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SEVERED MINERALS AS A DETERRENT TO LAND DEVELOPMENT

BY WILLIS V. CARPENTER*

INTRODUCTION

The reader who is involved with today's real estate transactions in the rural areas of our western states has undoubtedly encountered one or more of the following scenarios, or perhaps variations thereof:

Scene one. The prospective purchaser of a lot in a mountain subdivision looks up from the HUD property report he has been asked to read and asks the hovering salesman, "What does it mean here where it says that all the minerals were reserved by the United States in the original patent to the land?"

Scene two. The managing partner of an investment group, reviewing the documentation on a proposed acquisition of ranch acreage, makes this request of the group's lawyer: "Write a short note that I can forward to the other partners explaining that plenty of subdivisions have been built on lands where the state owned the minerals—and it's nothing to worry about!"

Scene three. A local banker is arguing by telephone with an officer of the title insurance company: "I don't care how safe you *think* we are. I only know I can't sell this loan to our eastern investors with a mortgagee's policy that does not protect the lender if the railroad mines the coal. If you won't take out that exception, I'll find another company that will!"

And so it goes. As urbanization pushes ever outward from the established towns and cities of the Rocky Mountain region, encompassing lands that have traditionally been agricultural in utilization, the origins of title are ever more frequently post-1872 patents from the United States. And though the property may

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have been in private ownership for over 100 years (an ancient title, by western standards), careful examination of the original patent and all intervening conveyances has never been more important.

This article is intended to provide the real estate practitioner with some current responses to, as well as warnings of, the vexatious problems created by the severance of mineral estate from surface estate. Particular emphasis will be placed upon federally owned minerals, since this aspect is one of common interest. The area of privately held minerals has been explored by others and will receive less attention here.[1] In addition, with the excuse that this writer's experience for the most part has been confined to Colorado lands, some discussion of the situation in which the minerals are owned by the State of Colorado will also be ventured, but the equally intriguing problems related to the state-controlled minerals of our neighboring states will not be covered specifically.

Finally, certain solutions that have been proposed and some that have actually been applied to the problems created by severed minerals will be examined—in particular Colorado's mineral leasing approach, which combines continued ownership of all mineral resources with protection to the surface owner.

I. A SEVERANCE OF MINERALS—WILL YOU RECOGNIZE IT?

Even for the veteran title examiner, establishing that a severance of minerals has in fact occurred presents some hazards. A severance may of course occur during any conveyance or transfer of real property. Each instrument in the chain of title must therefore be examined to determine whether it contains a grant or reservation of one or more or all of the minerals, or some fraction thereof, perhaps at different depths beneath the surface. But such an examination is not always accomplished with ease. Consider the various methods.

A. *Examination of Public Records and Abstracts Thereof*

A federal or state patent, usually the origin of record title, is the instrument most likely to contain a mineral reservation

[1] *See, e.g.*, Graham, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 LOY. U.L. REV. 136 (1969); Hardy, *Public Policy and Terminability of Mineral Rights in Louisiana*, 26 LA. L. REV. 731 (1966); Manning, *Mineral Rights Versus Surface Rights*, 2 NATURAL RESOURCES LAW. 329 (1969); Marberry, *Construction of Mineral Exceptions and Reservations*, 14 OKLA. L. REV. 457 (1961).

(speaking of course of those lands most recently settled—primarily in this century). Nevertheless, many early day abstractors were apparently unaware of the significance of the varying reservation clauses contained in most patents, and they often either failed to note the reservation in the abstract or else incorrectly noted it.

Even if the abstractor correctly picked up and disclosed the language of the patent, as revealed in the county records, not even a Las Vegas gambler would bet on its accuracy. In the days when every recorded document had to be copied by hand into the public records, it was easy to omit all or portions of the "boilerplate" printed material by which mineral reservations are inserted in government patents.

The advent of preprinted blank pages for the recorder's books, while reducing the workload, substantially increased the odds for error. All too frequently the recorder did not have the *correct* preprinted page for the patent being recorded, or perhaps the wrong blank was taken from the drawer by mistake. Whatever the reason, county records are notoriously unreliable when one is attempting to establish the exact terms of a mineral reservation in a patent or whether the patent contained any reservation at all.

By the time photographic reproduction processes had gained widespread acceptance in the recorders' offices, the bulk of the patents had already been transcribed into the public records, with all errors therein preserved for posterity. For these reasons, the careful examiner will not rely on the absence of a stated mineral reservation in the abstract or title insurance commitment under scrutiny, but will examine a true copy of the patent itself (normally obtained from the Bureau of Land Management or the State Board of Land Commissioners).[2]

B. *Examination of Title Insurance Commitments*

Even if one has a title insurance commitment rather than an abstract of title, it is unwise to place total reliance upon its representation as to whether minerals were or were not reserved in the original patent. The examiner who prepared the commitment for

[2]The foregoing discussion of public records is drawn directly from the author's experience with the Colorado recording system and may not be accurate with respect to other states.

For information on the nature and accessibility of federal land records, see Meek, *Federal Land Office Records*, 43 COLO. L. REV. 177 (1971).

the title insurance company may be copying an erroneously transcribed county record or an abstract which does not show the reservation. And although a person believes that he has title insurance to cover such an omission, the fine print in the policy form will normally exclude from coverage *all* mineral reservations contained in federal and state patents.[3]

One additional caution should be expressed in connection with title insurance commitments. Because of their very nature as a binder for *insurance*, they frequently do not get the thorough *examination* they deserve by the buyer's attorney. Unfortunately a severance of minerals will not always be expressed in a title commitment with words that attract attention.[4]

C. *Examination of the Original Patent*

Even a United States patent which contains no stated mineral reservation cannot be relied upon if issued pursuant to a law requiring a reservation of minerals to the United States, since the law, not the patent, controls.[5]

In Colorado one faces the additional annoyance of not being able to obtain a copy of the older original patents conveying former state lands; *i.e.*, those patents bearing numbers one to 1,027.[6] So far as is known, however, the "lost" patents do not reserve minerals to the state, since the systematic reservation of minerals was not commenced by Colorado until about 1911. The practice

[3]The policy form currently in use by most title insurors was promulgated in 1970 by the American Land Title Association. As might be expected, its language protects the issuing company by an express disclaimer of coverage for "reservations or exceptions in patents or in Acts authorizing the issuance thereof." Despite this exclusion, it is the practice of many title insurance issuers not to rely thereon and to disclose all known mineral reservations.

[4]A title commitment examined by this writer on lands in Jefferson County, Colorado, proposed to be purchased for the construction of a dwelling, stated an exception in the following words: "Reservations contained in warranty deed, dated October 24, 1916, and recorded October 25, 1916, in Book 186 at Page 527." When a photocopy of the deed referred to was obtained from the clerk's office and examined, it disclosed a reservation of "all clay, clay banks and clay deposits of every kind . . . ." Further investigation revealed that the reserved deposits were in fact owned by a local brick company *which intended to mine them* within the next few years!

[5]Swendig v. Washington Water Power Co., 265 U.S. 322 (1924); Proctor v. Painter, 15 F.2d 974 (9th Cir. 1926). A title insurance policy that contains the typical policy disclaimer quoted in note 3 *supra* will not insure against loss occasioned by the complete omission of reservation language in the original patent.

[6]Patent No. 1 was issued September 28, 1878. Patent No. 1,027 was issued July 28, 1891. Beginning with Patent No. 1,028, copies of all patents are available from the Colorado State Board of Land Commissioners.

was confirmed by enabling legislation in 1919.[7]

By the Act of January 25, 1927, the federal government granted to the states those numbered school sections which had previously been classified as mineral in character.[8] The grant was, however, conditioned upon the grantee state thereafter reserving to itself "all the coal and other minerals" in those lands should such sections thereafter be sold or conveyed. Disposition of minerals by the state in contravention of the federal statute constitutes grounds for the forfeiture thereof to the United States.[9] As a matter of policy, the Colorado State Board of Land Commissioners has declined to sell state minerals in *all* lands granted by the United States, whether school lands or not. However, where lands were acquired by the state from sources *other* than the federal government the minerals have on occasion been conveyed with the surface.[10]

D. *Examination of Deeds and Other Instruments Affecting Title*

Not only patents, but any instrument conveying title to real property may be the source of a severance, and whenever a deed from a railroad company is encountered, it should be *assumed* that there was at least an attempt to reserve the minerals even if the abstract does not so indicate.

A typical abstract for rural land in Colorado begins with entries made in short abstractor's paragraphs, handwritten in the early days and later typewritten, setting forth the salient characteristics of the documents affecting title. In the 1940's or 1950's, the abstract generally switches to a photographic reproduction of the entire instrument. With such photocopies, it is easy for the harried examiner to overlook an inserted reservation of minerals,

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[7] COLO. REV. STAT. ANN. § 112-3-26 (1963). Although pre-1919 attempted mineral reservations in Colorado patents, lacking statutory authority, were initially voided by decision of the Colorado Supreme Court, the 1919 statute sought to validate them retroactively. The statute was held to be constitutional and consequently the state owns the reserved minerals, regardless of the date of patent issuance. Miller v. Limon Nat'l Bank, 88 Colo. 373, 296 P. 796 (1931).

[8] 43 U.S.C. §§ 870-71 (1970).

[9] 43 U.S.C. § 870(b) (1970).

