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## Mining Law at the Crossroads

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# LAND AND WATER LAW REVIEW

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## MINING LAW AT THE CROSSROADS\*

*Don H. Sherwood\*\**

### INTRODUCTION

THE Public Land Law Review Commission has recommended, in its Report submitted to Congress and to the President on June 20, 1970,<sup>1</sup> that the General Mining Law of 1872<sup>2</sup> should be modified<sup>3</sup> by the establishment of a system

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1. ONE THIRD OF THE NATION'S LAND (1970), hereinafter cited as "PLLRC Report". Italics are used in the Report to indicate "unnumbered recommendations." *Id.* at 9. Accordingly, such recommendations will be referred to as such, but the typeset emphasis will be omitted.
2. 30 U.S.C. §§ 21-54 (1964). These statutes, as amended, are commonly said to embody the General Mining Law of 1872 [Act of May 10, 1872, ch. 152, §§ 1-15, 17 Stat. 90] and earlier acts of Congress pertinent to mining on public lands belonging to the United States [*e.g.*, Act of February 27, 1865, ch. 64, § 9, 13 Stat. 440, *now* 30 U.S.C. § 53 (1964); Act of July 4, 1866, ch. 166, § 5, 14 Stat. 86, *now* 30 U.S.C. § 21 (1964); Act of July 26, 1866, ch. 262, § 1-6, 14 Stat. 251; Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217], *but see also* 30 U.S.C. §§ 161-162, 501-505, 521-531, 541-541i, 601-604, 611-615, 621-625, and 701-709 (1964). Analysis of the mining laws found in the statutes and the acts of Congress just mentioned will not be attempted here. Most of the author's views with respect to the law of mines and mining on the public domain can be found in the articles listed in the note above appended to his name.
3. PLLRC Report 124, Recommendation 47:  
Existing Federal systems for exploration, development, and production of mineral resources on the public lands should be modified.

“that incorporates the desirable features of both” the location-patent system and the leasing system established in 1920 for oil and gas and some other minerals.<sup>4</sup> Recognizing that a discretionary leasing system would destroy “the traditional right to self-initiation of a claim to a deposit of valuable minerals,” a majority of the members of the Commission concluded that “the public interest requires that individuals be encouraged—not merely permitted—to look for minerals on the public lands,”<sup>5</sup> and expressed the belief “that all public lands should be open without charge for nonexclusive exploration which does not require significant surface disturbance.”<sup>6</sup>

The concept that “valuable mineral deposits in lands belonging to the United States” should “be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase,”<sup>7</sup> can be traced through the Federal statutes to the Act of July 26, 1866,<sup>8</sup> and the traditional right of self-initiation of mining claims can be traced beyond that—at least back to 1848.<sup>9</sup> True, the right is limited to “citizens of the United States and those who have declared

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4. PLLRC Report 124-125. The term “location-patent systems” has been coined by the Commission for the appropriation system found in the General Mining Law of 1872. The term is apt, but should not be confused with the “permit-patent system” which the Commission recommends without expressly identifying as such. The leasing system referred to is the Act of February 25, 1920, as amended, 30 U.S.C.A. §§ 181-286 (1971 Supp.).
  5. PLLRC Report 125.
  6. *Id.* at 125-126 (unnumbered recommendation). The Commission does not define the word “significant.” *But see id.* at 127, where the Commission discusses rehabilitation of public land disturbed by mineral activities.
  7. 30 U.S.C. § 22 (1964), derived from the Act of May 10, 1872, ch. 152, § 1, 17 Stat. 90. As contemplated by 30 U.S.C. § 21 (1964), derived from the Act of July 4, 1866, ch. 166, § 5, 14 Stat. 86, as amended by the Act of February 25, 1920, ch. 85, § 1, 41 Stat. 437, the scope of the term “valuable mineral deposits” has been limited by subsequent legislation, particularly the leasing acts, 30 U.S.C.A. §§ 181-286 (1971 Supp.), and the act of July 23, 1955, Pub. L. No. 84-167, ch. 375, § 3, 69 Stat. 368, as amended by the Act of September 28, 1962, Pub. L. No. 87-713, § 1, 76 Stat. 652, now 30 U.S.C. § 611 (1964), as amended. *See* Sherwood & Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 LAND & WATER L. REV. 319, 320-322 (1968), reprinted in 6 ROCKY MTN. MINERAL L. REV. 43, 44-45 (1968). *Cf.* 43 U.S.C. §§ 141-142 (1964). Notwithstanding the United States Constitution, art. IV, § 3, cl. 2, the Executive Branch of the Government has been permitted to restrict exploration for and appropriation of many valuable mineral deposits. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). *See* 1 Twitty & Reeves, *Legal Study of the Nonfuel Mineral Resources*, 65-67 (Public Land Law Review Commission Contract Study, May, 1969). *See also* Colby, *The New Public Policy with Special Reference to Oil Lands*, 3 CALIF. L. REV. 269 (1915).
  8. Ch. 262, § 1, 14 Stat. 251: “[T]he mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation. . . .”
  9. Swenson, chapter on *Legal Aspects of Mineral Resources Exploitation*, in P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT*, 699, at 708-716 (1968).

their intention to become such,"<sup>10</sup> but, in practice, and by reason of the fact that possessory titles to mining claims can be initiated, maintained, and perfected by American corporations without regard to whether aliens own the stock thereof,<sup>11</sup> all who care to prospect on the public domain can do so, in the expectation that success will be rewarded.<sup>12</sup> The Commission would eliminate the restrictions on alien ownership of interests in claims to and leases of public land minerals,<sup>13</sup> and if the Congress should adopt this recommendation, another traditional influence upon American mineral history—foreign investment<sup>14</sup>—might be given renewed impetus.<sup>15</sup> In any case, as administered historically, the mining law has encouraged exploration for minerals on public lands and the development of publicly owned mineral deposits as well.<sup>16</sup> So the real issue posed in Chapter Seven of the Commission's Report, entitled "Mineral Resources," therefore, is whether—and to what

