Denver Law Review

Volume 54 | Issue 2 Article 13

February 2021

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INTRODUCTION

Bob Clark, Phil Hoff, and two other colleagues included a fine and well-reasoned caveat in the report of the Public Land Law Review commission.[1] I have too much respect for their opinions to challenge them without quite a bit of thought. However, they adopt the basic premise that the Mineral Lands Leasing System is so good that it will accomplish all things. Mineral leasing will supposedly fill our need for energy and resource development, provide for the opportunity for the creation of new wealth, and make it economically possible to develop new mines. But it just isn't so.

The Mining Law of 1872[2] is so continually under this kind of attack, there must be something good about it.[3] How else can we

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[1] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 130, 132 (1970) [hereinafter cited as PLLRC REPORT].

[2] 30 U.S.C. §§ 22-54 (1970) (originally enacted as Act of July 4, 1866, ch. 166, 14 Stat. 86, as revised by Act of May 10, 1872, ch. 152, §§ 1-15, 17 Stat. 91, and subsequent amendments).

[3] For at least thirty years, many of us have had personal familiarity with charges that the Mining Law of 1872 is obsolete, antiquated, outdated, misused, against the public interest, a windfall to some citizens, and even un-American. These criticisms are not new. *See* T. VAN WAGENEN, INTERNATIONAL MINING LAW (1918). The congressional proceedings at the time the Mining Law was altered by passage of the Mineral Lands Leasing Act of 1920, ch. 85, §§ 1-38, 41 Stat. 437 (current version codified in scattered sections of 30 U.S.C.), expressed many criticisms. Some of these reasons had caused Congress to terminate the mineral leasing system for lead and copper mines on public lands. Act of July 11, 1846, 9 Stat. 37.

The lead and copper leasing laws had been passed in 1807, Act of March 3, 1807, 2 Stat. 448, but proved ineffective in the Mississippi Valley lands the United States had acquired from France. The repeal left a vacuum. No law provided for access to the mineral deposits on the public lands when the United States acquired vast western lands from Mexico and England. Mining prospectors became technical trespassers, although the miners did not care. Their status was not formally cleared until passage of the Mining Law in 1866, Act of July 26, 1866, 14 Stat. 251, revised in 1872. That law is still basically intact. It plugged a loophole that Congress had left in the laws of public lands. Although the government officially owned the land, there was no express prohibition against or provision for citizens finding and keeping the minerals. The miners recognized the situation. Since they were not prevented from asserting ownership of the minerals they discovered, they did so. The Mining Law of 1872 granted citizens the right to explore and mine without further permission.

explain the miracle of its survival? Continued life in the 1872 "antique"[4] may be because it reflects national needs and concerns that are worth preserving and that demand the return of self-initiation to our other natural resource laws. The "burial" of the General Mining Law is premature. Resuscitation and restoration could be best for America.

Before we throw the dirt on the casket of this King of Resource Laws, either by mal-regulation, direct and full repeal, or amendment that takes its heart, let us see what is good about the Mining Law of 1872. Before we statutorily accept and confirm the "creeping dicta" emasculation of the Crown Prince, the Mineral Lands Leasing Act of 1920,[5] let us examine whether it is an adequate replacement for the development of the resources of this country and the development of new wealth and opportunity for its people.

We must look at how the laws work in actual practice, not how they may or should work. In this day of "cost-benefit ratios" and "net returns" and such other analysis as "maximizing the optimum," I would like to join the semantic game and contribute a new concept. What about a "public interest impact statement" on certain laws and procedures?

An "impact statement" on the manner of administering public lands is awesomely complex. But that is no reason to dodge

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The law also recognized the need for curbing chaos and providing reasonable rules to divide equitably the opportunity among citizens. Local mining camp and local government rules were allowed to continue in force unless in conflict with laws of the United States. Under those rules the miners sought, found, developed, and profited from the mineral wealth found in the lands of the United States. Not all got to keep what they earned. There were brutal abuses of the rights by loophole and bullet law, but there was mining. The national wealth was increased and the economic health of the nation substantially underwritten then and later.

