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NONFUEL MINERAL RESOURCES OF THE PUBLIC LANDS VOLUME I. LEGAL STUDY. CHAPTERS 1 THROUGH 6

Twitty, Sievwright and Mills
Phoenix, Arizona

December 1970

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NONFUEL MINERAL RESOURCES OF THE PUBLIC LANDS

Volume II

LEGAL STUDY

A Study Prepared for the
Public Land Law Review Commission

by

Twitty, Sievwright & Mills
Phoenix, Arizona

Republished with revisions
December 1970

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Abstract

The report is a description of the existing Federal statutory and regulatory systems for administering the location and leasing of nonfuel minerals on the public lands, including uranium, even though it is an energy fuel mineral. Judicial and administrative decisions interpreting these systems are also analyzed and described. Nonfuel mineral disposal systems of selected states in the U.S. and Australia and in three Canadian provinces are described. Included also is a listing and discussion of possible alternatives to and modifications of the existing Federal systems which may be considered.

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LEGAL STUDY
OF THE
NONFUEL MINERAL RESOURCES

PREPARED UNDER CONTRACT WITH THE

PUBLIC LAND LAW REVIEW COMMISSION

by Twitty, Sievwright & Mills

Phoenix, Arizona

Volume I

Report

Chapters 1 through 6

Howard A. Twitty

George E. Reeves

Jerry L. Haggard

Project Officer

THE OPINIONS, FINDINGS, CONCLUSIONS, AND DATA EXPRESSED IN THIS PUBLICATION ARE THOSE OF THE AUTHORS AND NOT NECESSARILY THOSE OF THE PUBLIC LAND LAW REVIEW COMMISSION.

THIS PUBLICATION CONSTITUTES ONLY ONE OF A NUMBER OF SOURCES OF INFORMATION UTILIZED BY THE COMMISSION IN THE CONDUCT OF ITS PUBLIC LAND STUDY PROGRAM.

FOREWORD

This manuscript is one of a series which was prepared for the Public Land Law Review Commission as part of its data base in forming the recommendations for future public land policies that have been forwarded to Congress and the President of the United States in our report titled One Third of the Nation's Land.[1/]

In establishing the Public Land Law Review Commission in September 1964, Congress declared the following policy: That the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public. It also directed that a comprehensive review be made of the public land laws and the related administrative rules and regulations to determine whether and to what extent revisions are necessary to accomplish the stated policy objective.

Considerable evidence pointed to the need for such a review. Dating back in some cases to the birth of the nation, our public land laws have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other. Administration of the public lands and the related laws has been divided among several agencies of the Federal Government. Quite possibly, these laws and the manner in which they are administered may be inconsistent with one another and inadequate to meet the current and future needs of the American people.

The Commission was instructed to:

1. Study existing statutes and regulations governing the retention, management, and disposition of the public lands;

2. Review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands;

[1/] Available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. - Price $4.50.

3. Compile data necessary to understand and determine the various demands on the public lands which now exist within the foreseeable future; and

4. Recommend such modifications in existing laws, regulations, policies and practices as will, in the judgment of the Commission, best serve to carry out the policy objective.

To fulfill these requirements, the staff was charged with the responsibility of performing or having performed the appropriate research and of then presenting to the Commission all the information and data necessary as a foundation for the Commission's deliberations, conclusions and recommendations. A study program encompassing various subject areas was undertaken and separate manuscripts were prepared covering each of 33 separate topics.

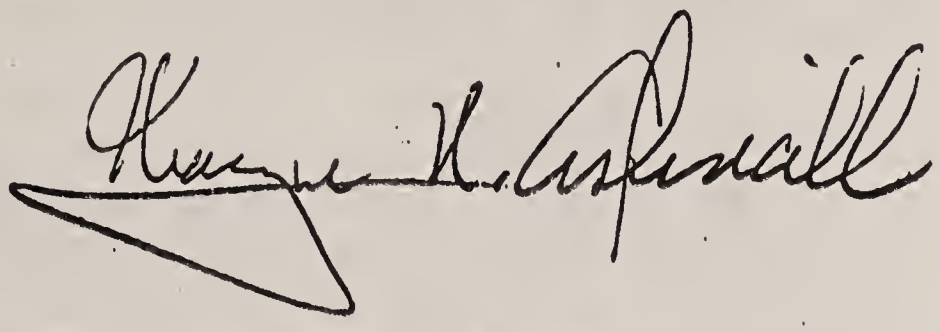
In fulfillment of a policy of maintaining the smallest technical and professional staff possible, most of the studies were accomplished under contract with individuals, institutions such as universities, and research organizations; a few of the studies and analyses were accomplished in-house by the Commission staff, some with consultant assistance.

Thus, while we reviewed the whole body of public land laws at one time, each study was designed to examine only a portion of the public lands complex and should be utilized with this understanding. There is, therefore, an interrelationship among the studies and the resultant manuscripts that will require review and examination of more than one report in order to obtain a complete view of any one aspect of public land law and administration.

Each manuscript was transmitted from the staff with a letter discussing the content of the report and setting forth the policy matters to be considered with respect to the particular subject. A copy of the letter of transmittal for this report has been made a part of this volume in order to assist in the understanding of the approach.

These manuscripts served an extremely useful purpose in providing a common base for discussion in the Commission and between the Commission and its Advisory Council and the representatives of the 50 governors. We believe that they will also be valuable as reference works, not only on Federal

public land matters but concerning all of our natural resources, for use by all levels of government -- Federal, state, and local -- and the academic community as well as those who are interested in the tremendous natural resources that we, as a nation, possess.