[10] *Cf.* STATE BD. OF LAND COMM'RS, SALE OF STATE SCHOOL LAND (1971). If requested to render a title opinion on a mineral interest conveyed by the State of Colorado, the title examiner will need to determine the state's source of title, since an administrative error by the state in disposing of the interest could result in the forefeiture thereof to the United States. *See* text accompanying note 9 *supra*.

especially if it is blurred or only partially discernible. Nevertheless, that fuzzy image may hide a valid reservation, which in Colorado in some cases has been held to be as valid when set forth in the *habendum* as in the granting clause.[11]

II. THE LANGUAGE OF SEVERANCE—RESERVATIONS

Although severance of the mineral estate from the surface estate may occur as the result of either a grant or a reservation of minerals, the *reservation* of minerals (or a portion of the minerals) in a conveyance of the surface is encountered far more frequently than the outright grant of minerals apart from the surface.

Reservations have been stated in numerous ways. But in government patents the language has been standardized to conform with the statute requiring the reservation. No attempt will be made here to provide a complete catalogue of every such form, but the most common types will be stated and briefly discussed.[12]

A. *Reservation of Minerals by the United States*

1. Protection of Mining Rights

For practical purposes, insofar as lands in the Western United States are concerned, the Lode Mining Law of May 10, 1872, was the first federal law affecting minerals that required a related protective clause in a United States patent.[13] The Act grants to any miner on the public domain the right to follow his mineral vein, provided the top or apex of the vein lies inside the surface lines of his mining claim, even though the vein goes beyond the vertical sidelines (but not the end lines) of his location. However, the law specifically disclaims the right of a miner to enter upon the surface of a claim owned or possessed by another. Thus, the so-called "extra-lateral rights" protected by this law

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[11] Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952). In addition to reservations in fee of minerals in place, the evidence of title may disclose one or more unreleased mineral leases. Although such a lease does not create a severance, and thus is not within the scope of this discussion, the title examiner must, of course, consider the effect thereof upon his developer client's intended use of the property. Caution should be exercised in ignoring what appear to be expired mineral leases. If production has occurred and is continuing, this fact most likely will not be evident from the record, yet the lease, by its terms, probably remains in force so long as there is production.

[12] A comprehensive discussion will be found in Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 ROCKY MT. MIN. L. INST. 325 (1971). *See also* Cox, *Exceptions and Reservations in United States Patents to Public Lands*, TITLE NEWS, Mar. 1956.

[13] 30 U.S.C. § 26 (1970). Unlike later acts, this law did not reserve any minerals to the government, but only assured recognition of the described mining "respects."

include subsurface but not surface privileges.[14]

To assure the recognition of these extra-lateral rights, in those areas of the West where the Land Office was aware of mining activity, federal patents issued for nonmineral entries subsequent to May 10, 1872, contain the following provision:

> [A]nd also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

2. Reservation of All Coal

When the United States finally realized the value of coal deposits on the public domain, vast areas of known coal lands were temporarily withdrawn from all forms of entry by the Acting Secretary of the Interior at the request of President Theodore Roosevelt.[15] The policy of withdrawal of coal lands was continued by President Taft and enlarged to include petroleum lands by presidential proclamation in 1909.[16] The Pickett Act, passed on June 25, 1910,[17] although specifically not confirming the legality of the previous withdrawals,[18] did authorize the President in the future to withdraw lands temporarily from disposition under the public land laws for certain stated purposes.[19]

The Pickett Act was not, however, without its counterpart. The withdrawals had created extensive congressional agitation because of the desirable agricultural lands that were thereby removed from homestead entry. Thus even prior to passage of the Pickett Act, the Act of March 3, 1909, was enacted not to void the withdrawal of coal lands, but to allow an agricultural entry to be made thereon, provided that the entryman agreed to accept a patent containing a reservation of all coal to the United States.[20]

The 1909 Act provides relief in the case wherein an entry in

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[14] 2 AMERICAN LAW OF MINING §§ 6.19, 6.39 (1960); Neff, *The Law of the Apex—a Continuing Enigma*, 18 ROCKY MT. MIN. L. INST. 387 (1972).

[15] 41 CONG. REC. 2614 (1907). These withdrawals in 1906 covered approximately 66 million acres.

[16] For a detailed discussion of the history of presidential withdrawals of coal lands on the public domain, see P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW 723-30 (1968); E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 69 (1972).

[17] 43 U.S.C. §§ 141-43 (1970).

[18] "[T]his section . . . shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil- or gas-bearing lands after any withdrawal of such lands made prior to June 25, 1910 . . . ." 43 U.S.C. § 142 (1970).

[19] 43 U.S.C. § 141 (1970).

[20] 30 U.S.C. § 81 (1970).

good faith is made and thereafter the lands are classified as being valuable for coal; in such event the entryman is entitled to a patent reserving coal to the United States.

The later Act of June 22, 1910, covers the reverse situation and provides that agricultural entries can be made on lands previously classified as coal lands, again with the stipulation that the patent reserve the coal to the government.[21] The 1910 Act also confirms the right of the entryman to contest the coal classification "with a view of disproving such classification and securing a patent without reservation."[22]

Four years later, the Act of April 14, 1914, authorized the Secretary of the Interior to issue a new or supplemental patent without reservation of coal whenever lands previously patented under the 1909 and 1910 Acts were subsequently reclassified as noncoal in character.[23] Occasionally, a tenacious homesteader would obtain such a supplemental patent, thereby acquiring ownership of the coal under his lands which theoretically was nonexistent. The issuance of such supplemental patents is virtually unknown today, however.

A reservation of coal under either the 1909 or 1910 Act will be set forth in the patent in the following words:

> [R]eserving, also, to the United States all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same . . . .

3. Reservation of Oil and Gas

Following an earlier law that pertained only to the reservation of oil and gas in Utah,[24] Congress passed the Agricultural Entry Act of July 17, 1914, which authorized the homesteading of lands withdrawn or classified as valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, provided that such minerals were reserved to the United States in the patent.[25] As with the prior coal acts, this Act also permits the patentee to contest the mineral classification of the lands and secure a patent

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[21] 30 U.S.C. §§ 83-85 (1970).

[22] 30 U.S.C. § 85 (1970). This amendment also contained the initial step in government legislation designed to afford some protection to the surface owner from damages caused by the extraction of coal, as discussed in section IV. D. *infra*.

[23] 30 U.S.C. § 82 (1970).

[24] Act of Aug. 24, 1912, ch. 367, §§ 1-3, 37 Stat. 496, *repealed by* Act of Dec. 16, 1930, ch. 14, § 1, 46 Stat. 1028.

[25] 30 U.S.C. §§ 121-23 (1970).

without reservation if the nonmineral character thereof can be proved.[26] Such privilege applies regardless of whether the lands were classified as valuable for minerals *before* or *after* the agricultural entry. However, the Agricultural Entry Act does not provide for the issuance of a supplementary patent upon a subsequent showing of nonmineral character.

An amendment to the Agricultural Entry Act, adopted March 4, 1933, added sodium and sulphur to the list of reserved minerals.[27] This amendment also contained a provision to protect the rights of lessees of minerals under the Mineral Lands Leasing Act of February 25, 1920,[28] by removing from agricultural entry those lands (1) lying within the geologic structure of a field, or withdrawn, classified, or reported as valuable for such minerals, or (2) upon which leases or prospecting permits had been applied for or granted. Having thus eliminated an agricultural entry on "withdrawn" lands, the 1933 amendment placed matters in the hands of the Secretary of the Interior by authorizing him in his discretion to permit an agricultural entry if such would not "unreasonably interfere" with the operations of the mineral lessee.[29]

A patent reservation under the Agricultural Entry Act will be stated as follows:

> [A]nd excepting and reserving, also, to the United States all the oil and gas [or other stated nonmetallic minerals] in the lands so patented and to it, and persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions, and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509).

4. Reservation of All Minerals

By the Act of December 29, 1916,[30] Congress not only adopted a new homestead law which allowed stockraising homestead entries of 640 acres, but also simultaneously created a blanket reservation to the United States of all the minerals in the lands patented thereunder, whether or not such lands were then classified as valuable for minerals. It was under this Stock-Raising Homestead Act that vast areas of Colorado and the other western states

[26] 30 U.S.C. § 122 (1970). Some surface protection is granted by this section, as discussed in section IV. D. *infra*.
[27] 30 U.S.C. § 124 (1970).
[28] 30 U.S.C. §§ 181-287 (1970).
[29] 30 U.S.C. § 124 (1970).
[30] 43 U.S.C. §§ 291-301 (1970).

were opened to grazing and private ownership.[31] It is principally the surface owners of these lands, now being rapidly settled in the residential sense, who require protection from the disruptive though essential operations of the miner.

The Stock-Raising Homestead Act provides that prior to entry the Secretary of the Interior must designate the lands as "stockraising lands." It also provides that lands withdrawn and reserved solely as valuable for oil and gas should still be subject to surface entry. An amendment to the Act limits the foregoing rights of entry by providing that stockraising lands within the geological structure of a producing oil or gas field can only be entered for surface patenting in the discretion of the Secretary of the Interior, in the absence of objection by the mineral lessee or permittee after due notice thereto.[32]

As discussed below, the Stock-Raising Homestead Act contains some protection for the present surface owner. In considering the extent of such protection, however, it is important again to note that Congress directed the Secretary to designate as "stockraising lands" only those lands "the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, [which] do not contain merchantable timber, [and] are not susceptible of irrigation from any known source of water supply . . . ."[33] This legislative qualification has led to the argument presently advanced in some quarters that lands patented under the Stock-Raising Homestead Act were granted for the limited rights of grazing, as set forth in the Act, with all other (*i.e.*, nongrazing) rights, surface *and* mineral, reserved to the government.[34]

A reservation of minerals under this Act will be set forth in the patent in the following language:

> [E]xcepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same

[31]Through 1971, 70.4 million acres of federal lands were patented in 19 states under the 1916 Act. In Colorado, of 42.7 million privately owned acres, 8.4 million were patented under the 1916 Act. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS Table 29, at 58 (1972).