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10. 30 U.S.C. § 22 (1964). *Cf.* Act of July 26, 1866, ch. 262, § 1, 14 Stat. 251: "citizens of the United States, and those who have declared their intentions to become citizens . . ."
  11. *Doe v. Waterloo Mining Co.*, 70 F. 455 (9th Cir. 1895). *See* 1 AMERICAN LAW OF MINING § 5.5 (1960); *cf.* Sherwood & Greer, *supra* note 7, at 328-330.
  12. The Federal leasing law is more restrictive. 30 U.S.C. § 181 (1964): "citizens of the United States, or . . . associations of such citizens, or . . . any corporation organized under the laws of the United States . . . Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any [Federal] lease . . ."
  13. PLLRC Report 136 (unnumbered recommendation emphasized):  
There are restrictive provisions in public land laws relating to direct and indirect ownership by aliens of interests in public land minerals. In some instances these restrictions apply to minute fractional interests of no significance. *In view of the substantial overseas commercial and investment interests of United States corporations and individuals, we believe existing restrictions on alien ownership should be removed except when required by explicit foreign policy considerations of general applicability to transactions of aliens.* The Commission perceives no reason to single out public land transactions as warranting unusual restrictions on aliens.
  14. RICKARD, HISTORY OF AMERICAN MINING (1st ed. 1932) is replete with examples.
  15. Of course, tax laws, treaties, import-export restrictions, and the like, have a greater net effect on foreign investment. Compare FLAWN, MINERAL RESOURCES (1966), and PARK, AFFLUENCE IN JEOPARDY (1968), with Cheney, *Mineral Resources in National and International Affairs*, 19 MINING ENGINEERING 47 (Dec. 1967), and Raymond, *Decline and Fall of Economic Development*, 171 ENGINEERING & MINING J. 89 (Aug. 1970).
  16. As its authors intended. The title of the Act of May 10, 1872, ch. 152, 17 Stat. 90, reads: "An act to promote the development of the mining resources of the United States." All seem to agree that the Act "served an earlier period." PLLRC Report 130. Compare Barry, *Discovery Under the Mining Laws*, 8 ARIZ. L. REV. 84, at 84 (1966).

extent—exploration and development should be encouraged in the future.

If “an overriding national policy that encourages and supports the discovery and development of domestic sources” of supplies of fuel and nonfuel minerals<sup>17</sup> is not in the public interest, however defined,<sup>18</sup> as some suggest, we should expect to sacrifice either our standard of living or our national security or both.<sup>19</sup> But if “it is in the public interest to acknowledge and recognize the importance of mineral exploration and development in public land legislation,”<sup>20</sup> then, as the Commission concluded, “mineral exploration and development should have a preference over some or all other uses on much of our public lands.”<sup>21</sup> It is, however, possible to deny that mineral exploration and the development of mineral deposits are important, even to America,<sup>22</sup> and it is likewise possible to insist that individual initiative can safely be discouraged on public mineral lands.<sup>23</sup>

The fact that the Commission split, at least on the last point, should therefore come as no surprise, and the Commission no doubt expected to be criticized for not recommending outright repeal of the General Mining Law. Four dissenting members of the Commission recommended replacement of the existing system with a discretionary leasing system.<sup>24</sup> While a leasing system for hardrock minerals is not, perhaps, “incapable of providing sufficient incentive for the mineral development of our public lands,”<sup>25</sup> such a system certainly

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17. PLLRC Report 121.

18. *Id.* at 6

19. See, e.g., Singer, *Human Energy Production as a Process in the Biosphere*, 223 SCIENTIFIC AMERICAN 174 (Sept. 1970), and Brown, *Human Materials Production as a process in the Biosphere*, *id.* at 194, and compare the materials cited *supra* note 15.

20. PLLRC Report 122. Compare *id.* at 121 (unnumbered recommendation): “Public land mineral policy should encourage exploration, development, and production of minerals on the public lands.”

21. PLLRC Report 122 (unnumbered recommendation).

22. McCloskey, *Can Recreational Conservationists Provide for a Mining Industry*, 13 ROCKY MTN. MINERAL L. INST. 65, 66-67 (1967).

23. *Id.* at 84-85.

24. PLLRC Report 130, 132. The Four Commissioners are: Professor Robert Emmet Clark, of the University of Arizona College of Law; Maurice K. Goddard, Pennsylvania State Secretary of Forests and Waters; former Governor Philip H. Hoff, of Vermont; and Congressman Morris K. Udall, of Arizona. Cf. 373 PAY DIRT 9 (July 27, 1970).

25. *Id.* at 132.

could be so administered as to eliminate what incentive still remains to prospect for and develop minerals on public lands. Since discretionary leasing is in fact often advocated by those opposed to mining generally, or the development of public lands in particular,<sup>26</sup> apparently on the supposition that a leasing system would be administered by individuals similarly inclined, the proposal of the Commission minority deserves careful scrutiny. At the outset, however, the recommendations of the Commission majority<sup>27</sup> should be examined, in context with the basic philosophy expressed in the Report.

The Commission could possibly have avoided some of the abuse it has suffered since publication of its Report<sup>28</sup> if it had not recommended, as it did, that "the Federal Government generally should rely on the private sector for mineral exploration, development, and production by maintaining a continuing invitation to explore for and develop minerals on the public lands."<sup>29</sup> While speculation as to what level the economy of the Soviet Union might have reached by now if that country had adopted twenty-five years ago a law modeled on the General Mining Law of this country would have been more interesting, the Commission made only these observations:<sup>30</sup>

... We are satisfied that private enterprise has succeeded well in meeting our national mineral needs, and we see no reason to change this traditional pol-

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26. See, e.g., Stewart L. Udall, Letter to the Public Land Law Review Commission (January 15, 1969), and attached Memorandum entitled *The Mining Law—An Antique in Need of Repeal* (January, 1969); Stoddard, *Outline for Public Land Policy*, 34 THE LIVING WILDERNESS 30 (Summer 1970); Merriam, "Idaho White Clouds: Wilderness in Trouble," 34 THE LIVING WILDERNESS 33 (Spring 1970); cf. the materials cited in Sherwood & Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 LAND & WATER L. REV. 1, 3, at n. 11 (1968).
27. See also the Commission's Recommendations found in PLLRC Report 1-7.
28. See, e.g., Peterson, *Moving in for a Land Grab*, 33 SPORTS ILLUSTRATED 22 (July 13, 1970); Stewart L. Udall, *Report Falls Short*, Tucson Arizona Daily Star 10 (July 12, 1970); *Capitalism v. Conservation*, 96 TIME 54 (July 6, 1970); cf. Gladwin Hill, *Revised Policy for U. S. Lands Asked in Study*, 119 The New York Times 1 (June 24, 1970).
29. PLLRC Report 122 (unnumbered recommendation).
30. PLLRC Report 122. Cf. FLAWN, *supra* note 15, at 180. The Commission made the quoted comments in part, at least, with the following in mind, PLLRC Report 122:

Existing Federal programs to develop nationwide geological information should be continued and strengthened. These Federal programs should serve to identify general areas favorable to mineral occurrence with detailed exploration and development left to private enterprise.

icy. . . . The efforts of private enterprise will be effective only if Federal policy, law, and administrative practices provide a continuing invitation to explore and develop minerals on public lands.

