



FEDERAL ENVIRONMENTAL LAWS IN INDIAN COUNTRY

Ft. Belknap Indian Community

Lucy Simpson, Esq.
Erin Farris, 2009 Sidley Fellow

July 13, 2009

Pre-Mining Landusky



Post-Mining Landusky



What is Jurisdiction?



- Jurisdiction is the power of governments to make and enforce laws.
- Civil v. Criminal
- Regulatory v. Adjudicatory
- Primary authorities affecting Indian tribes are:
Federal, State and Tribal governments.

Tribal Jurisdiction



- Tribes have jurisdiction over tribal members within reservation boundaries.
- Tribes have jurisdiction over non Indians on non-Indian land within a reservation only if: 1) consensual relationship with the tribe or its members; 2) the non member's activities has a direct effect on the tribe's political integrity, economic security or health or welfare of the tribe. *Montana* rule.
- Tribes have limited jurisdiction over non-Indians on tribal land.

Federal Primacy



- Federal statutes of general applicability, including most environmental laws, are presumed to apply to Indians in Indian Country.
- As a general rule, states have no authority over tribes and tribal members within their reservations.
- State laws can impact tribes when there is a tribal interest outside reservation boundaries.

Treatment as a State



- Delegates authority to tribes to regulate and implement certain environmental programs within an Indian reservation
- Requirements:
 - Federally recognized
 - Governing body carrying out substantial duties and powers
 - Jurisdiction over the area proposed for regulation (held by the tribe, by the US in trust, by tribal member) or meets the *Montana* test
 - Capable of carrying out regulatory functions

Benefits of TAS Status



- Allows tribes to set higher standards (e.g. higher WQS) than the minimum federal standards that would otherwise be applicable.
- Allows tribes an opportunity to influence on and off reservation natural resource management

Federal Laws with TAS Provisions



- Clean Water Act
- Clean Air Act
- Safe Drinking Water Act
- Surface Mining Control and Reclamation Act
- CERCLA
- Oil and Pollution Act

Citizen Suit Provisions



- Authorize private individuals and entities (including tribes through a tribal official) to directly enforce particular environmental laws
- Almost every environmental statute has citizen suit provisions
- Requirements:
 - Standing
 - Notice
 - No simultaneous lawsuits

Administrative and Procedural Rules



- Laws governing procedure, not substance.
- National Environment Policy Act (NEPA)
- Administrative Procedures Act (APA)

NEPA



- NEPA was enacted in 1969 to create a framework for federal agencies to follow when making decisions about projects that may detrimentally effect the environment.
- It governs how decisions effecting the environment should be made, not what the end decision should be.

How Does NEPA Work?



- Environmental Assessments
- Environmental Impact Statements
 - Scoping
 - Draft EIS
 - Public comment
 - Final EIS
 - ROD

U.S. BLM & Montana DEQ ROD Zortman & Landusky Mines

State of Montana
Department of Environmental Quality
1520 East 6th Avenue
P.O. Box 200901
Helena, Montana 59620-0901
(406) 444-2544

U.S. Department of the Interior
Bureau of Land Management
Malta Field Office
HC 65 Box 5000
Malta, Montana 59538
(406) 654-1240

May 2002

Dear Reader,

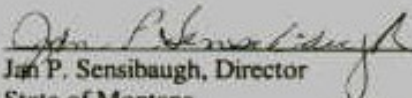
Enclosed is the signed Record of Decision (ROD) on reclamation of the Zortman and Landusky Mines. The decision is to select Alternatives Z6 and L4 from the Final Supplemental Environmental Impact Statement for reclamation of the Zortman and Landusky Mines, respectively.

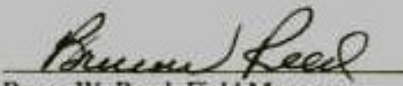
Mine reclamation under Alternatives Z6 and L4 is dependent upon additional funding in the amount of approximately \$22.5 million. In the event funding is not available within the next two years reclamation will be completed using Alternatives Z3 and L3, which can be implemented with the present reclamation funds.

The ROD also includes requirements for continued long-term water treatment with effluent limits established under the Montana Pollution Discharge Elimination System permits for each mine. The long-term water treatment trust fund needs approximately \$11 million to maintain water treatment. This shortfall in water treatment funding exists independent of which set of alternatives is implemented and is the agencies' priority for expenditure of any additional funds obtained for the project.