One criticism of the Mining Law of 1872 is an alleged lack of adequate return to the "Government," namely, no royalty. Much of the economic contribution made to the country was prior to the passage of the income tax amendment in 1916. Since that time, the United States has become a "carried working interest" beneficiary through the income tax. Imposing a royalty would not increase the net return to the United States. Because of management costs of the Interior Department, the net return to the United States Government could be reduced.

[4] S. UDALL, THE MINING LAW—AN ANTIQUE IN NEED OF REPEAL (1969); letter from Secretary of the Interior Udall to the Public Land Law Review Commission (Jan. 15, 1969) (with enclosed proposed bill urging substitution of leasing for the location system).

[5] Mineral Lands Leasing Act of 1920, ch. 85, §§ 1-38, 41 Stat. 437 (current version codified in scattered sections of 30 U.S.C.).

it. I am reminded of Brigham Young when he was asked if the Mormons came West willingly. He said, "Yes, we came willingly because we had to." That is exactly the reason miners are accepting the current rules and regulations. I will not call it blackmail, but I will call it armtwisting. If you have a *right* to apply for a lease, or a permit, or a patent, but you cannot get it until you agree to conditions that you think are unreasonable or economically exorbitant, you will probably agree nonetheless, "because you have to."

There is so much said against the Mining Law of 1872; what is right with it?[6] One element the law retains, despite rules and regulations, is the right to "self-initiate" a claim on public lands. That right once existed under many laws.[7] Today, in practice as

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[6] Statements directly supporting "free enterprise" systems, property rights, individual rights of self-determination, specific constitutional rights, state and local government responsibilities, the Americanism of profits, the human characteristics of government officials, and many "apple pies" were proposed for inclusion in the PLLRC Report; most were not included.

Those familiar with Washington and its ways can identify the graveyards of many good and basic laws and executive orders that were lost, not because they were not stressed or pushed, but because they were ignored. They faded away and died. In a recent example, look at President Ford's directive to federal agencies that each prepare an "Economic Impact Statement" before issuing rules and regulations. Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974) (titled "Inflation Impact Statement"); Exec. Order No. 11,949, 42 Fed. Reg. 1,017 (1977) (extended the life of the Order and renamed it "Economic Impact Statement"). See also OMB Circular A-107 (Jan. 28, 1975) for operating policy under Exec. Order 11,821. The attention it received is shown by the Department of Interior's proposed regulations on surface mining, issued December 6, 1976, 41 Fed. Reg. 53,428 (1976), wherein Interior, without preparing required guidelines, said no "inflation" statement was needed. Arguably, however, the regulations would have an impact on the Interior budget and personnel requirements as well as increase recovery costs for mining companies, with a resulting inflationary impact on consumer prices. The dispute is not over, but it shows that all executive orders are not equal.

[7] The homestead acts allowed occupancy without advance permission. The practice was to occupy and develop land by actually working it; to remain in possession as the homesteader developed; and to go to the government only for a patent. The classification section of the Taylor Grazing Act of 1934 ended homesteading. 43 U.S.C. § 315f (1970) (originally enacted as Taylor Grazing Act of 1934, ch. 865, § 7, 48 Stat. 1272, *as amended by* Act of June 26, 1936, ch. 842, tit. I, § 2, 49 Stat. 1976).

Certain rights-of-way once were granted along section lines to the one who built; no more. The so-called BLM Organic Act of 1976 repealed these rights-of-way. Federal Land Policy and Management Act of 1976, Pub. L. 94-579 § 706, 90 Stat. 2793-94. *See* 43 U.S.C.A. § 1701 note (Supp. 1977).

The Taylor Grazing Act of 1934 limited existing users of forage on the public lands to a small group of preference permittees. Prior to 1934, such users had been "implied permittees" with a destructive race by all to "eat it off first." Today, the erosion of

well as legal authorization, the Mining Law of 1872 stands alone with that right to self-initiate. Such law is the "last survivor" of the resource development herd of laws. This right is not only the major element of the mining laws, but it may be the keystone which is needed once again in all public land programs.

