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Of Mountains and Mice

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OF MOUNTAINS AND MICE

*Robert W. Swenson**

A favorite teacher of mine once criticized the Administrative Procedure Act of 1946 by quoting a line from Horace: the mountains labor and a funny mouse is born.¹ No doubt there are some who will feel that this applies as well to the final *Report* of the United States Public Land Law Review Commission.² This is unfair, for, if judged on the basis of past public land reports of the government,³ it is indeed a monumental accomplishment. All will agree that it contains some very interesting and far-reaching recommendations. It is a thoughtfully put together document. The Commission has not, however, undertaken to rewrite the public land laws—if indeed that ever was its purpose⁴—and many of us are somewhat cynical about the prospects of Congress coming up with anything more than a piecemeal revision of the existing mess of federal laws. The chairman himself was not very optimistic when he was reported to have stated that he would be

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1. S. Riesenfeld, Book Review, 32 MINN. L. REV. 424 (1948).
2. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 121-138 (1970). [Hereinafter cited as REPORT].
3. Early reports on the public lands included the REPORT OF THE PUBLIC LANDS COMMISSION, EXEC. DOC. NO. 46, 46th Cong., 2d Sess. (1880); S. DOC. NO. 188, 58th Cong., 2d Sess. (1904); S. DOC. NO. 154, 58th Cong., 3d Sess. (1905); and S. DOC. NO. 676, 60th Cong., 2d Sess. (1909). Later reports included the TASK FORCE REPORT ON NATURAL RESOURCES (APP., L) (Prepared for the Commission on Organization of the Executive Branch of the Government, (1949) and RESOURCES FOR FREEDOM (A Report to the President by the President's Materials Policy Commission) vol. 1 (1952).
4. The enabling act creating the Commission merely provides that the Commission shall "recommend such modifications in existing laws, regulations, policies, and practices as will, in the judgment of the Commission, best serve to carry out the policy" announced in the first section of the act, viz., that the public lands be retained, managed or disposed of "in a manner to provide the maximum benefit for the general public." 43 U.S.C.A. §§ 1391, 1394 (Supp. 1970).

satisfied if most of the recommendations were adopted within six to ten years.⁵ Many of the specific recommendations are controversial enough so that they are likely to be subjected to considerable debate. Beyond that, the overall commercial tone of the document is not likely to appeal to environmentalists.⁶

My purpose, however, is not to comment on the *Report* as a whole but, instead, to focus your attention briefly on the chapter entitled "Mineral Resources." My only expertise in this area is that I was asked by the Commission to prepare a brief history of the mining laws which was eventually incorporated as Chapter XXIII into the larger work on the public domain prepared by the eminent historian, Paul W. Gates of Cornell University.⁷ Professor Gates and I did not in any sense collaborate in this work, and he, of course, assumes no responsibility for my contribution. My adviser was Mr. Elmer F. Bennett who was then Assistant to the Director of the Commission and also General Counsel. Mr. Bennett reviewed my manuscript with care, and he and his associates corrected a number of things which writers prefer to call typographical errors. I hasten to add that at no time did he attempt in any way to influence the opinions expressed in my essay. I appreciated very much his neutral position. Since the staff never purported to influence my conclusions, there was no reason to assume that the Commission would adopt any of them either. The history of the mining laws was supplemented by a monograph prepared by the law firm of Twitty, Sievwright & Mills of Phoenix, Arizona.⁸ The Twitty report is for the most part a primer on substantive mining law with a somewhat repetitious view of its history. It is unfortunate, I believe, that this report did not attempt to encompass an em-

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5. The Hon. Wayne N. Aspinall, Chairman of the Commission, is reported to have said that he will not sponsor any bills to implement the report for at least six months, which would be after the November elections. He is also said to have added, "If most of these recommendations were enacted in the next six to ten years, I'd feel pretty doggoned good about the report." *The Salt Lake City Desert News*, June 23, 1970, § 1, at LA, col. 4. See also *New York Times*, June 24, 1970, § 1, p. 22, col. 1.
 6. *96 Time*, July 6, 1970, at 54. See also *The Wall Street Journal*, June 24, 1970, p. 2, col. 3.
 7. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968).
 8. TWITTY, SIEWWRIGHT & MILLS, *LEGAL STUDY OF THE NONFUEL MINERAL RESOURCES* vols. 1-vi (PLLRC Study Report, 1970).

pirical study of the actual operation of the mining laws. Such a study (which, as far as I know, was not undertaken) might have provided a basis for the difficult policy decisions which the Commission eventually had to wrestle with.

