

June 1997

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Recommended Citation

18 Pub. Land & Resources L. Rev. 151 (1997)

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THE NEW WORLD AGREEMENT: A CALL FOR REFORM OF THE 1872 MINING LAW

Bob Ekey*

[E]veryone can agree that Yellowstone is more precious than gold.

-President Clinton, August 12, 1996.¹

I. INTRODUCTION

Geologic forces shaped the jagged peaks and serrated ridges surrounding Henderson Mountain, just three miles from Yellowstone National Park's northeast corner. Geologic forces also created both gold and iron sulfide—pyrite or fool's gold—deep inside Henderson Mountain near Yellowstone. The \$800 million of gold and the high concentrations of pyrite prompted a fierce battle in the early 1990s over the future of the alpine area surrounding Henderson Mountain.

Henry David Thoreau once said, "a man is rich in proportion to the number of things which he can afford to let alone."² On August 12, 1996, President Bill Clinton demonstrated that we are a nation of great wealth and even greater wisdom when he travelled to Yellowstone National Park to announce a historic agreement between industry, government, and conservationists. That agreement provides that the federal government will reacquire the property around Henderson Mountain to protect Yellowstone and the surrounding environment from the threat of the proposed New World Mine.

The New World Agreement demonstrates more than the wealth of our nation and the wisdom of our citizenry. It points to the need for substantial reform of the 1872 General Mining Law.³ In spite of the mine's obvious short- and long-term environmental threats to Yellowstone and the surrounding ecosystem, provisions of the Mining Law convinced some federal agencies they were powerless to stop it. In the end, it took a cre-

* Communications Director, Greater Yellowstone Coalition, Bozeman, Montana. Mr. Ekey was involved in the campaign to stop the New World Mine. An early version of this paper was presented at the conference entitled "Managing America's Public Lands: Proposals for the Future" sponsored by the Public Land & Resources Law Review, University of Montana School of Law, October 24-25, 1996.

1. Bob Ekey, *Victory at Yellowstone: Historic Agreement Stops the New World Mine*, GREATER YELLOWSTONE REPORT, Summer 1996, at 1.

2. HENRY D. THOREAU, *WALDEN, OR LIFE IN THE WOODS* 89 (Merrill Publishing Co. 1969) (1854).

3. Now codified at 30 U.S.C. §§ 21-54 (1994).

ative approach that required cooperation from historically opposing parties and intervention at the highest levels of government to prevent such a travesty from occurring. The saga of the New World Mine clearly illustrates the need to reform the 1872 Mining Law to allow some areas of public land to be judged and designated as unsuitable for mining—restoring balance to our public land laws.

This essay, in Part II, relates the saga of the battle to stop the New World Mine, culminating with the New World Mine Agreement. Part III describes the Agreement. Part IV discusses the reason why the Agreement was necessary, specifically, the shortcomings of the 1872 Mining Law. Part V concludes that, while the Agreement may avert the threats posed by the New World Mine, such threats will continue unless the underlying problems with the 1872 Law are addressed.

II. HISTORY OF NEW WORLD FIGHT

In 1989, the residents in Cooke City, Montana, learned that Noranda, a giant Canadian conglomerate,⁴ wanted to develop a gold mine just outside of their town, on Yellowstone's doorstep. Noranda and its chain of subsidiaries wanted to build its mine on the flanks of Henderson Mountain—a triple divide for three headwater tributaries of the Yellowstone River.⁵ Downstream from the proposed mine site, lay Yellowstone National Park, the Wild and Scenic Clarks Fork of the Yellowstone, and the Absaroka-Beartooth Wilderness.⁶

Cooke City had already experienced the roller coaster ride of the boom and bust economy that accompanies mining. Mining started in the New World Mining District over a century ago and continued on-and-off through the 1950s. Mining's legacy in the New World District has left mountainsides pockmarked with open pits and sterile streams flowing orange.⁷ Mining exposes the iron sulfide, or fool's gold, to oxygen, creating a toxic acid runoff.⁸ Noranda's plans caused concern because they

4. The corporate structure of the mining companies changed considerably over the life of the mine controversy. In 1994, the corporate chain ran from Crown Butte Mines, Inc. (Montana), which was owned entirely by Crown Butte Resources, Ltd. (Toronto), of which 60% was owned by Hemlo Gold Mines, Inc. (Toronto), which was in turn 46% owned by Noranda, Inc. (Toronto). In 1996, following the merger of Noranda and Battle Mountain Gold (Texas), the corporate chain ran from Crown Butte Mines, Inc., to Crown Butte Resources, Ltd., which was then 60% owned by Battle Mountain Gold, of which Noranda Inc. controlled 26%. See Michael Milstein, *Should Noranda be Liable?*, BILLINGS GAZETTE, Feb. 14, 1994, at 1.