All of the remainder of Chapter Seven of the Report seems consistent with this basic philosophy.

THE COMMISSION'S RECOMMENDATIONS  
WITH RESPECT TO HARDROCK MINING ON  
PUBLIC LANDS

The Commission majority describes the present General Mining Law as follows:<sup>31</sup>

Under the General Mining Law locators are able to initiate rights to public land mineral deposits merely by discovery and without prior administrative approval if the lands have not been closed to mineral location by withdrawal, reservation, or segregation. Where the deposits are valuable, the locator may acquire legal title to the land within his claim or claims through issuance of a Federal deed known as a "patent" upon payment of a nominal sum. Even without a patent a locator may produce minerals without any payment in the form of a royalty or otherwise. This system generally applies to the metallic or hardrock minerals.

Rejecting, however, suggestions that the existing system should be replaced by a leasing system, the Commission concluded that the public lands should remain free and open to *nonexclusive* exploration.<sup>32</sup> But from that point on, the Com-

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31. *Id.* at 124. Responding to allegations such as those found in the Report of the United States Department of the Interior to the Public Land Law Review Commission, *Public Land Management: Identification of Problems—Analysis of Causes* 41 (March 29, 1968), and at pages 14-16 of the Memorandum cited in note 26 *supra*, that "the General Mining Law has been abused," PLLRC *Report* 124, the Commission described the following as "general deficiencies" in the present system:

Individuals whose primary interest is not in mineral development and production have attempted, under the guise of that law, to obtain use of public lands for various other purposes. The 1872 law offers no means by which the Government can effectively control environmental impacts. Other deficiencies include the fact that claims long since dormant remain as clouds-on-title, and land managers do not know where claims are located.

32. *Supra* at notes 5-6.

mission suggests revisions which will, if enacted by Congress, subtly but nonetheless drastically alter traditional mining law concepts. The Commission would permit "nonexclusive exploration" without hindrance or charge, only so long as significant surface disturbance can be avoided. "[D]ifferent conditions should prevail if the prospector desires an exclusive right, or if heavy equipment is to be used that will result in significant disturbances of the surface."<sup>33</sup> Here, in a sentence, the Commission makes it clear that the miner's freedom to prospect for and develop a mineral deposit should be restricted. What follows is, in essence, a permit system,<sup>34</sup> which, to the extent Congress restricts the exercise of administrative discretion, *might* work.<sup>35</sup> Let us then examine the significant revisions the Commission would make in the General Mining Law.

### 1. Development of Reserved Mineral Interests

Pointing out that "there are over 62 million acres of land, the surface of which is in non-Federal ownership, in which the Federal Government holds reserved mineral interests,"<sup>36</sup> the Commission first recommends "that, upon petition of the surface owner, mineral interests heretofore reserved should be sold to the surface owner at appraised market value if there is a determination that the land is not valuable for minerals,"<sup>37</sup> and then concludes "that upon a clear showing of need to unite the surface and subsurface titles in order to permit development of the surface, surface owners should be allowed to acquire valuable mineral interests at their appraised market

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33. PLLRC Report 126.

34. Although the Commission calls it a "location-patent system." *Id.* at 130. *Cf.* note 82 *infra*.

35. *See id.*, ch. 16, Recommendations 108-110, where the Commission suggests restrictions intended to solve problems created by uncontrolled and perhaps uncontrollable exercise of administrative discretion. This problem area is directly involved in most disputes between miners and their Government, as detailed in an excellent comment by Clayton J. Parr, *Government Initiated Contests Against Mining Claims—A Continuing Conflict*, 1968 UTAH L. REV. 102, reprinted in 6 ROCKY MTN. MINERAL L. REV. 1 (1968), but it is impossible to consider here all of the afflictions the mining law has suffered in recent years. The Commission's recommendations concerning administrative procedures are, however, discussed elsewhere in this volume.

36. PLLRC Report 137.

37. *Id.* (unnumbered recommendation). "Administrative cost to the Government" would fix the minimum charge for the conveyance.



value."<sup>38</sup> If the Secretary of the Interior's past practice with respect to reserved mineral interests is any guide,<sup>39</sup> there would be few dispositions under such legislation, unless made a matter of right, even if Congress should enact guidelines for both mineral activity and compensation to surface owners under Interior Department regulations.<sup>40</sup>

Adoption of a uniform policy with respect to reserved mineral interests would be a welcome change from the present situation,<sup>41</sup> which is both confused and confusing,<sup>42</sup> and clearly, known valuable mineral deposits should be reserved from future disposals of public lands for nonmineral purposes, as the Commission recommends.<sup>43</sup> But since it is suggested that development<sup>44</sup> of such *known* deposits should be discretionary in the Federal Government rather than in the surface owner,<sup>45</sup> the current situation will be but little improved, if at all, unless the Commission's subsidiary disposal recommendations above quoted<sup>46</sup> are enacted also and construed strictly in favor of surface owners, rather than in favor of Government retention of title.

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38. *Id.*

39. See American Mining Congress, *The Mining Industry and the Public Lands* 27-28 (January 11, 1968), for an excellent discussion of the patent mineral reservation problem generated largely by the refusal of the Secretary of the Interior to issue regulations permitting exploration for and development of minerals on lands patented under laws such as the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. §§ 682a-682b (1964). See 1 Twitty & Reeves, *supra* note 7, at 225; *cf. id.* at 220.

40. PLLRC Report 138 (unnumbered recommendation). The potential for later scandal, even where there is no fraud or collusion, would be enough to dissuade most administrators from exercising discretion in favor of disposal in such cases.

41. *Id.* at 136, Recommendation 55. The Commission, however, concludes for some reason not readily apparent that since the consent of a surface owner is not required when a prospector seeks reserved minerals under a reserved interest, such as that found in a stock raising homestead patent issued under 43 U.S.C. § 299 (1964), "present law is totally inadequate to provide proper consideration of the legitimate interests of surface owners." PLLRC Report 138. To the contrary, see Ary, *Problems of Access to Public Domain, State and Fee Lands 'From Shotguns to the Courthouse,'* 15 ROCKY MTN. MINERAL L. INST. 481 (1969).

