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Mining compatibility with other projects in Spain: Solutions and benefits

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ABSTRACT

Mining activities are compatible with other activities in space and time if they are developed together and adapted to each other. If permits are required for two projects that are not considered to be compatible, the authorities will be forced to decide which one has prevalence. In the event of conflict or dispute, it is always preferable to attempt to seek compatibility between projects rather than waste time, effort and money on contesting the prevalence decision, as costly and lengthy lawsuits will only delay the development of both projects, with the resulting loss of business opportunities. In this article, technical solutions designed to achieve mining compatibility with other projects are described in terms of benefits and synergies for the projects and benefits for the government that avoid complex decisions and proceedings and optimize revenues.

Background

"One of the critical problems facing the mining industry today is land acquisition for exploration and mining" (Ramani, 2009).

Demands from an increasing complex society for environmentally friendly and sustainable mining is forcing mine companies to develop new mining strategies that ensure an ecological and adequately sustainable approach to mining while maintaining revenues at reasonable levels (ICMM, 2003). There is evidence that the industry is starting to address the demands of sustainable development and practical efforts are being encouraged by the International Council on Mining and Metals (ICMM). Recent publications on mining sustainability tackle the subject from different angles (Lambert, 2001; Nooten, 2007; Van Zyl et al., 2007; Botin, 2009). Society has clearly indicated to the mining industry that traditional ways of doing things will no longer be acceptable (Humphreys, 2001). Governments also have a role to play in passing and enforcing suitable legislation (Waye et al., 2009).

The historical environmental damage caused by mining is well reflected in the literature, in publications such as those by Ponting (1991), more academic books (Sengupta, 1993; Ripley et al., 1996; Down and Stocks, 1997) and scientific papers (Salomons, 1995; Dudka and Adriano, 1997; etc). The economic dimensions of mining as promoting wealth for society cannot be denied nonetheless (Ghose and Roy, 2007).

Now more than ever, mining companies need to take on board the idea that it is possible to reconcile profitability and sustainable development. As Humphreys (2001) rightly stated, mining industry values need to be aligned with the values of the societies in which companies operate. However, conflict over the development of resources and the distribution of impacts and benefits can be significant in both political and economical terms (Solomon et al., 2008). In developing countries, multinational (typically metal) mining companies have acquired local legitimacy in the communities living in the vicinity of mines (Gifford et al., 2010). The scenario in Europe, however, is quite different in terms of societal development and mining legislation.

Resource extraction fuels the global economy and the mining industry has possibly caused more disputes over land use than any other industry. As Hilson (2002) has stated, land use disputes can occur between mining companies and other industries, primarily forestry and agricultural operations, which compete with mining companies for land. Hilson and Murck (2000) studied land use conflicts between large operators and communities in developing countries. Even though the issue differs substantially from that of the compatibility of different businesses, these authors emphasize that improving community consultation between parties enables reaching the kind of compromise that we advocate in this article.

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Mining in Europe and in the USA is subject to tough environmental regulations (Humphreys, 2001). In Europe, the competition for space is acute and the industry can no longer sustain the tensions associated with dissatisfied neighbours, not to mention the costs and consequence of possible litigation (Humphreys, 2001).

The purpose of this paper is to discuss land use conflicts between mining and other industries and to propose compatibility guidelines. The compatibility of mining with other kinds of activities has not received much attention in the literature, possibly due to the fact that it is a highly multidisciplinary subject with a bearing on mine engineering, financial evaluation, legislation (which varies between countries), the environment and socioeconomic aspects (Gómez-Márquez, 2010).

We focus on the case of Spain, which, despite having a regulatory framework of its own, is potentially representative of many European and other highly populated developed countries, where communities are usually protected in legal and economic terms. Hence, the kind of conflict that occurs between major companies and communities (Hilson, 2002; Howitt, 2001; Szablowski, 2002; McLeod, 2000; Esteves, 2007) does not fall within the scope of our study.

Creating and enhancing economic opportunities for a population could rightly be considered a responsibility of government. As Wise and Shtyla (2007) have pointed out, a possible strategy for achieving this goal is to optimize the 'rules of the game', that is, to shape business regulations and the policy and regulatory frameworks that determine how the economic opportunity system functions.