I. BASIC PRINCIPLES OF THE MINING LAW OF 1872

A. *Mineral Lands Are Not Available Under Other Laws*

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."[8] This has always meant that mineral values are dominant and that Congress does not intend to allow them to be subordinated to other values in public land use.

B. *Purchase of Nonmineral Lands Is Prohibited*

"[N]o location of a mining claim shall be made until the discovery of the vein or lode wihin the limits of the claims located."[9] Congress specified that mining laws cannot be used to take land for other purposes. No one can use mining laws to get lands from the United States Government unless he has done

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"dependency by use" (the Class I right) and "dependency by location" (the Class II right) is all but complete.

The Mineral Land Leasing Act of 1920 provided a preference to the "first qualified applicant" for leasable minerals such as oil and gas when not classified by the U.S. Geological Survey as in a "KGS" or "known geological structure." Today, the status of such preference is unknown. There is a priority to such applicant only if a lease is in fact issued. The Government may elect to issue no lease at all, apparently for any reason. If rejected, the former "First Qualified Applicant" must commence again, maybe too late.

The prospecting-permit system originally granted a two-year period, with a possible maximum extension of two more years. A preference lease was promised if adequate, timely, and successful exploration was completed. Today, applications for prospecting permits are dismissed without processing, and several years ago all pending ones were denied by then Secretary of the Interior Rogers C.B. Morton. The Act is dead without Congress firing a gun. The permit system is not endangered, it is dead. Even more critically, permittees who thought they had completed successful exploration and deserved a preference lease were kept dangling, and dangling, and dangling, until "government" could find grounds for denying the lease on post hoc ground rules. Where originally a permittee could continue to mine without trespass while his preference lease application was processed, even if later denied, that door was slammed by amendment to 43 C.F.R. § 3521.4-1 (1976), making "mining operations carried on prior to the effective date of a lease . . . an act of trespass."

[8] 30 U.S.C. § 21 (1970).

[9] *Id.* § 23. It should be noted that although there is no "vein or lode" in a placer claim, the same requirement of "discovery" is applied to determine the validity of a placer claim location.

enough work to locate a mineral. The fact that mining laws have been used to acquire title for other purposes may be an abuse that needs correction, but proper administration of the present law should be sufficient.

Particularly, we should recognize that the desire of Americans for "their piece of land" is strong. Our laws should provide for satisfaction of this desire. Who should be condemned because Americans have used (abused) the mining laws to acquire land when no other road lay open?

C. *Exploration Is Authorized and Invited*

"[A]ll valuable mineral deposits in land belonging to the United States . . . shall be free and open to explorations and purchase . . . [and] lands in which they are found to occupation and purchase . . . ."[10] "Free and open to exploration" was the authorization for a citizen to go on the public land unless specifically prohibited. This is direct permission for mineral exploration. It is the law that citizens have a right to free mineral exploration and development in non-withdrawn public lands.

The authorization may not have meant economically "free," but it certainly seems to frown on improper and unreasonable restrictions imposed on a whim—either economic or otherwise obstructionist.

D. *Access for Exploration Is Subject to Local Rules*

The law says exploration and occupancy of federal mineral lands shall be "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."[11] As long as locators comply with federal law, and with state limitation and local regulation "not in conflict with the laws of the United States governing their possessory title, [they] shall have the exclusive right of possession and enjoyment of all the surface . . . ."[12] The fact of paramount title in the United States is specifically declared irrelevant

[10] *Id.* § 22.
[11] *Id.*
[12] *Id.* § 26.

in possessory actions between citizens. The governing law is that of the situs state.[13]

These laws clearly state the distinction between possessory rights for exploration and the right to purchase the mineral resources and land in which they are found. The rules for disputes between parties over possession are left to local control; the paramount title of the United States remains. Federal law governs all rights to purchase minerals by patent of the land where they are located. The law also provides for local rules for locations, recording, and required work to hold possession. These local regulations are all subject to certain federal statutory requirements.[14]