42. See 1 Twitty & Reeves, *supra* note 7, at 214-231. *Cf.* PLLRC Report 137.

43. PLLRC Report 136, Recommendation 55. "Reserving valuable mineral interests has the obvious merit of providing potential revenues and permitting consolidation of mineral interests for potential development. Also, it forestalls possible windfalls to surface owners." *Id.* at 137.

44. And exploration. PLLRC Report 136, Recommendation 55. See *infra* note 45.

45. PLLRC Report 136, Recommendation 55. There is no apparent reason that exploration should not be discretionary with the Federal Government, under uniform policies, but if exploration is permitted, development should not be discretionary with the Government, at least if local zoning would permit such development. Compare *id.* at 138.

46. *Supra* at notes 37-38.

Here the Commission missed an opportunity to suggest remedy of one of the great faults of American public land mineral law: the impossibly complex and unnecessarily restrictive reserved mineral provisions of numerous statutes. Simple legislation relinquishing minerals and mineral rights to owners of existing patented lands held subject to Federal mineral reservations, unless the lands are mineral in character—in which case self-executing location and patenting laws would apply—could and should have been recommended. In this case, the timid approach<sup>47</sup> puts the administrator in a position where the only safe course—because of the possibility of subsequent discoveries—is to exercise discretion against disposal of mineral interests to those to whom they should obviously belong, the surface owners most concerned with “appropriate compensation for affected surface resources, values, and uses.”<sup>48</sup> Outright disposal, even subject to a modest royalty,<sup>49</sup> would be preferable to the recommended solution so vulnerable to the vagaries of administrative discretion.

## 2. Recording of Claims

The Commission has concluded that only the state laws requiring recordation of mining claims should survive enactment of Federal statutes fully prescribing uniform methods of location and maintenance requirements.<sup>50</sup> Noting that “in many cases, mining claim descriptions under existing law are totally inadequate to permit Federal agencies or other interested persons to find them on the ground,”<sup>51</sup> the Commission recommends “that locators be required to give written notice of their claims to the appropriate Federal land agency within

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47. The Commission “nonetheless concluded, after considering all factors, that the national interest requires a continued policy of reserving known valuable mineral interests,” even though it recognized “the pitfalls.” PLLRC Report 137.

48. *Id.* at 138 (unnumbered recommendation).

49. Recommended elsewhere by the Commission, *id.* at 128-129. Of course, to protect local zoning and the surface owner's executive right, implied obligations to develop would have to be negated.

50. PLLRC Report 129-130 (unnumbered recommendation).

51. *Id.* at 126 (unnumbered recommendation concluding that “claims should conform to public land subdivisions in all cases”). *But see* Colo. Rev. Stat. § 92-22-6(2) (1963), which provides for recording of maps of claims—in lieu of other discovery work—at the option of the locator. A mandatory requirement, derived from the permissive Colorado Statute, would have solved the problem.

a reasonable time after location."<sup>52</sup> Such proposals have been made by the Federal Government for years,<sup>53</sup> and while concepts of "sound land management" are said to justify recordation of claims with the Federal Government,<sup>54</sup> miners believe that such provisions are in fact sought to facilitate identification, location, and elimination of mining claims quickly, preferably by contest, rather than by condemnation, before the locator can establish the necessary discovery.<sup>55</sup>

The Commission does not favor "any change in the title consequences which flow from recordation under state law,"<sup>56</sup> but it does suggest that "mailing a copy of the documents filed with the county recorder" to the appropriate Federal agency could be required.<sup>57</sup> The mischief that this would cause has been described in detail elsewhere,<sup>58</sup> and the citizen's inability to rely on land office records<sup>59</sup> should explain the general antipathy to such a system of duplicate recordings. The system which the Commission proposes would be useful only to the land manager who happens to be opposed to prospecting and mining on public lands for one reason or another.

That harassment of individual prospectors could be the ultimate result of notice to the Government becomes clear elsewhere in the Commission's Report,<sup>60</sup> where the recommenda-

52. PLLRC Report 126 (unnumbered recommendation).

53. American Mining Congress, *The Mining Industry and the Public Lands*, 15 (January 11, 1968); United States Department of the Interior, *Public Land Management: Identification of Problems—Analysis of Causes* 42-43 (March 29, 1968).

54. PLLRC Report 126.

55. Industry experience under two laws, each of which provides for notice to the Interior Department of the location of mining claims, has not been good. Compare 30 U.S.C. § 613 (1964) (Section 5 of the Act of July 23, 1955, ch. 375, 69 Stat. 369, commonly called Pub. Law 167), with 30 U.S.C. §§ 621(b) and 623 (1964) (part of what was called the *Mining Claims Rights Restoration Act* of Aug. 11, 1955). See, e.g., *Converse v. Udall*, 262 F. Supp. 583 (D. Ore. 1966), *aff'd*, 399 F.2d 616 (9th Cir. 1968), *cert. denied* 393 U.S. 1025 (1969); *Henault Mining Co. v. Tysk*, 271 F. Supp. 474 (D. Mont. 1967), *rev'd* 419 F.2d 766 (9th Cir. 1969), *cert. den.*, *Henault Mining Co. v. Zaidlich*, \_\_\_\_\_ U.S. \_\_\_\_\_, 90 S. Ct. 1869 (1970); *United States v. Bennewitz*, 72 I.D. 183 (1965); *Elephant Rock Extension and Elephant Rock No. 2 Placer Mining Claims*, GFS (Mining) BLM-1970-5 (Colo. 7922-7923 (Hearing Examiner's Decision), Jan. 21, 1970).

56. PLLRC Report 126.

57. *Id.* Cf. Recommendation 48, ¶ 1, PLLRC Report 126.

58. American Mining Congress, *The Mining Industry and the Public Lands* 15 (January 11, 1968).

59. See Edwards, *The Silk Purse and the Sow's Ear: Benefits and Limitations of the Project to Improve the Federal Land Records*, 12 ROCKY MTN. MINERAL L. INST. 243, 247-252 (1966).

60. PLLRC Report 127-128. Cf. Recommendation 48, ¶ 2, PLLRC Report 126.

tion is made that to protect surface values and to maintain environmental quality in the vicinity of mining claims, permits should be issued upon receipt of the mailed copy of the notice of location, but conditioned upon restrictions covering "all phases of mineral activity from exploration, through development and production, to reasonable postmining rehabilitation."<sup>61</sup> To prevent such harassment, and the obvious potential for real or fancied favoritism, the Commission emphasized that "an administrator should have no discretion to withhold a permit," and that administrative discretion should be exercised within the "strict limits of congressional guidelines"<sup>62</sup> and formal rules.<sup>63</sup> Implementation of the Commission's recommendations on rulemaking<sup>64</sup> would alleviate the problem, but even with congressional guidelines, "the authority to vary . . . restrictions to meet local conditions"<sup>65</sup> will only increase the administrator's difficulties in controversial cases. Ground rules should be set before the game begins; conflict, confusion and controversy will arise in direct proportion to the extent of the administrator's authority to vary restrictions, no matter what course he takes in a dispute over the needs created by local conditions.