[32]43 U.S.C. § 291 (1970), *amending* 43 U.S.C. § 291 (1933).

[33]43 U.S.C. § 292 (1970).

[34]At the present time, this is not the official posture of the Department of the Interior regarding stockraising homestead lands.

pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862).

5. Reservation of Fissionable Materials

The Atomic Energy Act of August 1, 1946,[35] superimposed a reservation of uranium, thorium, and other minerals upon lands subsequently patented under prior acts. Numerous patents in Colorado contain such a reservation. However, the Atomic Energy Act of August 30, 1954, as amended, terminated the practice of making such reservations and released and quitclaimed the reserved fissionable materials to the current owner, except where rights pursuant thereto had been granted by the United States in the interim.[36] Abstracts and title policies may, of course, still show the reservation.

B. *Reservations by the State of Colorado*

In Colorado, grants of public lands for the support of the public schools comprise about 82 percent of all lands conveyed to the state by the federal government.[37] As noted earlier, the states are required to reserve all of the minerals in school lands sold or otherwise disposed of subsequent to January 25, 1927.[38]

The form of reservation in Colorado patents reads as follows:

> [R]eserving, however, to the State of Colorado all rights to any and all minerals, ores and metals of any kind and character and all coal, asphaltum, oil, gas or other like substance in or under said land, the right of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances.

C. *Railroad Grants-in-Aid and Subsequent Reservations*

Patents from the United States to the railroads conveying western lands as "grants-in-aid" customarily contained one of the following exceptions:

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[35]Atomic Energy Act of 1946, ch. 724, 60 Stat. 755.

[36]42 U.S.C. § 2098 (1970).

[37]

Grants Authorized	Acres (1971)
Public Schools	3,685,618
Other Schools (Univ. and A & M)	138,040
Penitentiary	32,000
Misc. Improvements	500,000
Other Purposes	115,946
Total Authorized	4,471,604

BUREAU OF LAND MANAGEMENT, *supra* note 31, Table 4, at 7-8.

[38]*See* text accompanying notes 8 and 9 *supra*.

(1) Excluding and excepting all mineral lands should any be found in the tract aforesaid; or
(2) Yet excluding and excepting from the transfer of these presents all mineral lands should any such be found to exist in the tract described in this patent, this exception, as required by statute, not extending to coal or iron lands.

In the landmark case of *Burke v. Southern Pacific Railroad Co.*,[39] the United States Supreme Court held that the issuance of the patent to the railroad constituted a conclusive determination that the lands granted were nonmineral in character and that those minerals which in fact did exist passed to the railroad.[40] One cannot help wondering how today's Supreme Court would decide the question if it were presented *ab initio*. Despite the *Burke* case, some title companies continue to include the quoted statutory language as an exception in the policy.

In Colorado, so far as railroad lands are concerned, we are involved only with patents to the Union Pacific Railroad Company or its predecessors in title, and more importantly with deeds *from* the Union Pacific which purport to convey only the surface estate to various grantees.[41] Although there is no consistency in the choice of words used in these deeds, normally they recite a reservation of (1) all coal, or all the coal and other minerals, or oil, coal and other minerals, (2) the right to prospect for, mine,

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[39] 234 U.S. 669 (1914).

[40] In the *Burke* case, the mineral rights of the railroad were under collateral attack by parties who had no interest therein at the time the patent was issued. The Court stated that upon a direct attack by the United States or by a pre-patent mineral locator, the patent would afford only presumptive evidence that the lands granted were nonmineral in character. 234 U.S. at 691-92. A different conclusion was reached in United States v. Union Pac. R.R., 353 U.S. 112 (1957), with respect to the nonpatented right-of-way lands received by the railroad. The rights-of-way were deemed to be conveyed to the railroad by the filing of a map showing the location of the line. No administrative determination was made by the Land Office as to the mineral or nonmineral character of the right-of-way lands, in contrast to the pre-patent administrative determination made on the alternate section grants-in-aid.

[41] The railroad grants in Colorado were:

Union Pacific	665,998.34 acres
Denver Pacific	1,129,300.17 acres
Kansas Pacific	2,375,885.30 acres
Total	4,171,183.81 acres

REPORT OF THE PUBLIC LANDS COMM'N, S. Doc. No. 189, 58th Cong., 3d Sess. (1905). More recent government statistics place the total of railroad lands granted in Colorado at 3,757,673.39 acres. BUREAU OF LAND MANAGEMENT, *supra* note 31, Table 6, at 9.

and remove the same, and (3) the right of ingress and egress, plus use of the surface for mining purposes.

D. *Other Severances—By Grant or Reservation*

In addition to Union Pacific deeds, all other deeds and conveyances in the chain of title must be examined. Many forms of private mineral reservations have been attempted in Colorado. Some have been held invalid.[42] Some have been tested and validated.[43] Undoubtedly, many others are waiting patiently in the public records for their day in court.

III. "ALL THE MINERALS"—ALL THE WHAT?

An interesting question is presented under the Stock-Raising Homestead Act, or other acts containing similar mineral reservation language, as to just what substances are to be classified as "minerals" under a reservation of "all the coal and other minerals."

It appears to be settled law that those words are adequate to reserve oil, gas, and related hydrocarbons.[44] There is no such settled law, however, with respect to sand and gravel, deposits of clay, and similar nonmetallic materials which, being neither animal nor vegetable, in layman's terms can only be classified as "mineral" in character.

The "sand and gravel" question has been considered in the treatises primarily as a discussion of the varying decisions of state courts and often from the point of view of private rather than governmental reservations.[45] The conclusions can only be characterized as diverse. Indeed, the subject is worthy of a separate study.

Surface owners may have been heartened by section three of the Act of July 23, 1955, wherein it is stated that certain "common varieties" of sand, stone, gravel, pumice, pumicite, and cinders are not be to deemed "a valuable mineral deposit within the mining laws of the United States so as to give effective validity to any mining claim hereafter located . . . ."[46] In final analysis,

[42]First Nat'l Bank v. Allard, 513 P.2d 455 (Colo. 1973); Bell Petroleum Co. v. Cross V. Cattle Co., 492 P.2d 80 (Colo. Ct. App. 1971); Radke v. Union Pac. R.R., 138 Colo. 189, 334 P.2d 1077 (1958).

[43]Corlett v. Cox, 138 Colo. 325, 333 P.2d 619 (1959); Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952).

[44]Skeen v. Lynch, 48 F.2d 1044 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931).

[45]*See, e.g.*, 1A THOMPSON ON REAL PROPERTY §§ 156-58 (1964).

[46]30 U.S.C. §§ 611-15 (1970). The Act is considered in detail by Lonergan, *The Ma-*

however, the Common Varieties Act merely *assists* the legal argument that sand and gravel are not "minerals" and does not legislatively end the controversy, since "locatable minerals" are not necessarily the same as "reserved minerals" under the Stock-Raising Homestead Act and similar laws.[47]

Interior Department regulations issued under the Common Varieties Act give further warning of the economic tests increasingly in vogue as a means of interpreting what is or is not a "mineral." The regulations state that "common varieties," *i.e.*, nonlocatable minerals, are those deposits which do not possess a distinct and special economic value. If a particular deposit has properties making it especially valuable for use in manufacturing, industrial, or processing operations, then it is not a "common variety," even though it consists of a mineral material which occurs "commonly." Factors to be considered, say the regulations, are the quality and quantity of the deposit, geographic location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial or processing facilities, and feasible methods for mining and removal of the material.[48]

Thus it would appear that a gravel pit located adjacent to the right-of-way of a proposed interstate highway might be deemed a "valuable mineral deposit," whereas one remotely located might not. Similarly, gravel easily minable by surface stripping would presumably receive a different classification than one under considerable overburden. Obviously, the same or similar reasoning could be applied to decide whether a reservation of "all minerals" includes sand and gravel, stone, pumice, pumicite, and cinders.

In 1971, the New Mexico Supreme Court held that "material" that is removed "from the land in its exposed state, without refining, and is used (as gravel) as an aggregate for coarse and surfacing materials for highway construction" is *not* reserved to the United States under the Stock-Raising Homestead Act. As a

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terials Act as a Solution to the Common Varieties Problem, 15 ROCKY MT. MIN. L. INST. 51 (1969).

[47]For an explanation of the terms "locatable minerals" and "reserved minerals" see 1 AMERICAN LAW OF MINING §§ 2.4, 3.23 (1960). For a recent case which makes this distinction see United States v. Coleman, 390 U.S. 599 (1968).

[48]43 C.F.R. § 3711.1 (1972).

result, it seemed that patentees under that Act, and their successors and assigns, could rest secure in their proprietary rights to the sand and gravel and like substances.[49] But later in the same year, without mention of the New Mexico case, the Board of Land Appeals of the Department of the Interior in *United States v. Isbell Construction Co.*[50] held in favor of government ownership of sand and gravel in Arizona when a construction company made patent applications for two placer mining claims.

