

1975

Federal Mineral Reservations

Loren L. Mall

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Mall, Loren L. (1975) "Federal Mineral Reservations," *Land & Water Law Review*. Vol. 10 : Iss. 1 , pp. 1 - 61.
Available at: https://scholarship.law.uwyo.edu/land_water/vol10/iss1/1

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME X

1975

NUMBER 1

With the demand for more energy supplies, concern over federal reserved minerals has increased. The author, Mr. Mall traces the major federal legislation concerning reserved minerals, the rights and liabilities created by the reservations, and the damages recoverable by surface estate owners. Finally, the author examines recent and proposed changes to the reserved minerals law which shift the emphasis on ownership of rights from miners to land owners.

FEDERAL MINERAL RESERVATIONS†

*Loren L. Mall**

THE 1974 federal legislative proposals to either ban or strictly regulate surface mining of coal are the result of a long-standing struggle between western land owners and miners who are both interested in the federally reserved minerals under the surface. The dispute dates back to the early 1900's when public lands in the western states were homesteaded by surface entrymen while the subsurface minerals were reserved by the United States for future mining and removal.

The inevitable conflicts between the owners of surface and mineral estates have usually been settled on a practical basis. Prior to 1974, the law placed mineral owners in a strong position, but the opposition of surface owners has been so troublesome that mineral owners have often opted for the expediency of paying the surface owners for their cooperation. Now, however, the nation's relentless consumption of

Copyright© 1975 by the University of Wyoming

†This article was originally published in 20 ROCKY MT. MIN. L. INST. (1975).
Reprinted by permission.

*Partner, Roath & Brega, Denver, Colorado; B.A., 1961, Kansas State University; J.D., 1967, University of Denver College of Law; Member of the Colorado State Bar; Speaker, Twentieth Annual Rocky Mountain Mineral Law Institute.

minerals promises to change the status quo. Current plans to strip mine for coal in the West have heightened the controversy by threatening considerable destruction of the surface. The surface owners have been able to enlist the support of groups interested in the use of the land such as developers of residential and commercial subdivisions and environmentalists. The mineral owners are supported by energy and mineral consumers. Faced with the growing controversy, both houses of Congress recently passed legislation which would have either banned or severely restricted the surface mining of the coal deposits reserved to the United States.¹ If such restrictions on surface mining of coal are enacted, the new law will probably be extended to all other minerals.

The new legislation would have removed a considerable quantity of federally reserved coal deposits from mining.² This seems unwise at a time when this nation is experiencing unprecedented demands for fuels and other minerals. On the other hand, careless mining of the reserved minerals would cause considerable harm to the lands mined as well as to the people and wild life associated in various ways with those lands. In recognition of these harsh realities, the mining industry is developing surface mining techniques which only temporarily disrupt the environment and do not cause permanent harm.

The present statutory framework which governs surface use and mineral development of the federally reserved coal deposits will not be totally altered by the new legislation. Other minerals are not yet affected. It is therefore useful to view the present controversy in light of its statutory and historical context. This article will analyze the separation of

-
1. The Senate passed its version of the bill in 1973. S. 425, 93d Cong., 1st Sess. (1973). Senator Mansfield of Montana was easily able to add an amendment during floor debate which would have totally banned surface mining of federally reserved coal deposits where the surface is privately owned. 119 CONG. REC. 18, 770-78 (daily ed. Oct. 8, 1973). The House bill H.R. 11500, 93d Cong., 2d Sess. (1974) was approved in July of 1974. It would have required the surface owner's consent to the mining of reserved coal deposits. H.R. 11500, 93d Cong., 2d Sess. § 709(b). The conference bill was vetoed by President Ford, but similar bills are expected in the next Congress.
 2. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 121 (1970). See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS table 17, 46 (1972). See table at 119 CONG. REC. 18758 (daily ed. Oct. 8, 1973) for coal deposits by state.

the mineral from the surface estate by the original federal legislation, the rights and liabilities created by the reservations, the damages recoverable by the surface owner according to the statutes and judicial decisions, the status of the reserved minerals as public lands, and the increasing use of private contests to eliminate mining claims from those surfaces. Finally, current state legislation and the proposed federal law will be reviewed.

BACKGROUND

Statutory Severance of the Minerals From the Surface

The United States government created two separate legal estates in large areas of the western lands. One is comprised of the surface while the other includes the sub-surface mineral deposits. Historically, this severance can be traced to the English common law by which the Crown retained the gold and silver from grants of the land.³ Accordingly, a rental on these precious metals was normally reserved by the Crown under the American Colonial Charters. The Continental Congress thereafter reserved a one-third interest in all gold, silver, lead and copper mined on the public lands opened to settlement under the Land Ordinance of 1785.⁴ Prior to 1846, a variety of settlement acts either reserved minerals from agricultural grants or denied preemption rights to occupants of mineral lands. After 1846, however, the preemption and homestead acts allowed the minerals to pass with patents to the land.⁵ Passage of the minerals was not authorized by the settlement acts but occurred despite the statutes. The settlement acts excluded known mineral lands from agricultural entry and patent. Conversely, the mining laws were the only legislative authority for the acquisition of mineral lands. Unfortunately, the classification of land as mineral during the settlement period was unscien-

3. 1 AMERICAN LAW OF MINING § 1.1 (1960). For a concise history of retention of minerals in public land in the United States, see Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 ROCKY MT. MIN L. INST. 325, 328-34 (1972) [hereinafter cited as Bate].
4. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 701 (1968) [hereinafter cited as GATES].
5. *Id.* at 706-7; 1 AMERICAN LAW OF MINING § 1.24 (1960).

tific since it depended on surface observations.⁶ Because of the failure of classification, vast tracts of mineral lands in the West had passed to private owners by 1900.

Congress would not act to prevent further loss of the mineral wealth of the nation at a nominal price.⁷ President Theodore Roosevelt was an activist, and supported by a tide of national conservation sentiment, he halted this practice in 1906. He withdrew large areas of the public domain thought to be valuable for coal from all forms of entry.⁸ President Taft withdrew suspected petroleum lands from all types of entry in 1909.⁹ This dramatic halt to western settlement compelled Congress to legislatively reopen the public domain to agricultural entry and acquisition.

In order to save the minerals for the public while allowing agricultural settlement, President Roosevelt had urged in 1907 the amendment of the homestead laws to reserve the minerals from surface patents.¹⁰ Both he and his successor, President Taft, continued to make withdrawals while Congress debated the point.¹¹ Finally, Congress acquiesced and adopted legislation which severed the mineral and surface

-
6. See 1 AMERICAN LAW OF MINING §§ 1.24, 3.7 (1960) for a discussion of the homestead acts and a brief description of other public land laws under which valuable minerals passed with land grants. The mining laws were intended to be the only method for acquiring mineral lands. *United States v. Sweet*, 245 U.S. 563 (1918). The classification of land as mineral usually depended upon the affidavit of the entryman, the notes of the surveyor as to mineralization he had seen, data from the field offices of the United States Land Department and occasional private challenges to agricultural entries. 1 AMERICAN LAW OF MINING § 3.1 (1960). Understandably, mineral classification dependent upon this evidence was a colossal failure. Since an agricultural patent carried with it all minerals which were subsequently found, *Burke v. Southern Pac. R.R.*, 234 U.S. 669 (1914), vast amounts of the mineral wealth of the nation passed into private ownership under the agricultural laws contrary to the language of the statutes.
 7. GATES, *supra* note 4, at 509. Individuals also acquired western mineral lands through the purchase of railroad grants, state school sections and through various other settlement acts and public land laws. *Id.* at 480, 490-91.
 8. GATES, *supra* note 4, at 726-27. Approximately 66 million acres in the West and Alaska were withdrawn from all forms of entry by President Roosevelt's action. On December 17, 1906, the withdrawal orders were modified to prohibit coal entries only.
 9. Over 3 million acres of lands thought to be valuable for oil were withdrawn. *Id.* at 733.
 10. *Id.* at 728; 41 CONG. REC. 2806-8 (1907).
 11. GATES, *supra* note 4, at 728.

estates and insured the flow of settlers to the West.¹² This legislative scheme, which still exists today, provides for granting patents of the surface but reserves various minerals to the United States subject to the right of qualified persons to prospect, mine and remove them.

The first two of the agricultural entry statutes allowed surface entries on coal lands. The Coal Lands Act of March 3, 1909¹³ provided relief to good faith entrymen who had entered agricultural lands which were later withdrawn from entry as coal lands. The entryman was allowed to complete his settlement, but he received a patent which reserved rights to the coal. The Coal Lands Act of June 22, 1910¹⁴ provided alternative relief by opening withdrawn coal lands to agricultural entry subject to a reservation of the coal. Both statutes reserved all coal to the United States together with the right to persons authorized under federal law to prospect for, mine, and remove the minerals.

By these Acts and the Pickett Act of 1910¹⁵, Congress reopened the large-scale withdrawals to both agricultural entry and metalliferous mineral location. After adoption of the Pickett Act in 1910, however, substantially all of the unappropriated public domain was withdrawn by executive action from nonmetalliferous mineral location and from agricultural entry by further withdrawals.¹⁶ Congress soon acted

12. See H.R. REP. No. 2019, 60th Cong., 2d Sess. 3 (1909). The thrust of the struggle centered on the old philosophy that the government held the public lands in escrow pending their final disposition to private parties. It was eventually replaced by a new national ethic holding that the public lands are public resources to be held in perpetuity in the public interest. E. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 313 (1951).

13. Coal Lands Act of March 3, 1909, 30 U.S.C. § 81 (1970).

14. Coal Lands Act of June 22, 1910, 30 U.S.C. §§ 83-85 (1970). A reservation of coal under either the Coal Lands Acts of 1909 or 1910 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. . . .

15. Pickett Act of 1910, 43 U.S.C. §§ 141-43 (1970). The Pickett Act itself provides that land withdrawn under its provisions continues to be subject to mining location. See note 19 *infra* for the numerous other statutes which also provide for the granting of surface patents and the reservation of minerals.

16. GATES, *supra* note 4, at 736.

again to reopen the petroleum lands to agricultural entry by adopting the Agricultural Entry Act of 1914.¹⁷

The Agricultural Entry Act of 1914 allowed entry for agricultural purposes under the homestead or desert land laws to lands withdrawn or classified as valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals. The Act provided for a patent to the surface and reserved the particular minerals for which the land had been classified as mineral. In order to provide more acreage to ranchers on arid western lands, the Stock-Raising Homestead Act of 1916¹⁸ was also adopted. It increased the homestead allotment from 160 or 320 acres to 640 acres. It eliminated the problem of classifying lands entered under its provision as agricultural or mineral. The 1916 Act simply provided for a qualified patent which reserved to the United States all minerals in lands homesteaded for stock-raising purposes.

Despite the success of Congress in reopening the petroleum land to agricultural entry by these and other public land laws,¹⁹ Congress could not agree for several years on a

17. Agricultural Entry Act of July 17, 1914, 30 U.S.C. §§ 121-23 (1970). Sodium and sulphur were added to the reserved minerals by a March 4, 1933 amendment. 30 U.S.C. § 124 (1970). See GATES, *supra* note 4, at 740 for a brief discussion of the legislative history of the 1914 Act. A patent reservation under the Agricultural Entry Act of 1914 will be stated as follows:

[A]nd excepting and reserving, also, to the United States all the oil and gas [or other specified 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).

18. Stock-Raising Homestead Act of Dec. 29, 1916, 43 U.S.C. §§ 291-301 (1970). 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 pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862).

19. For a useful compilation of the later statutes which sever the mineral estate from the surface, see Bate, *supra* note 3, at 368-406. A similar listing is contained in Twitty, *Laws of Subjacent Support and the Right to Totally Destroy the Surface in Mining Operations*, 6 ROCKY MT. MIN. L. INST. 491, 513-14 (1960). [hereinafter cited as Twitty]. Since adoption of the Stock-Raising Homestead Act in 1916, most of the disposal acts authorizing the private acquisition of public lands have reserved all minerals. The few exceptions make specific grants of various minerals for various purposes. 1 AMERICAN LAW OF MINING § 3.23 (1960). See a discussion of some of the statutes. *Id.* §§ 3.28-3.40. The term "public land laws" is ordinarily used to refer to statutes governing the alienation of public lands and is distin-

system which would reopen them to nonmetalliferous mineral entry.²⁰ Finally Congress enacted the Mineral Leasing Act of 1920²¹ as the only politically acceptable course. The Act established an entirely different system for the acquisition of petroleum minerals than the location system for other minerals.²² The 1920 Act had the effect of legislatively withdrawing from mineral location all oil, gas and petroleum lands of the United States and subjecting them to leasing.²³ The nonmetalliferous minerals subject to leasing include those reserved from surface patents as well as those owned by the United States where no surface patent has been granted.

The Coal Lands Acts of 1909 and 1910, and, more importantly, the Agricultural Entry Act of 1914 and the Stock-Raising Homestead Act of 1916 operating side by side, allowed agricultural settlement of much land throughout the West. Although these acts have not been expressly repealed, their effectiveness was largely ended by the Taylor Grazing Act of 1934 which brought homesteading on the public domain to a halt.²⁴

guished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public lands for gas and oil and other nonmetalliferous minerals. *Udall v. Tallman*, 380 U.S. 1 (1965), *rehearing denied*, 380 U.S. 989 (1965).

20. GATES, *supra* note 4, at 741.

21. Mineral Lands Leasing Act of Feb. 25, 1920, 30 U.S.C. §§ 181-263 (1970).

22. For a brief legislative history of the Mineral Leasing Act of 1920, see 1 AMERICAN LAW OF MINING § 1.28 (1960). It is probably significant that the mineral shortages now facing the country occur primarily among the leasable rather than the locatable minerals.

23. *Thomas v. Union Pac. R.R.*, 139 F. Supp. 588 (D. Colo. 1956), *aff'd*, 239 F.2d 641 (10th Cir. 1956). The Act provided for the leasing of lands for potash, coal, phosphate, oil, gas and nitrates. These minerals have been called the "fuel and fertilizer minerals." Davis, *Multiple Uses of Public Lands*, 1 ROCKY MT. MIN. L. INST. 495, 497 (1955).

24. 43 U.S.C. §§ 315-315r (1970). Congressman Taylor from Colorado was the legislator who championed the Grazing Act of 1934 so well that the Act is known by his name. Eighteen years earlier, he had also succeeded in bringing the Stock-Raising Homestead Act of 1916 into law. Taylor's efforts in 1934 effectively repealed the 1916 Act which he had brought to life. Taylor was consistent, nevertheless; his legislation in both 1934 and 1916 reflected the positions of the cattlemen whom he represented. Taylor had sponsored the 1916 Act as necessary to bring more homesteaders to the West, even though he admitted it would stop the free use of the public range by the large stockmen who were charged neither fees nor taxes. Actually, the 1916 Act enabled many cattlemen who had previously homesteaded to acquire additional public land by further homesteading. GATES, *supra* note 4, at 516-17.