Wayne N. Aspinall
Chairman

Public Land Law Review Commission

1730 K Street, N.W.
Washington, D. C. 20006

December 1, 1970

Honorable Wayne N. Aspinall
Chairman
Public Land Law Review Commission
Washington, D. C. 20006

Dear Mr. Chairman:

Transmitted herewith, in six volumes as republished by the National Technical Information Service of the Department of Commerce, is a study of Nonfuel Mineral Resources of the Public Lands, in two major parts. The legal portion of this study, contained in volumes I through IV, was prepared under contract by Twitty, Sievwright & Mills of Phoenix, Arizona. The resources portion, contained in volumes V and VI, was prepared under contract by the The University of Arizona. As submitted by the contractors, the study originally contained eleven volumes which were reorganized into six volumes for reprinting by NTIS.

These two reports were first submitted to you with our letters of June 7 and July 30, 1969. After you made copies available to the members of the Commission and the Advisory Council and Governors' Representatives, the manuscripts were reviewed and comments were received from the latter two groups. In addition, our staff reviewed the manuscripts. The contractors were then furnished with all the comments for their consideration so that inaccuracies could be corrected.1/ However, since these are their reports and not those of our commentators, we have not required any changes based on interpretations or opinions unless the authors agreed with those interpretations or opinions.

The overall study was designed to provide the Commission with a comprehensive understanding of the laws, policies, practices, and problems relating to exploration, development, and

---

1/The comments referred to are part of the official files of the Commission. When the Commission ceases to exist, these files will be deposited with the National Archives, Washington D.C.

production of nonfuel minerals on the public lands, together with the effects of the existing system, possible alternatives to it, and the probable effects of such alternatives.

The legal portion of this study is a description of the existing Federal statutory and regulatory systems for administering the location and leasing of nonfuel minerals on the public lands, including uranium, even though it is an energy fuel mineral. Also, judicial and administrative decisions interpreting these systems have been analyzed and described. For purpose of comparison, the legal study describes nonfuel mineral disposal systems of selected states in the United States and Australia and in three Canadian provinces. Included also is a listing and discussion of possible alternatives to and modifications of the existing Federal systems which may be considered.

The resource portion of the study examines the nonfuel mineral resources and the nature of their use, particularly as they are related to the discovery and development process. It also provides a description and analysis of the changing techniques, technology, and processes involved in the search for, discovery, development and production of minerals. In accordance with our specifications, the contractor gathered, primarily from industry sources, information and data to assist in understanding how and why the process of mineral development works as it does.

With this foundation of information concerning the mineral resource and its development, the study contractor examined the various interactions between nonfuel mineral resources and uses of of public lands and other public land resources, users, and uses. The report then discusses these factors in the framework of public land policy for nonfuel minerals.

Consideration of this matter was subject to review by the Commission of the need for an overall statutory national mining and minerals policy and its relationship to public land policy. Although the Commission considered all mineral resources--fuel and nonfuel--at one time, and we merged in our presentation the policy considerations common to both, it is useful, we believe, to restate the policy considerations as we saw them for the resources that are the subject of this study. We believe these are embraced in the following:

1. To what extent, if any, should nonfuel mineral exploration, development, and production on the

public lands be limited by declaring either that some public lands shall not be available for this purpose or that special restrictions should be made applicable to some classes of public lands?

2. In what circumstances, if any, should the nonfuel mineral interest be reserved to the United States when disposing of public lands for other uses?

   a. In what circumstances and under what conditions, if any, should the United States permit development of reserved nonfuel mineral interests? Do existing policies and procedures adequately provide for administration of reserved nonfuel mineral interests?

3. Should public lands containing nonfuel minerals be disposed of and, if so, under what conditions?

   a. Should disposal of nonfuel minerals be based upon a system of location and patent, lease, sale, or combination thereof?

   b. Should a single policy and system apply to all nonfuel minerals?

   c. Should energy fuel minerals now covered by the nonfuel minerals system--i.e., uranium--or not covered by any system--i.e., geothermal steam resources--be made available under the system adopted for nonfuel minerals?

   d. Should statutory provisions of the existing system be made more certain with regard to such matters as the (1) definition of valuable minerals and common varieties, (2) pedis possessio doctrine, and (3) requirements for discovery?

4. What policy or policies should govern the pricing of nonfuel minerals on the public lands?

5. To what extent should the requirements for acquiring nonfuel mineral interests be uniform in all public land states?

6. Should the agency having general administrative responsibility for an area of public land have responsibility for administration of nonfuel mineral law on such lands? To what extent should exploration, development, and production activities be subject to discretionary control by the administering agency?

7. To what extent, if any, should there be a statutory establishment of standards and guidelines to minimize conflicts between nonfuel mineral exploration, development, and production, and other uses and values of the public lands?

The work was supervised and directed for the staff by Jerry L. Haggard and Frank H. Skelding. Mr. Haggard served as Project Officer for the legal portion of the study, assisted by Mr. Skelding, while Mr. Skelding served as Project Officer for the resource portion, assisted by Mr. Haggard.

Sincerely,

Milton A. Pearl
Director

Enclosures

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Harry L. Moffett served as Assistant Director (Administration) from October 1966 to July 1969, and Leland O. Graham, Arthur D. Smith and Max M. Tharp made significant contributions as members of the staff prior to August 1969.

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PUBLIC LAND LAW REVIEW COMMISSION

Background

The public lands of America date back to the time of the Union's formation. Then, and soon thereafter, seven of the original States ceded to the Central Government some 233.4 million acres of land lying westward to the Mississippi River. Thereafter, through purchase and treaty, the United States acquired an additional billion acres of public domain, the last acquisition being the purchase of Alaska from Russia in 1867. Altogether, nearly 2 billion acres of land in 32 States have been part of the public domain at one time or another.