In the *Isbell* case, the patent was issued pursuant to the exchange provision of the Taylor Grazing Act which requires a reservation "of all minerals to the United States."[51] As a precedent for the proposition that sand and gravel are reserved to the government under the Stock-Raising Homestead Act, the case is subject to numerous infirmities. (1) "All the coal and other minerals" (Stock-Raising Homestead Act) is not necessarily the same as "all minerals" (Taylor Grazing Act), considering particularly the different dates of enactment (1916 as opposed to 1934) of the two laws and their dissimilar legislative history and purposes. (2) Citing the opinion of its own solicitor as authority, a questionable procedure at best, the Board in *Isbell* reversed the decision of the Director of the Bureau of Land Management who had held in favor of the patentee's ownership of the sand and gravel. (3) The Board cited *Farrell v. Sayre* as the case "most in point," and then declined to follow that case.[52] (4) The Board reached the conclusion that deposits of sand and gravel were reserved to the United States "conditioned only upon a finding that the said deposits are valuable." It then proceeded to hold that this particular deposit was "valuable" and therefore was reserved, but was not "of such value that it could have been mined, removed and disposed of at a profit," thus voiding Isbell's placer claim and its right to a mineral patent thereon.[53]

[49]State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122, 123 (1971).

[50]78 Interior Dec. 385 (1971).

[51]43 U.S.C. § 315g (1970). The opinion purports to quote the reservation language in the patent as follows: "Reserving, also, to the United States, all *mineral* in the lands so granted . . . ." 78 Interior Dec. at 388 (emphasis added). This is probably a misprint in the opinion and, if not, is not controlling since the Taylor Grazing Act calls for a reservation of "all minerals" and not "all mineral."

[52]129 Colo. 368, 270 P.2d 190 (1954). This case construed a private and not a patent mineral reservation but held that the mineral owner did not own the sand and gravel. The language used in that reservation was ". . . and excepting and reserving all mineral and mineral rights . . . ." Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963), was another most persuasive case which was cited and then shunned by the Board in *Isbell*.

[53]78 Interior Dec. at 396.

Based upon the *Isbell* decision, the Bureau of Land Management has now taken the position that the United States under the Stock-Raising Homestead Act as well as the Taylor Grazing Act reserved all of the sand and gravel, whether the sand and gravel compose the entire surface of the land or not.

However, given the wide variance in state and federal decisions, and the doubtful authority represented by *Isbell*, it now appears that ownership of the so-called "common varieties," where the surface was patented under the Stock-Raising Homestead Act, is far from settled.

IV. ADVISING THE CLIENT

With the foregoing guide to the recognition of a severance of mineral and surface estates, it is clear that in each of the three opening scenarios the retail or wholesale purchaser or the mortgage financier is about to put his money on a parcel of land wherein the minerals are separately owned by the federal or state government, the railroad, or some other private owner. What advice can safely be given to those purchasers and mortgagees regarding the hazards and safeguards of surface development under present and prospective law?

It should be understood by the reader that the answers presented below represent only a current survey of the law and title insurance practices, both of which are in a state of flux. New practices, new decisions, and new statutory enactments may occur at any time. A reexamination of title insurance practices plus a review of current law must be undertaken periodically by those who venture an opinion in this area.

With that caveat, an analysis of the protections that may be afforded can commence. These protections will be divided into the following categories: zoning; economics; case and statutory law; purchase or lease of the minerals; and finally (and perhaps most importantly) title insurance.

A. *Zoning as Protection*

In Colorado and other western states we have recently experienced the extension of zoning classifications to rural areas formerly devoid of planning practices or zoning limitations. In addition to county-enacted and county-enforced zoning, many state governments are presently engaged in widespread, though varying, planning functions which will have lasting impact upon the ability of rural property owners to do with their lands as they will.

The typical zoning classification attached to rural land will normally permit all types of agricultural practices, mining, and other extractive processes. Such zoning will afford no protection to the surface owner when the mineral owner moves in.

However, with the frequent acquisition of farm and ranch properties by investors and subdividers and the subsequent breaking up of the land into tracts that are typically five acres or smaller in size, new zoning classifications are often applied, the county zoning map is amended, and the lots then become limited in use to residential and specified commercial purposes even though the property remains outside an incorporated municipality.[54]

In addition to such mining exceptions as already exist in the zoning laws, particularly in the rural or recently urbanized areas, initial steps have been taken to preserve the miner's access to certain "commercial mineral deposits." Legislation has recently been adopted in Colorado that prohibits counties and municipalities alike, in counties with a population of 65,000 or more, from adopting nonmining zoning for areas where there are known commercial deposits of limestone used for construction purposes, coal, sand, gravel, and quarry aggregate.[55] In effect, this law assures a patchwork of industrial mining "parks," advocated as a compromise solution to preserve the value of lands likely to be mined at some future date. A study of the "commercial mineral deposits" in the populous counties of the state must be completed by the Colorado Geologic Survey by July 1, 1974. Using these studies, each Board of County Commissioners must adopt a "Master Plan for Extraction of Commercial Mineral Deposits" on or before July 1, 1975. After adoption of the county "Master Plan" no city or county governing body may take any action or allow any inaction to interfere with the present or future extraction of such "commercial minerals."[56]

But assume that examination of the applicable zoning code indicates that mining is *not* allowed on the lands in question. May an attorney safely advise his client that the surface will be inviolate from the "depredations" of the mineral owner? There

[54] Such, of course, is not always the case. In some areas, property may be subdivided for residential purposes without the necessity of a change in zoning classification.

[55] COLO. REV. STAT. ANN. §§ 96-36-1 to -5 (I COLO. INFO. LEG. SERV. FOR 1973, at 712-15).

[56] *Id.* § 92-36-5(2).

are at least three reasons why the answer must be only a *qualified* affirmative at best.

First, one must remember that zoning is legislatively imposed and administratively enforced. In short, "protective" zoning classifications may be modified, varied, or removed entirely. It is thought by some, including this writer, that the surface owner or mortgagee ought to be able to rely upon the stability of zoning, so as to preclude a subsequent change of the zoning ordinance or an administrative variance to allow mining.[57] Nevertheless, protection that ultimately relies upon the successful prosecution of a lawsuit may be small consolation to the client—particularly the banker client.

A second reason to doubt the permanency of protection by zoning arises from the clash of competing sovereigns. While conceding that zoning, so long as it exists and is enforced by competent authority, will effectively forestall the exploitation of privately owned minerals, one must also consider whether the zoning ordinance of a county or municipality can prevent the largest mineral owners in the West, the federal and state governments, from developing their reserved mineral estates.

With respect to state-owned minerals, it could be argued that a zoning ordinance which has been adopted by a city or a county pursuant to a state delegation of power by statute ought to apply with equal force to private citizen and state government. However, such does not appear to be the law, the state generally being held immune from regulation by local ordinance.[58]

When the United States or its lessee prepares to remove federally owned minerals, an attempted outright denial of access thereto by local zoning law is likely doomed by similar precedent.[59] Whether the federal government—and specifically the Bureau of Land Management—would attempt to circumvent or vitiate a local zoning code is of course a political question which

[57]It should be noted that the provisions of the Colorado law preserving commercial mineral deposits indicate that, at least until July 1, 1974, when the Colorado Geological Survey completes its study, reliance on the stability of zoning will be perilous at best. Even after that study is completed, any commercial deposit discovered subsequent to July 1, 1974, may be included in such study. *Id.* § 92-36-3. Therefore, in the populous counties, zoning as protection will be suspect until July 1, 1975, when the "Master Plans for Extraction" will be adopted by the various governing bodies.

[58]*See* cases cited in 1 E. YOCKLEY, ZONING LAW AND PRACTICE § 2-26 (1965); 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.06 (1968).

[59]E. YOCKLEY, *supra* note 58, § 2-25; R. ANDERSON, *supra* note 58, § 9.07.

may shift with each new mineral shortage.

The third apparent weakness of zoning as protection arises from the ever-present possibility of a successful attack on the validity of the zoning ordinance itself. Although zoning laws have proved to be a hearty breed and are successfully challenged in the courts only on rare occasions, an argument can be constructed to the effect that the ordinance is invalid if it does not properly concern itself with the competing interests of the mineral and surface owners.[60]

In addition to weighing the temporary nature of extraction against permanent loss of the mineral estate, the mineral owner would undoubtedly ask the court to consider the comparative values of the two estates, and where the mineral's value is many times the value of the surface, his chances of success are increased. He will try to show that it would be arbitrary to prohibit mining in an area where such activity would not unreasonably interfere with public rights. In a mountain subdivision of 10-acre tracts with intervening hills and valleys and heavy timber screening, he may have an excellent case.[61] And as an oil and gas lessee, he may try to show that his property is being drained by neighboring wells.[62]

In summary, we learn from the reported cases that it is nearly impossible to overturn a zoning ordinance. The discretion of local officials is rarely disturbed by the courts. A zoning ordinance is presumably valid and its opponent faces a heavy burden of proof. Doubtful cases invariably result in confirmation of the zoning law and there is no discernible trend to the contrary. Therefore, though the banker may be hard to convince, the prospective owner may take some comfort in zoning as a protection against damage to his surface estate by the extraction of minerals, provided that the restrictive zoning has in fact been enacted and is in force *prior to* the commencement of mining operations.[63] Whether the United States and its mineral lessees will acquiesce

[60] This argument is more fully developed in Sherwood, *Zoning Against Mining*, COLO. LAW., July 1973, at 27. *See also* R. ANDERSON, *supra* note 58, § 11.64.

[61] For other factors considered by courts in deciding the validity of local zoning against mining, see Midland Elec. Coal Corp. v. Knox County, 1 Ill. 2d 200, 115 N.E.2d 275 (1953); Kane v. Kreiter, 195 N.E.2d (Ohio Ct. C.P. 1963). *See also* Note, *Local Zoning of Strip Mining*, 57 KY. L.J. 738, 750-51 (1969).

[62] R. ANDERSON, *supra* note 58, § 11.63.