By 1934, the public range was overgrazed and in danger of permanent injury. Both cattlemen and conservationists sought new legislation to stabilize the livestock industry and to save the land from erosion.²⁵ The cattlemen also wanted to protect their own interests.²⁶ In response to these needs, Congress enacted what has become known as the Taylor Grazing Act of 1934. The Act is an important conservation measure because it stopped the uncontrolled overgrazing which was seriously damaging the public range.²⁷ It also had the effect of repealing the Stock-Raising Homestead Act of 1916 as well as the other major surface entry laws.²⁸ The Act accomplished that end by withdrawing most of the remaining unoccupied public lands from agricultural entry. Since adoption of the Taylor Grazing Act, no entry can be made under the various settlement laws until land is classified as suitable for the purposes of those laws.²⁹

The Taylor Grazing Act, like many of the public land laws enacted since 1916, allows the acquisition of surface rights in public lands. Classification of the land for the particular purpose of the surface entry is first necessary. The Act provides that surface patentees take their patents with a reservation of all minerals to the United States.³⁰ The Taylor Grazing lands withdrawn for classification as well as those which are patented remain open to mineral location.³¹ Persons who are qualified under federal law may enter to prospect for locatable minerals. Locators and persons who acquire federal mining permits or leases may mine and remove minerals. In both cases, payment is required to the surface owner for "damages caused to the land and improvements thereon."³²

The immensity of the problem resulting from separation of estates is apparent in the number of federal patents which

25. See generally GATES, *supra* note 4, at 607-34.

26. 1 AMERICAN LAW OF MINING § 2.49 (1960).

27. *Id.* at § 1.31.

28. GATES, *supra* note 4, at 612-13.

29. 1 AMERICAN LAW OF MINING § 3.2 (1960). The original withdrawal was accomplished with the aid of executive orders which were made and then confirmed by legislative amendment to the Act. *Id.*

30. 43 U.S.C. § 315g(c) (1970).

31. 43 U.S.C. §§ 315f, 315g(d) (1970).

32. 43 U.S.C. § 315g(d) (1970).

reserved minerals and the amount of surface acreage affected. As of 1972, 165,709 original entries had been made under the Stock-Raising Homestead Act affecting 70,362,406 acres of land.³³ A significant number of these entries did not result in patents, but the number of failures is not available. As of 1972, surface patents with minerals reserved to the United States had been issued under the various surface entry acts affecting 62,872,663 acres of land.³⁴ The acreage thus reserved is as large as the state of Wyoming.³⁵ Over 62 percent of the total mineral reservations or 39,201,523 acres, reserve all minerals, while 25 percent or 16,213,948 acres, reserve oil and gas only. Various combinations of minerals are reserved on the balance of the reserved acreage.³⁶ Accordingly, the Stock-Raising Homestead Act with its reservations of all minerals was by far the most widely used surface entry statute. In Montana, where the public outcry for federal legislation to protect the surface owners from strip mining of coal is now the greatest, approximately twelve percent of the state is subject to federal reservations of minerals under private lands. The percentage is approximately the same in Wyoming.³⁷

Surface Damages

In order to appreciate the severity of the potential conflicts which Congress so casually created by severing the surface from the minerals without careful analysis or technical study,³⁸ it is helpful to consider the type of damage which a surface owner will normally assert as a consequence of mineral exploration and development. Farmers and ranchers frequently resent a prospector's mere entry as if it were unauthorized and a trespass.³⁹ After entry is gained, the landowner becomes more apprehensive as he observes mineral

33. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 58 (1972).

34. *Id.* at 46.

35. The total acreage of Wyoming, the 9th largest state, is 62,343,040 acres.

Id. at 10.

36. *Id.* at 46.

37. 119 CONG. REC. 18776 (daily ed. Oct. 8, 1973) (remarks of Senator Metcalf).

38. GATES, *supra* note 4, at 511.

39. For a vivid illustration of this point see Ary and Morgan, *Problems of Access to Public Domain, State and Fee Lands "From Shotguns to the Courthouse,"* 15 ROCKY MT. MIN. L. INST. 481-84 (1969).

exploration. Exploration may well be conducted by core drills, leaving behind a substantial number of drill holes and cuttings. Once mining activities are begun in earnest, the farmer would tell you that the miner's drilling site and operations are:

. . . taking far more land than reasonably required, that the newly constructed roads for heavy equipment are dividing the field so that the mowers will have trouble, that the roads will create low spots in which water will collect and sour the meadows, and will alter his irrigation pattern, that the culverts in the road will plug and necessitate annual cleaning, that the surface water where confined by culverts will wash away topsoil, that fences will have to be built to keep cattle out of the mud pits, that the lessee is using all the water that is now needed for crops or livestock . . .⁴⁰

The mineral operator may want to construct and maintain pipelines, telephone and electric lines, storage tanks, ponds, roads, plants, buildings, equipment, and to remove trees or to level the ground. In the course of such activities, some of the surface, crops, grass, forage, shrubs and trees, fences and other improvements will be damaged. When mineral operations cease, drill holes, large pits, ponds, ditches, roads, utility lines and debris may be left behind. Deep trenches and spoil piles may remain. The physical scars to the surface may be substantial. It is an abhorrence of these wasting practices which has stirred the current national controversy and fueled the drive for a congressional ban or severe limitations on surface mining.

Statutory Interpretations Versus Deed Interpretations

Before examining the mineral reservations more closely, the ground rules of statutory construction must be considered. The conflicting interests of the surface owner and the mineral owner necessarily result in conflicting interpretations. Surprisingly, only a few court decisions construing government

40. Brimmer, *The Rancher's Subservient Surface Estate*, 5 LAND & WATER L. REV. 49, 50 (1970).

mineral reservations are available. Many courts have construed private deeds which sever the surface estate from the minerals, but these cases do not fully apply to government reservations.

Patent mineral reservations are construed according to the purpose for which the legislative body granted the surface and reserved the minerals. Therefore the statute authorizing the patent controls the reservation if the patent language is erroneous or even if the reservation is omitted from the patent.⁴¹ On the other hand, private mineral severances are construed according to the specific intent of the parties as shown by the language used in the deed.⁴²

Public legislation is construed broadly in favor of the government which made the grant; no rights pass by implication.⁴³ Conversely, ambiguities in private deeds reserving mineral rights are construed strictly against the grantor, who is also normally the draftsman.⁴⁴

While the intent of the legislative body or the private parties is sought in both government patents and private severances, and in both depends largely upon the language used, the intent is determined according to different principles. Legislative intent is sought in the history of the legislation as recorded in the legislative record, consisting of the

41. The patent is controlled by the statute. *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 332 (1924) (patents issued without a reservation did not convey what the statute reserved); *Proctor v. Painter*, 15 F.2d 974 (9th Cir. 1926) (a patent which would seem to convey minerals because there was no language of reservation nevertheless did not include minerals since Congress had not authorized their disposition); *c.f.* *United States v. Price*, 111 F.2d 206 (10th Cir. 1940) (since patent was regular on its face, the court would not go behind it to review the facts). *Price* supports the inference that if the government had sought to cancel the patent rather than to construe it, the court would have looked to the facts and determined that the minerals were reserved if the patent was issued under the Stock-Raising Homestead Act.

42. *United States v. 1,253.14 Acres of Land*, 455 F.2d 1177 (10th Cir. 1972).

43. *United States v. Union Pac. R.R.*, 353 U.S. 112 (1957); *United States v. Standard Oil Co.*, 20 F. Supp. 427, 453 (S.D. Cal. 1937) (the Government does not assume the attitude of a mere seller of real estate); *United States v. Union Oil Co.*, 369 F. Supp. 1289 (N.D. Cal. 1973), *appeal docketed*, No. 74-1574, 9th Cir., Jan. 11, 1974.

44. *Martin v. Knight*, 290 Ala. 171, 275 So. 2d 117 (1973); *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259 (1970); *Hoffman v. Magnolia Petroleum Co.*, 273 S.W. 828 (Tex. Civ. App. 1925); *Tenneco Oil Co. v. Alvord*, 416 S.W.2d 385 (Tex. 1967).

committee reports, statements by its sponsors, the title of the statute, successive draft and floor debate, as well as the condition of the country at the time and the purpose of Congress.⁴⁵ The intent of the private parties must be sought within the four corners of the severance deed, and parol evidence will only be admitted if the ambiguity cannot be resolved on the face of the instrument.⁴⁶ The intent will then be determined within the narrow circumstances surrounding the transaction and in the actions of the parties before the dispute arose.⁴⁷ Thus, judicial cases construing the meaning of private severance deeds do not apply to government mineral reservations and are likely to cause erroneous decisions if used for this purpose.⁴⁸

RIGHTS AND LIABILITIES CREATED BY THE RESERVATIONS

Entry Rights

The surface entry statutes restrict a prospector's exploration activities less than they restrict the subsequent acts of a miner during development. Prospecting requires only a temporary use of the surface and is now customarily pursued by wide-spaced drilling which is less damaging to the

45. United States v. Union Oil Co., *supra* note 43, at 1292; Winona & St. Peter R.R. v. Barney, 113 U.S. 618, 625 (1885):

The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it may be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and also read all parts of them together.

See also, United States v. Denver & Rio Grande R.R., 150 U.S. 1 (1893); United States v. Union Pac. R.R., 230 F.2d 690 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 112 (1957) (railway right of way grants must be construed by reference to existing circumstances and the Congressional purpose behind the act); *accord*, Twitty, *supra* note 19, at 497.

46. Western Development Co. v. Nell, 4 Utah 2d 112, 288 P.2d 452 (1955).

47. United States v. 1,253.14 Acres of Land, *supra* note 42.

48. At common law the right to use the surface is an incident of the mineral estate and does not require payment for damages without express agreement therefor in the private severance. Twitty, *supra* note 19. Mr. Twitty demonstrates, however, that the common law requires subjacent and lateral support of the surface estate by the mineral estate while the federal statutes do not; *accord* Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878 (10th Cir. 1974). *See also* 1 AMERICAN LAW OF MINING § 3.50 (1960); Healy, *Rights of Mineral Owners In Surface*, 1 ROCKY MT. MIN. L. INST. 85, 92 (1955). Mr. Healy argues that the common law rule allows mining to consume the surface if that use is necessary in light of the custom of usage of the business or the industry and the standards of the usual prudent operator.

surface than close-spaced drilling or other acts employed in development.

The provisions of the Coal Lands Acts of 1909 and 1910 which deal with exploration and disposition of coal have been superseded by the Mineral Leasing Act of 1920 which provides the exclusive means for the disposition of such lands.⁴⁹ The right to prospect and mine federally reserved coal since 1920 has therefore depended on federal prospecting permits and leases. Both permits and leases provide some protection to the surface owner since the Secretary of Interior has discretion in fixing their terms.⁵⁰ The Mineral Leasing Act expressly includes the reserved coal deposits under patented surfaces within its coverage.⁵¹ The Agricultural Entry Act of 1914 has also been superseded by the Mineral Leasing Act in the same manner since the minerals reserved by the 1914 Act are all subject to leasing. The effect of the Mineral Leasing Act was therefore to reduce the reserved mineral lands available for mineral location to lands patented under the Stock-Raising Homestead Act.

The Stock-Raising Homestead Act gives any qualified person the right "at all times"⁵² to enter onto patented surfaces to prospect for minerals. The prospector does not have to obtain the surface owner's consent,⁵³ but he is prohibited from injuring, damaging or destroying the permanent improvements of the surface owner. The prospector is liable for all damage to the crops.⁵⁴ After its adoption, Congress subsequently expanded the Act to include damages caused by a prospector's strip or open pit mining to the value of the land for grazing.⁵⁵ Congress probably intended to encourage

49. Mineral Lands Leasing Act of Feb. 25, 1920, 30 U.S.C. § 193 (1970).

50. Mineral Lands Leasing Act of Feb. 25, 1920, 30 U.S.C. § 189 (1970).

51. Mineral Lands Leasing Act of Feb. 25, 1920, 30 U.S.C. § 182 (1970). See the text accompanying note 64 *infra*, for a discussion of the protections which prospecting permits and leases offer. The Mineral Leasing Act of 1920 did not supersede the damage provisions of the Coal Lands Acts of 1909 and 1910 or of the Agricultural Entry Act of 1914.

52. 43 U.S.C. § 299 (1970).

53. *McMullin v. Magnuson*, 102 Colo. 230, 78 P.2d 964 (1938).

54. 43 U.S.C. § 299 (1970).

55. Act of June 21, 1949, 30 U.S.C. § 54 (1970) and Act of June 17, 1949, 30 U.S.C. § 54 (1970). Both Acts extend liability to "prospecting for mining or removal of minerals." The Acts are substantially identical and have been codified as one pursuant to the wishes of the legislators, S. REP. NO. 405,

prospecting under this Act by not requiring the surface owner's consent to such entries.⁵⁶

Prospectors prefer to carry out their claim location activities without the prior consent of surface owners. Evidently they reason that the surface owner might attempt to locate the minerals himself or have his favorite mining associate do so.⁵⁷ In prospecting without consent, however, a miner must be careful to determine which specific statute authorized the patent to the surface in question. If the patent was granted by the authority of any statute other than the Stock-Raising Homestead Act of 1916, unauthorized entry without a federal prospecting permit or mining lease may well constitute criminal⁵⁸ or civil⁵⁹ trespass under state law.

Mineral developers who own mining claims on stock-raising homestead lands seem to understand that they may not re-enter to mine without some form of approval. Similarly, the Stock-Raising Homestead Act⁶⁰ does not allow re-

81st Cong., 1st Sess. at 3 (1949). The slight difference in punctuation in the two basic laws could cause a meaningful difference in damage recovery. See F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, *CASES & MATERIALS ON NATURAL RESOURCES* 717-18 (1965). It is rare for a miner to use surface mining methods in prospecting, although it is not unknown to make discoveries via open-cut bulldozing.

56. 1 AMERICAN LAW OF MINING § 3.50 (1960).

57. *Supra* note 39, at 492.

58. *E.g.*, COLO. REV. STAT. ANN. § 40-18-13 (1963); WYO. STAT. § 6-226 (Supp. 1973) which provides:

Whoever, enters into or upon the land or premises of another after being lawfully notified or forbidden to do so by the owner or occupant, or his agent or servant; or who, being upon the land or premises of another, shall be lawfully notified to depart therefrom by the owner or occupant, or his agent or servant, and shall thereafter neglect or refuse to depart therefrom, shall be guilty of criminal trespass, a high misdemeanor, and upon conviction shall be fined not more than . . . \$500 . . . or imprisoned in the county jail not to exceed six months . . . or by both such fine and imprisonment.

59. *E.g.*, *Bourdieu v. Seaboard Oil Corp.*, 38 Cal. App. 2d 11, 100 P.2d 528 (1940); *appeal denied*, 48 Cal. App. 2d 429, 119 P.2d 973 (1941); *rev'd*, 63 Cal. App. 2d 201, 146 P.2d 256 (1944).

60. The Stock-Raising Homestead Act of 1916 requires either written consent or waiver, payment of damages as agreed or a bond before development entry. 43 U.S.C. § 299 (1970). Locators of mining claims under the Stock-Raising Homestead Act evidently must obtain consent or post bond as a condition to re-entry to do annual assessment work. No reported cases can be found on the point. The Act, however, provides that any person who has either acquired mineral deposits or the right to mine and remove them may re-enter with prior approval. Since a locator has by definition acquired a mineral deposit together with the right to mine and remove the minerals, his right to re-enter is subject to one of the forms of approval.

entry to do annual assessment work without some form of approval. No reported case has as yet distinguished the unfettered entry rights of mineral prospectors from the prior consent obligations of mineral developers.⁶¹ It seems likely, however, that the difference will eventually become apparent in either a criminal or civil trespass case.