At first, these lands were sold for their revenue. Eventually, however, as the pioneers swept westward, the revenue-raising policy was replaced by one stressing settlement and development of the land. The Homestead Act of 1862 was the first of a series of settlement and development laws enacted over a period of some 60 years - the desert land law, mining laws, and the various homestead laws - all designed to meet a particular need of the period. Meanwhile, many millions of acres were transferred to private ownership through military, railroad, and other land grants, including various grants to the States.

Through these means, nearly 1.2 billion acres have passed from Federal ownership, leaving approximately 715 million acres of the original public domain lands in Federal ownership. Of these 715 million acres 364 million are in the State of Alaska. Add to this the 52 million acres acquired for various purposes, and federally owned lands today amount to approximately 770 million acres - about one-third of the Nation's total land area. Some of these lands are in national forests and some are reserved for national parks, wildlife refuges, and other specific uses; but more than half constitute the "vacant and unappropriated" public domain lands which have never left Federal ownership and have not been dedicated to a specific use pursuant to legislative authorization.

The Act establishing the Public Land Law Review Commission contains in section 10 the following definition:

As used in this Act, 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, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf.

Working with the Commission are a 33-member Advisory Council and the representatives of the 50 State Governors.

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SUMMARY

Introductory background

The law governing the location, holding, and working of mining claims on the public domain of the United States may be traced back to a number of sources. Although the English common law has had its influence upon American mining law, the customs of the miners, crystallized in form of local rules or mining district regulations, provided both the foundation and the framework upon which Congress built the mineral location system.

In the early legislation concerning public lands, it was the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along separate lines, and to withhold mineral lands from disposal save under laws specially including them. Except for saline lands, there appears to have been no definite policy with regard to the disposition of minerals.

The discovery of gold in California in 1848 attracted large numbers of miners who found neither laws governing the possession or occupation of the mines nor a government capable of executing such laws had they existed. The miners were compelled, from the necessities of their position, to establish regulations for their own government. Under these rules, the mining industry of the West grew and flourished. In 1865, Congress recognized the possessory titles of the miners. In 1866, the first mining legislation was enacted by Congress, and this was followed by the legislation, enacted in 1870 and 1872, which forms the basis of the existing mineral location system.

Until the beginning of the twentieth century, the trend had been to include all minerals under the mining laws. Only coal was under a separate law, which provided for the sale of coal lands. This trend changed early in the twentieth century. Fraud in the disposal of coal and oil lands and problems arising under the mining laws in the prospecting for oil deposits contributed to this change in the trend, but the principal reasons for the change were the growing conservation

movement and a fear that soon all remaining mineral resources would be acquired and held by monopolies that would develop them, not in the public interest but only to satisfy their own greed. Concern was also expressed that because of waste and unwise use of mineral resources, the mineral deposits would soon be exhausted. As a result, commencing in 1906, large areas of coal, oil and phosphate lands were withdrawn from mineral entry, and, beginning in 1909, laws were enacted providing for the disposal of the surface of public domain under agricultural entry with a reservation of the minerals and the right to remove them. Support grew for the leasing of coal, oil and gas, phosphate, potassium, sodium, and oil shale deposits. Beginning in 1913, bills were introduced and debated in Congress for the leasing of these minerals. A leasing law enacted in 1917 as an emergency wartime measure provided for the leasing of potassium deposits and, in 1920, a leasing Act was passed providing for the leasing of coal, oil and gas, phosphate, sodium, and oil shale deposits on the public domain. In 1926, the 1920 Act was extended to sulphur deposits in Louisiana, and in 1932 to sulphur deposits in New Mexico. In 1927, the 1917 potassium leasing Act was repealed, and the 1920 Act was extended to potassium deposits.

In 1947, Congress enacted the Mineral Leasing Act for Acquired Lands, which provides for the leasing on acquired lands of minerals which could be leased on the public domain under the 1920 Act.

Congress authorized the Secretary of Agriculture to lease deposits of "hard rock" minerals on certain acquired lands under his jurisdiction. ("Hard rock" minerals are those minerals which, if they were on the public domain, would be subject to location under the mining laws.) This authority included mineral deposits on forest lands acquired under the Weeks Act, on lands acquired in connection with the rural rehabilitation program, and on lands acquired as a part of the Government's effort to retire submarginal lands. By Section 402 of the Reorganization Plan No. 3 of 1946, this leasing authority was transferred from the Secretary of Agriculture to the Secretary of the Interior. In 1950, Congress authorized the Secretary of the Interior to lease "hard rock" mineral deposits in the National Forests of Minnesota. Other Acts of Congress have authorized the

Secretary of the Interior to lease mineral deposits in certain withdrawn areas, such as the Lake Mead Recreation Area.

In 1944, Congress enacted a temporary wartime measure which authorized the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, and timber on the public domain under his exclusive jurisdiction. The sand, stone, and gravel to be disposed of was to be of a kind which, because of quantity or quality, was not subject to location under the mining laws. In 1947, permanent legislation, known as the Materials Disposal Act of 1947, was enacted authorizing the Secretary to dispose of the mineral and vegetative materials that he had been authorized to dispose of by the 1944 Act.

In 1955, Congress enacted a law which removed common varieties of sand, stone, gravel, pumice, pumicite, and cinders from location under the mining laws and made these materials subject to disposal under the 1947 Act. The 1955 Act also gave the Secretary of Agriculture the authority to dispose of these mineral materials and other materials subject to disposal under the 1947 Act which were on public domain lands under his jurisdiction.

As pointed out above, Section 402 of the Reorganization Plan No. 3 of 1946 authorized the Secretary of the Interior to lease "hard rock" minerals on certain acquired lands under the jurisdiction of the Secretary of Agriculture. Included in these "hard rock" minerals were mineral materials such as sand, stone, and gravel which, on public domain lands, would be subject to disposal under the Materials Disposal Act of 1947, as amended by the 1955 Act. In 1960, the authority of the Secretary of the Interior to dispose of these mineral materials on these acquired lands was transferred to the Secretary of Agriculture.