The cooperative administration by state and federal governments of mining on public lands has been criticized by industry because local adjustments created a variety of rules rather than one standard. Government employees criticized this approach because it provided for a local voice in administration of "our land." The emerging concept of state administration of national pollution laws may indicate a trend back to cooperative effort with local variations to meet local and regional needs. At the same time, however, we are about to abolish this cooperation in the mining laws because states have some control. I wonder what is wrong with this type of federalism?

E. *Claim Size Is Limited*

The 1872 law says lode claims shall not be more than 1,500 feet in length and between a minimum of 25 feet and maximum of 300 feet wide on each side of the lode vein on the surface.[15] That is twenty acres. Placer claims are locatable as well as lode claims.[16] The law does allow an association claim for any one person or association to be as large as, but not more than, 160 acres.[17] The courts have clearly established that while no one person can have more than 20 acres in any claim prior to Discovery,[18] he may acquire and hold alone more than 20 (and up to 160)

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[13] *See, e.g.*, Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900); Blackburn v. Gold Mining Co., 175 U.S. 571 (1900). *See also* 30 U.S.C. § 30 (1970).

[14] 30 U.S.C. § 28 (1970).

[15] *Id.* § 23.

[16] *Id.* § 35.

[17] *Id.* § 36.

[18] "Discovery" with a capital "D", as used throughout this paper, indicates the

acres of an association placer claim after Discovery.[19]

While laws at one time limited the number of claims one person could hold, such limits no longer exist. Twenty acres, lode or placer, were found a practical limit on the acreage one miner could occupy and protect while seeking a Discovery or retain after Discovery by annual assessment work.

F. *Proof of Good Faith Is Required by Actual Work*

Congress required that not less than $100 worth of labor or improvements shall be made for each claim each assessment year. It further stated that a claim for which such work had not been performed should be open to location as if no claim had been located.[20] The BLM Organic Act of 1976[21] makes failure to record assessment work with the Bureau of Land Management [BLM] conclusive evidence of abandonment.[22] This has been long sought by government. Evidently the right of a new locator remains, even if work has actually been done by his predecessor who failed to file with the BLM.

Congress did not allow a locator to buy his way out to avoid work on the claim. It provided that, even if a deferment of assessment work were granted, such work must be performed later to prevent the claim being subject to relocation.[23] Further, Congress provided that no patent could issue for a claim unless a minimum of $500 worth of work had been performed for such claim.[24] In

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discovery within each claim within rock in place of a valuable mineral so that "a person of ordinary prudence would be justified in the further expenditure of his labor and means on the particular claim, with a reasonable prospect of success in developing a valuable mine." Ranchers Expl. and Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 714 (D. Utah 1965). This standard is applied to each claim under 30 U.S.C. § 23 (1970) before a Discovery vests a right in the locator, which is good against the United States, to purchase (*i.e.*, patent) the claim.

A "discovery" with a small "d" denotes the discovery of a showing of minerals to justify proceeding with the exploration and occupancy authorized under 30 U.S.C. § 22. A proper location under state and federal laws constitutes a possessory interest good against all except the United States.

[19] *See, e.g.*, Smelting Co. v. Kemp, 104 U.S. 636, 650-52 (1881); Rooney v. Barnette, 200 F. 700, 708-09 (9th Cir. 1912).

[20] 30 U.S.C. § 28 (1970).

[21] Federal Land Policy and Management Act of 1976, §§ 101-707, 43 U.S.C.A. §§ 1701-1782 (Supp. 1977).

[22] *Id.* § 314(c), 43 U.S.C.A. § 1744.

[23] *See* 30 U.S.C. § 28(d) (1970).

