

VOLUME NO. 37

OPINION NO.27

HARD ROCK MINING ACT - Grandfather clause, facilities constructed prior to effective date of the act; HARD ROCK MINING ACT - What constitutes mining, concentrators, tailings ponds and pipelines; MINING - Hard Rock Mining Act, what constitutes mining; REVISED CODES OF MONTANA, 1947 - Sections 50-1201, 50-1202, 50-1203, 50-1207, 50-1208, 50-1209, 50-1210, 50-1211, 50-1219.

- HELD: 1. The concentrator and precipitation plant operated by the Anaconda Company in Butte, Montana, are exempted from regulation under the Hard Rock Act by section 50-1219, R.C.M. 1947, since these facilities were constructed prior to enactment.
2. The mine-mouth concentrator, slurry pipeline and tailings pond to be operated by ASARCO in conjunction with its proposed mine are subject to regulation under the Hard Rock Act, section 50-1201 et seq., R.C.M. 1947.

24 May 1977

Leo Berry, Jr.
Commissioner of State Lands
Department of State Lands
Helena, Montana 59601

Dear Mr. Berry:

You have requested my opinion on the following questions:

1. Are the concentrator and precipitation plant operated by the Anaconda Company in Butte, Montana, exempted from the regulation under section 50-1219, R.C.M. 1947?
2. Is the proposed ASARCO mining operation, including a mine-mouth concentrator and a waste slurry pipeline and tailings pond, subject to regulation under the Hard Rock Act, section 50-1201, et seq., R.C.M. 1947?

The first question may be easily answered under the terms of section 50-1219, which provides:

No provision of this act shall be applicable to any exploration or mining work performed prior to the date of promulgation of the director's rules and regulations pursuant to section 50-1204 of this act.

Since your letter clearly states that the Anaconda concentrator and precipitation plant were constructed prior to the adoption of the act, these facilities are exempted by section 50-1219.

Your second question is more complex. The issue is whether the construction and operation of a concentrator, slurry pipeline and tailings pond in conjunction with a mine are regulated activities under the Hard Rock Act, section 50-1201 et seq. That Act concerns the ultimate reclamation of lands affected by mining and the return of those lands to productive use. Section 50-1201 and 50-1202. The Department of State Lands administers the Act and issues permits for exploration, "development" or mining carried out in the State. Sections 50-1207 and 50-1208. Applicants for permits must file for approval of, among other things, mining and reclamation plans, section 50-1208, and must post a bond

conditioned upon "faithful performance" of the requirements of the Act. Section 50-1211. The issue you have raised is not specifically addressed by the act.

On April 19, 1972, the Attorney General issued a letter opinion interpreting the application of the Act to the Anaconda Company smelter operation. After setting out the title of the Act and several of its initial provisions, the Attorney General held:

It appears from a reading of the aforementioned provisions that the legislature was concerned with actual operations necessary for the extraction of or exploration for minerals. It is not contemplated in these sections that the act should apply to all processes used to produce the final product.

The smelting activity of Anaconda Company is not necessarily involved in the actual mining operations, rather it is a portion of the refining process, and such smelting operations are not regulated by chapter 12, Title 50, supra.

Therefore, the mining-refining distinction was the crux of the opinion. The Act, the Attorney General held in 1972, regulates mining but not refining. The basic premise of that opinion was correct inasmuch as the Act was not intended to apply to every step of mineral utilization from exploration through fabrication of a finished product. The Act's regulation ends with completion of the mining process.

Defining that point at which mining stops and non-regulated processes begin, however, is very difficult. Factually, the ASARCO project involves construction of a plant adjacent to the mine for beneficiation of mined ore by a concentrating process. Ore from the mine will be crushed to the consistency of granulated sugar; it will then be placed into a slurry pipeline for extraction of waste materials by a froth flotation process which adds certain reagents to the slurry. Subsequent thickening and filtering of the slurry renders a material with a much higher concentration of copper and silver than contained in the original ore. This material will be sold or smelted. The slurry waste will be shipped by slurry pipeline to a 400-acre tailings pond approximately 6-1/2 miles from the mine.

Categorizing this process as "mining" or as something else is difficult. Enclosed with your request for this opinion were the views of certain federal agencies, state agencies and universities concerning the question of whether milling and concentration are in fact part of the mining process. Of the seven comments received, four concluded that the process of mining includes milling and concentration. Each, however, arrived at that conclusion for reasons not shared by the others. On the negative side, one comment concluded flatly that milling and concentration are not mining and another stated that this conclusion is probably correct. Yet another stated that the issue hinges on the ownership of transportation facilities from the mine. Though the weight of authority as revealed by these comments indicates that mining includes milling and concentration, that conclusion is not unanimously authoritative.