5. Todd Wilkinson, *Fool's Gold*, NAT'L PARKS, July 1994, at 31.

6. *Id.*

7. Michael Satchell, *A New Battle Over Yellowstone Park: A Natural Wonder, A Mine and an 1872 Law*, U.S. NEWS & WORLD REP., March 13, 1995, at 34, 36, 42.

8. See Stephen H. Daniels, *Untried Designs Pushed Out West*, ENGINEERING NEWS RECORD, March 14, 1994, at 59.

dwarfed any previous mining activity. When first proposed, Noranda's plans called for mining two highly-acidic pits and then extracting gold, silver, and copper from the rock through a cyanide vat-leach process. This proposal quickly generated a motherlode of controversy and the mine company dropped the pits and cyanide process from its plans.

The mining company no longer needed to mine the pits. It had discovered three high-grade underground ore bodies—one rich vein narrowly missed by miners of yesteryear. The new plans called for extracting \$800 million in gold, silver, and copper from within Henderson Mountain.⁹ The ore bodies themselves were located primarily in the Miller Creek drainage, upstream of Yellowstone National Park, while the mine entrance, mill, tailings impoundment, and work camp would all be located on the other side of Henderson Mountain in Fisher Creek, upstream from the Wild and Scenic Clarks Fork, and the Absaroka-Beartooth Wilderness. The mine plans called for a 300 person work force to construct the mine, and a 175-person work force to operate the mine for its estimated 15-18 year mine life.¹⁰

One of the most controversial features of the mine plan was the proposal to build a tailings impoundment in Fisher Creek the size of 70 football fields. The plans called for the impoundment to store 5.5 million tons of acidic mine waste, called tailings. Geologists and engineers questioned the plan because it called for re-routing Fisher Creek around the impoundment, and placing it in a high avalanche and earthquake-prone area.¹¹ The geologists also questioned the mine company's assertion that the impoundment would remain intact "forever."¹²

The mine proposal sparked almost universal opposition in local and regional communities and across the nation. Residents of the Cooke City area formed the Beartooth Alliance to oppose the mine, an effective grass-roots group that wrote letters, conducted mine tours for officials and journalists, and gave nightly slide shows to tourists. Regional groups like the Greater Yellowstone Coalition (GYC) conducted scientific and technical reviews of the mine proposal, lobbied and helped orchestrate a national media campaign opposing the mine. Other regional and national groups also kicked into gear, including American Rivers, Northern Plains Resource Council, Mineral Policy Center, National Parks & Conservation Association, and local chapters of Trout Unlimited

Mine opponents received a big political boost when in 1993, Senator Max Baucus (D-MT) wrote a sharply worded letter spelling out his con-

9. Satchell, *supra* note 7, at 36.

10. *Id.* at 41.

11. *Id.* at 42.

12. *Id.*

cerns about the proposed mine:

The proposed New World Mine on the rim of both Yellowstone National Park and the Absaroka-Beartooth Wilderness Area raises serious environmental concerns. In fact, I cannot think of an area more sensitive than that being proposed by the New World Mine. Yellowstone is the crown jewel of our treasured National Park system. Its value to us and to future generations is beyond measure. I am not willing to gamble with a national treasure for short term economic gain.¹³

A 1995 poll revealed that Montanans in general shared the views of Senator Baucus and opposed the mine by a two to one margin.¹⁴ By 1995, practically every newspaper in Montana and Wyoming had editorialized against the mine. A Billings Gazette editorial reflected the view of most editorial boards when it asserted that "[w]e must keep voicing concerns until this plan for a mine in the worst possible place for a mine is stopped."¹⁵

In Wyoming, downstream from the proposed tailings impoundment, residents were outraged by the plan, which posed economic and environmental threats with no appreciable benefits. At the peak of the fight, fully 67% of the members of the Cody, Wyoming Chamber of Commerce said they opposed the proposed mine.¹⁶ Local fishermen waged an on-going campaign against the mine, taking out ads in the local papers, and renting billboards throughout the area to display their messages of opposition. In 1994, Wyoming Governor Mike Sullivan wrote a letter to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) stating: "I believe that as presently constituted[,] the Crown Butte Mines, Inc.'s New World Mine near Yellowstone National Park poses an unacceptable risk to significant waters within the State of Wyoming, particularly the Clarks Fork [of the Yellowstone]."¹⁷