We wish to thank everyone who participated in the EIS process and will keep you advised as to the progress of reclamation.

Sincerely,


Jan P. Sensibaugh, Director
State of Montana
Department of Environmental Quality


Bruce W. Reed, Field Manager
Bureau of Land Management
Malta Field Office

Challenging a NEPA Decision



- Challenges are in Federal Court
- Requirements:
 - Final Agency Action
 - Standing
 - Statute of Limitations

Opportunities to Use NEPA



- During preparation of EA
- During EIS scoping process
- During consultation process
- During preparation of EIS
- During comment phase
- Using ROD to compel compliance

APA



- The APA was enacted in 1946 and provides procedural requirements for federal administrative agencies to follow when making rules to ensure effective due process.
- Ensures a minimal level of public participation
- Important in environmental context, because the EPA and other federal agencies often engage in rulemaking and regulation development in order to ensure compliance with federal statutes.

How Does the APA Work?



- Notice and Comment when making rules
- Agency hearing requirements (when required by particular statute)
- Judicial review of agency action
- Sovereign Immunity Waiver

Substantive Environmental Laws



- Clean Water Act (CWA)
- Safe Drinking Water Act (SDWA)
- Clean Air Act (CAA)
- Resource Conservation and Recovery Act (RCRA)
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Endangered Species Act (ESA)
- National Historic Preservation Act (NHPA)

Clean Water Act



- The CWA was passed by Congress in 1972 to restore and maintain the chemical, physical and biological integrity of all navigable waters in the US.
- It creates standards for the amount of pollution that can be released and sets minimum levels of water quality for these waters.
- The Act is enforced primarily through a permit system which governs how much pollution can be discharged into a particular waterbody.

Swift Gulch



How Does the CWA Work?



- Water Quality Standards
 - Designating Uses
 - Setting Water Quality Criteria
 - Anti-Degradation Policies
 - Mixing zones
- Discharge Permit System
- Treatment as a State

Swift Gulch



Enforcement



- Civil enforcement
- Criminal prosecution
- Citizen suits

WQ monitoring at Swift Gulch



Swift Gulch



Opportunities to Use the CWA



- During development of WSQ
- During NPDES permitting process
- Reviewing the anti-degradation policy
- Affecting mixing zone use
- Reviewing Impaired Waters List
- Protecting wetlands
- Rejecting projects that endanger WQS
- Controlling nonpoint source pollution

Safe Drinking Water Act



- The SDWA was adopted by Congress in 1974 to protect the public health by protecting our nation's drinking water, both at the tap and at the source.
- The Act regulates both ground and surface drinking water sources.

How Does the SDWA Work?



- Drinking Water Standards
- Source Water Assessments
- Wellhead Protection Program
- Underground Injection Control Program
- Sewage/Wastewater Treatment Regulations
- Public Information
- Treatment as a State

