't really have the money to tackle these draining mines."[28]

Notwithstanding a dearth of cleanup funds, the chief problem is that under existing federal laws, liability is *strict, joint and several,* and *retroactive* (Tilton 1994, 64-65). Liability is *strict,* meaning that a defendant (either a miner owner of the land, or the party involved in the mine cleanup) is in legal jeopardy by virtue of the existence of a wrongful act, without any accompanying intent or mental state. That is, whether a defendant intended to cause damage to another's property or to a waterway is irrelevant, and the defendant will be held accountable. Federal law governing water pollution is also *joint and several,* meaning that any single potentially responsible party can be held liable for the entire cost of the remediation effort. And finally, liability is *retroactive,* meaning that clean-up standards devised in the 1980 Superfund legislation, for example, apply retroactively to generation, transport, and storage of wastes that occurred before 1980.[29]

These laws concerning liability govern the primary piece of Congressional legislation used to clean up hardrock mines: the Superfund law. Many hardrock mining sites are currently abandoned or have been inactive for long periods and thus cannot be easily regulated under public mining laws or pollution control laws aimed at current operating facilities (Seymour 2004, 800). To remedy this problem, federal regulators often use their authority under the Superfund law. With its strict, retroactive, joint, and several liability scheme, the Superfund statutory authority allows the U.S. to recover its costs from broadly defined categories about the parties responsible—without regard to the parties' negligence for whatever the activities that gave rise to the contaminant were lawful, or even consist with best management practices existing at that

time (Seymour 2004, 802). Using Superfund authority, the EPA has added some of the nation's largest and most seriously contaminated mining sites to the National Priorities List (NPL), a list of sites schedule for long-term remedial action.[30] Indeed, in the wake of the Gold King Mine spill, Silverton and San Juan County—the site of the disaster's onset—voted yes for a Superfund cleanup of old mines, reversing decades of opposition to such a designation, and thus demonstrating that the severity of the Gold King Mine spill and the broader problem polluted waterways in the west.[31] But serious problems remain.

Superfund enforcement at mining sites on public lands, in particular, presents immense challenges. Most of the nation's hardrock minerals are found in twelve western states, and many hardrock mines are located, at least partially, on public lands (Seymour 2004, 804). While the EPA is the primary authority for CERCLA cleanups on private lands, the President has delegated the lion's share of Superfund authority on public lands to federal land managers with jurisdiction, custody, and control over these lands. Superfund status waives the federal government's sovereign immunity to suit, and thus makes federal agencies attempting cleanup on public land, liable in the same manner and to the same extent as any non-governmental entity. Thus, federal and private entities alike can be found liable for cleanup costs under CERCLA if they are "owners," "operators," or parties who "arrange for disposal" of these contaminated substances at a facility" (Seymour 2004, 805 quoting from the CERCLA statute).

The complex web of policy and legal structures makes CERCLA enforcement difficult. When a federal agency exercises its delegated CERCLA authority, mining companies will often allege that such "jurisdiction, custody, or control" is enough to suggest the U.S. should be liable as a site "owner." Additionally, when the EPA attempts to enforce action on hardrock mines on commingled private/public lands, mining owners often file third-party actions against the U.S.,

which argue that federal land managers are liable as co-owners of a mining "facility," or as "operators" at the facility. Mining companies have claimed that the federal government's regulation of private mining companies or its involvement in encouraging wartime production minerals make federal agencies liable as "operators" of mining facilities or as parties that "arrange for" the disposal of hazards material at the facility (Seymour 2004, 805). Indeed, this fight over liability is taking place currently with the Gold King Mine; its owner, Todd Hennis, argues that he's not responsible for the spill while the EPA is attempting to make him a "potentially responsible party."[32] Ultimately, because economic penalties and liability are both severe and strict, we are left with protracted legal battles and cleanup impasses.

All these provisions tend to deter cleanups because, as economist David Gerard notes (2015), "One set of rules is used to address two distinct tasks — the remediation of past pollution and deterrence against future pollution."[33] This means that groups that initiate cleanup efforts are treated no differently, under both Superfund and Clean Water Acts, than the groups that caused the pollution in the first place. Therefore, volunteer parties can be held liable for the extent of all abandoned mine cleanup if they take on remediation efforts. Mine cleanup often require discharges that can pollute rivers and lakes, discharges that the EPA must permit as detailed in the Clean Water Act. Parties that affect the discharge must be permitted, and through that process, these parties assume legal responsibility for meeting the EPA permit standard. As Gerard observes, "The assignment of liability occurs even if the remediating party had no role in generating the pollution, and even if the party had nothing to do with generating the water-quality degradation."[34] Given the difficulty in mine cleanup, as we saw with Gold King Mine spill caused by the EPA itself, it comes as no surprise that few environmental groups and private parties are rushing in to clean up the widespread abandoned mines throughout the U.S.