Bonds required under the Stock-Raising Act of 1916 for re-entry to mining claims are frequently posted in the minimum allowed amount of \$1,000. The surface owner may protest, however, and the Bureau of Land Management will require a substantially larger bond if potential damages so warrant.

Leasing Act Provisions for Surface Protection

Like the surface entry acts, the federal leasing program attempts to protect surface owners by requiring a security bond from prospectors and developers. No pretense is made that the bonds give adequate protection against destruction of the surface since the bonds are typically \$5,000 to \$10,000 for coal leases and \$10,000 for oil and gas leases. The surface owner may protest the amount of the bonds, and the Bureau of Land Management will require larger bonds if appropriate. Despite the low bond coverages, the Bureau of Land Management does not release the liability on the bond after mining operations cease if the surface owner objects. The Bureau of Land Management, however, does not adjudicate damage claims; they are left to the courts.

Since 1951, leases issued under the Mineral Leasing Act have required the lessee to take reasonable steps to prevent unnecessary erosion of soil and damage to crops, including forage and timber. Restrictions against pollution of air and water and prohibitions against damage to improvements of the United States or private parties are also included. Since the mid-1960's, leases have protected fossils, ruins and artifacts.⁶² After mining operations cease, restoration of the surface to its pre-lease condition may also be required, whe-

61. 1 AMERICAN LAW OF MINING § 3.50 (1960).

62. The Montana Power Co., 72 I. D. 518 (1965) and text accompanying note 63, *infra*.

ther the surface is owned by the United States or a private party. Surface restoration includes filling pits, ditches and excavations and removing debris.

Oil and gas leases issued by the Secretary of the Interior are subject to stipulations requiring prior approval by the United States Geological Survey of any drilling or other operations on the leased lands which would disturb the surface and adversely affect the environment. The lessee must submit a plan of operation and a map describing the planned operations. After the Geological Survey and the managing federal agency prepare an environmental analysis, stipulations restricting surface operations may be made a part of the lease.⁶³ Because the conditions are discretionary, they are known as open-end stipulations.

The Secretary of the Interior has adopted a policy of enforcing the restoration clauses in the leases even where strip mining for coal has been undertaken on privately patented surface lands.⁶⁴ This policy has also been applied to the mining of all other leased minerals. In a 1965 ruling denying renewal of a coal lease without a clause requiring restoration of the privately owned surface, the Secretary said:

The undesirable after effects of the single-minded exploration of mineral resources are well known and the [restoration] clause is merely a reasonable attempt to achieve some balance between the competing issues of land now and in the future.

That the land is of relatively low value and used only for grazing and that the cost of restoration might exceed its value do not justify an exception from the Department's general policy. . . .

. . . .

. . . Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with lands of others in which it has reserved the minerals, together with the right to prospect for, mine and remove the minerals.⁶⁵

63. The restoration clauses in United States leases of minerals are authorized by 43 C.F.R. § 3132.5 (1970).

64. The Montana Power Co., *supra* note 62.

65. *Id.* at 521.

Extent of Recoverable Damages

The question of recoverable damages is controlled by the fundamental rule that the mineral estate is dominant and the surface estate is servient.⁶⁶ The common law provides, therefore, that the miner is entitled to make such use of the surface as is reasonably necessary to the extraction of the minerals without liability for damages.⁶⁷ This principle is of course subject to modification by private agreements or public legislation. The federal surface entry statutes established a system of private ownership of land with public ownership of the minerals. The legal relationship of the respective owners depends not on the common law rules but on statutory construction since those statutes established and defined the parameters of the two estates.

The various surface entry statutes, as originally enacted, did not provide uniform protection to the surface owners for damage. At one extreme, the Coal Lands Act of 1909 broadly provided for the payment of all damages caused by mining activities. At the other extreme, the Stock-Raising Homestead Act of 1916 expressly limited damage recovery to crops and tangible improvements. It was not clear which of these two damage provisions was required by the Coal Lands Act of 1910 and the Agricultural Entry Act of 1914. They both required payment for damages to crops and improvements caused by prospecting, but also referred to recovery of damages caused to the land by mining. The internal inconsistency of the 1910 and 1914 Acts allowed the inference that payment for damages of all types was required.⁶⁸ Similarly, it was not clear whether the 1909 Act required payment for damages to agricultural improvements only or for damages of any type.⁶⁹

66. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928).

67. *Ferguson, Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MT. MIN. L. INST. 411, 413 (1974); *Healy, Rights of Mineral Owners In Surface*, *supra* note 48, at 92.

68. 30 U.S.C. § 85 (1970); 30 U.S.C. § 122 (1970).

69. 30 U.S.C. § 81 (1970). The intent of Congress in enacting the two Coal Lands Acts was to reopen the withdrawn coal lands to entry and patent for agricultural purposes. H.R. REP. No. 2019, 60th Cong., 2d Sess. at 5 (1909) (report of the Committee on Public Lands on the Coal Lands Act of March 3, 1909) and 45 CONG. REC. 6046-47 (1910) (remarks of Congressman Ferris during floor debate on the Coal Lands Act of June 22, 1910).

The Mineral Leasing Act of 1920 provides for the leasing of nonmetalliferous minerals on lands which had been withdrawn from petroleum entry and on other public lands.⁷⁰ Many of these Leasing Act lands had been homesteaded before adoption of the Act or were homesteaded thereafter. The surface owner therefore holds the surface estate subject to the mineral reservations of the surface entry acts.⁷¹ Damage caused by the mining operations of subsequent mining lessees is compensable by both the provisions of the surface entry acts and the lease terms required by the Secretary of the Interior under his discretionary power to prescribe rules and regulations for the leasing program.⁷² Damage caused by mining operations of prior mining lessees whose rights vested before the surface entry are not compensable so long as proper mining operations are conducted.⁷³

The United States has considered the damage clauses of these statutes in only one case. The decision came in 1928 in *Kinney-Coastal Oil Co. v. Kieffer*.⁷⁴ In *Kieffer*, the Court held that a surface owner under the Agricultural Entry Act of 1914 was only entitled to payment for damage to crops and agricultural improvements and was not entitled to damage to the land itself. This was the damage rule for both prospecting and mining. The Supreme Court ruled that compensation for damage to non-agricultural improvements is not required because Congress contemplated entry under the various surface entry acts for agricultural purposes only.⁷⁵ The Supreme Court's rule limiting recovery to agricultural improvements and crops remains the law of the land, not only as to the Agricultural Entry Act of 1914 but also as to the Coal Lands Act of 1910, both of which have essentially the same wording. Since the express language of the Stock-Raising Homestead Act limited recoverable damages to crop damage and injury to tangible improvements, the Coal Lands Act of 1909 was

70. See note 20 *supra* and accompanying text.

71. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66.

72. 30 U.S.C. § 189 (1970).

73. See text accompanying note 97 *infra*.

74. 277 U.S. 488 (1928).

75. *Id.* at 505. There the Court said: "[The wording of the Act] 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." See also note 69 *supra*.

the only major surface entry statute which could be interpreted to require payment for damage to the land itself.

Although these damage provisions have recently been criticized as too narrow,⁷⁶ this was the law in 1949 when Congress enacted additional legislation in the area. By legislating in the area without changing the established law as announced by the courts, Congress has impliedly consented to the interpretation of the courts.⁷⁷ If Congress thought the damage provisions were inadequate, it could have expanded them, especially when new damage provisions were added.

The Open Pit Mining Act of 1949 was intended to eliminate the differences in damage compensation provided by the surface entry statutes in question. The 1949 legislation provided:

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 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 damages 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, 1949.⁷⁸

The Conference Report of Congress explained that:

[T]he [bill] is the result of investigation of an increasing number of complaints from stock raising and other homestead entrymen and patentees which revealed certain inequities in laws providing for compensation by mineral-rights holders for damages to surface rights.

76. Note, *Surface Damages From Strip Mining Under the Stock-Raising Homestead Act*, 50 DENVER L.J. 369 (1973); Note, *Protection For Surface Owners of Federally Reserved Mineral Lands*, 2 UCLA-ALASKA L. REV. 171 (1973).

77. *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Midwest Oil Co.*, 263 U.S. 459 (1915).

78. Act of June 21, 1949, 30 U.S.C. § 54 (1970).

For example, the act of March 3, 1909 (35 Stat. 844) requires security and payment to the surface owner of coal lands for all damages caused by mining activities. The act of June 22, 1910 (36 Stat. 583) provides in section 3 that prospectors on coal lands on which agricultural entries have been made must provide a bond, approved by the Secretary of the Interior, for all damages to crops and improvements. As to actual mining operations, however, the same section requires that the surface owner must be compensated for damages caused by the mining and removal of coal.

Like protection for surface entrymen on lands classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral land was provided by the act of July 17, 1914 (38 Stat. 509).

As to stock-raising homesteads, on the other hand, where large surface areas are required, section 9 of the act of December 29, 1916 (39 Stat. 862) limits the liability of a mineral claimant to damages to crops and injuries to permanent improvements.

....

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-grazing 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.

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 report.⁷⁹

The 1949 legislation puts to rest several newly-advanced arguments. First, the legislation was intended to extend the

79. S. REP. NO. 405, 81st Cong., 1st Sess. at 3-4 (1949). The Conference Committee indicated that surface owners under the 1910 and 1914 Acts were entitled to all damages caused by mining, evidently meaning damage to all improvements. The Committee analysis overlooks the Supreme Court ruling in the *Kieffer* case which expressly limited recovery of damages to agricultural improvements. Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 DENVER L.J. 1, 26 (1974).

surface owner's compensation under the 1910, 1914 and 1916 Acts from mere damages to crops and agricultural improvements to include damage to the value of the land for grazing caused by strip or open pit mining, a loss which may have always been protected by the Coal Lands Act of 1909. In addition, the 1949 legislation shows that Congress construed the "all damages" clause of the 1909 Act to mean only damages to crops, agricultural improvements and to the value of the land for grazing and agricultural purposes. This is a necessary result if the 1949 legislation is to make the damage provisions of the 1909 Act uniform with those of the other three Acts. Second, the legislation ratifies the Supreme Court's decision in the *Kieffer* case by recognizing the need to legislatively extend the damage provisions of the 1910, 1914 and 1916 Acts past their original limits if damage to the land was to be compensated. Third, the legislation ratifies the Supreme Court's ruling that only damages to agricultural improvements are to be compensated under the various acts since Congress did not undertake to change that view when it acted on the *Kieffer* rule. Fourth, the legislation requires compensation be paid to the surface owner only for damage to the value of the land for grazing, even though the grazing value may not be the full value of the land for a higher use.⁸⁰

The Open Pit Mining Act provided for damages to the value of the land for grazing purposes but not for agricultural purposes. Evidently Congress considered agricultural land values to be protected by the original legislation.⁸¹ A court should interpret the acts to include damage to crop-raising and other agricultural values of the land in addition to grazing values. Otherwise, the 1949 legislation would not accomplish the intended purpose of making uniform the damage provisions of the various surface entry acts whether they allowed entry for agricultural purposes or for stock-raising.⁸²

Having examined the legislation for its meaning, it will be helpful to consider the five judicial decisions on the sub-

80. *But see*, 1 AMERICAN LAW OF MINING § 3.50 (1960); *supra* note 76.

81. 1 AMERICAN LAW OF MINING § 3.51 (1960).

82. *Id.*

ject. These cases provide additional guidance as to the respective rights of surface and mineral owners.

The first decision in the 1928 *Kieffer* case sets out the Supreme Court's interpretation of federal mineral reservations.⁸³ There an oil and gas lessee under the Mineral Leasing Act of 1920 drilled a producing well and staked sites on parts of a surface tract for eight other wells. Shortly thereafter, the patentee under the Agricultural Entry Act platted the forty-acre tract as a townsite and sold several lots. The buyers quickly began to construct residential and business buildings. The mineral lessee brought an injunctive action to prevent the sales and use of the tract for townsite purposes.⁸⁴ The trial court granted the injunction, and, on appeal, the Supreme Court approved the injunction. It held that the Agricultural Entry Act and the Mineral Leasing Act divided land into surface and mineral estates. The Court said the surface estate was servient to the mineral estate, that the owner of the mineral estate had the right to use "so much of the surface as may be necessary for . . . [mineral] . . . operations,"⁸⁵ that the surface owner is not entitled to compensation for the minerals taken or for the use made of the surface, and that the only compensation payable is for crops and improvements since the language of the Acts shows only agricultural improvements are to be protected. The Court approved the trial court's findings that the use of practically all the surface was necessary for conducting reasonably efficient mining operations and that the townsites would interfere with that rightful use.⁸⁶

The California Court of Appeals rendered the next judicial decision on the subject in 1940 in *Bourdieu v. Seaboard Oil Corp.*⁸⁷ A surface owner under the Agricultural Entry Act of 1914 scored a significant victory in this case. The court held that a mineral lessee under the Mineral Leasing Act could only use the surface owner's tract for the produc-

83. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66.

84. *Id.* at 496.

85. *Id.* at 504.

86. *Id.* at 506.

87. *Bourdieu v. Seaboard Oil Corp.*, *supra* note 59.

tion of oil and gas from that tract. The lessee owned several leases on adjoining lands and was operating the various tracts as one field. The lessee had used the Bourdieu land for compressor plants, storage tanks, shipping pumps, water, gas and oil lines and roads for production from the entire field as a unit. The lessee had also injured the Bourdieu grazing lands by filling gulches and ravines with oil and water products from lands outside of the surface owner's tract. The court held that the use of the Bourdieu land for the efficient production of oil and gas from other lands was a continuing trespass for which the surface owner could recover the full rental value of the land.⁸⁸ The Agricultural Entry Act, the court said, only allows use of "so much of the surface as is *reasonably incident* to the mining and removal of the minerals *therefrom*."⁸⁹ The lessee's argument that separate operations would cost more and would make operation of the unit uneconomical was rejected.⁹⁰

The Wyoming Supreme Court handed down the third decision in the case of *Holbrook v. Continental Oil Co.* in 1955.⁹¹ The surface owners were ranchers who held their surface patents by virtue of the Acts of 1914 and 1916. They sought damages for a mineral lessee's construction on the land of three houses for employees. The surface owners also claimed, *inter alia*, for recovery for damage to their native grasses, water supply and livestock. The Wyoming court held that the mineral lessee was entitled to construct employee housing and facilities for the separation of water from oil produced from the Holbrook lands. These activities, the construction of roads and other operations, were held reasonably incident to the mining and removal of the oil.⁹² The court refused to award damages for the loss of native grasses since it said such grasses were not an agricultural "crop."⁹³

The Tenth Circuit Court of Appeals has recently affirmed this line of cases in two decisions, one in 1973 and

88. *Bourdieu v. Seaboard Oil Co.*, 48 Cal. App. 2d 429, 119 P.2d 973, 977 (1941).

89. *Id.* at 977.