Three government agencies have the principal responsibility for the administration of the laws relating to non-fuel minerals. They are the Bureau of Land Management and the Geological Survey, in the Department of the Interior, and the Forest Service, in the Department of Agriculture

The Bureau of Land Management has the responsibility

for the administration of the mining laws and for the disposal under the Materials Disposal Act of 1947 of mineral materials such as sand, stone, and gravel, on lands under its jurisdiction. It shares responsibility for the administration of the mineral leasing laws with the Geological Survey.

The Office of the Director of the Bureau of Land Management is in Washington. Mineral matters are handled in the field out of eleven State Offices and an Eastern State Land Office. A Land Office, under the supervision of a Manager, is a part of each of the State Offices. The Land Office Manager has been delegated authority to process and adjudicate mineral patent applications and to issue the mineral patents. He also has authority to adjudicate prospecting permit and lease applications and to issue permits and leases and approve assignments, relinquishments, and cancellations of permits and leases. There are 53 District Offices under the supervision of the various State Offices. These Offices have been delegated authority to make sales of mineral materials of an appraised value of up to $2,000. Larger sales are subject to the approval of the State Director.

The Geological Survey is under the supervision of a Director located in Washington. Its mineral leasing functions are the responsibility of the Classification Branch and Branch of Mining Operations of its Conservation Division. The Classification Branch has seven Regional Offices each under the supervision of a District Geologist. The Branch of Mining Operations also has seven Regional Offices each under the supervision of a District Mining Engineer.

The Forest Service, in the Department of Agriculture, which is under the direct supervision of the Chief of the Forest Service, administers approximately 186 million acres of National Forests and National Grasslands (approximately 160 million acres of public domain and 26 million acres of acquired lands). The Forest Service has certain responsibilities in connection with the administration of the mineral leasing laws on National Forests and National Grasslands under its jurisdiction, particularly where the lands are acquired lands. It sells, and in certain instances grants, free-use permits for mineral materials such as sand, stone, and gravel, on public domain and acquired lands under its exclusive jurisdiction.

The Forest Service is divided into nine Regional Field Offices each under the supervision of a Regional Forester. In each Region there are Forest Supervisors supervising designated National Forests and National Grasslands. The forests and grasslands are divided into Ranger Districts with a District Ranger responsible to the Forest Supervisor for the activities assigned to his Ranger District.

Lands and minerals subject to location, lease, or materials disposal

Generally speaking, all public lands of the United States containing valuable mineral deposits, except acquired lands and lands which are withdrawn or otherwise reserved, are open to location. With certain exceptions, public lands not withdrawn or reserved are subject to lease under the Mineral Leasing Act of 1920, and acquired lands are subject to lease under the Mineral Leasing Act for Acquired Lands (1947). The Materials Disposal Act of 1947 applies to public lands that are public domain lands.

Numerous withdrawals and reservations, both legislative and administrative, have closed certain types of lands to location or leasing, or both, or have imposed certain restrictions upon location or leasing of such lands. Among the types of lands affected are (1) lands containing hot springs or geothermal steam, (2) lands containing waterholes, (3) stock driveways, (4) military reservations, (5) Indian reservations, (6) power sites, (7) certain reconveyed and revested lands, (8) reservoir sites, (9) recreation areas, (10) wildlife refuge areas, and (11) wilderness areas.

The subject of withdrawal and classification has been treated in another study prepared for the Commission. The power exercised by the Secretary of the Interior in these respects seems at times to transcend the power conferred upon him by Congress. The Secretary also accomplishes the withdrawal of lands by some rather oblique means, such as the refusal to note the restoration of lands upon the land office records and the failure to issue regulations governing the location of lands declared by Congress to be open to location "under applicable law and such regulations as the Secretary may prescribe."

National forests are generally open to location, leasing, and materials disposal. With a few statutory exceptions, National Parks and Monuments are closed to such activities.

The law regarding the ownership of minerals under rights-of-way, and the power of the owner of the minerals to extract or dispose of them has developed in a sort of "see-saw" fashion, with the Supreme Court adopting first one theory and then another. The present state of the law appears to be that the minerals under rights of way granted by the United States are reserved to the United States, and are subject to location or lease where the right of way is an easement, but not otherwise.

One of the most fruitful sources of controversy is the policy of Congress to permit land to be patented under a non-mineral patent with the reservation of the minerals to the United States. The policy apparently had its inception in the act permitting a nonmineral entry to proceed to patent notwithstanding the fact that the land had been found to be valuable for coal subsequent to the entry, and has developed to the point where a general reservation of minerals is now included in virtually all nonmineral patents. Whether the minerals so reserved are subject to location or lease depends upon the interpretation of the statute by the Secretary of the Interior.

The disposal of metallic minerals is for the most part governed by the mining laws, although in areas where such deposits are not locatable, disposal may be governed by special statutes.

Whether certain nonmetallic minerals are subject to disposal under the mining laws is a question which grades, by virtually imperceptible degrees, into the question of whether the lands containing such substances are mineral in character, which question in turn grades into the question of whether a valid discovery has been made under the mining laws. Several important nonmetallic minerals or groups of minerals were removed from the purview of the mining laws by the Mineral Leasing Act of 1920, as amended. These include potash, sodium, phosphate, and, in Louisiana and New Mexico, sulphur. Building stone was the subject of special legislation, but the Building Stone Law of 1892 has been partially, if not wholly,

repealed by the Multiple Surface Use Act of 1955. This Act removed common varieties of sand, gravel, pumice, pumicite, and cinders from the purview of the mining laws. The Act does not define the term "common varieties", and the decisions of the Secretary of Interior afford little enlightenment except to point out that in order to be an uncommon variety, a substance must be used for different purposes than are common varieties of the same substances or, if used for the same purpose, it must command a significantly greater price. In application, the rule seldom permits the finding that a substance is an uncommon variety. For example, building stone found in an extensive range of pleasing colors, having a high compressive strength and light weight, has been held to be a common variety because it could be used only for the same purposes as "other deposits of similar stone".