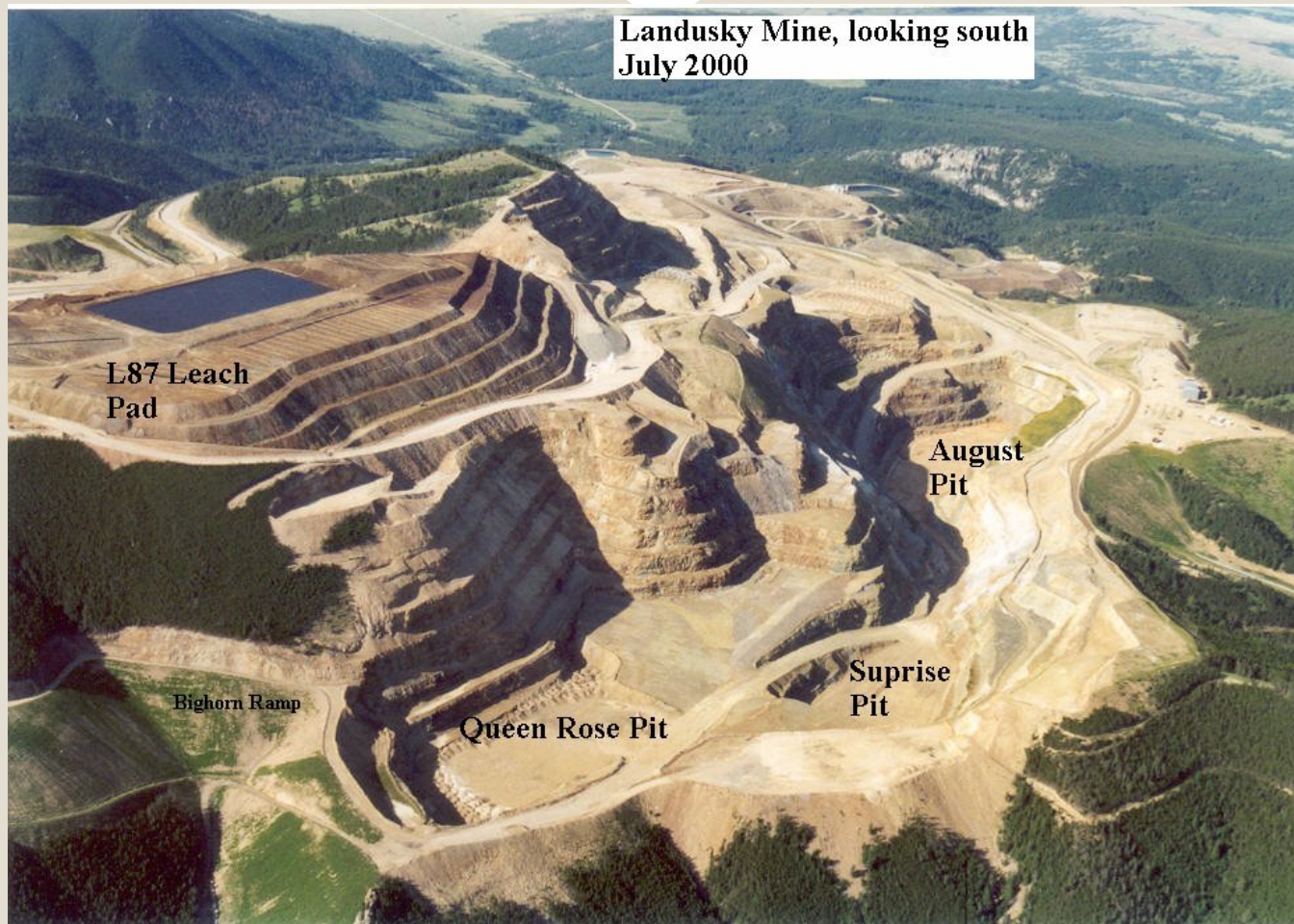
Zortman Gold Mine



July 2000



Landusky Gold Mine



Swift Gulch Drainage

32



7/21/2009

Enforcement



- Civil enforcement
- Criminal prosecution
- Citizen suits

Opportunities to Use the SDWA



- During development of drinking water standards
- During source water assessment process
- During development of wellhead protection system
- During development of UIC program
- Monitoring state revolving funds

Clean Air Act



- CAA was enacted by Congress to protect and enhance the quality of the Nation's air resources to promote the public health and welfare.

How Does the CAA Work?



- National Ambient Air Quality Standards
- Permitting Process
- Treatment as a State

Enforcement



- Civil Enforcement
- Criminal Prosecution
- Citizen suits

Opportunities to Use the CAA



- Regulate air quality on reservation lands
- Regulate particular pollutants not regulated by federal or state programs
- Assist in the prevention of air quality deterioration

Hazardous Waste



- Resource Conservation and Recovery Act (RCRA)– manages non-hazardous and hazardous wastes before they are released.
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)– focuses on cleaning up hazardous wastes after they have been released into the environment.

RCRA



- RCRA was enacted by Congress in 1976 to promote the reduction or elimination of solid and hazardous waste generation at the source and to encourage safe waste handling and recycling.
- Its primary purpose is to manage solid and hazardous waste in order to prevent spills and contaminations.

How Does RCRA Work?