### 3. Pre-discovery Protection and Exploration Rights

The prospector's license on the public lands is indeed precarious,<sup>66</sup> and the Commission has sought to alleviate this situation. No doubt the General Mining Law does leave the prospector exposed to appropriations by others until he has

61. *Id.* at 127.

62. *Id.* (unnumbered recommendation).

63. The Commission said, *id.* at 127:

. . . The conditions to be included in permits and other instruments later in the process, except as necessary to accommodate circumstances in a particular locality, should have been established through the formal rulemaking procedure we recommend in the chapter on Administrative Procedures.

64. *Id.* at 251-252.

65. *Id.* at 127 (unnumbered recommendation).

66. See, e.g., Fiske, *Pedis Possessio—Modern Use of an Old Concept*, 15 ROCKY MTN. MINERAL L. INST. 181 (1969), for an extensive discussion of the cases. See also Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337, 339-347 (1969), and compare Comment, *Judicial Approach to Updating the Mining Laws of 1872—Pedis Possessio*, 10 NATURAL RESOURCES J. 385 (1970).

perfected his own appropriation through the discovery of the required "valuable mineral deposit,"<sup>67</sup> but there are very few reported cases involving disputes between competing locators<sup>68</sup> compared with the hundreds of reported decisions in which, for one reason or another, Federal land managers have chosen to attack prospectors' titles on the ground that they have not yet completed their exploration work.<sup>69</sup> The tendency of the Government has clearly been to attack, in the words of *Castle v. Womble*,<sup>70</sup> "as soon as minerals are shown to exist, and at any time during exploration."<sup>71</sup> Herein was the crux of the matter—the "substantial litigation over the legal requirements for the discovery of valuable minerals"<sup>72</sup> can be traced directly to the Government which may be, as the Commission said, "poorly equipped to judge what is a prudent mining investment,"<sup>73</sup> but which has not hesitated to make such judgments, usually to the effect that a prudent man would not be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine.<sup>74</sup> So long as the quantum of evidence necessary to sustain a location was less than that required to obtain a mineral patent, the prospector had few problems with the Government. But once that distinction was discarded, in *United States v. Carlisle*,<sup>75</sup> the road was opened to administrative repeal of the General Mining Law, despite the efforts of Congress to pre-

67. 30 U.S.C. §§ 22, 23, and 35 (1964).

68. The cases are collected in the materials cited in note 66 *supra*.

69. The line of cases started, apparently, with the Departmental decision in *United States v. Altman*, 68 I.D. 235 (1961), which is quoted and discussed in 2 Twitty & Reeves, *supra* note 7, at 423-425, and can be traced through the volumes of the Gower Federal Service (Mining), published by the Rocky Mountain Mineral Law Foundation.

70. 19 L.D. 455, 457 (1894).

71. While the quotation is from the Department's own decision in *Castle v. Womble*, *id.*, the Department of the Interior has been declaring claims null and void for a decade on the ground that only enough mineral has been disclosed to warrant further exploration. See note 69 *supra*.

72. PLLRC Report 127. Cf. Comment, *Government Initiated Contests Against Mining Claims—A Continuing Conflict*, *supra* note 35, and Comment, *Marketability and the Mining Law: The Effect of United States v. Coleman*, 10 ARIZ. L. REV. 391, reprinted in 7 ROCKY MTN. MINERAL L. REV. 77 (1969).

73. PLLRC Report 128.

74. Compare *Castle v. Womble*, 19 L.D. 455 (1894), with almost any recent Interior Department decision.

75. 67 I.D. 417 (1960). As to the significance of the year 1960 in the history of American mining law, see Sherwood, *Prospecting for Locatable Minerals on Public Lands Classified for Retention for Multiple-Use Management*, 14 ROCKY MTN. MINERAL L. INST. 167, 173-176 (1968). See, generally, 2 Twitty & Reeves, *supra* note 7, at 407-408.

serve both the law and the distinction.<sup>76</sup> Now that prospectors as well as patent applicants must meet the test of "current marketability at a profit,"<sup>77</sup> some sort of title security must be made available against the Government in advance of such a discovery just as the courts have, over the years, made it available through the doctrine of "pedis possessio" against rival prospectors.<sup>78</sup>

So the Commission adopted an approach which would accord an exclusive right to explore "a claim of sufficient size to permit the use of advanced methods of exploration"<sup>79</sup> by permit. If one is to be protected only if he has a permit, the idea that "all public lands should be open without charge for nonexclusive exploration"<sup>80</sup> holds little promise for the prospector whether he might cause significant surface disturbance or not. Prospectors would then have to get a permit in advance of exploration or face the very "pedis possessio" problems which the Commission would like to avoid. Would a court protect the first to apply for a permit or the first to go upon the ground to conduct "nonexclusive" exploration?

The Colorado Supreme Court considered problems of this kind in *Dallas v. Fitzsimmons*,<sup>81</sup> where the dispute, between a mineral locator and a mineral lessee of the same state land, was won by the first to locate rather than by the first to apply for a lease from the state. Unless legislation is carefully drafted to protect the first to attempt appropriation in the field rather than in the land office, the right to explore in advance of obtaining a permit would be an illusory right unless the Department or the courts developed a pedis possessio rule similar to the one which has developed under present law. Otherwise, no prospector would dare go into the field without a permit, except in the most cursory, if not clandestine, way. But if the present "post notice, then record" system were con-

76. Compare 30 U.S.C. §§ 611-615 (1964), the Surface Resources Act of July 23, 1955, ch. 375, 69 Stat. 368, with the decision in *United States v. Ed Bergdahl*, 74 I.D. 245 (1967).

77. PLLRC Report 128.

78. See 2 Twitty & Reeves, *supra* note 7, at 348-363, and the materials cited in note 66 *supra*.

79. PLLRC Report 126, Recommendation 48, ¶¶ 1-2.

80. PLLRC Report 125-126 (unnumbered recommendation).

81. 137 Colo. 196, 323 P.2d 274 (1958).

tinued, as the Commission in fact seems to contemplate,<sup>82</sup> then “pedis possessio” disputes could be eliminated,<sup>83</sup> and “discovery” questions avoided during the exploratory period, in which case a great deal will have been accomplished to improve American mining law.