The location system

Mining claims may be located by "citizens and those who have declared their intention to become such", including women and minors. A corporation created under the laws of the United States or any state may locate a mining claim in the same manner as an individual citizen, irrespective of the ownership of some or all of the stock of the corporation by persons not citizens of the United States.

A location by an alien is not void, but voidable only, and his alienage may be asserted to invalidate his claim only by the United States or in an adverse suit. The right to locate mining claims has been granted to certain foreign nationals by treaty.

A location may be made by an agent, either in the name of the principal or in his own name on behalf of the principal.

Certain government employees are prohibited from locating mining claims.

In providing for the exploration, occupancy, and purchase of the mineral lands of the United States, the mining laws divide these lands into two distinct classes: (1) those

containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, and (2) those containing all forms of deposit, excepting quartz, or other rock in place. Mining claims on mineral deposits of the first class are called "lode claims", and mining claims on mineral deposits of the second class are called "placer claims".

A tunnel site location gives the proprietor of a mining tunnel the right to 1,500 feet of any blind lodes, not previously known to exist, intersected by the tunnel within 3,000 feet from the first working face of the tunnel. A mill site may be located in connection with a lode or placer claim and used for mining and milling purposes, or it may be used for a quartz mill or reduction works, unconnected with any mining claim.

A lode mining claim, ideally, is 1500 feet in length and 300 feet in width on either side of the vein, in the form of a parallelogram. Deviations from the ideal size and shape may be made for a legitimate purpose, but not in order to circumvent the mining laws. A placer claim may not exceed 20 acres for each locator, up to a maximum of 160 acres, and should, "as near as practicable" conform with the lines of the public land surveys. An oversize claim is not void, but is voidable as to the excess only, except in cases of fraud or bad faith. A mill site may not exceed five acres.

Before discovery, a prospector in actual possession of land who is diligently searching for mineral has a right, usually denominated pedis possessio, to remain undisturbed in his possession as against any forcible, fraudulent, or clandestine entry of another. This right is contingent upon continued actual occupancy and persistent and diligent prosecution of work looking to the discovery of mineral. Where the boundaries of a claim have been marked, the prospector's pedis possessio is usually held to extend to the entire claim. The doctrine of pedis possessio does not protect the prospector against the open and peaceable entry of another, nor is the doctrine applicable as against the United States.

Discovery is the all important fact upon which title to a mining claim depends, and prior to the enactment of the mining laws, discovery, followed by appropriation, was

recognized as the foundation of the miner's title. Under the mining laws, there can be no valid mining claim in the absence of the discovery of a vein or lode within the limits of a lode claim, or the discovery of mineral within the limits of a placer claim.

In controversies between mineral claimants, each of whom is claiming the same ground, the issue is the priority as between the claimants, and the courts have been quite liberal in sustaining discoveries in favor of the first locator. A lode location cannot, however, be based upon a conjectural or imaginary existence of a vein or lode, but only upon an actual discovery of the vein or lode. A discovery, to be valid as against other mineral claimants, need not be based upon the disclosure of ore of commercial value, either in quantity or quality. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient as against a subsequent mineral claimant.

The rules of discovery applied in a controversy between a mineral claimant and the United States have their origin in the rules applied in determining the mineral character of land. From the latter there developed the famous rule of Castle v. Womble, that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. Another rule of discovery, the marketability rule, first found expression in those cases in which the issue was whether a certain substance was a "valuable mineral" within the meaning of the mining laws. The marketability test or rule underwent substantial changes through the years, it being at first merely one of the tests used to determine the mineral character of land, becoming then an additional test for the mineral character of land (and later a rule of discovery) where minerals of widespread occurrence were involved, and finally, in United States v. Coleman, being decreed not to be an additional rule, but merely "complementary" to the prudent man rule, and applicable not only with respect to minerals of widespread occurrence, but with respect to all minerals.

The federal statutes present no comprehensive scheme or procedure for the location of either lode or placer mining claims, and state statutes now generally prescribe the manner of posting and recording location notices or certificates and the manner of marking the boundaries of the claim. The location procedures consist, generally, of posting a location notice, marking the boundaries of the claim, performing the required discovery work, and recording the location notice or a location certificate. The order in which these steps is performed is immaterial if they are all performed within the time permitted, or before any intervening claim.

Subject to certain statutory exceptions, the owner of an unpatented mining claim has the right of exclusive possession, which he retains as long as he complies with the acts of Congress and local statutes. Upon payment of the purchase price and the issuance of the final receipt by the local land officer, the applicant holds the claim by equitable title. The patent passes full legal title, which is unassailable except in an action brought for correction or annulment of the patent.

The owner of a placer claim has the right to the possession of the surface within its boundaries for all purposes connected with and incident to its use and operation as a placer mining claim, but does not have any right to veins or lodes apexing within the limits of the claim.

The owner of a lode claim is entitled to all veins or lodes apexing within the limits of the claim, even though such veins may depart outside the planes of the side lines extended vertically downward. The extent of the extralateral rights depends upon the course of the apex of the discovery vein in relation to the boundary lines of the location.