90. *Id.*

91. *Holbrook v. Continental Oil Co.*, 73 Wyo. 321, 278 P.2d 798 (1955).

92. *Id.* at 803.

93. *Id.* at 804-06. See the criticism of such an analysis in the text accompanying note 82 *supra*.

another in 1974. In the 1973 decision, *Mountain Fuel Supply Co. v. Smith*,⁹⁴ the Tenth Circuit followed the *Bourdieu* decision by holding that a mineral lessee may not use a surface parcel patented under the Agricultural Entry Act of 1914 for mining operations to produce minerals from other parcels owned by other persons. The lessee had been trucking oil produced from other lands in the unitized field across the Smith lands to a highway. Following the California court in *Bourdieu*, and rejecting the economic benefits of unitization, the Tenth Circuit approved an injunction against such use.

Another part of the decision significantly improves the possibilities and economy of mining federally reserved minerals. The Smith lands had been patented to agricultural entrymen under eleven different patents. The tracts were subsequently consolidated into one ownership by Smith. The court held that mineral development had to be conducted separately as to separate surface ownerships, but since the eleven surface tracts had been combined into one ownership, mining operations could be conducted on that land without regard to the original patent boundaries. This ruling is of great importance since many, if not most original western homesteads have been absorbed into large ranch holdings.⁹⁵ Many mining operations which would have been impractical because they lacked the large units necessary for economic production as well as access between tracts as originally patented will now be possible.

In the 1974 decision, *Transwestern Pipeline Co. v. Kerr-McGee Corp.*,⁹⁶ the surface patentee was a pipeline company. The surface entry was for transmission of natural gas, not for agricultural purposes. The case therefore falls outside

94. *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir. 1973). The case, of course, does not reach the question whether easements for access and production established on combined tracts terminate upon separation of the tracts. It would seem that easement rights, once established, would survive the separation of the surface tracts because of the property rights in the easement.

95. See GATES, *supra* note 4, at 497-515, 519-22, 610 n.9.

96. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3001 (U.S. Jul. 2, 1974). The petition was dismissed by agreement of the parties. The agreement required Transwestern to pay for the full value of the ore which Kerr-McGee agreed to leave unmined under the station.

the settlement acts and their statutory framework. The potash lease rights of Kerr-McGee in the Carlsbad Potash Basin had been acquired in 1954 by leases from the United States under the Mineral Leasing Act of 1920. The United States reserved the surface of the land for easements and rights of way insofar as they did not interfere with the mineral lessee's mining rights. Kerr-McGee and its predecessor explored from 1954 to 1965 to determine the location of commercial potash deposits in the basin. By 1965 Kerr-McGee had constructed a mill and began substantial mining operations within the basin. Transwestern acquired a right of way for its pipeline and compressor station in the basin in 1959 and started construction immediately. In 1962, Transwestern obtained a surface patent from the United States to the eighty acres on which the compressor station had been constructed. In exchange for the surface patent, Transwestern conveyed to the United States private grazing lands which it had acquired, presumably for the very purpose of this exchange. The exchange was made by authority of the Taylor Grazing Act.⁹⁷

The surface patent was granted subject to the reservation to the United States of all minerals, together with the right to prospect for, mine and remove such minerals as authorized. The patent was also subject to rights of prior permittees or lessees to use so much of the surface as required for mining operations. In addition, the patent provided that the surface could be used as necessary without compensation to the patentee for damages resulting from proper mining operations.

Transwestern negotiated with Kerr-McGee to leave enough ore in place to avoid disturbance to the station. Negotiations failed to produce an agreement, however, and Kerr-McGee prepared a mining plan in 1971 to mine under the station. Thereupon Transwestern filed suit. It asked, *inter alia*, for a declaratory judgment that its compressor station

97. The decision reports neither the circumstances of the exchange nor the fact that the Taylor Grazing Act was the authority for it. These facts appear in the record on appeal to the Tenth Circuit. Brief for Appellees at 10 n.2, *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, *supra* note 96.

was entitled to lateral and subjacent support. The trial court denied Transwestern's claims and dismissed the case.

On appeal, the Tenth Circuit affirmed the dismissal of Transwestern's suit. It applied the *Kieffer* rule and held:

Where, as here, the United States reserves the mineral estate, together with the right to prospect for, mine and remove the same in a grant of the surface estate, then is a servitude laid on the surface estate for the benefit of the mineral estate. *Kinney-Coastal Oil Company v. Kieffer* (citation omitted). Applying this standard, we hold that the trial court properly held that Kerr-McGee prevails over Transwestern and that Kerr-McGee was empowered to remove potash, and if necessary, to subside the surface in so doing.⁹⁸

The Tenth Circuit said no compensation would be payable to Transwestern for its loss of the compressor station or pipeline, "resulting from proper mining operations."⁹⁹

The rationale for the Tenth Circuit's holding is in two parts. First, Transwestern was fully aware of the prior lease rights of Kerr-McGee. Transwestern also had been advised, before it built, that a potash ore body existed under its intended station site and pipeline, and that mining would probably destroy any facilities constructed there. Second, the surface patent issued to Transwestern reserved the minerals to the United States; the patent was expressly subject to prior lease rights; and the patent explicitly provided that damages from proper mining operations would not be compensated. The Tenth Circuit therefore held that the *Kieffer* rule applied, and that the dominance of the mineral estate as stated in that case allowed the removal of lateral and subjacent support.

The *Transwestern* decision does not consider the logical question whether the patent reservations were proper. Since denial of surface damages depended on the patent language

98. *Id.* at 882-83.

99. *Id.* at 882.

and the validity of its waiver, it follows that the legality of the reservations must be determined. *Kieffer* established the rule that the surface uses allowed and the damages to be paid must be determined by examining the terms of the statute authorizing the surface entry together with the provisions of the Mineral Leasing Act of 1920.¹⁰⁰ The *Transwestern* court failed even to mention the Taylor Grazing Act which allowed the surface entry, or much less, to discuss its requirements. The court merely applied the *Kieffer* rule without any explanation how that rule, developed under another surface entry statute, could be properly applied to a Taylor Grazing Act patent.

The incomplete analysis of the *Transwestern* court weakens its authority, particularly in view of the fact that it is a case of first impression on the right to remove lateral and subjacent support. Further, the damages involved were large, and the language of the Taylor Grazing Act seems to contradict the result. Evidence presented at the trial shows the costs to Transwestern to rebuild its compressor station and pipeline elsewhere would range from six to eight million dollars.¹⁰¹ The Taylor Grazing Act seems to present an obstacle which must be hurdled if damages to the land and improvements are to be properly avoided. It provides:

When mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements.¹⁰²

100. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66, at 504.

101. *Cf.* Brief for Appellant at 41, *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, *supra* note 96. The Tenth Circuit evidently concluded that the issue was whether lateral and subjacent support was required. After determining there was no such requirement, it was unnecessary to consider the question of damages except to note that damages to surface improvements would result but would not be compensable.

102. 43 U.S.C. § 315(g) (1970).

The requirement of the Taylor Grazing Act to pay damages can be avoided only if the Act is construed together with the Mineral Leasing Act of 1920. Such an analysis discloses that the Tenth Circuit's *Transwestern* ruling was correct.

The Department of Interior has consistently treated surface patentees whose entries are junior to mineral lessees differently than surface patentees whose entries are senior to mineral lessees. This has been the Department's position ever since adoption of the Mineral Leasing Act of 1920. It was first stated in *Carlin v. Cassriel*¹⁰³ in 1924. The standard which is applied to subsequent surface entrymen, in effect, requires them to waive any damage rights they may have had under the statute authorizing their surface patent. The waiver of damage rights existing under the surface entry act is authorized by the Mineral Leasing Act of 1920. The Act gives the Secretary of the Interior discretion, in making leases, to reserve the right to dispose of the surface of leased lands under the laws of the United States, but only "insofar as said surface is not necessary for use of the lessee in extracting and removing the [leased] deposits therein."¹⁰⁴ The *Carlin* decision held that this part of the Mineral Leasing Act meant that the rights of a prior mineral lessee are vested and superior to those of the subsequent surface claimant. It also

103. *Carlin v. Cassriel*, I. D. 383 (1924). Based on this decision, the Department issued *Instruction*, 51 I. D. 166 (1925), to the Commissioner of the General Land Office requiring that surface entries be allowed and patents be issued for Leasing Act lands with the express notation on both that:

The entry is subject to the rights of the prior permittees or lessees to use so much of the surface of the area patented as is required for mining operations, without compensation to the entryman or patentee for damages to crops and improvements resulting from proper mining operations.

The Department expressed the hope that, if the surface entry application and the surface patent are so noted and limited, "the entrymen and their assigns will at all times be chargeable with notice of their rights, through expressed limitations founded upon the law and set forth in their grants." The *Instruction* also required that non-mineral patents state that the application for surface entry was made pursuant to Sec. 29 of the Mineral Leasing Act of 1920, 30 U.S.C. § 186 (1970). The requirements of the original 1925 *Instruction* have been carried forward to this day in substantially the same language. 43 C.F.R. §§ 2093.0-3 to .0-6 (1971). In the *Carlin* decision, *supra* note 103, the homesteader made his entry in 1917 under the Stock-Raising Homestead Act of 1916, but he did not file his entry application until 1923. The mineral lessee under a 1921 lease was therefore deemed to have prior rights which were vested before the 1923 application. The mineral lessee could make proper use of so much of the surface as was reasonably necessary to mining operations without liability to the surface owner for damages.

104. 30 U.S.C. § 186 (1970).

determined that the prior mineral lessee was entitled to use so much of the surface as is reasonably necessary to prospect for, mine and remove the reserved deposits without compensation to the surface claimant for the lessee's use of the surface.¹⁰⁵

The Interior Department's position and its regulations based on the *Carlin* decision are also consistent with the Taylor Grazing Act, notwithstanding the requirement of that Act that mineral lessees must pay for damage to the land and improvements. The first section of the Taylor Grazing Act¹⁰⁶ relieves prior mining permittees and lessees from the damage requirements set forth in the eighth section of the Act.¹⁰⁷ The eighth section of the Act, which contains the damage provisions, does not apply, by its own terms, to mineral rights acquired prior to the surface patent.¹⁰⁸

Viewed in the perspective of the Mineral Leasing Act of 1920 and the Taylor Grazing Act, the *Transwestern* deci-

105. *Carlin v. Cassriel*, *supra* note 103, at 385. The decision said that the damage provisions of the Stock-Raising Homestead Act were inconsistent with the right vested in the mineral permittee and therefore were modified by the Mineral Leasing Act. It was only on this basis that the Secretary exercised his discretion to allow the agricultural entry.

106. The Act provides in 43 U.S.C. § 315 (1970) that:

Nothing in this subchapter shall be construed in any way to diminish, restrict or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter. . . .

The substance of this provision was added to the proposed bill by the Senate Committee on Public Lands and Surveys "to insure the more complete protection of those now enjoying the use of the public lands." S. REP. NO. 1182 at 9, 73d Cong., 2d Sess. (1934). It is clear that the amendment was intended to protect prior mining rights. Senator Adams, spokesman for the Committee, explained during the Senate debate of the bill, "In the drafting of the bill and of the amendments which have been inserted by the Senate committee, great care has been exercised to preserve all the existing rights to the prospector [and] the miners." 78 CONG. REC. 11140 (1934). During the debate, Senator O'Mahoney, another committee member, advised the Senate that "Amendments have been added by the committee . . . to protect every right initiated under any existing public-land law . . . amendments to safeguard water rights and mining rights". 78 CONG. REC. 11144 (1934).

107. 43 U.S.C. § 315g (1970). See text accompanying note 101 *supra* for the damage clause.

108. 43 U.S.C. 315g(d) (1970). The damage provisions apply only "Where mineral reservations are made by the grantor in lands conveyed by the United States," and only to persons holding rights with respect to "the reserved minerals." These provisions exclude applicability to mineral rights acquired prior to the time minerals are reserved by a Taylor Grazing Act patent.

sion should be considered correct in allowing the removal of lateral and subjacent support which is necessary to mining without compensation to the surface patentee. Unfortunately, the decision is right for the wrong reasons. It remains to be seen whether the allowance of the removal of lateral and subjacent support will be extended to the statutory framework of the agricultural settlement laws.

Having reviewed the statutes and the few cases which have arisen on the subject of surface damages, a few additional conclusions may be drawn about the damages recoverable by surface owners as a result of mining operations. Agricultural or stock-raising surface owners are entitled to damages to agricultural improvements and to the agricultural value of the land. Surface owners under the four major surface entry acts discussed here are not entitled to damages for non-agricultural improvements.¹⁰⁹ Surface owners under any surface entry statute are not entitled to damages to the land or to improvements if damage is caused by a mining permittee or lessee whose rights were acquired prior to the surface entry. Industrial, commercial and residential developments should be enjoined from construction when they interfere with mineral development of the reserved minerals, just as the *Kieffer* Court ruled.¹¹⁰ Further, if such improvements are constructed, there will be no compensation for damages caused by proper mining activities or absent negligence on the part of the mining developer.¹¹¹ This rule of law is a definite obstacle to those involved with the spreading growth of residential, commercial and industrial development on lands subject to government mineral reservations under the surface entry statutes. This obstacle has been removed in rare instances by the withdrawal of the reserved minerals from mineral acquisition by acts of Congress.¹¹² Subdividers and existing communities may also find protection from federal mining leases by incorporation as a municipality be-

109. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66; *Holbrook v. Continental Oil Co.*, *supra* note 91. See also text accompanying note 75 *supra*.

110. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66.

111. Note, *Protection For Surface Owners of Federally Reserved Minerals Lands*, *supra* note 76, at 180.

112. See Carpenter, *supra* note 79, at nn.93-100 and accompanying text for such federal legislation.

cause the Mineral Leasing Act of 1920 excludes incorporated cities, towns and villages from federal leasing.¹¹³ The state law requirements of population density would have to be satisfied, however, in order to incorporate.

The surface owners under the various surface entry acts are not without some protections in the law. The miner is entitled to use only so much of the surface as is reasonably required in mining from those lands¹¹⁴ and not from lands owned by others.¹¹⁵ The miner may not use excessive surface area or subject the land to improper activities¹¹⁶ and is liable for negligent mining operations, whether the negligence damages agricultural or non-agricultural improvements.¹¹⁷ In addition, the miner should be subject to injunctive action in cases where his activities exceed his rights and threaten permanent injury, just as the surface owner in the *Kieffer* case was enjoined from improper activities interfering with the mining operations. A surface owner's claims of trespass and negligence operate as a powerful deterrent against careless mining operations on severed estates. Furthermore, the potential of financial loss resulting from injunction of operation of a large mine is staggering.

The major surface entry acts discussed in this article are not altogether clear, at least not without a study of the cases which have interpreted the statutes. More recent surface entry acts do not define the respective rights of the mineral and surface owners at all. Generally, these statutes merely reserve the minerals to the United States without explanation. Future judicial decisions may therefore apply either the common law rules of severed estates or the statutory

113. 30 U.S.C. § 181 (1970).

114. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66 at 504.

115. *Mountain Fuel Supply Co. v. Smith*, *supra* note 94; *Bourdieu v. Seaboard Oil Corp.*, 38 Cal. App. 2d 11, 100 P.2d 523 (1940).