Therefore, the Act itself must serve to resolve the question. As stated above, the Act primarily concerns reclamation of lands disturbed by mining. Careful consideration of the entire Act leads to a conclusion that the Legislature intended to regulate milling and concentration. Exploration and development, both defined by section 50-1203, are regulated by section 50-1207 which requires an application and a permit from the Department of State Lands. A person who desires to develop an area covered by an exploration permit must show the location of primary support roads and facilities, the acreage to be disturbed during the ensuing twelve months, and a reclamation plan for lands to be disturbed during that same time. The term support roads and facilities indicates an intent to regulate more than the process of extracting the ore, a conclusion borne out by section 50-1208 which regulates mining permits and which refers to a mine complex. (See also section 50-1209.) More concretely, the repeated reference to "disturbed land" in section 50-1207 (and 50-1208 through 50-1211) when tied to the definition of that term, reinforces the conclusion. Disturbed land under section 50-1203 specifically includes tailings ponds, dumps, roads, conveyor systems, leach dumps, and all similar excavations and covering resulting from the mining operation. It is clear that the tailings pond and the slurry pipeline ("conveyor system") are covered. Since tailings for a tailings pond must come from somewhere the Legislature probably intended that a mill/concentrator also be covered.

This coverage of the term "disturbed land" is important because it appears a number of times in reference to activities which must be approved by the department. The opera-

tor's reclamation plan, which must be approved, must specify not only the method for disposal of mining debris, but also the methods of diverting surface waters around "disturbed areas" (which specifically includes tailings ponds) to prevent pollution and erosion. As already noted, a person who proposes to develop an area already under and exploration permit must obtain approval of a reclamation plan for lands to be disturbed. An operator who desires to obtain a mining permit for a "mine complex" under section 50-1208 must provide a map showing land which will be disturbed, and a plan of mining providing for operating procedures and completion of mining and associated land disturbances. The reclamation plan described in detail in section 50-1209 must provide for the reclamation of all disturbed land. Finally, the operator's performance bond is based upon the extend of the "disturbed" area.

Whatever is included by the term "disturbed land" is crucial to the regulatory scheme of the Act. As discussed above, that term explicitly includes tailings ponds and conveyor systems and, by implication, a mine-mouth mill-concentrator. Further, this construction has been adopted by the Board of Land Commissioners in its regulations implementing the Hard Rock Act. Rule 26-2.10(2)-S10020 (MAC) provides that development under the Act is deemed to include grading, excavation, construction and installation of an "ore treatment mill" which is "contiguous or near the mine." Development also includes structures necessary for "creation or maintenance" of tailings piles or settling ponds. Rule 26-2.10(2)-S10030 (MAC) requires that the reclamation plan provide for disposal of mining debris, including mill tailings. Rule 26-2.10(2)-S10040 (MAC) provides that an intent not to abandon a mine can be shown by proof that the mine or mill is shut down for other reasons.

These rules, like the Act itself, reveal an intent to regulate more than the "bare bones" of the ore extraction process. Though the overriding purpose of the Act is reclamation, it also regulates exploration, development and mining, and requires approval of operational plans therefore. The numerous references to roads, tailings ponds, debris disposal, support facilities and mine complex indicate a legislative intent to regulate the entire range of activity surrounding any mining operation. While the prior Attorney General's opinion was correct in distinguishing smelting from the mining operation, there is no showing that milling and concentration, when undertaken in conjunction with the production of a particular mine, should be exempt from regulation. I am aware of the definitions of

"mineral and mining" in section 50-1203 which apparently make a distinction between mining per se, and processing or other subsequent uses of the ore. These distinctions, however, are not made with any evident intent to curtail regulation. In any event, they are not carried over into the remainder of the Act. It is clear that the Legislature intended to regulate at least the initial stages necessary in processing the ore subsequent to "mining" per se. Waste disposal areas such as tailings ponds are regulated and the existence of such waste requires some grading, sorting or other processing of the ore. The mere fact that a process or structure may technically belong to processing rather than extraction does not exempt it from regulation under the Hard Rock Act.

THEREFORE, IT IS MY OPINION:

1. The concentrator and precipitation plant operated by the Anaconda Company in Butte, Montana, are exempted from regulation under the Hard Rock Act by section 50-1219, R.C.M. 1947, since these facilities were constructed prior to enactment.
2. The mine-mouth concentrator, slurry pipeline and tailings pond to be operated by ASARCO in conjunction with its proposed mine are subject to regulation under the Hard Rock Act, section 50-1201 et seq., R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General