Assessment work, consisting of the expenditure of $100 for labor or improvements, must be performed annually by the owner of a claim or someone at his instance. Failure to make the required expenditures does not result in the forfeiture of the claim, but does render it subject to relocation by another. If a contiguous group of claims are held in common, the assessment work may be done on any one claim, provided that the work is done in connection with a

plan tending to develop all claims in the group. State statutes generally provide for the recording of an affidavit of performance of annual assessment work, and usually provide that the recording of the affidavit shall be prima facie evidence that the work has been performed. Resumption of work by the owner of a mining claim forestalls relocation of the ground by another.

From time to time, during periods of war or economic depression, Congress has suspended the assessment work requirement. One such suspension statute, the Soldiers' and Sailors' Civil Relief Act of 1940, § 505, 50 U.S.C.App. § 565 (1964) is still in effect. Under certain conditions, performance of annual assessment work may be deferred by the Secretary of the Interior.

A mining claim is abandoned when the owner voluntarily leaves the claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it or who may appropriate it. The Secretary of the Interior has the authority to declare a claim invalid by reason of abandonment.

Forfeiture of a mining claim is the legal result which flows from the breach of a condition subsequent, subject to which the locator acquires his title, and depends upon proof of a failure to comply with the federal mining laws or state statutes. A forfeiture may be declared only by one who, after the claim has become subject to forfeiture, has perfected a valid relocation of the same ground. The United States cannot declare a mining claim forfeited for failure to perform annual assessment work.

The procedure to obtain a patent to a mining claim consists of a number of steps, which may be summarized as follows:

(1) The claimant must file an application in the proper office under oath, showing compliance with the law, together with a plat and the field notes of the claim or claims, showing the boundaries, which must be distinctly marked on the ground.

(2) Prior to filing the application, the claimant must

post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced in the plat, and must file an affidavit of at least two persons that such notice has been duly posted, together with a copy of the notice, in the proper office.

(3) When the application, plat, field notices, notice and affidavits have been filed, the manager of the land office is required to publish a notice of the application for a period of sixty days, in a newspaper to be designated by him as being published nearest the claim, and to post the notice in his office for the same period.

(4) At the time of filing his application, or at any time thereafter within sixty days, the applicant is required to file a certificate of the office cadastral engineer that $500 worth of labor has been performed or improvements made upon the claim by the applicant or his grantors, that the plat is correct, with such further description, by reference to natural objects or permanent monuments as will identify the claim. The applicant must also furnish an accurate description of the claim to be incorporated in the patent.

(5) At the expiration of sixty days, the claimant is required to file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication.

If no adverse claim has been filed within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5 per acre for lode claims or $2.50 per acre for placer claims, and that no adverse claim exists. If an adverse claim is filed, its validity must be determined by a local court, unless it be waived, before a patent can be issued.

Private contest proceedings constitute a means by which a private person may call to the attention of the Bureau of Land Management the invalidity of a mining claim, where such invalidity does not appear on the records of the Bureau of Land Management. The Government may initiate a contest for any cause affecting the legality or validity of any entry or mining claim on public land.

At any time prior to the issuance of a patent, a protest may be filed against the patenting of the claim upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Anyone may protest the issuance of a patent, but a protest cannot be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit.

The leasing systems

The Mineral Leasing Act of 1920, the Mineral Leasing Act for Acquired Lands, and the laws providing for the leasing of "hard rock" minerals on acquired lands and on the National Forests of Minnesota, each provides for both prospecting permits and leases. Unless the lands are known to contain a valuable mineral deposit, a prospecting permit is issued which entitles the holder to a preference-right lease upon a showing that he has discovered a valuable mineral deposit. If the lands are known to contain a valuable mineral deposit, leasing is by competitive bidding. Issuance of prospecting permits and leases is, except for preference-right leases, entirely discretionary.

Applications for permits and leases are processed and adjudicated in the Land Office of the Bureau of Land Management. The Land Office receives from the Geological Survey advice as to whether a valuable deposit of a leasable mineral is contained in the lands. This determination of the Geological Survey is binding on the Land Office. In addition, the Geological Survey makes recommendations concerning various matters to be included in a permit or lease and is consulted by the Land Office Manager before any permit or lease is assigned, relinquished, or cancelled. If the lands are under the jurisdiction of another agency, such as the Forest Service, the Land Office will notify that agency of the permit or lease application. If public domain lands (except for "hard rock" minerals in the National Forests of Minnesota) are involved, the agency will recommend whether a permit or lease should be issued and will recommend conditions to be included in the lease or permit if one is issued.

If acquired lands or "hard rock" minerals in the National Forests of Minnesota are involved, a permit or lease will not be issued unless the agency having jurisdiction of the surface consents and, further, the agency may insist that conditions imposed by it be included in the permit or lease.

Within the Geological Survey, the determination of whether the lands contain a valuable mineral deposit is based on recommendations of the Regional Geologist and the Regional Mining Supervisor in the field, but the final decision is made in Washington by the Conservation Division. Likewise, recommendations concerning provisions to be included in a permit or lease are initiated by the Regional Mining Supervisor, after consultation with the Regional Geologist where desirable, but the recommendations are approved by the Conservation Division in Washington, which sends them to the appropriate Land Office. After a permit or lease is issued, the Regional Mining Supervisor then inspects and supervises the operations and, after production commences, collects all rents and royalties.

The Forest Supervisor is advised by the Land Office of applications for permits and leases for lands within the National Forests and National Grasslands. He submits his recommendations to the Regional Forester, who advises the Land Office of recommendations and decisions of the Forest Service with respect to pending permit and lease applications. When a lease offer, on which there will be competitive bidding, is made by the Bureau of Land Management for a mineral deposit on lands under the jurisdiction of the Forest Service, the Forest Service may issue its own permit authorizing prospecting under conditions which protect the surface of the lands and other resources. The Forest Service supervises operations under such permits and, in addition, supervises operations under permits and leases issued by the Bureau of Land Management in order to make certain that only activities authorized by the permit or lease are carried on by the permittee or lessee.