116. *Mountain Fuel Supply Co. v. Smith*, *supra* note 94; *Bourdieu v. Seaboard Oil Corp.*, *supra* note 115. Both excessive use of surface area and improper

117. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66 at 505. Even non-agricultural activities are acts of trespass. The measure of damages for lost use of the surface is the lease value of the surface. *Bourdieu v. Seaboard Oil Corp.*, 63 Cal. App. 2d 201, 146 P.2d 256 (1944). See also 1 AMERICAN LAW OF MINING § 3.50 (1960).

al improvements would be protected by the tort law. They, like any other property, are protected from damage by negligence whether or not they were contemplated by Congress on agricultural entries.

scheme of the major surface entry acts.¹¹⁸ The *Transwestern* decision infers strongly that the statutory scheme will prevail.

The Equity Argument

The respective rights of the mineral owner and the surface owner do not depend on uncertain concepts of equity; the rights are statutory as the Tenth Circuit Court of Appeals illustrated in *Transwestern*. This is an important point because of the new criticism leveled at the Supreme Court's decision in *Kieffer*.¹¹⁹ The resurrected argument is that the Supreme Court should have required compensation for damages to all improvements, even non-agricultural improvements, and only failed to do so because of the inequitable attempt of the surface owner to create a town to stop mining activities.¹²⁰ This is not an accurate analysis of the decision. While the relative equities of the case were weighed by the Court, a careful reading of *Kieffer* shows that the Court emphasized potential rather than actual liability of the mineral lessee. The Court recognized there would be liability for negligence which caused damage to "agricultural improvements or crops."¹²¹ This determination was made so that the lower court could fix the amount of actual damages and the security to be provided by the mineral lessee. The Court measured the mineral lessee's exposure to liability for the sole purpose of determining the prerequisites to re-entry. Clearly, *Kieffer* stands for the proposition that a miner may properly develop a patented surface estate so long as he is willing to give security against certain potential injuries to the surface.¹²²

The traditional common law rule did not allow the surface owner compensation for injury to the surface due to

118. 1 AMERICAN LAW OF MINING § 3.43 (1960). See note 19 *supra* for the more recent surface entry acts not discussed in detail in this article.

119. See text accompanying note 76 *supra*.

120. Note, *Protection For Surface Owners of Federally Reserved Mineral Lands*, *supra* note 76.

121. *Kinney-Coastal Oil Co. v. Kieffer*, *supra* note 66 at 504. The surface patent had been granted under the Agricultural Entry Act of 1914.

122. *Id.* In the interest of predictability, potential mining entrants should be able to rely on *Kieffer* as authority for the proposition that posting security against negligent operations and agricultural or crop damage is sufficient to allow proper entry.

mining operations which removed the underground mineral deposits.¹²³ The courts have changed this common law rule in situations where extensive destruction of the surface is necessary to remove the mineral deposit. In the leading case of *Smith v. Moore*,¹²⁴ the Colorado Supreme Court construed a private reservation of both coal deposits and the right to use enough surface as was necessary and reasonable for removing the coal. The Colorado court denied the right to strip mine the coal without compensation. It reasoned that if the grantor of the land who reserved the mineral deposit could consume the surface, without paying compensation, he would have retained dominion over that which he purportedly conveyed and the grantee would be deprived of the very substance of his bargain. The Colorado court required compensation to the grantee for the full value of the surface estate which would be destroyed by strip mining.

The *Smith v. Moore* rule does not apply to the federally reserved minerals. It is based on concepts of equity while the federal statutes govern the rights and liabilities of the surface owner and the owner of federally reserved minerals.¹²⁵ Further, the need for the same protection to the owner of private surfaces overlying federal minerals does not exist. The damage provisions of the federal statutes require compensation to be paid for the value of the land for agricultural purposes and for the value of agricultural improvements.¹²⁶ These are the only values of the surface owners which are entitled to protection.¹²⁷

The legislative history of the surface entry acts which has not been discussed in the cases makes it clear that the Supreme Court in *Kieffer* correctly limited the damages to agricultural improvements. In the first place, the word "improvements" has a long history in the public land laws of

123. *Supra* note 67.

124. *Smith v. Moore*, 172 Colo. 440, 474 P.2d 794 (1970).

125. *United States v. Union Pac. R.R.*, *supra* note 43. Congress not only has the power to legislate concerning the public domain, but it may deal with the public domain as a proprietor just as a private individual may deal with his farming property. *Alabama v. Texas*, 347 U.S. 272, 273 (1954).

126. *United States v. Isbell Const. Co.*, 78 I. D. 385, 393 (1971).

127. *See text accompanying note 109 supra.*

this country. Since colonial times, American laws have required payment to those who settled in good faith on the lands of absentee owners and who were later evicted by the true owners.¹²⁸ Payment has been required for "improvements" to the land such as wells, houses, barns, fences and other agricultural improvements.¹²⁹ After the American Revolution, the principle was enacted into law by several states. Congress used the same word, "improvements," in an identical sense in the various preemption acts after 1830 and the homestead acts by requiring that farm-making "improvements" be constructed as one qualification for a patent to the land.¹³⁰ The House Report on the proposed Stock-Raising Homestead Act refers to "improvements" as "sinking wells, constructing fences and buildings, corrals, silos, and such things as will improve . . . [the] . . . entry for stockraising purposes."¹³¹ The value of the improvements required under the Stock-Raising Homestead Act of 1916 was \$1.25 per acre.¹³² Even in 1916, that sum could hardly have provided more than the basic improvements described here. The single meaning of the word "improvements" in the public land laws for over two and a half centuries indicates that Congress intended to use the word in the same context in the various surface entry acts. Unquestionably "improvements" contemplates nothing more than agricultural improvements.

Additional support for the judicial rulings that the mineral estate is dominant while the surface estate is servient appears in the legislative history of the various surface entry acts. The floor debate over the Coal Lands Acts shows that Congress was well aware that the creation of such composite estates would create disputes between the mineral and sur-

128. GATES, *supra* note 4, at 37-38.

129. H.R. REP. No. 35 64th Cong., 1st Sess. at 16 (1916). Irrigation works were also included in the word "improvements." See 45 CONG. REC. 6048 (1910) (remarks of Congressman Gillespie).

130. The meaning and legislative use of the word "improvements" was a part of the colonial laws of Virginia in the mid-1600's. Settlers on the wild frontier often found years after their entry that title to the land was held by an absent speculator who evicted them. Since the squatter had often improved the land in good faith with a well, house, fences and other agricultural needs, Virginia legislation required payment by the rightful owner to the squatter of the full value of the improvements. GATES, *supra* note 4, at 66-67, 219-21.

131. H.R. REP. No. 35, 64th Cong., 1st Sess. at 16 (1916).

132. 43 U.S.C. §§ 293, 294 (1970).

face owners¹³³ and that mining might "necessarily destroy the entire surface of the homestead."¹³⁴ Congress was compelled to make the severances, despite admonitions, on the theory that if the "[land] is fit for agricultural purposes it ought to be farmed . . ."¹³⁵ It was also noted that if the agricultural entryman objected to the mineral reservation, he could make his homestead upon the vast acreages which were not subject to mineral reservations.¹³⁶

Congress also knew the type of surface damage which surface mining causes. Certainly the technology of surface mining by open pit or strip mining methods was well known by 1900. Strip mining is the oldest recorded method of extracting coal and other minerals from the earth.¹³⁷ In fact, the authorities show that nearly every coal field opened before 1840 was mined by strip mining practices, then known as quarrying.¹³⁸ Some of the minerals reserved under the Stock-Raising Homestead Act, such as limestone or building stone, were customarily mined long before 1916 by open pit methods.¹³⁹

THOSE MINERALS WHICH ARE RESERVED

The Stock-Raising Homestead Act reserved to the United States "all the coal and other minerals in the lands" as to which surface patents were granted.¹⁴⁰ The Taylor Grazing Act reserved "all minerals."¹⁴¹ It is interesting to discover that this language does not necessarily reserve all minerals. Not only is there a dispute as to which substances are mineral,

133. 45 CONG. REC. 6044-45 (1910) (remarks of Congressman Robinson during the vigorous debate on the Coal Lands Act of 1910).

134. 45 CONG. REC. 6046 (1910) (remarks of Congressmen Ames and Ferris).

135. *Id.* at 6048 (remarks of Congressmann Mondell).

136. *Id.* at 6047 (remarks of Congressman Ferris).

137. SURFACE MINING 32, 247 (P. Pfeleider ed. 1968); ELEMENTS OF PRACTICAL COAL MINING 6 (S. Cassidy ed. 1973).

138. H. EAVENSON, THE FIRST CENTURY AND A QUARTER OF AMERICAN COAL INDUSTRY, 377 (1942). Congress was familiar with quarry mining on the public lands as early as 1895. The Act of January 21, 1895, 43 U.S.C. § 956 (1970), authorized the Secretary of the Interior to permit the use of rights of way through the public lands of the United States to any citizen engaged in mining or quarrying.

139. Twitty, *supra* note 19, at 518.

140. 43 U.S.C. § 299 (1970).

141. 43 U.S.C. § 315g(c) (1970).

there is also a dispute as to whether acknowledged minerals which comprise most of the surface were reserved.

It is settled that oil, gas and related hydrocarbons are reserved under the Stock-Raising Homestead Act by the language, "all minerals."¹⁴² The meaning of the word "mineral," however is not so precise that it can readily be applied to all other substances. As the Tenth Circuit Court of Appeals has said:

"Mineral" is a word of general language, and not *per se* a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute. Regard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies. (Citations omitted).¹⁴³

Clay, stone, sand and gravel are among those substances which fall into the disputed area. In *New Mexico ex rel. State Highway Comm'n. v. Trujillo*,¹⁴⁴ the Supreme Court of New Mexico held that gravel was not among the minerals reserved by the Stock-Raising Homestead Act. While the court conceded that clay, sand and gravel are normally considered minerals, it reasoned that materials which possess no exceptional characteristics or value which distinguish them from the surrounding soil are not recognized as "minerals" in the sense in which that term is used in conveyances. The court concluded that materials which form part of the surface are not minerals which were reserved by the Stock-

142. *Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931), *cert. denied*, 284 U.S. 633. Oil shale was also reserved by the use of the word "oil" in the Agricultural Entry Act of 1914. *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967).

143. *Bumpus v. United States*, 325 F.2d 264, 266 (10th Cir. 1963).

144. *New Mexico ex rel. State Highway Comm'n. v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971). The Highway Commission of New Mexico took the gravel material from the stock-raising homestead for use in road construction. The BLM, claiming ownership of the gravel, issued a permit for free use of the gravel since it was being used in a federal project. The court held that the gravel was owned by the surface owner, and that condemnation and compensation for the taking were required.

Raising Homestead Act. If the minerals which form part of the surface were reserved from the grant, the court said the surface patentee would not own any material on which to conduct his homesteading activities.

Only a few months after the New Mexico decision, the Department of Interior came to the opposite conclusion on the same question in *United States v. Isbell Const. Co.*¹⁴⁵ The sand and gravel in this case comprised practically all of the surface and subsurface to depths between 20 and 600 feet. The surface estate had been patented to the State of Arizona with a reservation of all minerals, as required by the Taylor Grazing Act which authorized the patent.¹⁴⁶ The Interior Board of Land Appeals collected the many cases which hold that grantors cannot be deemed to have reserved those minerals which comprise the surface, without clear and express language of reservation, because otherwise the grantor would have retained dominion over that which he purportedly conveyed to the grantee who would be deprived of the very substance of his bargain. Those cases were distinguished because the Taylor Grazing Act required compensation to the surface owner for damage to the land. The Board therefore held that a reservation of all minerals to the United States reserved valuable deposits of common sand and gravel. It allowed no exception to this rule where those minerals comprise all or substantially all of the land in question because compensation to the surface owner for damage to the land was required by the surface entry statute.

The Board said in *Isbell* that the Stock-Raising Homestead Act contained a similar indemnity for surface owners. On this basis, the Board indicated that common sand and gravel deposits on stock-raising homesteads would also be considered reserved to the United States.¹⁴⁷ The contradic-

145. *United States v. Isbell Const. Co.*, *supra* note 126.

146. 43 U.S.C. § 315g(c) (1970).

147. See the criticism of this position in Carpenter, *supra* note 79, at 15-16. The Common Varieties Act, 30 U.S.C. §§ 611-15 (1970), reserved common varieties of sand, stone, gravel, pumice, pumicite and cinders from the class of locatable minerals. Only if deposits of these materials possess a distinct and special economic value are they locatable. The Common Varieties Act therefore does not legislatively determine whether these substances are reserved minerals since locatable minerals under the mining laws are not the same as reserved minerals under the settlement laws. Carpenter, *supra* note 79, at 14.

tory views represented by the *Trujillo* and *Isbell* decisions leave this reserved minerals question unsettled. The *Isbell* case establishes the Bureau of Land Management position. It may be a long time before the courts establish a consensus of their own or consider reversing the agency rule.

Congress, itself, raised the newest question concerning reserved minerals. When it adopted the Federal Geothermal Steam Act¹⁴⁸ in 1970, Congress directed the Attorney General of the United States to file suit¹⁴⁹ in order to obtain a judicial determination whether geothermal resources were reserved to the United States by the Stock-Raising Homestead Act. The Attorney General complied with this mandate and brought a suit in California entitled *United States v. Union Oil Co.*¹⁵⁰ to determine the ownership of geothermal resources. The surface owners had leased the geothermal resources to Union Oil and others who were producing steam. The United States sought damages and an injunction against the production of the geothermal resources which it claimed were reserved to the United States.

The *Union Oil* court ruled that geothermal resources were not reserved by the Stock-Raising Homestead Act. The court reasoned that geothermal resources are primarily superheated water, and that water was not considered a mineral when the Act was adopted nor has water ever been considered a mineral under the public land laws.¹⁵¹ As a result of the *Union Oil* case, the surface owner under the Act is the owner of the geothermal resources taken from his lands.¹⁵²

148. Federal Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-25 (1970).

149. 30 U.S.C. § 1020(b) (1970).

150. *United States v. Union Oil Co.*, *supra* note 43.

151. The court also relied on the position of the Department of Interior that geothermal resources are not locatable under the mining laws as additional authority for holding that they were not reserved. It should also be noted that the Department of Interior holds the position that any mineral extracted with the geothermal steam are minerals reserved to the United States by the Stock-Raising Homestead Act. *Id.* at 1300 (Appendix A). See 30 U.S.C. § 1004(b) (1970). This issue may become important since geothermal waters are often heavily mineralized. At this stage of development of energy from geothermal resources, the mineralized waters are a nuisance. As early as 1818, however, geothermal steam at Larderello, Italy was commercially produced for heating in order to concentrate and remove the boric acid which occurred in solution in the hot waters. *United States v. Union Oil Co.*, *supra* note 43, at 1296.