Potential Solutions

As discussed in the previous section, many scholars criticize the General Mining Law for these environmental protection insufficiencies and inabilities, but not all scholars agree with these criticisms. Some legal and economic scholars, for example, have defended the Mining Law, not for its environmental track record, but for its ability to protect against expropriation in a "capital-intensive industry" with "long-lead times" like mining (Morris, Meiners, and Dorchak 2004, 746).[35] These scholars argue that the Mining Law "provides a rational basis for allocating resources in a principled manner that solves critical information and incentive problems inherent in public ownership of resources" (Morris, Meiners, and Dorchak 2004, 751).[36]

Still, if anything was made clear by the Gold King Mine spill, it was that the laws governing hardrock mining cleanup cannot respond to the vast economic and environmental liabilities confronted by mountain communities throughout the West. The regulatory environment that governs how mining occurs – and the legal liability assigned to various parties for reclamation, damage, and cleanup—disincentives resolving these environmental problems. The General Mining Law of 1872 does not mandate a firm legal requirement, or enough money, to clean these old mines up. In additional, when we add to this the financial liability that would be assigned should any clean-up go wrong, and we get our current situation: a system ill-equipped to meaningfully enforce federal laws governing acid mine drainage. Fixing the problem requires a multi-faceted legislative approach, an approach that would help create the necessary funds as well as mitigate liability for those seeking to cleanup mines.

The California Gold Rush and other western mining booms of the mid-19th century helped create the 1872 Mining Law. In the west, mineral deposits were found predominantly on federal lands, but there existed no law governing the transfer of these minerals rights from public

to private owners. Thus, in 1872, Congress codified the customs, codes, and laws miners were using in the previous decades. This Congressional legislation gave broad discretion over the use of public land resources to the private companies, requiring very little government oversight. The central provisions of this legislation, remarkably, remain intact today (Gerard 1997; Seymour 2004, 825).[37]

The Mining Law allows United States citizens and firms to explore for minerals and establish rights to federal lands without authorization from any government agency. If a site contains a deposit that can be profitably marketed, claimants enjoy the "right to mine," regardless of other potential uses or non-use value of the land (Gerard 1997). Originally, claimants maintained their right to mine by satisfying an annual work requirement, but in 1992 Congress replaced this requirement with an annual $100 holding fee for each claim. With this fee, claimants acquire outright title both to the minerals and the land by obtaining a mineral patent, at a per-acre cost of $2.50-$5. Unlike natural gas or coal mining, where operators must pay for the right to extract minerals, no such rules govern hardrock mining; producers do not pay royalty taxes on the minerals taken from federal lands.

Given the lack of cleanup funding for hardrock sites (Seymour 2004; Lounsbury 2008), a hardrock reclamation fund might be one part of a long-term solution. A portion of the proposed royalties, rents, or taxes paid by hardrock minders could supply a fund dedicated to the cleanup of inactive and abandoned mines. Congress could follow the legislation it created to cleanup abandoned coal mines. The Abandoned Mine Reclamation Fund has gathered its money from a per-ton tax on coal mined in the U.S., collecting $7.4 billion from January 1978 and October 2005 (Lounsbury 2008, 199). The Hardrock Mining and Reclamation Act introduced November 5, 2015 is a good start in solving the issues of funding. Among other things, the bill would set a

2-5 percent royalty fee on new hardrock mining operations and establish hardrock minerals reclamation fund to help finance abandoned mine cleanup.[38]

In terms of liability, the disincentive to reclaim old sites extends not only to private parties but also to state governments. If a state begins cleanup of an old site, it is required to reduce pollution levels to the levels specified by the Clean Water Act, regardless of cost. Faced with this level of cleanup or nothing at all, states often have an incentive to do nothing. As noted above, under CERCLA, liability is joint, several, strict, and retroactive; it extends to parties classified as current owners or operators, owners or operators at the time of disposal, generators, arrangers, or transporters. As a result, a good Samaritan who, for example, removes a small amount acidic drainage leaching into a river and caps them elsewhere might become liable for remediating the *entire* site, including all hazardous residue generated by historic mining operations. The economic costs of such liability are staggering. CERCLA cleanups even at "non-mega" mine sites usually costs seven-figures (one Congressional Research Service study estimated the average cost to be $22 million), and reclamation of "mega" sites can cost hundreds of millions of dollars (Lounsbury 2008, 153). Given the potential for this sort of liability, it is understandable that good Samaritans would refrain from action in order to avoid the repercussions of CERCLA. Ironically, these strict environmental regulations have had the unintended consequences of deterring cleanup.[39] Thus, the shortcomings of environmental liability laws should be at the center of any reform debate, but they are not.