I would like, first, to recount briefly some of the highlights in my chapter on the mining laws. This will be followed by an appraisal of the recommendations of the Commission relating to mining.

Although nothing particularly startling was unearthed in my study, I think the material does demonstrate that some of the old myths about mining history (often solemnly announced in the older texts) must be discarded. In the first place, the failure to adopt a leasing system for the so-called solid minerals was often justified on the basis of the experience in the leasing of the lead mines in Missouri and the Upper Mississippi River (Illinois and Wisconsin) during the period 1807 to 1846. It is correct that these early experiments were disastrous, but the reason for the failure was not so much that the cost of administering the system exceeded the revenue to the government⁹ as the fact that the public lead mines were incompetently administered by the government itself, especially after 1829. Also, within a period of six years after 1834, about three-fourths of the public mineral lands in the western half of the Wisconsin Territory illegally passed into private ownership, creating a most unfortunate land ownership pattern. The demise of the leasing system was also accelerated by prolonged litigation over the constitutionality of the various federal acts. The details of this experiment and the real reasons for its failure are well documented by a contemporary historian, James E. Wright.¹⁰

The federal government's reaction to the collapse of the leasing system was most unpredictable. Within a few years after 1846, copper lands in Michigan and Wisconsin were authorized to be sold outright as "agricultural" land despite

9. President Polk made this contention in his first annual message to Congress in 1845. See 4 MESSAGES AND PAPERS OF THE PRESIDENTS 410 (Richardson ed. 1897).

10. WRIGHT, THE GALENA LAND DISTRICT: FEDERAL POLICY AND PRACTICE 1824-1847 (1966).

their *known* mineral value. It is impossible to estimate the value of the mineral land which passed into private ownership during this period. This was followed years later by the scandals in connection with the Minnesota iron ore mines, in which the general public land laws were perverted to allow private acquisition of land of immense value for a nominal price. This profligate policy can perhaps only be explained by the prevailing attitude that land was an unlimited asset to be disposed of as rapidly as possible in the interest of quick settlement in order that all might prosper.

The mining law in the far West developed, of course, after the discovery of gold in California in 1848. Thus began a period in the history of the public domain which is unparalleled in its romantic appeal. The mining camp, a classic example of frontier government, developed customary rules for mining on the public domain. Despite the fact that each miner was technically a trespasser searching for his own private Eldorado, Congress failed to adopt any legislation dealing with the mining problem for over 16 years. In my essay, I have discussed in detail the various proposals put forth during this period by representatives from different parts of the nation. The Western bloc, led primarily by Senator William Stewart of Nevada, championed free exploration and mining on the public domain. His principal opponent was Rep. George W. Julian of Indiana who wanted to apply the philosophy of the homestead and preemption laws to the mineral lands. Stewart prevailed in 1866 when he was able to circumvent Julian's House committee on public lands by inserting the mining bill into a bill dealing with rights of way over public lands which had initially been referred through error to the mining committee. He was thus able to obtain a vote on the measure without a referral to Julian's committee. Despite the political shenanigans, no one in the house or the Senate was actually misled (as has been suggested on occasions) by the title of the bill, and the mining law was fully debated on its merits. Julian always maintained that it was a "clumsy and next to incomprehensible bill."¹¹ Clearly the act was badly drafted so far as the detailed requirements of lode locations were concerned.