Assuming that the Commission intends exploration permits to be issued as of right to the first to “locate” in the field, subject to restrictions with which all can comply—whether large corporation or weekend prospector—the chief problems would involve the creation and enforcement of limitations designed to prevent monopolistic and speculative tendencies. So the Commission recommended that Congress “establish the maximum size of an individual exclusive exploration right and the aggregate acreage [which could be] held by one person,”<sup>84</sup> and “specify the period of time for which that exploration right is granted,”<sup>85</sup> concluding that “maximum sizes for claims and other holdings will avoid monopolistic tendencies in the operation of this system.”<sup>86</sup>

Except to the extent that “gentlemen’s agreements”<sup>87</sup> may occasionally exist in some areas for relatively short intervals of times, the General Mining Law itself has seldom, if ever, encouraged monopolies. To the contrary, it has discouraged monopolistic tendencies, largely because of the “pedis possessio” doctrine, the assessment-work requirement, and the limited size of individual mining claims, even though there has

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82. See PLLRC Report 126-127. Although the point is not entirely clear, the Commission does say that it contemplates no change “in the title consequences which flow from recordation under state law,” *id.* at 126, and that a permit would be issued “upon receipt of the required notice of location,” *id.* at 127 (unnumbered recommendation), from which one could conclude that location precedes the issuance of a permit. But what is to happen if A records his location before B, but delivers a copy of his recorded certificate to the land office and applies for a permit after B has made a similar filing and application for a permit to explore the same land? The race to the land office would be preceded by a race to the court house. Whether the latter would be preceded by a race to the field is perhaps intentionally left unanswered. Would state law apply here as well as to the recording procedure?
83. Although the problem of proof of priority would remain. Compare note 82 *supra* with Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337, 348 (1969) and Sherwood & Greer, “Mining Law in a Nuclear Age: The Wyoming Example,” *supra* note 7, at 338-342, 6 ROCKY MTN. MINERAL L. REV. at 62-66.
84. PLLRC Report 126 (unnumbered recommendation (a)).
85. *Id.* (unnumbered recommendation (b)).
86. PLLRC Report 126.
87. See 2 Twitty & Reeves, *supra* note 7, at 362.

been no limit on the number of claims an individual can maintain. By greatly increasing the size of individual claims,<sup>88</sup> monopolistic tendencies would unquestionably be created where none now exist; hence the Commission recommends "performance requirements" which would operate much as does the assessment work provision today during the exploration period.<sup>89</sup> The uncertainties now existing, therefore, which are—for the most part—of the Interior Department's own making, would be eliminated by formalizing what prospectors have heretofore done for themselves through the performance of assessment work on claims held in the absence of a discovery under *pedis possessio*. But now the obligation to perform such work could, perhaps, be avoided through payment of rentals.<sup>90</sup>

#### 4. Royalties and Patent Rights

Now that the situation with respect to the discovery test has been almost hopelessly confounded by the decision of the United States Supreme Court in the *Coleman* case,<sup>91</sup> the Commission has concluded:<sup>92</sup>

... that Federal land agencies are poorly equipped to judge what is a prudent mining investment,

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88. PLLRC Report 126, 131.

89. *Id.* at 126-127:

... [R]estrictions designed to assure maximum exploration activity should be imposed. Performance requirements could be some combination of time limits, rentals, or work similar to the present Mining Law assessment provision. . . .

90. *Id.* at 126 (unnumbered recommendation):

... To prevent speculation and assure diligent effort, an explorer should be required to pay rental, subject to offsetting credits for the actual performance work completed.

The last proviso has drawn fire from the Sierra Club. See Berry, *An Analysis: The Public Land Law Review Commission Report*, 55 SIERRA CLUB BULLETIN 18, 20 (Oct. 1970):

... We should reject the proposal to, in effect, subsidize mining exploration by allowing expenditures therefore [*sic*] to be credited against payments to the government. . . .

91. *United States v. Coleman*, 390 U.S. 599 (1968); see 2 Twitty & Reeves, *supra* note 7, at 437-450.

92. PLLRC Report 128. The Commission explained, *id.* at 127-128:

Under the existing Mining Law, there has been substantial litigation over the legal requirements for the discovery of valuable minerals. In view of recent judicial administrative rulings, a mineral explorer has little assurance that his rights to develop minerals will be secure even after he is satisfied that his discovery will support an economically feasible operation. If he must satisfy the legal test of current marketability at a profit, he is then faced with the uncertainties of the cyclical price patterns for minerals, particularly since he cannot control the timing for consideration of his application for patent. If prices are low, there is increased risk that his claim will be held invalid.



and this issue should be closed when the mineral explorer is prepared to commit himself by contract to expend substantial effort and funds in the development of a mineral property.

and recommended:<sup>93</sup>

When the claimholder is satisfied that he has discovered a commercially mineable deposit, he should obtain firm development and production rights by entering into a contract with the United States to satisfy specified work or investment requirements over a reasonable period of time.

Again, concepts remarkably like those utilized for generations under the assessment work provisions of the mining law appear to solve a vexing problem. In this case, however, the Commission would give the Department of the Interior what the United States Supreme Court twice<sup>94</sup> refused to concede to it—the power to control the development of mining claims on the public lands, presumably by enabling the Government to cancel a claim for failure to do the required work.<sup>95</sup> Depending, of course, upon the rules which Congress might enact to guide the administrators, this feature of the Commission's recommendations is not overly harsh, provided the claimant can successfully apply for a patent, because the Commission would permit the miner to obtain a patent.<sup>96</sup>

... We recognize that the patent system has provided security of title and has provided an incentive to search for concealed minerals on the public domain. To avoid windfalls and to prevent misuse of the min-

93. *Id.* at 126: Recommendation 48, ¶ 3.

94. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935). *Cf.* *Oil Shale Corp. v. Udall*, 261 F. Supp. 954 (D. Colo. 1966), *aff'd*, *Udall v. Oil Shale Corp.*, 406 F.2d 759 (10th Cir. 1969), *cert. granted*, *Hickel v. Oil Shale Corp.*, 396 U.S. 817 (1969).

95. The Commission does not mention cancellation or forfeiture as a remedy for breach of a development contract, but the threat of Government control and supervision is apparent, although "the review of development plans at this, as well as other stages, would be the responsibility of trained technical personnel of the United Geological Survey. That staff performs this function in connection with other minerals at the present time." PLLRC Report 128.