The materials disposal systems

Disposals of mineral materials, such as sand, stone, and

gravel, on the public domain under the jurisdiction of the Department of the Interior may be made by the Land Office but are usually made by the Manager of the District Office, with sales of mineral materials of an appraised value in excess of $2,000 usually being subject to the approval of the State Director. Most sales of mineral materials, except where small quantities are sold, must be made by competitive bidding after formal advertising. In 1962, Congress revised the provisions permitting sales of mineral materials and, in certain instances, authorized negotiated sales if statutory criteria were met. There is also limited authority to issue free-use permits for mineral materials to state and federal agencies and nonprofit organizations.

The Forest Service and the Bureau of Land Management are both subject to the Materials Disposal Act of 1947 with respect to sales of sand, stone, gravel, and other mineral materials on public domain lands. However, the Forest Service has not changed its regulations since Congress, in 1962, amended the law. The Regional Forester is authorized to make mineral material sales, with the right to delegate this authority to the Forest Supervisor and, where the appraised value does not exceed $1,000, to the Forest Ranger.

The Forest Service is also authorized to dispose of mineral materials such as sand, stone, and gravel on acquired lands under its jurisdiction. The Forest Service has adopted regulations authorizing sales of these mineral materials for acquired lands which are more liberal than Congress authorized in 1962 for sales of the same mineral materials on the public domain. The Regional Forester is authorized to make these sales with the right to delegate this authority to the Forest Supervisor, and where the appraised value does not exceed $1,000, to the Forest Ranger.

Uses and use conflicts

Conflicts between mining claimants may arise from overlapping surface boundaries, conflicting extralateral rights, assertions of a forfeiture and relocation, location of the same deposit by lode and placer claimants, or

locations of "known lodes" within the boundaries of placer claims.

Mining claims located before the enactment of the various mineral leasing laws carry the right to all minerals. Prior to 1953, the mining laws and the mineral leasing laws were mutually exclusive, and land for which a prospecting permit had been granted or applied for, or land known to be valuable for leasable minerals, was not subject to location. Conversely, no permit or lease embracing lands within a valid mining claim was valid. In 1953, temporary legislation was enacted permitting the location of mining claims on lands (1) included in a permit or lease, (2) covered by an application or offer for a permit or lease, or (3) known to be valuable for leasable minerals. In 1954, similar legislation of general prospective application was enacted. Under these laws, leasable minerals were reserved to the United States, and under the 1954 law, the relative rights and duties of the mining claimant and the mineral lessee were prescribed. In 1955, Congress enacted legislation providing for the location of claims based upon the discovery of valuable source material in lignite.

Beginning in 1909, Congress enacted a number of statutes providing for the sale of lands with the reservation of minerals. These acts divide lands valuable for minerals into two estates, one including the underlying minerals, and the other, including the surface, to be used for nonmineral purposes. The mineral estate is the dominant estate, although the mineral claimant must comply with certain provisions of the statute and must compensate the surface owner for damages caused by injury to crops and agricultural improvements and injury to the value of the land for grazing.

An applicant for a nonmineral entry of lands valuable for certain leasable minerals may, upon disproving the mineral character of the land, obtain a patent without a mineral reservation.

Conflicts between mineral claimants and the United States may arise with respect to (1) possession and use of the surface, (2) rights to surface resources, (3) rights of access, or (4) reclamation of the surface.

The owner of an unpatented mining claim may use it only for purposes incident to mining operations. The rights and duties of mineral lessees and purchasers of materials are specified in the regulations and in the lease or contract forms.

The owner of an unpatented mining claim may use the timber and other surface resources for mining purposes. In 1955 legislation was enacted reserving to the United States the right to manage and dispose of the surface resources of a mining claim.

Comprehensive regulations promulgated by the Secretary of the Interior in 1969 govern the surface exploration, mining, and reclamation of lands under nonfuel mineral permits and leases and contracts for disposal of mineral materials. These regulations provide for measures to be taken to avoid, minimize, or correct damage to the environment and hazards to the public health or safety.

Special statutory or regulatory provisions govern the use of land within such areas as National Parks, power sites, and wilderness areas.

Problem areas in the present systems

The most fundamental problem in the present scheme of mineral legislation is the conflict between the policy of Congress in enacting the various mineral land statutes and the policy of the administrative agencies in the administration of these statutes.

Another basic problem is the use of the mineral land laws as a vehicle for the regulation of matters only incidentally connected with the use, occupation, lease, or purchase of federal lands.

The severance of the mineral and surface estates may effectively "lock-up" the minerals, rendering them incapable of being developed by anyone, or, if development is feasible, there may result a conflict between the mineral claimant and the surface owner.

The only way in which the public domain may be closed

to location under the mining laws is by withdrawing lands from location. Whether certain lands are available for location is of paramount importance, and the effect of a withdrawal, or an attempted withdrawal, of the public land from location constitutes a problem of the first magnitude.

The Multiple Surface Use Act of 1955 provides that common varieties of sand, stone, gravel, pumice, pumicite, and cinders shall not be deemed valuable mineral deposits within the meaning of the mining laws and, therefore, subject to location under these laws. The Act does not define "common varieties", and the numerous decisions of the Secretary of the Interior construing this Act afford little enlightenment.

There is no reason for continuing to treat lode and placer claims differently. Mill sites, which were adequate for small underground mines, are now completely inadequate, and tunnel sites are now little used.

The doctrine of pedis possessio, shaped in disputes between miners and tailored to the circumstances of the individual prospector occupying a single claim, affords scant protection to a modern mining or exploration company seeking to delimit a large, low-grade mineral deposit.