[63] *See* Western Paving Constr. Co. v. Board of County Comm'rs, 506 P.2d 1230 (Colo. 1973). A similar conclusion is reached by Sherwood, *supra* note 60, at 32.

in the applicability of local zoning ordinances remains a primary area of uncertainty.[64]

B. *Economic Reality as Protection*

Akin to zoning protection is the salient question of the balancing of values between mineral and surface rights. Once the surface has been subdivided and improved with buildings, streets, and other improvements, its value will likely preclude strip mining, assuming that the strip miner is liable for surface damages. However, this argument fails (1) whenever underground mining with minimum surface use is proposed, (2) whenever extremely valuable deposits or wartime essential minerals are involved, or (3) with regard to the ever-present possibility of harassment by mineral locators seeking a payoff. Although the banker with his first lien may be primarily interested in a guarantee that damage to surface improvements will be compensated, it will be small comfort to a prospective homeowner to assure him that he will receive fair market value for his residence on the eve of its destruction.

Economic reality also comes into play where the mineral estate is owned by more than one party. In some states, the owners of less than one-half of the minerals are prohibited from mining. In Colorado, however, there is no absolute protection against mining in such cases, and any fractional owner has the right to mine and account to his cotenants for profits therefrom.[65] Although it can be argued that as a practical matter the division of the mineral estate into fractional interests may lessen the possibility of mining activity, it can also be argued that the presence of many fractional interests may indicate that a valuable mineral is indeed present. Thus, although the surface owner may try to acquire these fractional interests by purchase or lease, he has no absolute protection, at least in Colorado, until he has garnered them all.

C. *Nonstatutory Law as Protection*

Thus far in our history, common law decisions have affirmed the dominance of the mineral estate over the surface estate. This dominance carries with it the right of the owner of the minerals

[64]"[E]xploration for and development of reserved minerals should not be permitted if such activities would be inconsistent with local zoning." PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 138 (1970).

[65]COLO. REV. STAT. ANN. §§ 92-23-1 to -9 (1963).

to use so much of the surface as is reasonably necessary to produce the minerals, without compensation to the surface owner.[66]

But there is evidence of changing judicial views, particularly where the value of the surface has increased in comparison with the value of the minerals. Given the advances that are occurring in the technology of strip mining, a greater number of damage cases are likely to reach appellate level. There it can be anticipated that the courts will hold a mere reservation of minerals does not carry with it the right to *destroy* the surface by strip mining absent an express provision to that effect.[67] Undoubtedly we will see exceptions to and variations on this theme: *e.g.*, where (1) the minerals which were known to exist on the property at the date of the reservation can only be extracted economically by strip mining; (2) strip mining was in progress on neighboring lands at the time of the severance; and (3) the surface is valuable only for grazing or other "primitive" uses, and the minerals cannot be commercially extracted by underground mining methods.

D. *Statutory Law as Protection*

Statutory law does afford some protection to the surface owner, both as to government owned and privately owned minerals. As of the end of 1972, however, it could be stated that statutory law did not absolutely prohibit the development of the min-

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[66]1 AMERICAN LAW OF MINING § 3.50 (1960).

[67]*See, e.g.,* Smith v. Moore, 172 Colo. 440, 474 P.2d 794 (1970). In that case the Colorado Supreme Court said:

> [W]hen the surface and the mineral estates have been severed, the owner of the mineral estate may remove the underlying minerals but must support the surface and cannot destroy the surface by strip mining.

Id. at 443, 474 P.2d at 795. The court in *Smith v. Moore* referred to Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923), as authority for that statement. In *Barker v. Mintz* the surface owner had obtained a permanent injunction against the mineral owner, a grantee of Union Pacific, restraining him from strip mining for his coal. The court *dissolved* the injunction, holding that under the Colorado statute cited in note 89 *infra*, the posting of a bond would provide the surface owner with an adequate remedy. In the court's words:

> The land is wild and its present value, except for the coal, is only for pasturage, a very little of it for cultivation. The stripping destroys these values, but the fair and equitable way is so to treat the matter that each party will get the greatest amount of good with the least possible harm, and that is by allowing the defendant to take out his coal and pay the plaintiff for the damage he thereby does to her estate. He will then get the full value of his property and she will get the value of hers. Is that not equity?

Id. at 266, 215 P. at 535. *Barker* hardly seems like solid authority for *Smith v. Moore*; however, *Smith v. Moore* is presently the law in Colorado and is perhaps the logical continuance of the cases cited therein which consider the competing interests of the surface and mineral owners from an equitable point of view.

eral estate (except for the enactment of a limited number of "special favor" statutes).[68] The most that could be expected from the older statutes was a promise of some measure of relief by way of damages. However, current legislative proposals have taken a new turn, as will be discussed.

1. Federal Statutes

Federal ownership of minerals occurs in the West on public lands (where both the surface and minerals are owned by the government) and on privately owned lands pursuant to mineral reservations contained in surface patents issued under the authority of three principal homestead enactments: the Coal Lands Acts of 1909-1912; the Agricultural Entry Act of 1914; and the Stock-Raising Homestead Act of 1916. The minerals reserved under these Acts were respectively coal, oil and gas and other nonmetallic minerals, and finally all the coal and other minerals.

Each of these Acts offers to surface owners some measure of relief from mineral development. The 1909 statute provides merely that no person shall enter lands patented under that Act for the purpose of prospecting for, mining, or removing coal without the previous consent of the surface owner "except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction."[69] The statute does not define "all damages."

The 1910 amendment to the Coal Lands Act guarantees the right of entry upon the surface of patented lands for prospecting purposes upon the filing of a bond or undertaking with the Secretary of the Interior as security for the payment of "all damages to the crops and improvements on such lands by reason of such prospecting."[70] Upon acquisition of the right to mine the coal deposits (presumably following a successful prospecting venture) the miner is granted the right to "reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom . . . upon payment of the damages caused thereby" to the surface owner, or upon "giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages."[71]

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[68]*See* note 79 *infra* and accompanying text.
[69]30 U.S.C. § 81 (1970).
[70]30 U.S.C. § 85 (1970).
[71]*Id.*

Obviously drawing upon the prior statutory language of 1909 and 1910, the Agricultural Entry Act of 1914 contains a nearly identical provision which permits prospecting upon the filing of an approved bond with the Secretary of the Interior as security for the payment of "all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction."[72] Similarly, reentry following discovery is permitted, together with occupation of so much of the surface as may be required "for all purposes reasonably incident to the mining and removal of the minerals therefrom" upon payment of damages or the posting of a bond in an action instituted in court to fix damages.[73] Again, "damages" are not defined.

The Mineral Lands Leasing Act of February 25, 1920, as amended in 1946,[74] removed the minerals reserved under the 1909 and 1914 Acts from mineral entry and location. It also appears to exclude such minerals from development through leasing when situate in "incorporated cities, towns, and villages."[75] With respect to these leasing act minerals, therefore, incorporation of the surface lands into a municipality—and not mere zoning—may be the ultimate protection.

But such was not the state of the law when Michael F. Kieffer, a surface owner under the 1914 Act, apparently aware of economic reality as protection, commenced selling residential lots on his homestead tract. The lands concerned were in the Salt Creek oil field in Natrona County, Wyoming, a producing area leased to Kinney-Coastal Oil Company pursuant to the Act of 1920. By the time Kieffer had platted and sold 40 of the 80 acres to purchasers who were erecting dwellings amongst the derricks and bunkhouses, Kinney-Coastal saw the handwriting on the wall. When Kieffer announced plans to subdivide the remaining 40 acres, Kinney-Coastal had had enough and enjoined Mr. Kieffer from continuing his real estate venture. When the action finally reached the United States Supreme Court in 1928, the Court advised Mr. Kieffer that:

> The acts of 1914 and 1920 are to be read together—each as the complement of the other. So read they disclose an intention to div-

72. 30 U.S.C. § 122 (1970).
73. *Id.*
74. 30 U.S.C. §§ 181-287 (1970).
75. *Id.* § 181.

> ide oil and gas lands into two estates for the purposes of disposal—one including the underlying oil and gas deposits and the other the surface—and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values . . . . In effect therefore a servitude is laid on the surface estate for the benefit of the mineral estate to the end, as the acts otherwise show, that the United States may realize, through the separate leasing, a proper return from the extraction and removal of the minerals.[76]

Then, the court proceeded to interpret the damages clause of the 1914 Act in its narrowest sense to include only crops and "agricultural" improvements. This interpretation, which stands today as the law of the land, was accomplished with these words:

> The only compensation which he [the surface owner] rightfully may demand is, as the act of 1914 says, for "damages caused" by the mining operations. The sentence next preceding that in which these words occur makes it fairly plain that they refer to damages to "crops and improvements," and the title to the act, coupled with the reference to "crops" shows that "agricultural" improvements are the kind intended. Certainly it is not intended to include improvements placed on the land, after the mining operations are under way, for purposes plainly incompatible with the right to proceed with those operations until the oil and gas are exhausted.[77]

Thereupon the court sustained the injunction and Kieffer went out of the subdivision business—at least at that location.