152. The case is now on appeal to the 9th Circuit and could be reversed in that court or eventually the Supreme Court.

The *Trujillo* court and the *Union Oil* court have developed a rationale which may guide future questions as to which minerals were reserved by the Stock-Raising Homestead Act. These two courts have rejected the traditional view that patents granted under the Act created two separate estates; the surface estate which passed to the patentee and the subsurface mineral estate which was reserved to the United States.¹⁵³ This traditional analysis leads to the anomalous result that all of the subsurface would be reserved to the United States, leaving homesteaders no subterranean water or subsoil on which to make their stock-raising homesteads. Instead, the two courts have concluded that the Stock-Raising Homestead Act reserved only minerals in the land but not all of the subsurface.¹⁵⁴

FEDERALLY RESERVED MINERALS AS PUBLIC LANDS

While all persons who share the miner's viewpoint of the public land laws are sure that federally reserved minerals are part of the so-called "public lands," it is difficult to find direct statutory authority to that effect. No one doubts that the reserved minerals are open to mineral entry for exploration and location; the surface entry statutes, themselves, make that clear. Nevertheless, it would be helpful to know if the reserved minerals fall within the term "public lands" as used in the Mining Law of 1872¹⁵⁵ for patent rights and as used in the Unlawful Inclosures Act¹⁵⁶ for access rights.

There are several reasons to conclude that reserved minerals are part of the public lands. First, the severance statutes expressly provide that reserved minerals are open to prospecting, mining and removal. These expressly reserved rights have always been considered by the courts and the Department of Interior to be subject to the operation of the Mining Law of 1872 which applies to unappropriated public

153. *Skeen v. Lynch*, *supra* note 42.

154. *New Mexico ex rel. State Highway Comm'n v. Trujillo*, *supra* note 144, at 125; *United States v. Union Oil Co.*, *supra* note 43, at 1295.

155. 30 U.S.C. §§ 21, 22 (1970); *Udall v. Tallman*, *supra* note 19. The mining laws refer to the statutes which govern the mining of hard minerals on "public lands."

156. Unlawful Inclosures of Public Lands Act, 43 U.S.C. §. 1061-66 (1970).

lands. Second, more specific authority is found in the Congressional act creating the Public Land Law Review Commission in 1964.¹⁵⁷ That Act defined the term, "public lands" to include the subsurface resources retained by the United States in patented surfaces.¹⁵⁸ Lastly, the regulations of the Department of Interior provide that the reserved minerals are open to location, thus confirming their status as public lands. The regulations expressly provide that lands patented under the Stock-Raising Homestead Act are open to mineral location and patent.¹⁵⁹ The regulations also recognize the right to prospect and remove leasable minerals from surface lands patented under the Agricultural Entry Act of 1914,¹⁶⁰ and locatable minerals from the stock driveway withdrawals made under the Stock-Raising Homestead Act of 1916¹⁶¹ and from reclamation withdrawals made under the Reclamation Act of June 17, 1902.¹⁶²

The Department of Interior regulations do not contain provisions for mineral entry under the many newer disposal acts which allow patenting of the surface with reservations

157. Act of Sept. 10, 1964, 43 U.S.C. § 1400 (1970):

As used in this subchapter, the term "public lands" includes (a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, including the mining laws, (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) national forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands. . . . (emphasis added)

158. Ireland, Stapleton, Pryor & Holmes, *Study of Trespass and Unauthorized Use of the Public Lands of the United States*, PUBLIC LAND LAW REVIEW COMM'N STUDY REPT. (1970) [hereinafter cited as Ireland, Stapleton, Pryor & Holmes] describing public lands which are open to prospecting and location). See also, 43 C.F.R. § 3814.1 (1973) (specifically referring to stock-raising homesteads); *c.f.* *Devearl v. Dimond*, 62 I.D. 260 (1955) holding that the minerals reserved to the United States under Stock-Raising Homestead Act patents were "vacant, unreserved, and undisposed of public lands" under the statute adding lands to the Navajo Indian Reservation in Utah.

159. 43 C.F.R. § 3811.1 (1973) provides:

Lands entered or patented under the stockraising homestead law (title to minerals and the use of the surface necessary for mining purposes can be acquired), lands entered under other agricultural laws [where the agricultural entryman will be entitled to a patent including the minerals] but not perfected, where prospecting can be done peaceably are open to location. (emphasis added)

The requirement to prospect peaceably or not at all applies only to those lands on which a homestead entry has been made but not yet completed.

160. 43 C.F.R. § 3813.2 (1973).

161. 43 C.F.R. § 3815.1 (1973).

162. 43 C.F.R. § 3816.1 (1973).

of the minerals.¹⁶³ These statutes typically reserve all the minerals and the right to prospect for, mine and remove the deposits under the applicable law and according to such regulations as the Secretary may prescribe.¹⁶⁴ The regulations promulgated by the Secretary for these statutes usually provide that leasable minerals may be disposed of according to the leasing laws, but of course, the decision to lease is discretionary with the Secretary and rarely exercised. The regulations usually provide that locatable minerals are not open to prospecting or disposition until specific regulations for those purposes have been promulgated by the Secretary.¹⁶⁵

Obviously, the Secretary has not yet elected in these typical situations to exercise his discretionary authority to dispose of the reserved minerals. The Secretary's inaction may be prompted by a hesitancy to create conflicts with surface owners. It has been held that Congress may properly delegate to the Secretary the discretion to decide how and to what extent the reserved minerals under such statutes shall be open to mineral location.¹⁶⁶

Statutes which authorize the disposition of surface rights and which merely reserve minerals do not themselves open those lands to mining entry.¹⁶⁷ Specific statutory authorization is necessary to open such lands to mining entry whether by leasing or location, and such authorization will not be implied in a statute which only reserves minerals.¹⁶⁸

Since the term "public lands" properly applies to reserved minerals, the Unlawful Inclosures Act applies to them also. Even though this Act is not widely understood to apply, it does offer considerable assistance to miners seeking access to the reserved minerals. It prohibits interference by surface owners and others with those who have a right to enter the public lands:

163. See notes 19 and 118 *supra* and accompanying text.

164. *E.g.*, Small Tract Act, 43 U.S.C. §§ 682a, 682b (1970); Recreation & Public Purposes Act, 43 U.S.C. § 869-1 (1970).

165. *E.g.*, Small Tract Act, 43 C.F.R. § 2731.6-3 (1973); Recreation & Public Purposes Act, 43 C.F.R. § 2741.6(e) (1973).

166. *Dredge Corp. v. Penny*, 362 F.2d 889 (9th Cir. 1966).

167. *Solicitor's Opinion*, M-36279 (July 10, 1955).

168. *City of Phoenix v. Reeves*, 81 I.D. 65 (1974).

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands

. . . .¹⁶⁹

One section of the Act makes interference with the right of access a crime.¹⁷⁰ Another section charges the local United States Attorney with responsibility to bring a civil suit upon the filing of an affidavit by a citizen showing violations of the Act. The federal district courts have jurisdiction of the civil suits and must give priority to the case over other civil suits. The courts are to restrain violations by injunctions and to order unlawful enclosures destroyed within five days if not removed.¹⁷¹

Despite the traditional and correct view that the Unlawful Inclosures Act prohibits interference with agricultural settlement,¹⁷² the Act benefits all persons, including miners, who are lawfully entitled to reach the public lands.¹⁷³ It has been applied specifically by one federal court to benefit a mineral prospector who was prevented from reaching unappropriated public lands to locate mining claims.¹⁷⁴ The interfering parties used "guns, pistols, blows, ropes and tar"¹⁷⁵ to deny passage to the miners. The statute was invoked by the territorial attorney general, and the offenders were fined \$100 each and sentenced to one year in jail.¹⁷⁶ In

169. 43 U.S.C. § 1063 (1970).

170. 43 U.S.C. § 1064 (1970).

171. 43 U.S.C. § 1062 (1970).

172. See Comment, *Access To Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149 (1973); Ireland, Stapleton, Pryor & Holmes, *supra* note 158.

173. Cf. *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913).

174. *Hayes v. United States*, 101 F. 817 (8th Cir. 1900). The reported case leaves open the possibility (admittedly quite unlikely before 1900) that the public lands to which access was denied were reserved minerals under privately patented surfaces. The record on appeal, however, shows the dispute concerned access to entirely unappropriated public domain lands. Record, vol. 114, at 439, *Hayes v. United States*, *id.*

175. *Id.* at 819.

176. *Id.* at 820. The case arose in the Territory of New Mexico. The attorney general of the territory was a federal officer.

1959, the Acting Solicitor of the Department of Interior ruled that the Unlawful Inclosures Act afforded relief to miners who were denied access over public lands to their mining claims.¹⁷⁷ These authorities should apply with full force to the reserved subsurface below patented surface lands. Since the statutes reserved the subsurface for both mineral exploration and development, entry can properly be enforced by aid of the Act to explore for unknown mineral deposits as well as to develop known deposits.

Whether the Unlawful Inclosures Act confers any right to cross private lands which are not subject to mineral reservations is not settled. The Wyoming Supreme Court held that such an infringement of private rights would be unconstitutional.¹⁷⁸ The Utah Supreme Court, on the other hand, justified the constitutionality of such access right on the basis that the United States had retained an implied easement to reach its remaining lands when it made the private grants.¹⁷⁹ The Eighth Circuit Court of Appeals has also recognized the Act as conferring such access rights. It held the Act was a defense to a trespass action brought by the owner of private land against a sheepherder who crossed those lands to get his sheep to the public range. Unfortunately, the decision does not consider the constitutional question.¹⁸⁰

Certainly the patent provisions of the mining laws¹⁸¹ apply to the federally reserved minerals under the patented surfaces. The law and the regulations make no distinction between patent procedures for reserved minerals or for minerals where the surface is still owned by the United States. In the reserved mineral patents, the patentee receives fee title to the subsurface mineral deposit with the right to "reenter and occupy so much of the surface thereof as may

177. Rights of Mining Claimants to Access Over Public Lands to Their Claims, 66 I.D. 361 (1959).

178. United States v. Douglas-Willan Sartoris Co., 3 Wyo. 287, 22 P. 92, 97 (1889).

179. United States v. Buford, 8 Utah 178, 30 P. 433 (1892).

180. Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914); accord, Western Wyoming Land and Live Stock Co. v. Bagley, 279 F. 632 (8th Cir. 1922); Mumford v. Rock Springs Grazing Ass'n, 261 F. 842 (8th Cir. 1919); Jastro v. Francis 24 N.M. 127, 172 P. 1139 (1913). But see United States v. Rindge, *supra* note 173, at 623-24.

181. 30 U.S.C. § 29 (1970).

be required for all purposes reasonably incident to the mining or removal of the coal or other minerals."¹⁸² The rights granted with the reserved mineral patents necessarily follow the rights retained by the United States in the statutes allowing surface patents. In mineral patents where the estates are not severed, the patentee receives fee title to both the subsurface mineral deposit and the surface within the boundaries of the claim.

To this date, it is a rare occurrence for mineral owners to take their reserved mineral deposits to patent. In fact, Bureau of Land Management officials do not recall ever receiving such an application. A patent might enhance the mineral owner's access rights by clarifying his ownership, but it would not eliminate the interference to operations which many owners have managed to create. Therefore, owners of valuable reserved minerals have usually purchased surface damage agreements or the entire surface estate as more practical than patenting.

PRIVATE CONTESTS

Some landowners whose land is subject to mineral reservations have not been content to merely support protective legislation and wait for Congress to take action to protect their surface estates. A few surface owners have recently seized the initiative by filing administrative actions in the Bureau of Land Management to have mining claims on their lands declared void.¹⁸³ The Interior Department regulations authorize the filing of such a private contest:

Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land . . . may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a

182. Stock-Raising Homestead Act of Dec. 29, 1916, 43 U.S.C. §§ 291-301 (1970). The Agricultural Entry Act of 1914, 30 U.S.C. §§ 121-23 (1970) makes a similar provision. See also, 43 C.F.R. §§3813-14 (1973).

183. *E.g.*, Sedgwick v. Callahan, 9 IBLA 216, GFS (Min) 27 (1973); Thomas v. DeVilbiss, 10 IBLA 56, GFS (Min) 35 (1973).

proceeding will constitute a private contest and will be governed by the regulations [in the subpart].¹⁸⁴

The surface owner clearly has an adverse interest to the mining claimant since mining operations can damage and even destroy the surface owner's estate.¹⁸⁵ This adverse interest assures the surface owner's standing to bring the private contest.¹⁸⁶ The private contest is then heard and decided by the Bureau of Land Management on the theory that such claims assist the Secretary of Interior in his duty to supervise the public lands.¹⁸⁷

In a private contest, the surface owner typically attacks the validity of an unpatented mining claim on the basis that no valid discovery of a valuable mineral has been made.¹⁸⁸ Claims have been held invalid in private contests, however, for failure to validate the location in accordance with the law,¹⁸⁹ or because staked on land not subject to mineral location at the time of entry.¹⁹⁰

The use of private contests to remove mining locations from the surface dates back at least to 1924.¹⁹¹ Those who are entitled to bring the private contest include surface patentees or their successors under the various surface entry acts,¹⁹² grazing lessees under the Taylor Grazing Act,¹⁹³ holders of special use permits granted by the Forest Service for construction of a dam and spillway on national forest lands,¹⁹⁴ and agricultural lessees from the surface patentee.¹⁹⁵ The right to file a private contest extends to any party claiming an adverse interest in the land on which the mining claim is located.

184. 43 C.F.R. § 4.450-1 (1973).

185. *Sedgwick v. Callahan*, *supra* note 183.

186. *Id.*; *Branch v. Brittan*, 50 I.D. 510 (1924).

187. *Duguid v. Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

188. *E.g.*, cases cited note 183 *supra*.

189. *Turf Paradise, Inc. v. Adams*, Contest No. 9945, Arizona 080536 (Unreported dec. Sept. 9, 1966).

190. *City of Phoenix v. Reeves*, *supra* note 68.

191. *Branch v. Brittan*, *supra* note 186.

192. *Sedgwick v. Callahan*, *supra* note 183.

193. *Thomas v. DeVilbiss*, *supra* note 183.

194. *Duguid v. Best*, *supra* note 187.

195. *Turf Paradise, Inc. v. Adams*, *supra* note 189.

Once the private contest is filed and a prima facie case of invalidity is made by the surface owner, the burden of proof rests on the mining claimant to show by a preponderance of the evidence that the test of discovery of a valuable mineral deposit has been met or that the claims are otherwise valid.¹⁹⁶ The Administrative Law Judge makes a decision which is subject to administrative appeal to the Secretary of Interior.¹⁹⁷ Mining claimants have not yet succeeded in obtaining injunctions from state courts against the lengthy appeal proceedings by arguing that they will be deprived of the use of the mining claim for several years.¹⁹⁸

Not all private contests have been successful. Nevertheless, several other actions discussed here have been useful to the surface owner to eliminate invalid mining claims from his estate. In self defense, mining claimants of federally reserved minerals will probably find it worthwhile to carefully validate their mining locations and to rigidly adhere to the discovery and assessment work requirements.

PROPOSED CHANGES TO THE RESERVED MINERALS LAW

The legal status of the federal reserved minerals is awash in a torrent of change or proposed change. We have considered the possibilities for change which private contests within the Bureau of Land Management may bring. We should now consider the changing administrative regulations which have already effected substantial changes. We will then consider the recent state legislation and the pending federal legislation.