Even the otherwise conservative 1996 Wyoming legislature expressed its concern, passing one of the few overtly environmental statutes in its recent history.¹⁸ The statute, an amendment to Wyoming's Industrial Siting Act, placed a ten dollar per ton surcharge on all mine wastes im-

13. Letter from Max Baucus, U.S. Senator, to Alex Balogh, CEO, Noranda Minerals (Oct. 25, 1993) (on file with author).

14. *Many Montanans Oppose Mine Plan*, LIVINGSTON ENTERPRISE, Dec. 28, 1995, at A3.

15. Gary Svec, Opinion Editor, *Gazette Opinion: The Park is More Precious Than Gold*, BILLINGS GAZETTE, March 21, 1995, at 4A.

16. Wyoming's Park County Commissioners also opposed the mine, specifically the plans to locate mine tailings in their backyard. Michael Milstein, *County Opposes Mine Plans*, BILLINGS GAZETTE, July 20, 1994, at 5C.

17. Letter from Mike Sullivan, Governor of Wyoming, to William Yellowtail, Regional Administrator, Region VIII, EPA (Dec. 30, 1994) (on file with author).

18. 1996 Wyo. Sess. Laws, ch. 60, § 1.

ported into the state for disposal.¹⁹ The legislature made few efforts to hide the fact that their target was the New World Mine.²⁰ In the waning hours of the mine fight, Senator Craig Thomas (R-WY) announced his opposition to the mine, stating: "There is only so long you can withhold your opinion when in fact you have a strong conviction that this might be the worst place to site a mine."²¹

During the scoping for the National Environmental Policy Act (NEPA) process,²² the EPA and other agencies began to raise serious concerns about the potential of the mine to pollute waters flowing into Yellowstone National Park, and about the instability of the proposed tailings impoundment.²³ The EPA was not alone in its concern about the environmental threats posed by the mine. Two independent geologists stated that it was not a question of *if* but *when* the tailings impoundment would fail.²⁴ That sentiment was echoed by the Engineering News Record, an industry trade publication, when it editorialized: "Henderson Mountain would be the first U.S. test of [the] submerged tailings system. . . . [D]on't experiment in a place where the price for failure is ruining a wild and scenic river or the oldest national park in the U.S."²⁵

The National Park Service raised concerns about the New World Mine plan early on in the process. Stuart Coleman, Director of Resource Management for Yellowstone National Park, stated: "if you were going to throw a dart at a map of the United States and place a gold mine there, those mountains would probably be the worst place a dart could land."²⁶ It wasn't until late in 1994, however, when Mike Finley replaced Bob Barbee as Yellowstone National Park Superintendent, that Yellowstone found its voice. In March of 1995, Finley said: "I'm stunned this could be taking place, with such potentially devastating impacts How can the logical mind approve this?"²⁷ A month later, he was warning local papers

19. WYO. STAT. ANN. § 35-12-113(g) (1996).

20. See *Wyoming Keeps Pushing for Bigger Role*, LIVINGSTON ENTERPRISE, Feb. 27, 1996, at A4. The chair of the Senate Mining Committee is rumored to have stated that as he saw it, "Montana gets the gold and we [Wyoming] get the shaft."

21. Associated Press & Chronicle Staff, *Wyoming Senator Opposes Proposed New World Mine*, BOZEMAN DAILY CHRON., July 24, 1996, at 9.

22. NEPA's scoping requirements are found at 40 C.F.R. § 1501.7 (1996).

23. See, e.g., Region VIII, EPA, Scoping Comments for the New World Mine EIS (Sept. 26, 1993) (on file with author).

24. Dennis Davis, *Geologists Say Tailings Impoundment for Proposed Mine Will Eventually Fail*, POWELL TRIB., Aug. 24, 1995, at 1, 3.

25. *What Price Lucre?*, ENGINEERING NEWS REC., Mar. 14, 1994, at 100. Concerns over potential pollution caused by the mine are all the more alarming in light of Noranda's pathetic record of environmental non-compliance in both the U.S. and Canada. See Satchell, *supra* note 7 at 36, 41.