The 1916 Stock-Raising Homestead Act added only a paltry measure of protection to the previously existing statutory scheme. Following closely the format of the 1914 Act, the 1916 Act required a reservation in the patent of the right to enter the patented lands for prospecting purposes on condition that the prospector "shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting."[78]

Pausing for a moment, one can envisage an entire residential subdivision on Stock-Raising Homestead Act lands. There are many such developments today, and more are being built. In come the prospectors, bearing not only their 1916 picks and shovels, but their modern day bulldozers and draglines. They may not harm the permanent improvements; that much is clear. And they

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[76] Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504 (1928).
[77] *Id.* at 505.
[78] 43 U.S.C. § 299 (1970).

must make restitution for damages to "crops." So they set to work in the lawn areas of the suburb, and perhaps also in the parks, greenbelts, and other "unimproved" areas. On at least one occasion such activity, or the threat of it, has prompted Congress to take the unusual step of specific legislation withdrawing the subject minerals from location and leasing.[79]

But to continue consideration of the provisions of the Act of 1916, they, too, anticipate reentry by those who have acquired the right to mine or remove the minerals, but the conditions under which the miner may occupy as much of the surface as may be required for all purposes reasonably incident to the mining or removal of the minerals have been expanded to three. These conditions are (1) securing the written consent or waiver of the homesteader, (2) payment of the "damages to crops or other tangible improvements to the owner thereof" where agreement has been reached as to the amount, or (3) execution of a bond for the benefit of the surface owner to secure payment of "such damages to the crops or tangible improvements" of the owner as may be fixed by a court of competent jurisdiction.[80]

In construing patents issued under *both* the 1914 and 1916 Acts, the Wyoming Supreme Court in 1955 chose to follow the *Kieffer* case and limited the liability of an oil drilling company to damage to "agricultural improvements or agricultural crops."[81] The trial court's decision that the natural grass growing upon the surface of the lands was not a "crop" within the meaning of those Acts was affirmed. The court found that damages "to the land" were not compensable.

With respect to damages to the land occasioned by strip mining or open pit methods (as opposed, for instance, to drilling for oil and gas), Congress has seen fit to enact the following law, known as the Open Pit Mining Act of June 21, 1949:

> Notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip or open pit mining methods, any minerals from any land included in a stock raising or other homestead entry or patent, and

[79]Act of Oct. 5, 1962, Pub. L. No. 87-754, 76 Stat. 750. This Act specifically describes 4,540.57 acres of land in Maricopa County, Arizona. With regard to these lands, at the request of the developer, Congress declared that "the mineral interests of the United States, which have been reserved in patents . . . are hereby withdrawn from all forms of location and . . . entry . . . including the mining and mineral leasing laws . . . ."

[80]43 U.S.C. § 299 (1970).

[81]Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955).

> who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 21, 1949.[82]

At the present time, there appear to be no reported cases decided under the Open Pit Mining Act. Unaccountably, the legislative history of this Act does not reveal any awareness by Congress of the holding of the Supreme Court in the *Kieffer* case that damages under the 1914 Act were limited to "agricultural" crops and improvements. Senate and House reports claim only that surface patentees under the 1909 and 1914 Acts are afforded compensation for "all damages" caused by the mining and removal of minerals, whereas a surface owner under the 1916 Act is entitled to recover only for "damages to crops and injuries to permanent improvements"—an inaccurate assessment of the situation to say the least. "It is to correct such an anomalous and inequitable situation and to place surface entrymen on all mineral lands on an equal basis as to compensation for damages to the surface that the committee has adopted this amendment."[83]

It appears that some surface owners convinced their representatives in the Congress that the advent of strip mining methods jeopardized the entire surface of a stockraising homestead. They seem to have foreseen the possibility that if only grazing lands were involved, no compensation would be due.

This possibility is disclosed in the legislative report:

> In many present-day mining operations, such as that employed in the production of bentonite, for example, strip-mining methods are prevalent which permanently destroy the entire surface value of the land for grass-raising and stock-raising purposes. Thus, the number of head of stock an entryman can raise on his homestead is limited to some extent for both the present and future by the activities of the holder of the mineral rights on the land.[84]

Unfortunately for the surface owner, there does not appear to be any inclination on the part of Congress to extend the definition of damages under any of the Acts beyond agricultural improvements and agricultural crops in non-strip-mining situations. And where strip mining occurs, a limitation of damages to

[82] 30 U.S.C. § 54 (1970).
[83] U.S. CODE CONG. SER. 1376-77, 1405-06 (1949).
[84] *Id.* at 1377, 1406.

the *value of the land for grazing* is so clearly expressed in the 1949 Act as to be capable of no expanded interpretation.[85] Fair market value, with its implications of highest and best use, does not even appear to be on the horizon, much less in the books.

As an aside, it can be observed that in 1949 and prior years very little urban development had occurred on lands patented subsequent to 1909 and subject to a severance of surface and mineral estates. Now, however, we are experiencing that precise occurrence and barring an unlikely modification of attitude by the courts, assistance from Congress in the form of new legislation is vital if permanent improvements, which require institutional financing, are going to be erected on such severed surface estates. In addition the federal government seems hardly aware of the control over urbanization that it could exercise through its mineral ownership, should it decide to do so in connection with the environmental revolution that is now apparent.

It appears likely that some significant new protection will be enacted by Congress in the form of Senate Bill 425, the Surface Mining Reclamation Act of 1973, although the final form of the bill cannot be predicted as this is being written. The importance thereof to the present discussion lies principally in the Act's proposed absolute prohibition (added by the so-called "Mansfield Amendment") against surface mining of coal on privately owned lands which overlie federally owned minerals.[86] In effect, the Act will withdraw such reserves from exploitation unless the coal can be extracted by underground methods.

The beneficiaries of this amendment have been described by Senator Mansfield as the "third or fourth generation rancher . . . the farmer and even . . . the residents of a small town which might find itself in the midst of a deep, rich vein of strippable coal . . . the last of the rugged individualists of this Nation . . . ."[87]

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[85]For an interesting discussion of the subject, with somewhat different conclusions, see Note, *Surface Damages from Strip Mining under the Stock Raising Homestead Act*, 50 DENVER L.J. 369 (1973). *See also* 1 AMERICAN LAW OF MINING § 3.48 (1960). The 1914 and 1916 statutes, and cases decided thereunder, are reviewed in Stocker, *Protection for Surface Owners of Federally Reserved Mineral Lands*, 2 U.C.L.A.-ALAS. L. REV. 171 (1973).

[86]S. 425, 93d Cong., 1st Sess. § 612(b) (1973). The Amendment provides:

> All coal deposits, title to which is in the United States, in lands with respect to which the United States is not the surface owner thereof are hereby withdrawn from all forms of surface mining operations and open pit mining, except surface operations incident to an underground coal mine.

[87]119 CONG. REC. 18770-71 (daily ed. Oct. 8, 1973).

Obviously the benefited group also includes the subdivider grantees of the "folk" portrayed by the amendment's distinguished sponsor, thereby permitting development on lands otherwise encumbered by the threat of mining of the dominant mineral estate.

2. State Statutes

As with local zoning ordinances enacted pursuant to state statute, the protection that is or can be made available to the surface owner by means of state legislation is of doubtful force with respect to federally owned minerals.

Colorado has two ancient statutes—elder statesmen, so to speak, from the hard rock mining era, seldom called upon in battle but perhaps still able to bear arms. One of these statutes prohibits all mining under any building or other improvement, absent security for damages "except by priority of right."[88] Exactly what is meant by "priority of right" is not disclosed by subsequent case law, but it might be deemed to include a right, reserved by patent or deed, to make reasonable use of (*i.e.*, cause reasonable damage to) the surface for the extraction of reserved minerals where severance of the minerals has occurred before the improvements were erected. If that is its meaning, the statute is obviously too feeble to protect the surface owner. An interpretation of "except by priority of right" more commensurate with the current need for protection would be "unless otherwise agreed by surface and mineral owners."

The other aged Colorado statute provides for security by way of bond to protect the surface owner before the miner can commence operations whenever the ownership of the surface is separate from the ownership of the minerals.[89] Once again, however, the security which the miner must offer could be severely limited by an interpretation of the instrument creating the severance to include the right to occupy or even destroy the surface as an incident of the mineral grant or reservation.

As a general proposition, state legislation has been suggested,[90] and in a few instances enacted, primarily with respect to privately owned minerals, along the following lines:

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[88] COLO. REV. STAT. ANN. § 92-24-2 (1963).

[89] *Id.* § 92-24-6.

[90] *Cf.* Manning, *supra* note 1; Note, *Severed Mineral Interests, a Problem Without a Solution?*, 46 N.D.L. REV. 451 (1970); Cal. A.B. 2311, Reg. Sess. (1968). *See also* Grahm, *supra* note 1, at 136, 147.

(1) A law restricting the length of time that a mineral owner can sit upon his rights and not develop, upon expiration of which the surface owner automatically becomes vested with the mineral rights.[91] The proposal raises immediate constitutional questions. One can imagine the opposition to such legislation that could be expected from the large private mineral owners, such as the railroads. If the law were made applicable to state minerals (or federal minerals, if federal legislation were proposed) the cry of "giveaway" would surely be heard;

(2) Legislation giving a regulatory agency, such as the Oil and Gas Conservation Commission, the right to limit the number and location of drill and tunnel sites so as to minimize surface interference;[92]

(3) Enactment of a new form of action, somewhat like a partition action, whereby the surface owner could surrender some of his surface rights to the mineral owner and in return obtain surface protection for the balance of his lands.

E. *Purchase or Lease as Protection*

1. Federal Minerals

A question often asked by the prospective purchaser or lender is, "Can I buy up those minerals so that I don't have to worry about them?" The anticipated answer is "yes" in our society where virtually everything is available for a price. However, the correct answer is "no" where federal minerals are concerned. They are simply not available at any price—unless, in addition to the price, one happens to have the appropriate influence to obtain special legislation.

It may come as a surprise to some to learn that in several instances acts of Congress have been passed which authorized the *outright acquisition* of federal reserved minerals by purchase.[93]

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[91]LA. CIV. CODE ANN. arts. 789, 3546 (West 1952, 1953); MICH. STATS. ANN. § 26.1163(1)-(4) (rev. vol. 1970); TENN. CODE ANN. § 64-704 (Supp. 1973); VA. CODE ANN. § 55-155 (1969).