We seek to demonstrate that adequate policies implemented to make mining and other industries compatible will significantly reduce money losses. We explore the advantages and disadvantages of seeking compatibility, provide guidelines to implementing compatibility studies at different development stages and describe possible technical compatibility solutions for conflicts between mining and other sectors, such as wind farms, road construction, business complexes and forestry exploitations. Our research was based on our experience in litigations, not all of which are described in this text, although we do describe a number of illustrative case studies in support of our conclusions.

The legal framework in Spain

Given that a mining operation involves the extraction of a natural resource belonging to the state and not to a mining company, mineral exploitation rights in Spain are awarded either under an exploitation permit or an administrative licence. The administrative licence is automatically accompanied by a formal declaration of public benefit, which can also be requested for an exploitation permit. As a consequence of a recognition of public benefit, mining rights holders are entitled to apply for a compulsory purchase order for the land necessary for their activity. Activities in other specifically regulated sectors, for example, toll roads and wind farms, are also authorized under an administrative licensing regime.

In theory, two licences may not be awarded for the same activity in the same terrain at the same time. However, two projects from different sectors, provided they do not interfere with each other, can be licensed in accordance with a formal declaration of public benefit for the same terrain and period of time. In this case, the two projects are considered to be compatible, meaning that there is no interference between the projects in terms of the technical, spatial and temporal conditions of each over their lifetimes.

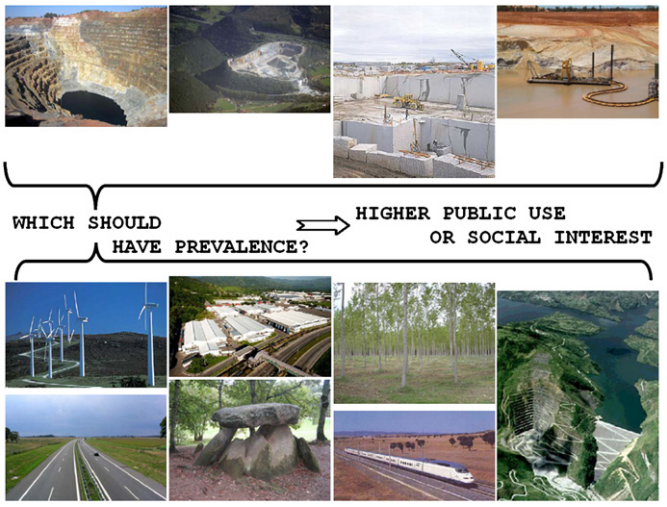

Fig. 1. Prevalence or compatibility?

If two projects are incompatible, and no technical solution exists to make them compatible, a decision is made in regard to which of the two should ultimately be implemented. This concept is referred to as prevalence (Fig. 1).

Those who are unfamiliar with the legislation and its implications in regard to the concept of public benefit would expect prevalence to imply that permission will be granted to the project that was first authorized, under the principle of *qui prior est tempore potior est jure* (deriving from Roman law), which indicates that the earlier claim is stronger in law. This argument, however, does not explain prevalence, as the ruling criterion is public benefit. In other words, the project demonstrated to offer the greatest public benefit will prevail—which is entirely logical when referring to goods (minerals, wind, water, etc.) or projects of general public interest (roads, electricity lines, gas pipelines, etc.).

A typical error committed by many companies, managers and engineers involved in compatibility/prevalence proceedings is, rather than examine the legal regime applicable to each case, to become bogged down in and waste resources on arguments that fail to resolve the core issues of compatibility and prevalence.

Thus, the first step in correctly focusing a compatibility procedure is to understand the corresponding legislation, which falls into two areas:

- Specific sectoral legislation defining how authorization may be granted for a project and also describing rights, especially those referring to formal declarations of public benefit and compulsory purchase orders.
- Common legislation governing all public administrative proceedings, describing legal procedures and deadlines for companies participating in proceedings and also identifying the public bodies responsible for proceedings, irrespective of the sector.

In terms of territorial scope, legislation in Spain can also be classified as national legislation, applicable to all activities in the national territory, and regional legislation, applicable only to projects which fall within the scope of a particular Autonomous Community.

Seeking compatibility: advantages and disadvantages

When two activities are in conflict because they are apparently incompatible, the logical approach is to attempt to seek compatibility