- Solid waste management
- Hazardous waste management
 - Regulating waste generators, transporters, and storage facilities (permit system)
 - Land disposal restrictions
 - Corrective actions
- Underground storage tanks

Enforcement



- Civil enforcement
- Criminal prosecution
- Citizen suits

Opportunities to Use RCRA



- Submitting useful comments
- Developing tribal hazardous waste and UST programs
- Implementing solid waste programs
- Participating in RCRA as “municipalities”

CERCLA



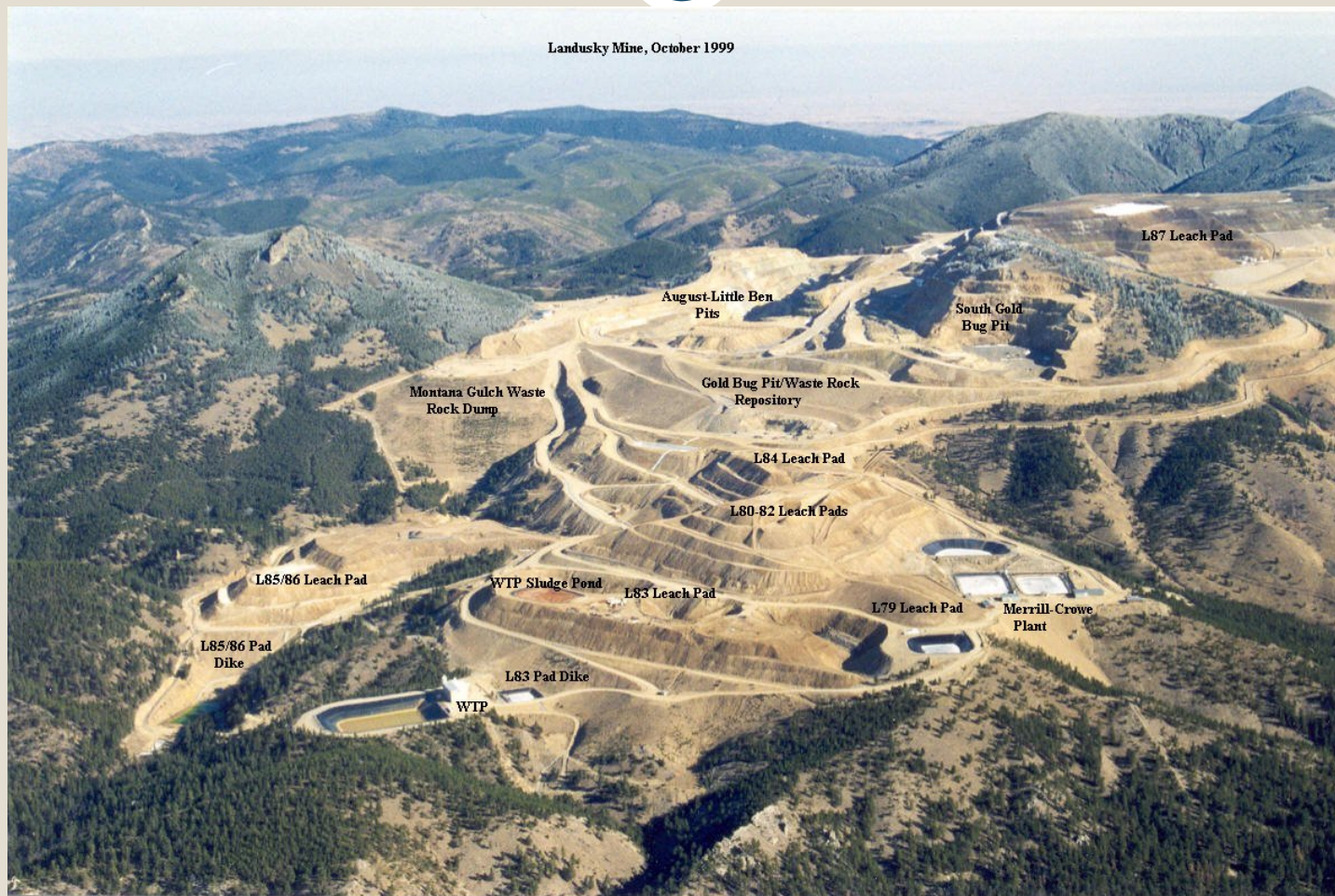
- CERCLA was initially enacted by Congress in 1980 to respond to the large number of abandoned and leaking hazardous waste dumps that were threatening human health and the environment.
- Its primary purpose is to clean up hazardous pollutants, including those pollutants released during the mining process.

How Does CERCLA Work?