[92]Limited regulation of strip mining by a governing agency already exists in Colorado pursuant to the Colorado Open Land Reclamation Act, COLO. REV. STAT. ANN. §§ 92-13-1 to -13 (Supp. 1969).

[93]*See, e.g.*, Priv. L. No. 92-144 (Oct. 21, 1972). The Act directs the Secretary of the Interior "to convey, sell, and quitclaim all mineral interests of the United States in and

Obviously, this method of reuniting the surface and mineral estates is not available to everyone, nor does it flow from any systematic policy.

Undoubtedly there are millions of acres of patented surface lands overlying federally reserved minerals wherein no commercially valuable mineral deposits are located. In such cases it can be argued that the mineral and surface estates ought to be joined by a planned program of (1) investigation by the geological survey to establish the absence of valuable minerals, perhaps with a test drilling program at the expense of the surface owner, followed by (2) appraisal or other method of establishing the purchase price. Direct sale to the surface owner, with the proceeds going to the federal treasury, would be the final step. Given the increasing pressures on our western lands for recreational ventures as well as commercial, industrial, and residential uses, such an outright purchase program might create substantial public revenue while solving the severance problem on vast acreages.

True, Congress has previously enacted general statutes that authorize the purchase of government lands. Yet anyone who has ever tried to acquire federal real estate pursuant thereto is well aware of the interminable delays and bureaucratic entanglements to be encountered, not to mention limitations on the size of purchases. Furthermore, mineral lands are expressly excluded from those statutes.[94]

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to the property situated in the State of Georgia . . . to Thomas A. Buiso, the record owner of the surface thereof." The purchaser is required to pay "the fair market value of the interest to be conveyed," plus the administrative costs of conducting exploratory programs deemed necessary by the Secretary to determine the character of the mineral deposits in the land, evaluating the exploratory data and preparing and issuing the instrument of conveyance. Many such bills are introduced at each session of Congress. Few become law. *But see* note 94 *infra*.

[94]The various United States statutes are examined in Moran, *Sales and Exchanges of Public Lands,* 15 ROCKY MT. MIN. L. INST. 25 (1969). It is interesting to note that the Department of the Interior does not oppose the disposition of federally owned mineral interests into private hands as a matter of "official policy," as indicated by the following statement:

> The [Department of the Interior's] position has been that we will not abject [sic] to a conveyance of a reserved mineral interest in the United States when such reservation is found to interfere with intensive development of the land or if the mineral interest is of no value. The sale should be made in return for the fair market value of the reserved mineral interest if it is prospectively valuable plus the cost of making the conveyance and, where necessary, the cost of determining the mineral value.

Letter from Harrison Loesch, Assistant Secretary of the Interior, to Hon. Wayne N. Aspinall, Chairman, Committee on Interior and Insular Affairs, House of Representatives, Mar.

Proposed Senate Bill 2401, which died without passage in 1972 upon expiration of the 92d Congress, contained provisions authorizing the Secretary of the Interior to sell certain government lands upon a finding that to do so would "serve important public objectives which cannot be achieved prudently and feasibly" without such sale.[95]

A similar bill, though substantially redrafted, has now been introduced in the 93d Congress as Senate Bill 424. It contains the idential language quoted above from the previous bill, but with the proviso that the important public objectives to be served by the sale of lands must "outweigh all public objectives and values, including recreation and scenic values, which would be served by maintaining such tract in Federal ownership."[96] This test has obviously been inserted to strengthen bureaucratic discretion regarding the disposition of public lands.

A novel feature of Senate Bill 424 is the provision that, despite a general stipulation requiring the reservation of all minerals to the United States, the Secretary of the Interior is authorized, in the alternative, to enter into surface covenants which forbid prospecting, mining, or removal of minerals for a specified period if such activities "would interfere with or preclude the appropriate use or development of such land . . . or, where necessary, [to] convey minerals in the conveyance of title."[97]

In the same section of the bill, the Secretary is directed to make only such sales as will be in conformity with state and local land use plans, programs, zoning, and regulations. Furthermore, local authorities are to be informed of proposed sales 90 days in advance, "in order to afford the appropriate body the opportunity of zoning or otherwise regulating . . . the use of such land prior to such sale."

It appears extremely doubtful to this observer, however, that

9, 1972, in S. Doc. No. 92-1286, 92d Cong., 2d Sess. 3-4 (1972).

[95]S. 2401, 92d Cong., 1st Sess. §§ 8-9 (1971), introduced August 3, 1971, by Senators Jackson and Allott. If enacted, this bill would have repealed the surface protection provisions of the Stock-Raising Homestead Act—a step backwards, to say the least.

[96]S. 424, 93d Cong., 1st Sess. § 7 (1973), introduced January 18, 1973, by Senators Jackson, Bennett, Church, Gurney, Haskell, Humphrey, Inouye, Metcalf, Moss, Pastore, and Tunney.

[97]*Id.* § 8. However, this section might be interpreted to preclude a sale of previously reserved minerals or even a covenant to protect the surface, since it fails to mention reserved minerals specifically and appears to anticipate a sale of minerals only in connection with a *concurrent* sale of the surface.

any act of Congress will ever serve the purpose of allowing a reasonably priced sale of the federal mineral estate to the owner of the surface, though the minerals be declared valueless, when such surface owner is a confessed land developer. This could only be done if such act in very specific terms provides for exactly that type of sale, with express directions as to the manner of determining the nonmineral character of the lands, their appraisal and disposition.

Legislation recently introduced at the instance of the Bureau of Land Management seems to be at least a "half-step" in this direction.[98] It goes directly to the point, specifically authorizing the sale and conveyance of *reserved minerals* under controlled conditions. These conditions are:

(1) the surface is in nonfederal ownership;
(2) either the lands have no mineral value, or government ownership of the minerals is interfering with or precluding appropriate development;
(3) the proposed development is a more beneficial use of the land than mineral development;
(4) sale will be made only to the surface owner;
(5) surface owner pays the fair market value of the mineral interests being conveyed; and
(6) surface owner also pays all administrative costs of conducting and evaluating an exploratory program to determine the value of such mineral deposits, and preparing and issuing the documents of conveyance.[99]

Looking at the other side of the coin, we should nevertheless consider whether federal mineral lands *ought* to be sold under any circumstances. Is it logical to assume that today's nonmineral classification will prove correct 50 or 100 years hence? The history of the disposition of our public lands is replete with erroneous determinations of the presence or value of mineral resources, not to mention other resources. The potential for federal environmental control which arises from ownership of the mineral estate could be a contributing factor to the government's "land use

[98] S. 1041, 93d Cong., 1st Sess. (1973). The bill was also introduced in the House of Representatives as H.R. 5441.

[99] *Id.* §§ 205-06. These conditions are virtually identical with those contained in prior special acts, as discussed at note 93 *supra*.

plan" required by Senate Bill 424[100] if that bill is ultimately passed.

2. Colorado Minerals

Of the 66.7 million acres in the State of Colorado, 4.47 million acres (6.7 percent of the state's land area) were granted to the state government by the United States,[101] and the state has retained and still owns 4.3 million mineral acres.[102]

In lieu of the sale of minerals, Colorado has adopted a very active mineral leasing program designed not only to produce income but also to protect the surface owner in nonmineralized areas. The scheme has much to recommend it and should be carefully considered by the drafters of federal legislation as well as by the large private owners of severed mineral estates.

The typical State of Colorado mineral lease is for 50 years or less. A uniform rate of 1 dollar-per-acre annual rental is charged, to be paid in advance for the entire term of the lease unless the State Board of Land Commissioners agrees to 5-year advance installments. The only other charge is a 10 cents-per-acre filing fee, with a minimum fee of 10 dollars. Absent an actual showing of valuable minerals in place, leases will be issued only to the surface owner or the developer, thereby offering protection against any other party acquiring the mineral rights and disturbing the surface use.

The lease covers all minerals, unless an active drilling or mining program is underway on neighboring lands. Speculation in leases is not allowed, and a warning contained in the lease application hints at the Board's policy of disapproving assignments of leases if they appear to be used for financial gain by the assignor. Absent speculation, the leases may be assigned in whole or in part with the Board's approval upon payment of a 10-dollar fee. If requested, leases will be issued in the name of a title insurance company, and it is the custom of such companies in Colorado to cooperate with each other in the assignment of leases whenever the lands change hands and the new title insurance policy is issued by a different company.

In the event of a subsequent discovery of minerals, a protec-

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[100] S. 424, 93d Cong., 1st Sess. § 5 (1973).

[101] BUREAU OF LAND MANAGEMENT, *supra* note 31, Tables 1, 4, at 3, 7.

[102] According to statistics furnished to the author by the Colorado State Board of Land Commissioners.

tive clause in the lease requires the lessee to drill and produce such wells as may be necessary to protect the leased premises from drainage or, in lieu of such drilling and production, to compensate the state for the estimated loss of royalties. It is thought, however, that the Board would not activate this clause unless considerable financial gain to the state were involved. In such a case, the lessee would hardly be the object of pity, being then the owner of a valuable mineral lease.[103]

Thus in Colorado, as an example, the surface owner of a 5-acre tract and his mortgagee can obtain complete protection against any possible development of the state's fee minerals for a period of 50 years by an advance payment of $260.00; the state preserves its entire mineral ownership and the right to require production thereon should circumstances make it profitable; and the interests of both surface and mineral estate are balanced, with benefit to the public treasury and no undue hardship on either owner.