Proposed Changes to the Regulations

When Congress adopted the Mineral Leasing Act of 1920, it gave jurisdiction of the leasing materials to the Depart-

196. *Sedgwick v. Callahan*, *supra* note 183.

197. 43 C.F.R. pts. 1840 & 1850 (Supp. 1964).

198. *E.g.*, *Duguid v. Best*, *supra* note 187. *See also* Everett E. Wilder, 14 IBLA 406, GFS (Min) 25 (1974) where holders of a mining claim on lands subject to a patent applicant were not allowed to object in the patent proceeding but were required to file a private contest to litigate the question whether their ownership was superior to that of the patent applicant.

ment of Interior and made the Secretary of the Interior the administrator of the leasing program.¹⁹⁹ The Secretary has a wide latitude in administering the lands subject to the jurisdiction of the Department of Interior, but of course, his regulatory powers are bound by Congressional acts²⁰⁰ and his own regulations which remain in effect.²⁰¹

Under its right to administratively change leasing programs, the Department of Interior virtually ceased issuance of coal leases as of the fall of 1970 and prospecting permits as of the spring of 1973.²⁰² In June of 1974, the Department of Interior published its environmental impact statement on its new lease program.²⁰³ It will reopen competitive lease sales of what are considered the best coal deposits. The leases would require environmental safeguards as well as reclamation of the land affected. The program includes federal coal deposits under both public and private surfaces. The public will participate in hearings to select the lease sites and will surely resist leases of reserved minerals under homesteaded lands. The need for coal is expected to be so great, however, that no areas can be considered immune from leasing.

State Legislation

Twenty-nine states have enacted legislation of one sort or another to regulate surface mining, primarily for coal.²⁰⁴ Among the most recent and perhaps the most restrictive of the state acts are those of Montana and Wyoming. The two acts directly affect the mining of federally reserved minerals in those states.

199. 30 U.S.C. § 189 (1970); *Thomas v. Union Pac. R.R.*, *supra* note 23.

200. *Seaton v. Texas Co.*, 256 F.2d 718 (D.C. Cir. 1958); *cf.* *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953).

201. *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

202. 1 BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, DRAFT ENVIRONMENTAL IMPACT STATEMENT—PROPOSED FEDERAL COAL LEASING PROGRAM I-1 (1974).

203. *Id.* at I-1a to I-7; *Id.* at Vol. 2, IV-74, VIII 134-36.

204. H.R. REP. NO. 93-1072, 93d Cong., 2d Sess. at 61 (1974) (accompanying H.R. 11500). Both Colorado and Wyoming have for many years had statutes limiting a mineral owner's development of mineral deposits under surfaces owned by others. The statutes give the owner or occupant of the surface the right to demand satisfactory security from the mineral operator for compensable damages to the surface. If it is refused, mineral operations may be enjoined. COLO. REV. STAT. § 92-24-6 (1963); WYO. STAT. § 30-19 (1957). *See* *Whiles v. Grand Junction Mining & Fuel Co.*, 86 Colo. 418, 282 P. 260 (1929). These state statutes apply to federally reserved minerals as supplemental to the federal legislation.

Montana adopted its Strip Mining and Reclamation Act in 1973.²⁰⁵ The Act established a permit system for strip mining coal and uranium.²⁰⁶ A mining and reclamation plan must be submitted to the state, and the issuance of a mining permit depends upon whether the state reclamation standards can be met.²⁰⁷ The Act prohibits prospecting or mining activities on any lands in the state, including federal lands, without a permit.²⁰⁸

The Montana legislation requires the surface owner's consent to nearly all mining activities.²⁰⁹ Prospectors, miners and others contemplating surface disturbance by mechanical equipment are required to give notice to the surface owner or those with possessory rights before beginning work. Trail building is expressly described as surface disturbance, but all work by hand tools is exempt from the notice and consent requirements.²¹⁰

The written notice to the surface owner must describe the locations to be disturbed and must include work and restoration plans. The miner must obtain the written consent of the surface owner before any mining work, except work with hand tools, is begun.²¹¹ No written consent is required, however, where the operations are expressly authorized in a valid prospecting permit, mineral lease or other agreement.²¹² The exemption of hand-dug discovery pits on federal lands from notice and consent presumably includes the federally reserved minerals under privately patented surfaces.²¹³

205. MONT. REV. CODES §§ 50-1034 to -1056 (Supp. 1973). Montana adopted a chapter on reclamation of mining lands in 1971. MONT. REV. CODES §§ 50-1201 to -1224 (Supp. 1973). The 1973 legislation also included the Strip Mined Coal Conservation Act found in MONT. REV. CODES 50-1401 to -1409 (Supp. 1973), and the Open Cut Mining Act found in MONT. REV. CODES §§ 50-1501 to -1516 (Supp. 1973).

206. MONT. REV. CODES § 50-1039 (Supp. 1973) (permit system); § 50-1036 (Supp. 1974) (removed clay and phosphate from the permit requirement).

207. MONT. REV. CODES § 50-1039(2) (Supp. 1974).

208. MONT. REV. CODES § 50-1041 (Supp. 1974).

209. Landowner Notification Act, MONT. REV. CODES §§ 50-1301 to -1306 (Supp. 1973).

210. MONT. REV. CODES § 50-1302 (Supp. 1973). Discovery pits when dug by hand tools on federal lands open to mineral entry are exempted from the consent requirement. MONT. REV. CODES § 50-1304 (Supp. 1973).

211. MONT. REV. CODES § 50-1303(a) (Supp. 1973).

212. MONT. REV. CODES § 50-1305 (Supp. 1973).

213. MONT. REV. CODES § 50-1304 (Supp. 1973). See text accompanying note 157 *supra* concerning the federally reserved minerals as federal land.

The Montana legislation makes it a crime to do mining work without the required written consent.²¹⁴ Furthermore, the person who controls the surface where the violation occurs is granted immunity from liability "for injury to any person on either owned or leased land."²¹⁵ The immunity provision is vague—and ominous. Evidently, it is intended to relieve the land owner or those in control of any tort liability to invitees and trespassers resulting from dangerous conditions on the surface. We can only hope it does not license surface owners to injure prospectors whom they consider in violation of the statute.

Wyoming set out new mining controls in its Environmental Quality Act.²¹⁶ Like Montana, the Wyoming Act establishes a permit system which requires prior approval before mining operations are undertaken.²¹⁷ The mining permit is to be issued upon state approval of mining and reclamation plans which show that the work will be done in accordance with the regulations and other provisions of the Act.²¹⁸ During mineral exploration, only open cuts by bulldozer are regulated.²¹⁹ During development and mining, however, all operations are regulated.²²⁰

Wyoming also requires that applications for a mining permit for minerals owned separately from the surface estate must be accompanied by the surface owner's consent to the operations.²²¹ If the consent cannot be obtained, the Environmental Quality Council is empowered to issue the permit anyway if it finds the mining operations will not "substantially prohibit the operations of the surface owners."²²² Whether consent to enter is given by the surface owner or the state, the miner must give a bond to the state for the benefit of the surface owner to secure payment of damages to the surface

214. MONT. REV. CODES § 50-1306 (Supp. 1973). The Act purports to make any such failure a misdemeanor without requiring a willful or intentional violation.

215. MONT. REV. CODES § 50-1306 (Supp. 1973).

216. WYO. STAT. §§ 35-502.1-56 (Supp. 1973).

217. WYO. STAT. § 35-502.23 (Supp. 1973).

218. WYO. STAT. § 35-502.24 (Supp. 1973).

219. WYO. STAT. § 35-502.30 (Supp. 1973).

220. WYO. STAT. § 35-502.20 (Supp. 1973).

221. WYO. STAT. § 35-502.24 (b) (x) (Supp. 1973).

222. WYO. STAT. § 35-502.24 (b) (x) (C) (Supp. 1973).

estate, crops or forage and the tangible improvements of the surface owner.²²³

The legislation adopted by both Montana and Wyoming in 1973 was the result of considerable agitation by ranchers and other land owners.²²⁴ These individuals understood very well the limitations of their surface rights. They sought and obtained state legislation which gives them something more than they acquired through their surface patents. Montana surface owners gained an absolute veto power, in effect, over access to and the mining of federally reserved minerals. Wyoming surface owners gained a more limited veto and protection of their non-agricultural improvements.

The Montana and Wyoming legislation concerning mining of the federally reserved minerals raises some fundamental constitutional questions. The restrictions against mining the reserved minerals are invalid if the states do not have jurisdiction over the federally reserved minerals. The minerals are part of the federal public lands until they have been reduced to private ownership by mineral entry or federal lease. Logic would seem to dictate that the reserved mineral estate, as federal property, would be subject to federal legislation, and that the overlying surface estate, as private property, would be subject to state legislation. Those propositions are legally correct so far as they go²²⁵ but the issue is not that simple. Because the estates are inextricably intertwined, neither legislative authority can regulate one estate without necessarily affecting the other.

Which authority prevails must be determined by constitutional principles of preemption. Our federal system of

223. WYO. STAT. § 35-502.33 (a) (ii) (Supp. 1973).

224. 119 CONG. REC. 18770, 18776 (daily ed. Oct. 8, 1973) (remarks of Senator Mansfield and Senator Hansen, respectively). See Time, April 16, 1973, at 62.

225. U.S. CONST. art. IV, § 3, cl. 2 provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The tenth amendment reserves to the states dominion over land within the boundaries of the states. *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), *aff'd*, 302 U.S. 186 (1937).

government is based on the fundamental premise that state legislation which is contrary to valid federal law is unconstitutional since the laws of the United States are the supreme law of the land.²²⁶ If the federal legislation regulates a subject constitutionally delegated to Congress, the federal law has "preemptive capability."²²⁷ State legislation on the subject will be nullified, however, only to the extent Congress intended preemption.²²⁸ Where no such intent is expressed, a direct conflict between state and federal law requires an inference that preemption was intended.²²⁹

Certainly federal laws governing reserved minerals have preemptive capability. Both the means and the end of the legislative scheme lie within the parameters of legitimate federal concern. The subject matter is federal land and the regulation of it is entrusted to Congress.²³⁰ The purpose of the regulation is federal whether one perceives the laws as concerning simply the disposition of federal land or, more broadly, as furthering interstate commerce.²³¹

There is little room for debate whether the state laws conflict with the federal legislation. The surface entry acts contain relatively explicit provisions for mineral entries. None

226. U.S. CONST. art. VI, § 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

227. See Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971,) *aff'd mem.*, 405 U.S. 1035 (1972).

228. See authorities cited note 227 *supra*. The earlier view was that "the exercise of federal power was inherently exclusive of any concurrent state power over any matter reached by the federal act." Engdahl, *supra* note 227, at 53. The 1872 mining law did not preempt the entire field, and the states are permitted to elaborate on some aspects of mining where the federal law is silent. 1 AMERICAN LAW OF MINING § 1.22 (1960). State laws have dealt principally with location procedures and the amount and proof of development necessary to hold a mining claim.

229. As the Supreme Court stated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963):

A holding of federal exclusion of state law is unescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility. . . .

230. See note 225 *supra*.

231. U.S. CONST. art. I, § 8:

The Congress shall have the Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

of those provisions allows the surface owner to deny mineral access; in fact, the provisions carefully require approval of a bond by the Department of Interior or the establishment by a court of the appropriate damage safeguards if the surface owner does not consent to mineral entry. The entire thrust of the surface entry acts is to provide a means for access to these public minerals which is not subject to denial.²³²

Assuming, however, that the state provisions are considered to be merely supplementary to the federal law, an intent to preempt may be derived from the statutory language and legislative history of the federal law, the nature of the subject matter, or from the pervasiveness of the legislative scheme.²³³ In sum, if the state law stands as an obstacle to the realization of federal objectives, preemption is mandated.²³⁴ As the Supreme Court has said, a state cannot "affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."²³⁵

Indeed, the new state legislation impedes the national government's original purpose of reserving the minerals for the public benefit.²³⁶ A requirement to obtain the surface owner's consent to mining and the protection of non-agricultural improvements clearly interferes with the federal program for extraction of the reserved minerals as it was conceived in 1909 and subsequently applied.²³⁷ Furthermore,

232. See note 239 *infra*.

233. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972).

234. *Id.*

235. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-51 (1930); *James v. Dravo Contracting Co.*, 302 U.S. 134, 142 (1937).

236. 45 CONG. REC. 6041 (1910). When Congressman Mondell introduced the Coal Lands Act of June 22, 1910 to the floor of the House for debate, he said:

We must separate the surface from the coal in our public coal lands, or else give up the idea of reserving the coal to the Government, because the coal areas are so extensive that to withhold these lands from agricultural entry until someone might desire to purchase them at the coal price would mean to close the door of opportunity and development in many western regions for generations to come.

119 CONG. REC. 18772 (daily ed. Oct. 8, 1973). Senator McClure said: The rationale for the reservation was that the people of the United States as a whole should benefit from the ownership of the minerals under the lands, and not just those who acquire title [to surface lands] from the United States. . . .

237. Objections were raised to the breadth of the damage provisions of the Coal Lands Act of June 22, 1910 as unwarranted interference with mineral

the state law conflicts with the federal law. For these reasons, so much of the state legislation as attempts to grant surface owners a veto power over entry to and development of the federally reserved minerals is unconstitutional.²³⁸

The argument for validity of the state laws is founded upon tenth Amendment principles; states have the inherent right to legislate so as to protect the public health, safety and general welfare within their boundaries.²³⁹ It is apparent that the federal courts are hesitant to imply preemption of state law in the vital areas of health and safety.²⁴⁰ As the Supreme Court has held, unless there is an express reservation of exclusive jurisdiction by the United States or a ceding of jurisdiction by a state to the United States,²⁴¹ a state has inherent power over public lands within its boundaries.²⁴² Absent the presence of these two exceptions, the police power of a state extends over the federal public domain, at least when there is no legislation by Congress on the subject.²⁴³ Therefore, so much of the Montana and Wyoming legislation as requires the reclamation of mined lands should be considered constitutional.

extraction. 45 CONG. REC. 6044 (1910) (remarks of Congressman Robinson). By the time the Stock-Raising Homestead Act was adopted in 1916, the damage coverage provided by it was less extensive.

238. It is true that the Wyoming law does not allow the surface owner a complete veto power since the state can override a refusal. The state can only override, however, if it finds that mining operations will not "substantially prohibit the operations of the surface owners." WYO. STAT. § 35-502.24 (b)(C) (Supp. 1973). This is a consideration not allowed in the federal law. It seems to protect even non-agricultural improvements and operations even though the federal laws protect only agricultural improvements and activities. See text accompanying note 79 *supra*. Since the balance between the competing interests of surface owner and mineral owner is altered by the Wyoming law, it is no answer to say that state law merely supplements the protection given the surface owner. Of necessity, such protection concurrently erodes the rights of the mineral estate, which are also the subject of federal protection. Where preemption may be fairly inferred, a state law may not disturb the balance in competing interests as established by federal law. See *Northern States Power Co. v. Minnesota*, *supra* note 233, at 1153-54.
239. *E.g.*, *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).
240. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). If an intent to preempt is sufficiently clear, however, the state interest in health and safety must give way to the judgment of Congress. See *Northern States Power Co. v. Minnesota*, *supra* note 233, at 1153.
241. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *State v. Cline*, 322 P.2d 208 (Okla. Crim. App. 1958).
242. *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), *aff'd*, 302 U.S. 186 (1937).
243. *Omaechevarria v. Idaho*, 246 U.S. 343, 353 (1918).