11. JULIAN, POLITICAL RECOLLECTIONS 286-92 (1884).

But its main policy determination rang loud and clear: free mining on the public domain with a right to obtain a patent from the federal government.

There is good evidence that the placer law of 1870 was to a great extent intended to benefit the California miners whose worked-out placer claims were now found to be more valuable for agricultural purposes than for mining.¹² In 1872, the two acts were reenacted with a number of changes relating to the details of placer and lode locations. The policy of free mining was continued, and this has been the cornerstone of American mining law to the present time.

One departure from the location law philosophy involved the coal fields which, after 1864, were exposed to sale under a series of special acts.¹³ The only reasonable conclusion for distinguishing coal from the metalliferous minerals was the dubious feeling that since coal deposits were more readily discoverable, there existed here a greater potential for revenue. It was clear that President Theodore Roosevelt favored a leasing system for the coal lands as early as 1906. It is fair to conclude that it has by no means been established whether his program of conservation was motivated primarily by his all-out drive against monopoly or was actually a sincere desire to obtain the most effective utilization of this resource, considering the needs of the future. Whatever may be the speculation on this point, when Congress failed to revise the coal laws, the President in a dramatic gesture in 1906 withdrew from entry approximately 66 million acres of known coal land. In 1907, the President advocated a system of agricultural entries on coal lands provided the resources were reserved to the United States. Some legislation of this type was passed. But, the principal response to the Roosevelt withdrawals, which later included vast forest lands, was the vitriolic reaction of a Congress which felt that the power lay with Congress, not the President.

12. CONG. GLOBE, 41st Cong., 2d Sess. 5043 (1869).

13. Act of July 1, 1864, 13 Stat. 343; Act of March 3, 1865, 13 Stat. 529; Act of March 3, 1873, 17 Stat. 607. The latter statute was eventually superseded by the Mineral Leasing Act of 1920. 30 U.S.C. § 181 (1964).

As far as oil was concerned, after a period of uncertainty, Congress finally and foolishly decided in 1897 that oil lands were locatable under the placer law. The severe acreage limitations and the uncertainty of the application of the discovery requirement made the placer law simply unworkable in this context. Fearing that all the oil land in the West would soon pass into private ownership, President Taft in 1909 withdrew over 3 million acres of oil land from the location law. Although the Pickett Act of the following year authorized such withdrawals by the President,¹⁴ it was not until 1915 that the act was sustained by the Supreme Court in a decision which must be without parallel in the annals of American constitutional law.¹⁵ From 1910 to 1920, substantially all of the unappropriated public domain was withdrawn from nonmetalliferous location under the mining laws. There seems to be no question but that public sentiment favored leasing of the oil lands. Even the most ardent foes of the Roosevelt conservation program had now changed their minds. The question that remains is: Why did Congress delay so long in the enactment of the leasing law of 1920? The answer seems clear enough from everything I have read. The principal hang-up was the problem of what should be done about oil companies which were caught at the time of the 1909 Taft withdrawal in various stages of prospecting—activities which ranged anywhere from “paper locations” to actual drilling, short of a discovery. The so-called relief legislation question was the principal factor in the failure of Congress to adopt a leasing system for ten years.

When leasing for oil and gas was finally adopted in 1920, this represented the first major change in the public mining laws in 50 years. That the location laws were totally unsuitable to oil and gas mining seemed apparent to everyone but Congress during the political controversy over leasing before 1920.¹⁶

The last chapter in the history of mining records in kaleidoscopic fashion a stream of events which rival the old days

14. 43 U.S.C. § 141 (1964).

15. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

16. HISTORY OF PUBLIC LAND LAW DEVELOPMENT, *supra* note 7 at, 745.

of the Wild West. After the embarrassing Teapot Dome episode, the government discovered that over-production, depletion, and wasteful practices in the oil industry caused serious problems. President Hoover, shortly after his inauguration, closed the oil lands to leasing. This was followed by a systematic program of cancelling outstanding permits which failed to comply with the provisions of the Leasing Act relating to commencement of drilling. After the public domain was reopened in 1932 to leasing, prospecting permits were issued subject to certain conservation restrictions. It was perhaps inevitable that the location and leasing systems would eventually collide although this was largely postponed to the 50's when the uranium boom hit the country. The conflict came about because the Mineral Leasing Act, which made certain nonmetalliferous minerals exclusively leasable, made no provision for disposing of other minerals which might be discovered in leased land. Nor was there any attempt to amend the mining laws so as to provide the mining patents must contain reservations of the various Leasing Act minerals. A very early departmental ruling precluded any entry under the mining laws where a prospective permit for oil and gas had been issued and still remained alive.¹⁷ Mining entries were also precluded on land classified as valuable for Leasing Act minerals, etc. Stop-gap legislation, proposed by the mining industry, provided for retrospective validation of many uranium locations. Later legislation sanctioned a system of multiple use of federal lands, gave the federal government the authority to use certain surface resources on unpatented mining claims, and removed certain "common varieties" from the location laws. In more recent years, the mining industry has had a succession of battles with the government over withdrawals, oil shale, and classification of public lands. The current concern of the nation over the effect of mining on man's land, air and water environment was effectively voiced by President Johnson as early as 1965.¹⁸ One of the most pressing problems of the mining industry today is the environmental pollution question.

17. Joseph E. McClory, 50 INTERIOR DEC. 623 (1924).

18. 111 CONG. REC. 2085 (1965).

Turning to the *Report* of the Commission, Chapter Seven, it will be noticed, opens with several paragraphs describing and affirming the mineral industry's contribution to the gross national product, the necessity of increased mineral production in order to maintain our standard of living and our national defense, and the salutary role of private enterprise in mining. This sounds very much like the old "produce-consume-pollute" syndrome. It seems to me that the *Report* does little more than pay scant lip service to the environmental problems which many of us think are of paramount importance. I say this because on pages 122-23, we hear, "Even though we are concerned about various impacts on the environment," these impacts can at best be only minimized and must often, in fact, yield to considerations such as the national importance of mineral production. Apparently the Commission itself is not convinced that the envisioned increased production and a decent environment can in fact effectively coexist. On page 127, the Commission suggests that where mineral activities cause a disturbance of public land, restoration and rehabilitation should be required only after a determination of economic feasibility. Moreover, decisions on environmental protection must be made by the land managing agency prior to the commencement of production. Not only does this place a heavy burden on the agency, but it injects the vague factor of "economic feasibility" which has caused so much trouble in connection with the enforcement of water quality standards.

What bothered me most about this chapter was the fact that the land agency which supervises the development of mineral resources is also charged with the responsibility of protecting that environment against the consequences of that development. "The two objectives often conflict, and it is almost invariably the organized exploiters who win, the unorganized public that loses."¹⁹ That President Nixon is in complete agreement with this criticism is clear from his message to Congress on July 9, 1970.²⁰ His proposed Reorganization Plan No. 3 of 1970 calls for the establishment of a separate agency of the federal government called the Environmental

19. N. Y. Times, July 12, 1970, 12E (editorial).

20. 116 CONG. REC. S 10877 (1970).

Protection Agency (EPA) which would have exclusive responsibility for administering the national pollution control program. Recognizing that the environment must be viewed as a single, interrelated system, the President suggested that the present delegation of responsibility for the control of air, water and land pollution to several different departments is simply unworkable. His reasons are straightforward:

In the first place, almost every part of government is concerned with the environment in some way, and affects it in some way. Yet each department also has its own primary mission—such as resource development, transportation, health, defense, urban growth or agriculture—which necessarily affects its own view of environmental questions.