26. Wilkinson, *supra* note 5, at 31.

27. Satchell, *supra* note 7, at 36. Likewise, Interior Secretary Bruce Babbitt was not shy in expressing his opinion of the proposed mine: "Placing a giant mine just across the boundary from

that “[t]his proposal poses a real threat to Yellowstone National Park. Worst of all, that threat may manifest itself when the company is not around to take care of the impacts, say twenty to thirty years from now.”²⁸

On June 1, 1995, President Clinton held a town meeting in Billings, Montana. During the meeting, he was asked by Sue Glidden, co-owner of the Cooke City General Store, what he would do to ensure the protection of Yellowstone. President Clinton, obviously aware of the mine proposal, said that he was monitoring the situation and that, in his opinion, “[n]o amount of gain that could come from it could possibly offset any permanent damage to Yellowstone.”²⁹

Two months later, as President Clinton planned a vacation in Jackson Hole, Wyoming, the New York Times and local Jackson Hole newspapers urged him to visit the site of the proposed mine. On August 25, 1995, President Clinton flew over the mine site with Mike Finley, Superintendent of Yellowstone National Park. Later, in the Lamar Valley of Yellowstone, President Clinton announced to a gathering of media and regional conservationists, that he was invoking his powers under the Federal Land Management Policy Act, and was withdrawing the New World District from future mining claims.³⁰ Because Crown Butte and others had already blanketed the area with claims, this Presidential action was not calculated to stop the mine, though it did send a clear signal to Crown Butte. The Associated Press said the action didn’t kill the project, but it “tightened the noose.”³¹

The withdrawal, as initially published in the Federal Register, was to encompass 19,100 acres of federal lands in the New World District—virtually all non-withdrawn federal lands in the area, with the exception of an area on the eastern side of the District.³² The stated purpose of the withdrawal was to protect “the watersheds within the drainages of the Clarks Fork of the Yellowstone, Soda Butte Creek, and the Stillwater

Yellowstone is a bad idea, pure and simple.” *Id.*

28. *Mine in Wrong Place at Wrong Time, Park Chief Says*, LIVINGSTON ENTERPRISE, April 19, 1995, at A1.

29. Todd Wilkinson, *Global Warning: Designation of Yellowstone National Park as Endangered*, NAT’L PARKS, March 1996, at 7, 12.

30. Bob Ekey, *Clinton Tours New World Mine: Historic Meeting with Conservationists*, GREATER YELLOWSTONE REPORT, Summer 1995, at 1; Jim Day, *Crowd Applauds Mining Ban Proposal*, LIVINGSTON ENTERPRISE, July 17, 1996, at A1.

31. *See Clinton “Tightens Noose” on New World*, BOZEMAN DAILY CHRON., August 27, 1995, at A6.

32. *See Notice of Proposed Withdrawal*; Montana, 60 Fed. Reg. 45732 (Dep’t Interior 1995). Later, when the New World Agreement was announced, the U.S. Department of the Interior amended the withdrawal to include the area on the eastern side of the District, near Kersey Lake, and to include all private lands subsequently acquired by the federal government. *See Amendment to Proposed Withdrawal*; Montana, 61 Fed. Reg. 49480 (Dep’t Interior 1996).

River, and the water quality and fresh water fishery resources within Yellowstone National Park."³³ This withdrawal was widely supported by the local residents in Cooke City. At a July 1996 hearing in the local Cooke City Fire Hall, over one hundred Cooke City residents turned out to support the President's action—no Cooke City residents spoke against the proposed withdrawal.³⁴

On September 8, 1995, the World Heritage Committee visited Yellowstone National Park to review the proposed mine.³⁵ During its four-day visit, the Committee listened to a lengthy presentation from the mine company, toured the mine site with company officials, conservationists, and state and federal agencies, and heard a full day of expert testimony from all parties to the debate. During the visit, the National Park Service blasted the mine project and submitted written and technical testimony warning that the mine would harm water quantity and quality in Yellowstone National Park. Three months later, on December 5, 1995, the World Heritage Committee agreed with the National Park Service and designated Yellowstone as "in danger" due to the threats posed by the New World Mine and other activities.³⁶ Though this decision carried little legal weight, it did heighten national and international scrutiny of the mine proposal.

Conservationists were dealt another victory on October 13, 1995, in a decision by U.S. District Judge Jack Shanstrom.³⁷ Two years earlier, in September of 1993, nine conservation organizations, represented by the Sierra Club Legal Defense Fund, had filed suit against Crown Butte Mines, Inc., Crown Butte Resources, Ltd., Noranda Minerals Corp., and

33. 60 Fed. Reg. 45732.