- Clean-up Actions (Remedial v. Removal)
 - National Priorities List
 - ARARs
 - No Permit Requirements
- Compensation
- Strict liability for responsible parties

Landusky Mine 1999



Landusky Mine 2001



Zortman Mine 2000



Zortman Mine 2001



Enforcement



- Natural Resource Damages Claims
- Cost Recovery Actions
- Private Party response actions
- Citizen suits
- No pre-enforcement challenges

Opportunities to Use CERCLA



- Pursue compensation and liability recovery actions
- Consultation requirement for remedial actions
- Brownsfields programs

Endangered Species Act



- ESA was passed by Congress in 1973 to prevent the extinction of species that are of “esthetic, ecological, educational, historical, recreational, scientific value to the Nation and its people” due to economic growth and development.
- It prohibits federal agencies, state and local governments, and private citizens and landowners from harming threatened and endangered species and their environment.

How Does the ESA Work?



- Prohibition of transport, sale, possession of endangered species by private citizens
- The No-Take rule
- Listing and Conservation
- Biological Assessments (can be part of NEPA)

Enforcement



- Civil Enforcement
- Criminal Prosecution
- Citizen Suits

Opportunities to Use the ESA



- To challenge federal agency actions
- During comment process
- To petition for listing of certain species

National Historic Preservation Act



- NHPA was adopted by Congress in 1966 to protect properties with historic significance.
- NHPA is particularly important for Indian tribes because it offers opportunities to protect areas of cultural and religious significance to a particular tribe.

How Does the NHPA Work?



- National Register of Historic Places
- Section 106 process
 - Identify and assess effects of federal agency action
 - Federal consultation

Opportunities to Use the NHPA



- Tribal assumption of state historic preservation office functions
- Section 106 process– notice and participation

Other Laws Impacting Cultural Resources



- The Archaeological Resources Protection Act protects archeological resources on public and Indian lands from uncontrolled excavations and commercial development.
- The Native American Graves Protection and Repatriation Act protects Indian graves and associated cultural objects.
- Executive Order 13007, “Indian Sacred Sites” requires federal agencies to avoid negatively impacting the physical integrity of sacred sites.

Emergency Planning and Community Right to Know Act



- Encourages contingency planning to deal with emergency chemical accidents and spills.
- Provides local governments and the public with necessary information about possible hazards.

Toxic Substances Control Act



- Requires the EPA to test and regulate all chemicals produced or imported into the United States.

Federal Insecticide, Fungicide and Rodenticide Act



- Gives the Department of Agriculture authority to regulate the development, manufacture, sale, and application of pesticides.
- Purpose: to avoid unreasonable adverse impacts on the environment or endangered/threatened species.

Pollution Prevention Act



- Declares US policy that pollution should be prevented or reduced whenever feasible.
- If pollution cannot be prevented it should be recycled in an environmentally safe manner.
- The disposal or other release of pollution into the environment should be employed only as a last resort.

FLPMA



- Creates uniform management scheme for public lands.
- BLM is responsible for managing oil and gas development and mining on public lands using a multiple use strategy, taking into account the need for commercial activities, public recreation and conservation of public lands.
- Section 1732(b)– in managing public lands, the Secretary “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

National Forest Management Act



- Provides public participation in forest planning and management.
- Although it allows logging, it recognizes the need to protect the quality of soil, water, and air resources.

Wild and Scenic Rivers Act



- Serves to protect free-flowing rivers that have “outstanding remarkable scenic, recreation, geologic, fish and wildlife, historic, cultural and other similar values.”

Wilderness Act



- Declares it to be American policy to protect wilderness areas, meaning undeveloped federal land retaining its wild character, for preservation in their natural condition.
- Creates a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as “wilderness areas.”

Executive Order Consultation



- Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (2000).
- Requires the federal government to consult with Indian tribes when working to formulate or implement policies that have tribal implications.
- Requires each agency to develop an accountable process to ensure meaningful and timely input by tribal officials.

Government to Government Relations



- Executive Memorandum 13084, “Government-to-Government Relations with Native American Tribal Governments” (1994).
- Identifies the major principles that federal agencies should follow in their interactions with tribal governments.
- Purpose: to ensure that the federal government operates in a government-to-government relationship with federally recognized tribes.

For More Information:



Indian Law Resource Center
602 N. Ewing Street
Helena, MT 59601
(406) 449-2006
www.indianlaw.org