[24] *Id.* § 29.

addition to his development work, the purchaser of a claim had to pay $5 per acre for a lode claim and $2.50 per acre for a placer claim before patent would issue.[25]

The combination of a maximum size for each claim and the requirement that a Discovery be made on each claim limited the number of claims which an individual miner, and even a company, could hold for exploration. Annual assessment work and development work before patent could be done for a group of claims after Discovery, but the size of the group was limited by two practical tests: benefit for each claim and interrelation of each claim to others of the group.[26]

G. *Summary of the General Mining Law*

1. A Law of Opportunity

The General Mining Law of 1872 is a poor man's law, a pioneer law. It encourages exploration. Work, time, and energy can be substituted for prohibitive "front-end money" requirements. It puts investment capital—money and work—into the effort to develop new wealth for our nation. It does not unreasonably inflate the costs of the minerals found, mined, and marketed by imposing unproductive expenditures that dry-up the risk capital.

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[25] *Id.* §§ 29, 37. The cost was $2.50 per acre for a placer claim. At that time the United States was selling nonmineral land for $1.25 an acre.

[26] The limits of claim size and good faith work operated together. One miner could explore for minerals on one claim at a time, but in the early days he was protected in his exclusive right of possession only to that part of the total claim on which he was actually working. The doctrine of *pedis possessio* was later extended to protect the entire claim from claim jumpers as long as a miner was in physical possession of some part of the claim and was diligently working toward a Discovery. If the first locator relinquished possession, he could not prevent other citizens from entry or attempts to make a valid Discovery. The acreage limitation for each claim (and for the size of permits and leases under the Mineral Leasing Act) still works to prevent miners from hoarding the public mineral lands by holding more claims than they can explore and develop. On mining claims, a miner is limited to the number of claims he can actually or constructively occupy while seeking a Discovery on each separate claim. After Discovery, the number of claims which can be held is limited only by the need to do $100 worth of annual assessment work for the benefit of each claim. Assessment work may be performed outside the boundaries of a claim and still be for its benefit, but there are two practical limits on excessive holdings: The work must be *for the benefit* of the claim, and the benefit of each claim must be worth at least $100. *See* 30 U.S.C. § 28 (1970).

2. A Law That Protects Against Hoarders

The General Mining Law of 1872 broadens the opportunity for small beginnings, the "seed" developments that are big tomorrow. It protects against the greedy, who hoard potential mineral wealth by trying to control more than they can explore or develop within reasonable time limits. It punishes sloth and awards diligence. It prevents monopoly. It provides a self-protecting system whereby the legitimate miner can oust the illegitimate from mineral deposits on public lands. Likewise, it works against the hoarder and nonproducer.

3. A Law That Provides Checks on the Validity of the Government's Decisions

The General Mining Law of 1872 allows a citizen to challenge the validity of the government's decisions. It provides an opportunity to develop markets and supply materials which such officials cannot see, do not feel are needed, or do not want. The right to self-initiate a mining claim minimizes arbitrary, discretionary denial. It prevents public lands from being held for the preferred few. It provides equitable opportunity for all citizens. It prevents "Government" from withholding mineral deposits for the benefit of competing products.

The above three statements summarize the law, not its administration. Any amendments to the law and any failure to affirm and protect its principles will allow further erosion of those principles that still best serve the public interest of all Americans.

II. PLLRC RECOMMENDATIONS

The PLLRC made general and specific recommendations as to "Mineral Resources."[27] The Commission adopted certain basic principles to govern the development of these resources:

> *Public land mineral policy should encourage exploration, development, and production of minerals on the public lands.*[28]

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[27] PLLRC REPORT, *supra* note 1, at 121-38. The specific recommendations in Chapter 7 must be read in concert with the basic chapter of the report, *A Program for the Future. Id.* at 1-7. The general premises of the Report are guidelines for minimizing potential misuse of the specific recommendations. Without such premises, the general and specific mining law recommendations might be misinterpreted or misused. One must at least be wary of the truth behind the old adage, "If they can be, they will be."

[28] *Id.* at 121-22.