34. Day, *supra* note 30.

35. *World Heritage Committee Determines Yellowstone in Danger*, West's Legal News, Dec. 14, 1995, available in WESTLAW, 1995 WL 911463. Conservation organizations invited the World Heritage Committee to visit the Park and the site of the proposed mine. *Id.* Since 1973, the United States has been a signatory to the World Heritage Convention Treaty. Under that treaty, member nations nominate culturally and environmentally significant sites within their borders as World Heritage Sites. If the World Heritage Committee votes to include the nominated site on the World Heritage list, the nominating nation pledges to protect the site as an internationally important resource. *See id.* In 1972, the United States designated Yellowstone National Park as a World Heritage Site under the World Heritage Treaty. Convention for the Protection of the World Cultural & Natural Heritage, Nov. 6, 1972, 27 U.S.T. 37. By inviting the World Heritage Committee to review Yellowstone's status as a World Heritage Site, the conservation organizations hoped to raise national and international awareness of the mine issue, and to obtain independent verification of the threats posed by the mine to Yellowstone. *See West's Legal News, supra*; *see also, generally*, Wilkinson, *supra* note 29.

36. Michael Milstein, *Group: Mine Plan Endangers Park, Burns Blasts Move by Heritage Panel*, BILLINGS GAZETTE, Dec. 6, 1995, at 1A; *see also, generally*, Wilkinson, *supra* note 29.

37. *See Beartooth Alliance v. Crown Butte Mines, Inc.* 904 F. Supp. 1168 (D. Mont. 1995). The decision was upheld by the Ninth Circuit on March 5, 1996 in an unpublished opinion. Kathleen N. Hellevik, *9th Circuit Upholds Ruling Against Crown Butte, Mine Company Must Clean Waste*, March 12, 1996, West's Legal News, available in WESTLAW, 1996 WL 443227.

Noranda, Inc. The suit alleged that these companies were violating the Clean Water Act because they owned or operated the New World District, yet did not have discharge permits for the ongoing water pollution at the site.³⁸ The ruling was in response to a motion for summary judgement, and it was an across-the-board victory for the conservationists. First, Judge Shanstrom found three "point sources" at the New World site (two historic pits and the Glengarry adit) which were discharging pollution into "waters of the United States."³⁹ Second, Judge Shanstrom held that the Crown Butte companies and, significantly, Noranda Minerals, were in violation of the law, because they owned or operated these three point sources but did not have the required discharge permits that would have regulated cleanup of the ongoing pollution.⁴⁰ Finally, Judge Shanstrom refused to grant Noranda, Inc.'s motion for summary judgment as to its liability, finding instead that there were material factual issues as to whether Noranda, Inc. should remain a party to the suit.⁴¹

This sweeping ruling was significant for a number of reasons. First, by finding Crown Butte liable for the existing pollution, regardless of the status of the proposed mine, the ruling devastated Crown Butte's argument that they were not liable for past pollution.⁴² Second, by holding Noranda Minerals liable, and by refusing to dismiss Noranda, Inc., Judge Shanstrom shook Noranda's confidence that its corporate structure would shield it in the event of problems at the New World site. Finally, the ruling exposed the companies to massive liability both in the form of direct expenses for cleanup, and in the form of civil penalties which, under the Clean Water Act, could amount to over \$100 million.⁴³

In the wake of the President's action and the lawsuit decision, Greater Yellowstone Coalition Executive Director Mike Clark and other GYC board members traveled to Toronto in December, 1995, to ask whether the company would be willing to enter into discussions about withdrawing from the project with some compensation. The GYC delegation offered to join the company in approaching the federal government to seek to negotiate an out-of-court solution.

The prospect of the conservation community and mining industry voluntarily working together to find a solution to the New World project

38. *Beartooth Alliance*, 904 F. Supp. at 1171.

39. *Id.* at 1174. Someone wishing to legally discharge pollutants into "waters of the United States" must first obtain a permit from the United States. *Id.* at 1173 (citing 33 U.S.C. §§ 1311(a) & 1342(a) (1994) of the Clean Water Act).

40. *Id.* at 1174, 1176.

41. *See id.* at 1174-76.

42. *Id.* at 1175-76.

43. *See Hellevik, supra* note 37. *See also* 33 U.S.C. § 1319(d) (civil penalty provision); § 1319(c)(3)(A) (criminal penalty provision); § 1319(g) (administrative costs provision).

appealed to the President's Council for Environmental Quality (CEQ).⁴⁴ CEQ felt that a new approach with both sides working together toward a solution was worth pursuing.