3. Private Minerals

Colorado's largest private mineral owner, Union Pacific Railroad, appears to have formulated a policy that includes outright relinquishment of minerals in some areas, an agreement for surface protection with a reservation of specific drill and tunnel sites and easements for access thereto in other areas, and no protection in regions of known coal and other mineral deposits. A case-by-case approach is used, and the most accurate generality that can be applied is that each individual application for relief will have to be advanced with the company on its own merits. Considerable delay may ensue if the geology of the area in question is not already well known to the company.

The purchase of minerals from other private owners may prove quite costly. The writer is aware of a case in which the owner of one-half of the coal underlying a prospective subdivision sold his interest to the developer for $500.00, but the owner of the other one-half interest held out for $30,000.00, causing several

[103]Where the developer or title company continues to hold the lease in its own name after sale of a residential lot, production under the lease would certainly cause some concern as to who is the true owner of the lease. Since the lot owner is the one sought to be protected by the acquisition of the lease, it would seem logical that the title company or developer holds title to the lease solely for the lot owner's benefit, as upon a resulting trust.

years' delay. Counsel for some land developers have been able to obtain relatively inexpensive mineral leases for the term of the primary financing or, alternatively, surface protection agreements with reserved drill sites.

It is also possible, at least in Colorado, to acquire long forgotten mineral interests created by an ancient deed and never assessed for taxes. Frequently such interests are fractional interests whose owners are unknown or cannot be located. At the request of the surface owner the county assessor will assess such severed minerals. If the taxes go unpaid, which is usually the case, the official policy of most county treasurers, now recognized by statute, is to grant the surface owner a right of first refusal to acquire the minerals at the tax sale.[104] From then on the process is like any other tax sale and in 3 years the surface owner becomes the mineral owner, too, by virtue of a treasurer's deed. Should the mineral owner appear and pay the taxes or redeem, the surface owner at least has a chance to negotiate an outright purchase of the subject minerals.

F. *Title Insurance as Protection*

Changing attitudes toward title insurance protection are now apparent in Colorado. Competition for the title insurance dollar has increased to such a point that one hesitates to speculate as to what can or cannot be done, or is being done, with regard to outstanding mineral interests. It is safe to predict that within the next few years far more title protection will be written in this area than is presently the case.

Whether or not title insurance protection against severed minerals is obtainable may depend upon the type of mineral interest (federal, state, or private) that poses a threat to the surface. It will also depend upon the kind of protection (owner's or mortgagee's) requested. These various classifications will be considered separately.

In general it appears that if the property is located within a municipality, and particularly if the zoning classification prohibits mining, coverage will be easier to obtain. Similarly, title insurance protection against mining disturbances in an unincorporated but "nearby" subdivision is more apt to be written than in the "uncharted" outback. Some companies refuse to grant such

[104]COLO. REV. STAT. ANN. § 137-11-50 (II COLO. INFO. LEG. SERV. FOR 1973, at 760).

insurance to any mountain subdivision. Others are not so discriminating.

1. Federal Minerals

Nearly all companies will grant surface protection against the incursions of the "proprietor of a vein or lode" under the Lode Mining Law of 1872, provided that the property is not situated in a region of known lode mining activity (*e.g.*, Aspen or Leadville).

However, with respect to the specific reservation of federal minerals, no consensus is available. Coverage has been written—that much is certain—but usually upon "special" conditions. Protection would probably be made contingent upon the owner taking timely action to require a bond from the miner (pursuant to Colorado statute or the various federal acts), and the insurance coverage would apply only to those damages in excess of the amount of the bond. One might speculate as to whether the "home office" is aware of the likely limitations on the bond to "agricultural crops and agricultural improvements" and "the value of the land for grazing."[105]

2. Colorado Minerals

Turning again to the situation in which state minerals are involved, most of the problems appear to be under control because of the state's policy of granting an "all minerals" lease. The title company will condition protection upon a state mineral lease being obtained. Though the lease expires in 50 years and the title coverage may continue, the title company is willing to assume the risk that the area will be sufficiently urbanized by that time to discourage mining activity. On the other hand, the chance of mining activity in 50 years may be far greater than at present, as we become more desperate for minerals and go to greater efforts with advanced technology to extract them.

3. Private Minerals

Title insurance has not been noticeably successful in affording protection against privately owned and severed minerals. Some title companies will grant absolute protection to one lot in a subdivision (but not the entire subdivision) whenever the mineral owner is Union Pacific. Examples of across-the-board coverage exist, but again they seem to be the result of "special facts."

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[105] *See* text accompanying notes 77 and 82 *supra*.

Generally no title insurance protection is available in the case of other private minerals, even with a favorable geologist's report, unless a satisfactory surface agreement or lease from the mineral owners can be obtained.

4. Owner's versus Mortgagee's Coverage

Most title insurance company officers believe that adequate protection to the *owner* is contingent upon future legislation, particularly federal. For the *mortgagee*, however, protection in certain situations is currently available from some title companies. Most of the affirmative examples previously cited relate to mortgagee's and *not* owner's policies. The risks are obviously less with mortgage title insurance. A definite term of years is involved and the amount of insurance in force is decreasing at all times as the debt is amortized and paid. Of course the insurors are faced with the possibility that the mortgagee may foreclose and the former mortgagee policy thereupon by its own terms may ripen into an owner's policy. Although chance is part of the insurance game plan, it must be noted that those older insurance companies that have already been scarred by subsidence cases in our eastern states are less inclined to write this form of insurance in the Rocky Mountain region than are the newcomers.

For the owner, as contrasted to the mortgagee, there appears to be very little title insurance protection currently available, although with Colorado-owned minerals, protection limited to the term of the state mineral lease can be procured. In addition to the differences already discussed, the reason for the absence of owner's coverage appears to be twofold. First, most owners are not cognizant of the problem and do not demand it nor have the influence to obtain it, as do the institutional mortgage lenders. Secondly, insurance companies cannot calculate the risk as they have no casualty experience to rely upon. In time, however, the pressure of competition may cause owner's as well as mortgagee's title insurance to be written.

The policy provisions that have been observed to date (almost exclusively in mortgage policies) are carefully composed by the title company's legal staff. Following a recitation of the particular mineral reservation, they read something like this:

> The company hereby insures the above-named mortgagee against loss which the said insured shall sustain by reason of damage to improvements resulting from the exercise of any right to use the surface of the land for the extraction or development of said minerals.

It should be observed that this language does not cover damages that arise from (1) loss of aesthetic value, (2) subsidence, (3) diminution in value of the property by reason of mining, either to the area mined, or an adjacent area affected thereby, or (4) loss of the actual value of the surface (as opposed to damage to improvements situated on the surface).

From what we have already seen of protection currently afforded under federal and state statutes, zoning laws, and other factors discussed above, with one exception it does not appear that the risk encompassed in protective title policy provisions is beyond the pale of normal insurance liabilities, provided its use is also coupled with some intelligent consideration of the geological features of the area, its known mining activity at the present time, and historical mining activity. If we conclude that title insurance ought to be the more or less universal means of "ultimate" risk sharing, then our attention must be directed to that one exception—the vast expanse of federal mineral acreage. Owned by the "sovereign of sovereigns," federal minerals reserved under the various homestead patents defy zoning prohibitions upon their development and promise only token damages under outdated laws that envisage no more than rural agricultural usage and improvement.

CONCLUSION

Despite the increasing pressures of land use legislation, environmental protection laws, and the legitimate concern of conservationists, thousands of acres of western lands will continue to be wholly or partially urbanized in the immediate future. Much of this development will occur on lands where the mineral estate has been severed and is currently owned by the United States.[105] The situation pleads for legislation that, in addition to affirming the primacy of local control through zoning and accomplishing desirable restrictions on development in the public interest, adopts a federal program which will achieve these three objectives:

> (1) continue the public ownership of all minerals for present and future revenues from mineral production where commercially valuable deposits occur, and for interim revenues in the form of reasonable rents for

[106]According to the Public Land Law Review Commission, the federal government owns the reserved minerals under more than 62 million acres of lands wherein the surface has been patented. PUBLIC LAND LAW REVIEW COMM'N, *supra* note 64, at 137.

surface protection against mineral development in those areas adaptable to urbanization where valuable deposits are now unknown or nonexistent;

(2) protect the average landowner from the economic ravages that could ensue from legitimate mineral exploitation, without hindrance to the development of those vitally needed minerals, both of the energy producing hydrocarbon type and those that are essential for industry, space exploration, construction, and other essential uses; and

(3) offer a workable format for making the necessary administrative decisions which, because of the requirements of lenders, developers, and prospective owners, require an application-response time schedule measured in terms of days and not years.[107]

It is submitted that a mineral leasing approach patterned after the State of Colorado's program is an appropriate and practical solution which should be satisfactory to all competing groups. Furthermore it would be adaptable to title insurance protection, the *sine qua non* of mortgage investment.

An appropriate amendment to legislation currently pending before Congress could be made, the program to be administered by the Department of the Interior through the Bureau of Land Management for the benefit of the state and federal governments alike, with an attendant curtailment of those private interest bills which are not available to all citizens.

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[107]The recommendations of the Public Land Law Review Commission were simply to (1) sell the reserved minerals to the surface owner if it is determined that the land has no mineral value, (2) if required to permit surface development, sell the minerals even if valuable—at appraised market value, and (3) grant the Secretary of the Interior authority to prohibit all prospecting or mining activity. *Id.* at 137-38. It is submitted that the first two proposals are unworkable because of the imprecise nature of mineral assessment and appraisal, the costs and delays occasioned thereby, and the political trend away from a *final* disposal of federal real estate.