96. *Id.* The Commission points out that current patent fees do not "justify sale of fee title which may carry valuable surface rights," and it is obvious that \$2.50 or \$5.00 per acre is a nominal price for a fee title to surface and mineral both. So the Commission concludes, *id.* at 129 (unnumbered recommendation), that "mineral patent fees should be increased at least enough to cover administrative costs associated with the issuance of patents." *Cf. id.* at 126, Recommendation 48, ¶ 5.

ing laws for nonmineral purposes, we propose that a mineral patent should carry only a right to use the surface necessary for the extraction and processing of the minerals to which patent has been granted.

But only if the mining claimant exercises an optional right to acquire title to the surface in return for the market value of the surface rights can he expect to be secure.<sup>97</sup>

It is not clear whether the Commission referred to "mineral deposit" when it meant "mineral estate" (as opposed to surface estate) or whether it intended to make acquisition of a fee title possible through purchase of surface rights where a mineral deposit has been patented.<sup>98</sup> If the Commission did intend to make acquisition of a fee possible, it certainly *is* clear that "if the mineral patentee does not acquire title to the surface, the right to the mineral interest should terminate automatically at the end of a reasonable period after cessation of production."<sup>99</sup> So unless the mineral patentee obtains title to the surface as well, his mineral title is at best a determinable fee which he might lose even after having paid for it and having agreed to pay royalties on production.<sup>100</sup> For the very reasons which the Commission pointed out to be objectionable under the present "legal test of current marketability at a profit,"<sup>101</sup> the mineral patentee would become subject to "the uncertainties of the cyclical price patterns for minerals,"<sup>102</sup> something patentees do not now fear. So the miner *must* have the absolute right at his option to acquire the fee or

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97. PLLRC Report 128 (unnumbered recommendation). The Commission concluded that, in some circumstances, the required investment could "be so large that business judgment would dictate the need for fee title." Likewise, an optional right to lease the surface could be made available. *Id.*

98. PLLRC Report 126, Recommendation 48, ¶ 4 (emphasis added):  
When a claimholder begins to produce and market minerals, he should have the right to obtain a patent only to *the mineral deposit* . . . . He should have the option of acquiring title or lease to *surface* upon payment of market value.

Why the claimholder should have to wait until he goes into production is not explained. Under present law, at least, one assumes a substantial risk of loss if he goes into production—or even extensive development—in advance of patent.

99. PLLRC Report 128 (unnumbered recommendation).

100. Since the Commission's intent, at least in part, is to "encourage more complete use of the mineral deposit and discourage merely speculative holding," PLLRC Report 128, the obligation to pay a royalty implies the obligation to develop and produce so that the royalty will be earned. See note 107 *infra*.

101. PLLRC Report 128.

102. *Id.*

the security provided by his patent to the minerals would be illusory.

The Commission concludes that those producing minerals from public lands should pay a fair value for what they obtain and market,<sup>103</sup> both before and after patent,<sup>104</sup> and therefore recommends that:<sup>105</sup>

equitable royalties should be paid to the United States on all minerals produced and marketed whether before or after patent.

In explanation, the Commission said:<sup>106</sup>

. . . Congress should specify such royalties at levels that will provide a continuing incentive for mineral exploration, development, and production on public lands.

As we envision the system that we recommend, the United States would reserve a royalty interest in minerals in the development contract, and would then perpetuate it in the patent. In either event, the royalty would be paid only on minerals produced, and not on ore in the ground.

Unless great care is exercised in drafting legislation to give effect to the Commission's recommendations, the royalty requirement would greatly compound the title uncertainty caused by the determinable-fee concept. This would result from the well-known rule that where royalties based upon production are called for, an obligation to *produce* the minerals upon which the royalty is based and calculated will be implied.<sup>107</sup>

Of course, all should recognize that the royalty concept is essentially anti-conservationist.<sup>108</sup> As a fixed charge against production without regard to profitability, the royalty shuts

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103. PLLRC Report 128.

104. *Id.* (unnumbered recommendation).

105. PLLRC Report 126, Recommendation 48, ¶ 5.

106. PLLRC Report 129.

107. *See, e.g.*, Swenson, *Implied Development Covenants in Solid Mineral Leases*, 5 AMERICAN LAW OF MINING § 30.10, at 331 (1967), and compare 3 AMERICAN LAW OF MINING § 15.8 at n. 4 (1960).

108. No one has said this more succinctly than Howard Edwards, in *The 1969 View of the 1872 Law; Current Proposals to Modernize or to Replace the General Mining Law*, 15 ROCKY MTN. MINERAL L. INST. 139, 151-152 (1969).

a mine down before it would otherwise close, and makes uneconomic some portions of almost any orebody. As a result, there will be less efficient operation at all new mines forced to compete with older mines not subject to such unearned royalties payable to the United States. The royalty concept, if adopted, will favor established operators, existing mines, and exploration on private land, especially in the East, where mine operators generally purchase mineral lands without undertaking royalty obligations, at least with respect to non-bedded deposits. To add the fixed cost of a royalty to the Government's carried net profits interest is both wrong in principle,<sup>109</sup> and short-sighted. In this conclusion, whatever one may say about the Commission's recommendation that patent fees should be increased,<sup>110</sup> the Commission clearly erred.<sup>111</sup>

### CONCLUSION

With the exception of the royalty recommendation just discussed, it seems clear that the problems posed above represent difficulties for the legislative draftsman rather than insurmountable defects in the Commission Report itself. The plain fact is that the Commission's recommendations with respect to locatable minerals can be made to work if the royalty concept is abandoned and if the Executive Branch can be persuaded to administer the mining law as proposed. The Commission has left some serious questions unanswered, but the draftsman can remedy these; the question is whether omnibus legislation can be enacted to accomplish all of the many things that the Commission has suggested. The risk is that piecemeal legislation may defeat the Commission's basic intent altogether.

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109. *Id.* at 151.

110. PLLRC Report 129 (unnumbered recommendation):

. . . [W]e believe mineral patent fees should be increased at least enough to cover administrative costs associated with the issuance of patents.

*Cf. Id.* at 126: Recommendation 48, ¶ 5.

111. To say, as the Commission did, PLLRC Report 128, that royalties should be paid to the Government because "the mining industry usually pays for hard rock minerals taken from private lands" is to ignore the basic fact that private landowners do not share with the Federal Government its power to tax the miner's income.