In the second place, if the critical standard-setting functions were centralized within any one existing department, it would require that department constantly to make decisions affecting other departments—in which, whether fairly or unfairly, its own objectivity as an impartial arbiter could be called into question.²¹

If Congress does not veto the new reorganization plan within sixty days—and it seems unlikely that it will do so²²—there will be a number of very significant changes. For example, the Federal Water Quality Administration and the Water Pollution Control Advisory Board are some of the departments which will be transferred to the EPA from the Department of the Interior. The National Air Pollution Control Administration, the Bureau of Solid Waste Management, and the Air Quality Advisory Board in the Department of Health, Education and Welfare will be transferred to the EPA. It is also refreshing to note that the Atomic Energy Commission will lose its environmental radiation standard-setting authority, although apparently it would retain its right to set radiation discharge rules for all atomic installations, including industrial nuclear power plants.²³ It is interesting to note that the new reorganization plan was adopted over the vigorous

21. *Id.* at S 10878.

22. 76 *Newsweek*, July 20, 1970, 18.

23. *The Washington Post*, July 10, 1970 § A at 4, col. 3.

opposition of the Interior, Agriculture and HEW departments.²⁴ The Council on Environmental Quality, recently established by Congress, will continue to act as a top-level advisory group while EPA would be the operating or line organization.²⁵ The reorganization plan should be revised in the future so that any agency which may be set up to supervise the public lands will have no independent power to regulate environmental matters.

Reorganization Plan No. 4, submitted to Congress on the same day, calls for the establishment of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce to coordinate studies involving the beds of oceans and the superincumbent air space.²⁶

I confess to mixed feelings about the Commission's recommendations on the Mining Law of 1872. Returning to my opening remarks about mountains and mice, I think you do have here a very funny little mouse, indeed. And it appears certain that he has suffered some rather severe prenatal injuries. The Commission would retain the present separate leasing and location programs, but the location law would be modified in several significant respects. The most important of these include securing from the government an exclusive exploration permit which would give the miner some initial security in his investment. The permit would specify a reasonable rental, and expenditures for exploration and development would be credited against the rentals. When a commercially mineable deposit is discovered, the miner enters into a contract with the government requiring specified development work over a period of time. After production commences, he has a right to obtain a patent to the minerals only and also an option to buy or lease the surface by paying for the land at its market value. If he does not exercise his option to purchase the surface, his title to the minerals would automatically terminate within a reasonable time after cessation of production and would probably be characterized by property lawyers as something like a determinable fee. Under the location con-

24. N. Y. Times, July 10, 1970, § 1 at 14, col. 1.

25. 116 CONG. REC. S 10878-79 (1970).

26. *Id.* at S 10879.

tract, fair but modest royalties are payable to the government before as well as after a patent is issued.

I think the new system is needlessly cumbersome, and I believe the minority report which recommends a general leasing system for all minerals except those which are subject to outright sale under special federal statutes is obviously sound.²⁷ Perhaps I am missing something here, but I can find no reason why the mining industry feels that it cannot operate without a right to a patent to the surface and to the minerals. The argument seems to be that this is necessary to protect what is often an enormous investment, but this same security could be achieved under a leasing system as the minority people point out. It may be that the present leasing law will have to be modified in several respects, but this is a relatively simple matter. The provision for a patent is largely an illusion because royalties are payable whether or not a patent is issued. Of course, with a patent in fee, the miner could temporarily stop production with a view to resuming mining when it becomes more economical to do so. I am in complete agreement with the royalty recommendation. This is about one hundred years overdue.

If we must live with this revised location system—this funny mouse—I think the Commission makes a number of good suggestions relating to the acquisition of exploration permits and the development contract. For example, the elimination of the placer-lode distinction and extralateral rights is sound. Gearing locations to government surveys is sensible. Preemption of state legislation on the location and maintenance of valid mining claims should be welcomed by the industry. Here, however, I notice the *Report* would continue the effect of recording under state law. I personally doubt the wisdom of this. The recording of mining claims in state offices is a notorious mess. Of course, under the proposals, records will for the first time also exist in the federal land agency office. I have no objection to a procedure for clearing public lands of dormant mining claims. Drafted carefully, there should be no serious constitutional problems. In short, I think

27. *Supra* note 2 at 130-31.

the Commission should be congratulated for going much farther than I would have anticipated in recommending these specific changes in the Mining Law.