Thus, Rep. Scott Tipton, R-Cortez, is right to note the importance of good Samaritan legislation, which would protect those who take on mine cleanup from the liability associated with the effort, or the particular mine's problems in the first place. Sen. Michael Bennet, (D-CO), and former Sen. Mark Udall introduced a bill that would protect third party cleanup groups from

liability under the Clean Water Act, but that measure did not pass the Senate. Tipton had sponsored companion legislation in the House. Now, Sen. Cory Gardner, (R-CO), has taken up the cause along with Bennet and Tipton, a cause that seems the most useful in solving abandoned mine issues.

In speaking in support for good Samaritan legislation, Senator Bennet said recently, "The Gold King Mine spill has served a catalyst to focus Congress' attention on the dangers posed by the thousands of abandoned mines and Colorado throughout the West."[40] Other senators like Barbara Boxer (D-CA) have expressed support for this solution, but have noted "problems" with the proposed solution. Boxer said, "I want to make improvements to the legislation so that it will protect the environment and ensure that taxpayers will not be on the hook if a good Samaritan makes the pollution."[41] Certainly, the resounding claim from environmental, legal, and political science scholars has supported Bennet's urge for change and the concerns Boxer has expressed. Let's hope Congress can deliver this time around.

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[1] "Gold King Mine Spill: Six Months Later," *Durango Herald*, February 7, 2016, 1A.
[2] Ibid., 4A.
[3] Proposed by Senators Michael Bennet (D-CO) and Corey Gardner (R-CO), and Rep. Scott Tipton (R-CO).
[4] Introduced by Senator Tom Udall (D-NM).
[5]Courtesy of Stacey Sotosky, Assistant Professor of English & Communications, Fort Lewis College
[6] Ibid
[7] Some groups, however, successfully pair their legal work alongside other grassroots organizing in multi-facet campaigns where the various elements reinforce each other. For example, the Center for Biological Diversity has made litigation using Freedom of Information Act (FOIA), the Administrative Procedures Act, and especially the Endanger Species Act central to its strategy and identity. Indeed, a legal threat can serve as ammunition for legislative change and spur turnout at legislative, rule-making, or other hearings. Pending or active lawsuit can attract new members and cultivates leaders and a fundraising base that supports the legal strategy. See Cody Ferguson and Paul Hirt (2019) "'Power to the People': Grassroots Advocacy for Environmental Protection and Democratic Governance in the Late 20th Century."
[8] Melnick's (1999) work is a good exception as he demonstrates the dangers of adversarial legalism in tobacco regulation.
[9] May (2004) quotes from both the Clean Air Act 42 U.S.C. § 7604(a) (2000) and the Clean Water Act 33 U.S.C. § 1365(a) (2010).
[10] *Natural Resources Defense Council v. Train,* 510 F.2d. 692, 700 (D.C. Cir. 1974). Citizen suits do not apply only to federal enforcement. A 1997 survey found twenty-six states allow citizens to enforce state environmental laws (May 2004, 53).
[11] During a 1973 Congressional debate over revisions to the Clean Water Act, Senator Birch Bayh (D-IN) said that citizen suits "can be a very important tool for keeping industry and Government alike from letting standards and enforcement slip" (Bayh quoted in Abell 1995, p. 1960, fn 11). In an interview with Kieran Suckling, director of the Center for Biological Diversity, he said that the citizen participation and appeal provisions of various environmental laws are the most valuable tools his group had for protecting endangered species and habitat. He also said that probably the most important law that they use with the greatest frequency is FOIA. See Ferguson and Hirt (2019).
[12] Early studies of the Clean Water Act show that "more than 65 percent of all citizens actions. . . had been brought under the Clean Water Act" (Miller 1987 quoted in Abell 1995, p. 1960 fn. 13). Jeffrey G. Miller. 1987. *Citizen Suits: Private Enforcement of Federal Pollution Control Laws.* New York: Wiley Law Publications.

[13] "Navigation and Navigable Waters," Title 33 U.S.C. (2011) §1319, Supp. V, p. 418. Available at: https://www.gpo.gov/fdsys/granule/USCODE-2011-title33/USCODE-2011-title33-chap26-subchapIII-sec1319/content-detail.html

[14] Nie (2008, 141) notes these judicial opinions. In corresponding order see Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (takings); Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965) (standing); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (consideration of alternatives); Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F. 2d 1 109 (D.C. Cir. 1971) (NEPA); and Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978) (ESA).

[15] "Government Organization and Employees," Title 5 U.S.C. (2011) §706, Supp. V, p. 112. Available at: https://www.gpo.gov/fdsys/granule/USCODE-2011-title5/USCODE-2011-title5-partI-chap7-sec706

[16] Named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) where the U.S. Supreme Court articulated a set of legal tests to determine whether to grant deference to a government agency's interpretation of a congressional statutes.