### 1. The Leasing Alternative

Unfortunately, a minority of the Commission's members could not agree even with the permit-patent system recommended by the majority. The minority would prefer "a general leasing system for all minerals except those which are made available by law for outright sale."<sup>112</sup> Of course, a leasing system contemplates a royalty and is objectionable for that reason alone. But since the Commission majority would require a royalty, the minority's objections to the majority's proposed system go to the fact that:<sup>113</sup>

Hard mineral explorers may go on the public lands and search for minerals except where particular lands are withdrawn or their use restricted

and to the fact that:<sup>114</sup>

Mineral developers may obtain fee title to the minerals and, if they desire, may purchase so much of the surface as may be needed for a mining operation.

The minority might just as well have said that it is opposed to mining on public lands. As the President of the Sierra Club has said:<sup>115</sup>

. . . [W]e can and should rely upon a reasonable leasing system under which the major control and crucial choices are firmly vested in competent administrators with sufficient power to protect environmental quality.

And as the Executive Director of the Sierra Club has said:<sup>116</sup>

. . . [U]nlike the mineral leasing system, under [the Commission majority's proposed] . . . system mining still occurs at the option of the miner, not the government. No power is given the government to stop mining from taking place in any area, no matter how great the competing values there may be. . . .

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112. PLLRC Report 130.

113. *Id.* at 132.

114. *Id.*

115. Berry, *An Analysis: The Public Land Law Review Commission Report*, *supra* note 90, at 20.

116. McCloskey, *An Analysis: The Public Land Law Review Commission Report*, 55 SIERRA CLUB BULLETIN 18, 21 (Oct. 1970).

Clearly, the minority's preference for a leasing system is shared by those who would like to be able to stop mining after the discovery of an orebody. Unless the competing values are sufficient to justify condemnation and compensation, *no one* should be able to deprive the prospector of the fruits of his discovery after he has found an orebody on land open to exploration. If we cannot let the prospector search for minerals where he wishes, having set aside park and wilderness areas where his activities are restricted or prohibited, we simply do not deserve a competitive enterprise system. When we have reduced our mining effort to one corporation—whether owned by the Government or not—*then* we can afford the extravagance of a leasing system.

The Commission minority says that a leasing system would “continue to encourage orderly and needed resource exploration and development.”<sup>117</sup> A leasing system is anything but orderly, as experience with Leasing-Act minerals has amply demonstrated, and actually discourages wise development of resources because the successful applicant is under both time and financial pressure to put the property into production. A leasing system—like the royalty requirement, and perhaps because of the royalty requirement which it contemplates—obligates the lessee to produce or forfeit his lease, and that alone should be sufficient to reject the minority view. With secure titles, market demand determines when a property will be operated, and that is as it should be.

We should discourage land-office speculation whenever possible and the history of speculation in Federal oil and gas leases hardly commends a leasing system to hard minerals. True, leasing can and does work with bedded deposits of largely uniform composition and thickness, particularly if production can be achieved with a bore-hole, and a leasing system is appropriate for minerals such as coal, oil, and gas, but leasing for minerals of erratic occurrence has not worked well, even on private lands. Experience on state lands, on Indian lands, and on private lands, has demonstrated that leasing systems do not work well with respect to hard minerals of non-uniform grade

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117. PLLRC Report 130.

and composition, and quick reference to mineral development of Indian lands—the last place a miner would freely choose to prospect—should be sufficient.<sup>118</sup>

Leasing systems lead to speculation, waste funds on bonuses and delay rentals which should be spent in exploration, subject the operator to unnecessary interference which can be politically motivated, create title uncertainties,<sup>119</sup> discriminate against individuals and small operators, demand great capital—especially if competitive bonus bidding is required, make the selection of a lessee difficult and subject to scandal if any “combination approach”<sup>120</sup> is used, and make geological and engineering decisions dependent upon extraneous factors related to Government convenience rather than to the marketplace and public need. That at least some of these objections—uncontrolled bureaucratic interference, lack of title security, and discrimination against small operators—are legitimate is obvious even to the minority. That the solutions recommended by the minority would not work ought to be equally obvious: (1) The “right of judicial review for abuse of discretion” which the minority suggests will force the Secretary of the Interior to abide by Congressional intent would give the citizen the opportunity to joust with the Justice Department, an expensive exercise in futility, as the cases make abundantly clear.<sup>121</sup> (2) The suggestion that “the life of the lease be equal with the productive life of the mineral deposit” is hardly the equivalent of title security when the operator has no control over his market or the price of his product. (3) How the Secretary of the Interior can “consider the royalty offered as well as the cash bonus offered when awarding a lease,” is not explained. How could he compare A’s offer of \$20,000 bonus

118. Berger, *Indian Mineral Interests—Potential for Economic Advancement*, 10 ARIZ. L. REV. 675 (1968), reprinted in 7 ROCKY MTN. MINERAL L. REV. 213 (1970). Cf. Hansen, *Why A Location System for Hard Minerals?* 13 ROCKY MTN. MINERAL L. INST. 1, 18, at n. 43 (1967).

119. *United States v. Southwest Potash Corp.*, 352 F.2d 113 (10th Cir. 1965), should frighten anyone forced to operate under a Federal hard mineral lease. Cf. Holmberg, *Oil and Gas Leases on Federal Lands: A Time for Title Security*, 10 ROCKY MTN. MINERAL L. INST. 313 (1964).

120. Compare PLLRC Report 192, Recommendation 75.

121. See the cases collected by West Publishing Company under Key Nos. 4 and 5, *Mines & Minerals*, and in Annot., *Judicial Review of Interior Department Decisions Affecting Claims of Mineral Interests in Public Lands*, 5 A.L.R. FED. 566 (1970).

and  $12\frac{1}{2}\%$  royalty on production with *B*'s offer of \$1,000 bonus and  $18\frac{1}{4}\%$  royalty? Whichever choice he might make, the potential for error and scandal culminating in his dismissal from office would be painfully apparent to him at least.

## 2. The Crossroads

The alternatives, if we choose to replace or modify the present General Mining Law, are clear: Either something akin to the Commission's proposed permit-patent system can be adopted, with or without a royalty requirement, or the leasing system which the Commission minority advances can be enacted, thereby repealing a law which worked well until someone, somewhere, hit upon the idea that if it could be made into an administrative jungle, it could be replaced with a leasing law. If mining is to be discouraged on American public lands, and mineral opportunities closed to all but the very wealthy, the Congress should extend the leasing system to all minerals now locatable under the General Mining Law.