Certainly the regulation of mining activities has a direct effect on the public health, safety and general welfare, as the House of Representatives committee report on the proposed federal coal mining bill demonstrates.²⁴⁴ The House report cites the collapse of a mine waste impoundment in West Virginia in which 124 people were killed and 4,000 left homeless in 1972. It also reports 11,000 miles of streams in the East have been ruined by acid drainage from coal mining. Moreover, the report relates, forests and wildlife have been destroyed, landslides have occurred, and rivers have been filled with silt. Surface uses are disturbed for considerable periods of time. Water tables are affected. These and other deleterious effects on the public health, safety and general welfare illustrate the public danger from surface mining which the state legislation is intended to protect. Accordingly, a strong argument can be made that the states should be allowed jurisdiction over the reserved minerals by virtue of their compelling interests so as to impose more restrictive requirements on mining operations than the present federal laws. This is particularly true where the federal legislative scheme is old and new mining technology causes more damage than may have been contemplated when Congress originally legislated on the matters of access and surface damages.

Whatever the validity of the new Montana and Wyoming laws, the federal legislation recently considered in Congress may moot the constitutionality issue. The Senate bill would totally ban surface mining of federally reserved minerals and the House proposal would condition mining upon the consent of surface owners. If either version becomes law, this radical change will render state legislation merely supplemental. Both the Senate and House bills go to considerable length to avoid superseding existing and future state laws which provide more stringent surface mining controls. The Senate bill also directs that state controls on surface mining and reclamation may supplement the federal law without being declared inconsistent.²⁴⁵

244. H.R. REP. NO. 93-1072, 93d Cong., 2d Sess. at 56-61 (1974).

245. S. 425, 93d Cong., 1st Sess. § 611 (1973); H.R. 11500, 93d Cong., 2d Sess. § 207 (1974).

Proposed Changes By Federal Legislation

It is not startling to learn that federal legislation may altogether ban surface mining of federally reserved coal deposits. The Surface Mining Reclamation Act of 1973²⁴⁶ passed the Senate with just such an amendment. The amendment provided:

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.²⁴⁷

Should it have become law, the Senate bill would have constituted an absolute prohibition against surface mining of the federally reserved coal under privately owned surfaces. The federally reserved coal would simply have been withdrawn from the federal leasing program.

The Senate bill also contained the seed for extension of the regulation of strip mining to other minerals. It would have required the gathering of data necessary to the future regulation of surface mining of all other minerals.²⁴⁸

The thrust of the House bill, H.R. 11500,²⁴⁹ is quite different. It would have required the consent of the surface owner before surface operations to mine the federally reserved coal could begin.²⁵⁰ This idea was considered and rejected in the Senate as giving away federal rights and providing a windfall to the surface owner by giving him a veto which he does not have the right to exercise.²⁵¹ The House bill, however, would have given the surface owner the chance to veto coal mining under his surface land or to demand payment for his consent.²⁵² A resolution of this legislative difference must be achieved before either bill becomes law.

246. S. 425, 93d Cong., 1st Sess. (1973).

247. 119 CONG. REC. 18912 § 612(b) (daily ed. Oct. 8, 1973).

248. *Id.* at 18902 § 102(9).

249. H.R. 11500, 93d Cong., 2d Sess. (1974). The proposed bill is called the Surface Mining Control and Reclamation Act of 1974.

250. H.R. 11500, 93 Cong., 2d Sess. § 709(a) (1974).

251. 119 CONG. REC. 18772 (daily ed. Oct. 8, 1973).

252. The Denver Post, May 9, 1974, at 53, col. 4 (remarks of Congressman Morris K. Udall, a prime sponsor of H.R. 11500). Rep. Udall said, "We're

If either approach to the mining of federally reserved coal under private surface land is adopted, a fundamental change in our nation's history will have occurred. The existing law will have been overturned, as the Senate recognizes.²⁵³ Congress will have reneged on the very basis by which the major surface entry acts won enactment in the early 1900's.²⁵⁴

The conservationists of that time opposed allowing the surface entries at all, or at least they opposed the payment of any damages caused by mining to the surface owners.²⁵⁵ Their stated reasons were that the underground minerals could not be economically extracted if damage payments were required, and that the government would be continuing its giveaway of the public's mineral wealth to homesteaders by requiring unwarranted payment to them for damages.²⁵⁶ In practice, surface owners under the surface entry statutes have usually been fairly paid for all damages from mining activities, often considerably more than they are legislatively entitled to receive.²⁵⁷ The economic burden of obtaining the surface owner's consent will result in increased costs to the great number of fuel consumers and unjust enrichment of a small number of surface owners; providing them compensation for something they do not own.²⁵⁸

The great emotional appeal of a complete ban on surface mining of federally reserved minerals is understandable, but we should also note that it will be a complete change in the present law regarding mining of those minerals. The present law clearly permits surface mining as well as subsidence of the surface²⁵⁹ pursuant to the original severance acts.

going to make those rich surface owners at the expense of consumers who have to pay higher costs for coal." He also said surface owners would be protected by the requirements of full restoration of the land to its original contours after mining operations cease.

253. 119 CONG. REC. 18770 (daily ed. Oct. 8, 1973) (remarks of Senator Fannin).

254. Note 12 *supra* and accompanying text. The 1974 legislation was approved by Congress after a long struggle in the Conference Committee. The bill was then vetoed by President Ford.

255. 45 CONG. REC. 6046 (1910) (remarks of Congressman Ferris).

256. *Id.*

257. Ary and Morgan, *supra* note 39, at 492-95; Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner*, 8 ROCKY MT. MIN. L. INST. 315, 316 (1962).

258. During floor debate on the Senate bill, S. 425, 93d Cong., 1st Sess. (1973), Senator Metcalf called the requirement of surface owner consent "legal blackmail." 119 CONG. REC. 18773 (daily ed. Oct. 8, 1973).

259. See note 39 *supra*.

The wisdom of the proposed legislation will ultimately be for Congress to decide. Pending that decision, it should be noted that mineral interests which are already vested cannot be destroyed, at least not without just compensation.²⁶⁰ As the Supreme Court has said:

[W]hen the location of a mining claim is perfected under the law, it has the effect of a grant by the United States to present and exclusive possession. The claim is property in the fullest sense of the term and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment.²⁶¹

Thus, the ownership of a mining claim and the right to remove the minerals according to the laws and regulations then existing should be considered vested when the location is perfected. The law regarding removal or disposal of the minerals could not be changed at that point without affecting the locator's rights, at least under the existing law.²⁶² A valid mining location, even though unpatented, is a grant in the nature of an estate in fee; if that estate is taken by the United States, just compensation must be paid as required by the fifth amendment to the United States Constitution.²⁶³

260. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930). See also *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935); *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956).

261. *Wilbur v. United States ex rel. Krushnic*, *supra* note 260, at 316.

262. 17 OP ATT'Y GEN. 230 (1881).

263. *North American Transp. & Trading Co. v. United States*, 53 Ct. Cl. 424 (1918), *aff'd*, 253 U.S. 330 (1920). The extent to which the mineral rights could be infringed without violating the taking clause of the Fifth Amendment is a formidable constitutional question beyond the scope of this article. Three recent, informative articles on the subject are worthy of study. See Corker, *Limits to "The Petty Larceny of the Police Power"*, 20 ROCKY MT. MIN. L. INST. ____ (1975); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Michelman, *Property, Utility, and Fairness: Comments On The Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). The definitive authority on the subject is F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973). See also, Comment, *Land Quality: The Regulation of Surface Mining Reclamation in Wyoming*, 9 LAND & WATER L. REV. 97, 115 & n.134 (1974).

The traditional rule has been that a severe reduction in the profit-making capacity of property is a taking subject to compensation under the fifth amendment. See Sax, *supra*, at 151; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Dooley v. Town Plan and Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964). As the concept of private property rights has changed in recent years, so is there an indication that the judicial approach to the taking clause may evolve to include both the effect of regulation on

The location is not perfected, however, until a valuable mineral deposit has been discovered.²⁶⁴

The point of time when federal mining lease rights vest is not certain. The administrative law has recognized vested rights as soon as the lease issues.²⁶⁵ The proposed federal bills, on the other hand, consider the rights as having vested only where active mining is underway; inactive leases and future leases would be subject to the new restrictions.²⁶⁶

those regulated, and the effect of *absence* of regulation on other property owners and the public at large. See Sax, *supra*, at 154-59; State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906 (1949), *aff'd per curiam*, 338 U.S. 863 (1949). Speaking of the case, where two property owners rights are mutually antagonistic, Sax declares:

It hardly seems appropriate, when government intercedes to settle the conflict, to find that a "taking" has occurred simply because the uses one owner has formerly been able to make within *his* boundaries have been curtailed. The restriction may instead represent a resolution of conflicting demands so as to protect and maintain the uses of other parcels of property within their boundaries. Sax, *supra*, at 154-55.

The trend of the law in this direction is apparent in land use cases. For example, the power of states to impose reasonable reclamation requirements on surface mining is clearly established. See, Dufour v. Maize, 358 Pa. 309, 56 A.2d 675 (1948); Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NATURAL RESOURCES J. 137 (1969). The Supreme Court also has taken a permissive view of local laws regulating surface mining. See Bosselman, *supra*, at 155; Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding a prohibition of surface mining below water table in developed residential districts).

The owner of mineral interests, however, may justly distinguish his situation from the usual land use regulation case. First, contrary to the facts in *Goldblatt*, the land here concerned is largely undeveloped. Furthermore, the mineral and surface rights are not vested in the same person—a material difference. Restriction of the mineral rights in the divided ownership context is more apt to constitute a "severe reduction" of the profit-making capacity. This is a taking under the traditional view, and even under the modern view, a clearly relevant factor. Finally, and most importantly, the mineral owner should be justified in relying on the present federal delineation of rights between the surface and mineral owners. Monies and energy may well have been expended with the expectation that the mineral interests would amount to something in a legal sense. Consequently, any new legislation, state or federal, which would have the effect of reallocating the mineral estate to the surface owner should be vulnerable to a fifth amendment challenge. The argument would not be applicable, of course, to surface mining legislation directed to the prevention of deleterious effects on *other* property surrounding the land on which mineral activity takes place. See Sax, *supra*, at 154; Binder, *Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339 (1973).

264. See *Cameron v. United States*, 252 U.S. 450, 456 (1920).
265. *Carlin v. Cassriel*, *supra* note 103. A mineral lessee whose interest is earlier than an agricultural entry under the Stock-Raising Homestead Act has a vested right by virtue of the Mineral Leasing Act which takes precedence over the rights of the stock-raising patentee, and the lessee is not liable for damages to the land or improvements due to proper mining operations. The Department of Interior practice is to preserve the vested right by noting on the agricultural application and patent the prior rights of the lessee. 43 C.F.R. §§ 102.31-33 (1963). See also *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, *supra* note 96.
266. S. 425, 93d Cong., 1st Sess. § 206 (1973) prohibits coal lessees from opening, developing or expanding surface coal mining operations without a new

Recent decisions by the United States Supreme Court indicate the courts offer little refuge to miners who might contend that legislation which substantially denies mining rights is a taking which requires compensation.²⁶⁷ That judicial attitude may leave most miners to the tender mercies of the changing legislation. The effect of the federal legislation on mining claims will be against mining interests not yet acquired. The effect, as to federal mining leases, will be immediate uncertainty. Even if a present lease is considered a vested interest once it is in effect, the miner will probably be required to renew the lease in order to complete his operations. The miner is entitled to such a renewal, but the Secretary of Interior has discretion to change the terms of the lease,²⁶⁸ and the new terms may have the collateral effect of stopping mining by making the project uneconomical.

Mining under prospecting permits presents the same problem. In the case of coal lands, the Secretary is not required to issue a lease unless there is evidence that the prospecting permit lands contain coal in "commercial quantities." This requires that the coal can be economically removed.²⁶⁹ Much coal removal will not be economical if surface mining is banned either by law, regulation or denial of surface owner consent.²⁷⁰ Furthermore, the requirements of surface owner consent in both the present state law and proposed federal law present difficulties of proof. A title search will be necessary to determine if the persons signing surface leases and damage agreements have the right to contract on those matters. Studies of the validity of those agreements will be necessary to determine their enforceability and their compliance with both the federal legislation and the Montana and Wyo-

permit. Doubt was expressed during floor debate in the Senate that this requirement was constitutional. It was called either a taking or a breach of the lease. 119 CONG. REC. 18773 (daily ed. Oct. 8, 1973) (remarks of Senator Moss); H.R. 11500, 93d Cong., 2d Sess. § 201(a) (1974) has substantially the same provisions as the Senate bill.

267. *E.g.*, *United States v. Fuller*, 409 U.S. 488 (1973). Ranchers whose base lands, owned in fee simple, were condemned by the United States were not compensated for the additional value attaching to those lands by virtue of their location adjacent to Taylor Grazing lands. Only a bare majority of the Court joined in the holding.

268. *E.g.*, 30 U.S.C. § 207 (1970) (federal coal leases).

269. 30 U.S.C. § 201(b) (1970).

270. 119 CONG. REC. 18775 (daily ed. Oct. 8, 1973) (remarks of Senator Hansen).

ming legislation.²⁷¹ These are real problems now because the institutional lenders who are asked to provide the huge sums necessary to begin large mining operations insist on assurance that once begun, the mining project will be allowed to finish. Lenders have already begun to require title opinions on these points. Faced with the uncertainty whether surface mining will be allowed, lenders cannot obtain the assurances of continuity they need.

CONCLUSION

The minerals which the United States government reserved throughout the West are in a more uncertain status now than ever before. Homesteaders have accepted the law of mineral reservation as a fact of life without much thought. Over a half-century passed with only isolated disruption of either the surface or the mineral estates. Few land owners conceded that their land might contain minerals. Where minerals were removed, damage rules established by the federal legislation upheld the removal rights of miners. Now, however, plans for the imminent removal of subsurface minerals on a large scale have brought the entire question of the reserved minerals into sharp focus again.

The legislation of the early 1900's which opened the public lands to homesteaders for agricultural settlement while reserving the minerals to the United States for the public benefit merely postponed a showdown over the inherent conflicts. Congress has faced the problem again and will evidently use the 1974 strip mining legislation as a second attempt to resolve the differences between land owners and miners. The new Congressional approach promises to shift the emphasis on ownership of rights from miners to land owners.

The determined stand which surface owners have taken against the strip mining of western lands has forced considerable change already. Private contests have become a weapon

271. See text accompanying notes 209, 221 *supra*.

used by landowners to remove invalid mining claims from private surface lands. Federal leasing programs have adopted stringent restoration requirements. State laws in the West have also established strict reclamation standards. The trend in all areas of the law is to require much more restoration effort and expense.

The moving force behind this change is revulsion of the public against the effects of strip mining. The lesson is therefore clear. The mining industry must either develop economic underground mining techniques or perfect surface restoration methods. The public will accept no less.