The concept proposed by the conservation groups and the mining company was that the company would relinquish its assets in the New World Mining District in exchange for other federal properties. Nine conservation groups represented by GYC and the Sierra Club Legal Defense Fund were part of the talks, because settlement of the Clean Water Act lawsuit would be included as part of the agreement.

During the winter of 1995 and spring of 1996, the tenor and progress of the talks resembled a roller coaster ride. Negotiations progressed slowly with major issues being how liability for existing pollution at the site would be handled and how to value the property. Finally, the groups began making serious progress in July. Some all-night negotiating sessions in early August produced the final agreement.

The final agreement established a maximum price for compensating the mining company, established a fund for clean-up of the mine site, and established the conditions under which conservation groups would settle their Clean Water Act lawsuit against the companies.

III. SUMMARY OF THE AGREEMENT

The New World Agreement (Agreement) provides that the federal government will exchange \$65 million worth of federal property or other assets for the New World District properties.⁴⁵ Because Crown Butte does not own all of the lands containing identified ore bodies, Crown Butte is responsible for acquiring additional mineral interests in the area from other land owners prior to the completion of the asset exchange.⁴⁶ Pending completion of the exchange, Crown Butte agrees to suspend all permitting activities for the proposed mine and, contingent upon successful completion of the exchange, Crown Butte covenants never to pursue mining in the New World District in the future.⁴⁷

Under the terms of the Agreement, the \$65 million figure serves as a cap on the value of the federal assets to be exchanged. Prior to completion of the exchange, the Agreement requires that an independent appraisal be

44. CEQ acts in an advisory capacity to the President and also coordinates interagency environmental policymaking. *Role of Council on Environmental Quality: Testimony Before the Subcomm. on Oversight and Investigations of the Senate Energy and Natural Resources Comm.*, 104th Cong., 1st Sess. (1995) (statement of Kathleen McGinty, Chair, CEQ).

45. Brian Kuehl, *Deal Protects Yellowstone, Cleans Up Site and Ensures Public Participation*, GREATER YELLOWSTONE REPORT, Summer 1996, at 6.

46. *Id.*

47. *Id.*

conducted to confirm the fair market value of the District properties. If the appraisal reveals that the properties are worth less than the anticipated \$65 million, then the parties could renegotiate the relevant price terms to keep the agreement on track.⁴⁸

In addition to the exchange provisions, the Agreement requires that, at the time of transfer of the properties, Crown Butte place \$22.5 million into an escrow account to be used for cleanup of existing pollution at the New World site. In exchange for the funding of the escrow account, and contingent upon the successful exchange of properties, GYC and the other conservation organizations agreed to settle the remaining issues in their Clean Water Act suit, and agreed not to sue Crown Butte or the federal government for pollution problems at the New World site.⁴⁹

IV. WHY THE AGREEMENT WAS NECESSARY

Federal lands are ostensibly managed for multiple uses. Through the Multiple-Use Sustained-Yield Act,⁵⁰ the National Forest Management Act,⁵¹ and the Federal Land Policy and Management Act,⁵² Congress has clearly expressed its intent that federal land managers should balance the various uses of federal lands.⁵³ Under this statutory structure, a federal land manager may prohibit one use on a parcel of federal land if necessary to protect other uses.⁵⁴ For example, a land manager can prohibit a timber sale, deny a grazing permit, close an area to recreational uses, or deny a request to lease oil, gas, coal, or any other leasable mineral, in favor of a competing use. However, there is only one use that federal land managers cannot effectively prevent—hardrock mining. Although federal lands are to be managed for multiple uses, hardrock mining is often viewed as the highest and best use of all federal lands.⁵⁵ Even if hardrock mining will displace other uses of the federal lands—grazing, logging, recreation,

48. *Id.*

49. *Id.* The Agreement was actually signed by only eight of the nine Plaintiffs in the Clean Water Act lawsuit. The ninth organization, Northern Plains Resource Council, has remained involved in the continuing Agreement negotiations, and it is anticipated that it will ultimately settle the Clean Water Act suit.

50. 16 U.S.C. §§ 528-531 (1994).

51. 16 U.S.C. §§ 1600-1614 (1994).

52. 43 U.S.C. §§ 1701-1784 (1994).

53. See James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Land for Timber Production*, 17 ENVTL. L. 557, 563 (1987) (describing multiple-use provisions of the National Forest Management Act and the Multiple-Use Sustained-Yield Act); Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 795 (1996) (describing the Federal Land Policy and Management Act's multiple-use, sustained yield criteria).