Mineral exploration and development should have a preference over some or all other uses on much of our public lands.[29]

The Federal Government generally should rely on the private sector for mineral exploration, development, and production by maintaining a continuing invitation to explore for and develop minerals on the public lands.[30]

The PLLRC also made specific recommendations concerning the Mining Law, with substantial overlapping into both the Mineral Leasing and Materials Act systems.[31] The numbered recommendations included the need for realistic determination of what public lands shall be excluded from mineral exploration;[32] proposed modifications of the federal system to allow mineral activity on the public lands;[33] removal of irrelevant obstructions to public land mineral activity;[34] and recommendations on oil shale deposits.[35]

The Commission considered and rejected replacement of the existing mining law system by a leasing system, saying, *inter alia:* "The public interest requires that individuals be encouraged—not merely permitted—to look for minerals on the public lands. The traditional right to self-initiation of a claim to a deposit of valuable minerals must be preserved."[36] The general and detailed mineral recommendations of the PLLRC were structured parts fitting into a total public land policy. Their interrelations must be remembered. Many other recommendations on mineral activity made by "government" and by "industry" may be self-serving of their special interests.

CONCLUSION

The history of the Mining Law of 1872 leads to a recognition that a good law may not succeed if poorly or unsympathetically

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[29] *Id.* at 122.

[30] *Id.* at 122-23.

[31] *Id.* at 11-12. The recommendations number 46 through 55. Detailed discussion, with nonnumbered but important recommendations italicized, is in pages 121-38 of the report. Relevant recommendations on government organization, appeals procedures, and payment of funds are found in other chapters of the report. *E.g.*, *id.* at 281-89, 253-56, 243-49.

[32] *Id.* Nos. 46 and 55 at 11-12.

[33] *Id.* Nos. 47-50 and 54.

[34] *Id.* No. 53 at 12.

[35] *Id.* Nos. 51-52 at 11.

[36] *Id.* at 125.

administered.[37] However, a poor law may serve the public interest if the administrators want it to work.[38] Special, not public, interests will almost certainly dictate the operation and administration of present and future laws unless the decisions of government officials can be meaningfully reviewed. This applies to decisions on use and non-use and on environmental and resource needs of Americans. Meaningful review of governmental decisions as to the availability of mineral deposits on public lands has traditionally been provided by the self-initiation right of the miner. The principle of "self-initiation" by right should be restored to the permit, leasing, and other mineral laws of the United States. The right to locate under the Mining Law must be retained in some form that allows for self-initiation. The locator must be given a reasonable way to challenge discretionary action of government officials. Most important, the use by government of unreasonable limitations on a mining claimant's right to proceed must be controlled.[39]

The conclusion is obvious that the attacks on the Mining Law of 1872 seek to eliminate the right of self-initiation that now operates effectively only under the 1872 Act. The preservation of the crucial right of self-initiation is necessary for protection of the public interest in the wise use of our mineral resources. With an assured right for citizens meaningfully to challenge governmental denial of access to mineral resources, the proposed changes in the mineral laws can work successfully.

The right of self-initiation under the Mining Law of 1872 must be protected. It should be restored to other resource laws dealing with United States lands to give us incentive, to give us

[37] Examples are the coal leasing system of the U.S.; the prospecting permit provisions of the Mineral Land Leasing Act; and the oil shale programs.

[38] One example is the uranium material program of the 1945-1955 period, when the Mining Law of 1872 was used to find and develop reserves by overriding substantial legal questions which could have been invoked, but were not. The history of that period should be written. It is too great a tribute to the principles of the Federal Mining Law to be ignored.

[39] An example of unreasonable limitations is the power of "government" to deny a citizen the right to work his claim by unrestricted delays in the granting of permission to proceed. Other examples are the front-end loading of the mining operation with cash payment requirements and with nonproductive work requirements. Another is the developing practice of government "cost recovery," to cover processing by the government, with no limitations on how much the government may elect to spend.

opportunity, and to give Americans encouragement to explore public lands and retrieve the wealth that belongs to them.