[17] As Nie (2008, 141) notes, for judicial decisions that define these standards of review see Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 850-52 (D.C. Cir. 1970), cert, denied, 403 U.S. 923 (1971); Motor Vehicle Manufactures Association v. State Farm Auto. Insurance Co., 463 U.S. 29, 43-44 (1983); *Chevron*, 467 U.S; and *Overton Park*, 401 U.S.

[18] "The Public Health and Welfare," Title 42. U.S.C. (2009) §7604, Supp. III, p. 6018. Available at: https://www.gpo.gov/fdsys/granule/USCODE-2009-title42/USCODE-2009-title42-chap85-subchapIII-sec7604

[19] Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965), cert, denied, 384 U.S. 941 (1966).

[20] Examples abound: from the Federal Land Policy and Management Act's direction to prevent "unnecessary or undue degradation" to the Endangered Species Act's mandate that the Secretary use the "best available science" to make decisions under the statute (Nie 2008, 142).

[21] Nie (2008, 142) quoting from *Strickland v. Morton*, 519 F. 2d 467, 468 (9th Cir. 1975)

[22] "San Juan County spill highlights years of Colorado cleanup effort," *Denver Post*, August 6, 2015, http://www.denverpost.com/environment/ci_28597473/san-juan-county-spill-highlights-years-colorado-cleanup.

[23] *History of Mine Safety and Health Legislation*, U.S. Department of Labor, http://arlweb.msha.gov/MSHAINFO/MSHAINF2.htm.

[24] "The Gold King Mine: From an 1887 Claim, Private Profits, and Social Costs," *Colorado Public Radio*, August 17, 2015, http://www.cpr.org/news/story/gold-king-mine-1887-claim-private-profits-and-social-costs.

[25] Bruce Stover, quoted in "Animas River Spill: A Stark Reminder of Colorado's Mine Pollution Legacy," *Community Radio for Northern Colorado*, August 11, 2015, http://www.kunc.org/post/animas-river-spill-stark-reminder-colorados-mine-pollution-legacy#stream/0.

[26] "Hey, Congress, Quit Blaming the EPA: The Gold King Mine Accident is on You, Too," *On Earth*, September 2015, http://www.onearth.org/earthwire/congress-blaming-epa-for-animas-river-spill.

[27] "The Gold King Mine." *Colorado Public Radio*, August 17, 2015.

[28] Bruce Stover, quoted "Animas River Spill."

[29] For more discussion of the impacts of these legal guidelines, see the Property and Environment Research Center's interview with economist David Gerard, 13 August 2015, http://www.perc.org/blog/why-its-so-hard-clean-abandoned-mines

[30] See *Mining and Mineral Processing Sites on the NPL*, Environmental Protection Agency, 1997, https://www3.epa.gov/epawaste/hazard/tsd/ldr/mine/npl.pdf. Nearly all of the more than 60 sites then listed on the NPL were, at least in part, were previously used for the extraction, processing, or beneficiation of hardrock minerals. For a case-study of this Superfund process, see Brooks (2015).

[31] Silverton, San Juan County vote yes for Superfund cleanup of old mines," *Denver Post*, February 22, 2016, http://www.denverpost.com/news/ci_29547638/silverton-san-juan-county-vote-possible-superfund-cleanup.

[32]"Public Bill for Gold King Spill Looks, EPA Seeks Liable Owners," *Denver Post*, December 25, 2015, http://www.denverpost.com/news/ci_29309457/public-bill-gold-king-spill-looms-epa-seeks.

[33]Property and Environment Research Center's interview with David Gerard, August 13, 2015 https://www.perc.org/2015/08/13/why-its-so-hard-to-clean-up-abandoned-mines/

[34] Ibid.

[35] Morriss et al. conclude that the politics surrounding the Mining Law "unintentionally produced a law that solves the most important problem of federal land ownership" (Morriss et al. 2004, 806). And it prevents something often seen in capital-intensive, fixed location business endeavors like mining: expropriation (752).

[36] Morriss et al. conclude that the politics surrounding the Mining Law "unintentionally produced a law that solves the most important problem of federal land ownership" (Morriss et al. 2004, 806). And it prevents something often seen in capital intensive, fixed location business endeavors like mining: expropriation (752).

[37] For excellent histories of the 1872 Mining Law see Wilkinson (1993), Chapter 2. An even more sustained analysis can be found in Bakken (2008).

[38] Introduced by Senator Tom Udall (D-NM). Unfortunately, its last action was on November 5, 2015: read twice and referred to the Committee on Energy and Natural Resources.

[39] For a discussion of liability and its politics, see Brooks (2015), Chapter 3.

[40] Colorado Sens. Bennet, Gardner urge law to spur cleanup at old mines," *Denver Post*, March 2, 2016, http://www.denverpost.com/news/ci_29587008/colorado-sens-bennet-gardner-urge-law-spur-cleanup?source=pkg.

[41] Ibid.