54. *Id.*

55. See George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RESOURCES & ENV'T, Summer 1995, at 3, 5-6.

etc.—a federal land manager is required to permit the mining if the miner has perfected his rights under the 1872 Mining Law.⁵⁶

In the case of the proposed New World Mine, the Forest Service made its views quite clear in the preliminary draft of the Environmental Impact Statement, when it stated that it interpreted the 1872 Mining Law to require that it issue a permit if the mine were to comply with all other federal laws: "If the plan is in compliance with these requirements, the Forest Service would have no statutory or regulatory authority to deny the plan."⁵⁷

However, compliance with other statutes does not guarantee that the mine will not harm the environment, as the director of the National Park Service pointed out during the debate over the New World Mine. In 1993, Park Service Director Roger Kennedy said: "[I]t is quite possible that Noranda could comply with all Federal and state legal requirements with regard to siting, operating, and reclamation of the mine but still have long-term and undesirable effects on the Yellowstone ecosystem."⁵⁸

In the New World Mine controversy, the EPA and the National Park Service raised questions about water quality, wetlands destruction and tailings impoundment design problems in relation to the proposed New World Mine. Although the Clinton Administration has been vigilant throughout this debate, would future administrations under changed political regimes be as vigilant? Even if a mine proposal were denied, the company could reconfigure the proposal and resubmit it—to agencies like the Forest Service who interpret the law to say it has no right to say no.⁵⁹

There have been creative challenges to the 1872 Mining Law's "right to mine," specifically challenging the transfer of federal property to private hands, a process called patenting.⁶⁰ But the law now stands. It clearly

56. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 48 (1992).

57. GALLATIN NAT'L FOREST AND SHOSHONE NAT'L FOREST, U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, AND MONTANA DEP'T OF STATE LANDS, *PRELIMINARY DRAFT ENVIRONMENTAL IMPACT STATEMENT, CROWN BUTTE MINES, INC., NEW WORLD PROJECT*, 20 (1995).

58. Letter from Roger Kennedy, Director, National Park Service, Max Baucus, U.S. Senator (Dec. 16, 1993) (on file with author).

59. See WILKINSON, *supra* note 56, at 66-67.

60. See WILKINSON, *supra* note 56, at 48 (explaining patenting process).

Two administrative decisions provide examples of such challenges. In 1994, an Administrative Law Judge (ALJ) with the U.S. Dept. of Interior Office of Hearings and Appeals revived a long-unused test for the validity of mining claims known as the "comparative values test." In *United States v. United Mining Corp.*, the Bureau of Land Management challenged the validity of a number of mining claims filed under the Building Stone Act, 30 U.S.C. § 161 (1986). No.IDI-29807 (Dept. of Interior, Nov. 1, 1994) (on file with author). The ALJ invalidated the claims, holding that the Building Stone Act requires that the claimed lands be "chiefly valuable for building stone" and finding that, in this instance, the claimed land was "more valuable for geological and aesthetic purposes" than for building stone. *Id.* at 12. The ALJ found that, even if the claims in question were not invalid under the Build-

needs to be reformed.

One of the challenges to reforming the 1872 Mining Law is addressing the massive amounts of land that have already been claimed by miners. According to Charles F. Wilkinson, "there are 1.1 million alleged unpatented mining claims, 25 million acres in all, scattered across the West, and the Bureau of Land Management receives 90,000 new claims each year."⁶¹ The requirements for maintaining a claim are ridiculously low.⁶² The requirements should be much more rigorous so that those who do not develop their claims would likely relinquish them. Thus the land would revert back to public ownership and control.⁶³

The 1872 Mining Law must also be reformed to require payment of royalties based on the gross value of minerals extracted. The fact that no royalties are paid for minerals extracted from what was once public land, and the low cost of patenting a claim—either \$2.50 or \$5.00 an acre⁶⁴—clearly should be addressed when the law is reformed.

But the major issue that the New World Mine highlights is that there are some places about which federal agencies should be able to say "No, this is an inappropriate place to develop a mine." The authority to make such suitability determinations would put mining on par with all other uses on federal lands.⁶⁵ Agencies like the Forest Service should be made to ask whether, in a proposed location, a mine would be appropriate, or would be out of balance with water quality, recreation, wildlife and other values of the area.⁶⁶

ing Stone Act, they would still be invalid because "[a] mining claim is invalid under the Act of 1872 if the claimed land is more valuable for purposes other than mining." *Id.* at 11, 13.

In 1995, American Rivers, Inc., Trout Unlimited, and a local outfitter challenged the validity of four lode claims that Crown Butte was attempting to patent. *See Answer, American Rivers, Inc. v. Crown Butte Mines, Inc.*, No. MTM-83728 (Dept. of Interior, Feb. 1995) (on file with author). These claims, covering 27 acres on the top of Henderson Mountain, contained an estimated 10% of Crown Butte's targeted ore body. Because most of Crown Butte's mining claims were already patented, however, this challenge could not, by itself, stop the New World Mine. The Department of Interior has not yet ruled on this patent challenge.

61. WILKINSON, *supra* note 56, at 47.

62. Besides the filing of annual reports, the cost to the miner is a mere \$100 per year. WILKINSON, *supra* note 56, at 47.

63. WILKINSON, *supra* note 56, at 57.

64. WILKINSON, *supra* note 56, at 48.

65. *Cf.* WILKINSON, *supra* note 56, at 66 (quoting former Forest Service Chief John R. McGuire, who felt powerless to stop mining on the national forests despite environmental harms).

66. *See* WILKINSON, *supra* note 56, at 67-74 for a discussion of other proposed reforms for the 1872 Mining Law. *See also* Joel A. Ferre, *Forest Service Regulations Governing Mining: Ecosystem Preservation Versus Economically Feasible Mining in the National Forests*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 351, 374 n. 145 (describing Interior Secretary Bruce Babbitt's proposed changes).

V. CONCLUSION

In the New World case, the mining company, conservationists and government sought a new way out of a classic environmental battle. Clearly the overwhelming public opposition to the mine and the success of the Clean Water Act lawsuit provided the company with incentive to negotiate. The prospect of stopping this proposed environmental threat forever provided incentive to both conservationists and the National Park Service.

Some critics of the settlement say that the U.S. government should not be blackmailed into stopping environmental degradation next to a National Park and that the Agreement sets a bad precedent—that it will prompt other companies or individuals to stake mining claims next to sensitive areas, and then demand payment.

However, it has long been the practice of the U.S. government to compensate property owners in order to remove an environmental threat. For example, the U.S. purchased a mining claim for a potential black marble stone quarry in the Maroon Bells-Snowmass Wilderness Area in southwestern Colorado.⁶⁷ On another occasion, the U.S. exchanged land with an individual who had an inholding in the West Elks Wilderness Area in Colorado, where he was using helicopters to ferry log home kits into the inholding. He received commercial property in exchange for his property in the wilderness area.⁶⁸ While such solutions are not new and they are by no means ideal, they point to a need for fundamental changes to our public land and resources laws.

Although President Clinton said the New World Mine Agreement was a model for a new way of approaching "America's challenges,"⁶⁹ asset exchanges clearly should not be a template for how to stop mines that threaten the environment. One effective and lasting way to combat the pollution and other environmental problems caused by mining is to reform the 1872 Mining Law.

Immediately following the announcement of the New World Agreement, newspapers across the country published editorials in favor of the Agreement, and called upon Congress to reform the 1872 Mining Law. The New York Times wrote:

The narrow escape at Yellowstone underscores the urgency of reforming the antiquated 1872 Mining Act, which was signed into law by Ulysses S. Grant to encourage Western development. The law gives companies

67. See Dan Sullivan, *Retiree Finds Niche Protecting Lands: Trust Turns Parcels Over to Wilderness Areas*, DENVER POST, Jan. 2, 1997, at A1.

68. See '93 Land Swap Pays Off in Millions for Developer: 107 Acres Sells for \$4.2 Million, Six Times the Appraised Value, ROCKY MOUNTAIN NEWS, Oct. 24, 1995, at 10A.

69. See Ekey, *supra* note 1, at 4.

what amounts to an automatic right to extract gold, copper, and other minerals that they discover on Federal lands and to take title to that land for a few dollars an acre. The law does not provide for stringent suitability reviews to determine whether the site is environmentally dangerous or whether it could be used for some better purpose. . . . The perfect ending to the saga of the Yellowstone mine would be to get this law reformed.⁷⁰

Coal miners kept canaries in the mines. If the canary died, it meant noxious gases threatened the miners, too. Let the New World Mine controversy and Agreement be our canary, telling us that there is something noxious about the 1872 Mining Law.

70. *Victory at Yellowstone*, NEW YORK TIMES, Aug. 13, 1996, at A1.