The most troublesome problem in the location system is the law of discovery. From the bare-bones statute have evolved several rules of discovery, the latest of which, the marketability rule, requires that the particular deposit in question can, as a present fact, be mined, removed, and marketed at a profit. The application of this rule results in the postponement of the recognition of the locator's right of exclusive possession for mining purposes to a time long after his need for security of tenure has become critical.

The most widely-publicized abuse of the mining laws is the attempt to appropriate valuable real estate for nonmineral purposes by locating mining claims. Where the surface has been sold with the reservation of minerals to the United States, another abuse is found in certain urban or suburban areas where "mining claims" have been located on residential property, apparently with the motive of selling the "claims" to the owners of the surface.

The location procedures today are prescribed by the state legislatures of the various states. Although differences exist, these procedures are generally very similar. The sinking of a discovery shaft, formerly a requirement in most states, has become all but an anachronism.

The doctrine of extralateral rights is of little importance. Mining claims are now usually oriented to efficiently cover the ground, rather than to obtain extralateral rights.

The United States cannot forfeit a mining claim for failure of the owner to make the required annual expenditure. Mere absence from a claim does not constitute an abandonment in the absence of an intent to abandon. The result of the state of the law regarding abandonment and forfeiture is that stale mining claims cloud the public domain.

The administration of the mineral leasing system is now shared by the Bureau of Land Management and the Geological Survey, and, to a lesser degree, by the agency having jurisdiction of the surface of the land. Each agency performs certain functions, but the absence of any clear-cut statement of the division of responsibilities has resulted in disagreement.

Regulations, instructions, and manuals of the agencies are, in some instances, out of date and at times do not reflect changes made in the laws.

The land records system of the Bureau of Land Management, which is maintained in the Land Offices, is set up to show acquired lands, but the Land Offices are not advised of all land acquisitions and, as a result, their records on acquired lands are not complete.

Each of the four nonfuel minerals named in the Mineral Leasing Act of 1920 has its own statutory provisions, regulations, and instructions. The leasing of these same minerals on acquired lands is provided for by the Mineral Leasing Act for Acquired Lands and another set of regulations and instructions. The result is an extremely complex set of statutory provisions, regulations, and instructions for leasing these four nonfuel minerals. To add to the problem, there are other leasing laws, each with its own regulations and

instructions.

The Mineral Leasing Act of 1920 was enacted almost 50 years ago and may contain provisions which today are obsolete or undesirable because of other legislation or changed conditions. Such provisions include those relating to monopolies, trusts, price fixing, hours of work by employees, prohibition of employment underground of boys under 16 and females, and payment of wages twice a month in lawful money. Experience may have demonstrated that other provisions are unwise, such as the provision making the relinquishment of a lease discretionary with the United States, and the provisions that leases may be cancelled for default only by court proceedings.

The mining industry contends that prospecting permits should be issued although it may be inferred from geologic evidence that the lands contain a valuable deposit of the leasable mineral and, further, that a prospecting permit should not be denied where additional prospecting is required to project a program of development. On the other hand, it is urged that prospecting permits should be issued only after competitive bidding.

The holder of a prospecting permit does not know what the terms of his lease will be if he is successful in finding a valuable mineral deposit. A lessee has no control over unilateral changes by the United States when a lease is renewed or when there is a readjustment of the terms and conditions periodically as provided for in the lease. The permittee or lessee has no control over changes that may be made in the regulations which may make performance under the lease more burdensome, if not unprofitable.

With respect to mined land reclamation, the problem is not only the trend toward overlapping systems for mined land reclamation, but the more basic problem of the scope of mined land reclamation legislation, if any, that Congress should pass and the legislation standards to be set forth in the legislation.

It is not clear what minerals may be classified as common varieties subject to disposal under the Materials Disposal Act of 1947.

The Materials Disposal Act and the regulations issued thereunder do not provide a satisfactory method of disposing of mineral materials, particularly where the marketability of the mineral materials has not yet been established and the purchaser needs an assured supply for a period of years at a fixed price.

Alternatives

Most Alternatives suggest only one solution, but, where more than one solution is suggested the number of variations is indicated.

A. Alternatives affecting one or more systems.

A-1 Make the mineral laws self-executing, insofar as possible.

A-2 Make the Classification and Multiple Use Act of 1964 permanent.

A-3 Place a limit on the time within which administrative action must be taken.

A-4 Sell federal nonfuel mineral resources.

A-5 Retain and perform as a governmental function some or all of the exploration for, and development and production of, nonfuel minerals on public lands. This proposal may be subdivided into the following three major categories:

1. Retain and perform some or all exploration functions.

2. Retain and perform some or all development functions.

3. Retain and perform some or all of the mineral exploration, development, and mining functions.

A-6 Enact a single statute authorizing the Secretary of the Interior to dispose of all mineral resources. (Two variations.)

A-7 Enact general legislation (with or without tax incentives) relating to mined land reclamation on all lands.

A-8 Afford protection to the surface owner of lands patented with a reservation of minerals to the United States. (Eight variations.)

A-9 Authorize the disposal of surface and minerals under nonmineral land laws where it is found that mineral lands are more valuable for surface uses and nonmineral resources than for their mineral resources.

A-10 Avoid the disposition of public lands with a reservation of minerals which results in locking up the mineral rights. (Two variations.)

B. Alternatives affecting only the mining location system.

B-11 Combine a modification of the location system under the present mining laws with other systems. (Three variations.)

B-12 Repeal the mining laws and place all minerals now under the mining laws under the Mineral Leasing Act of 1920 or a new mineral leasing law.

B-13 Authorize the holder of unpatented mining claims in existence at the time of the amendment of the mining laws to accept for these claims the benefits and obligations of the amended mining laws.

B-14 Provide prediscovery protection to one exploring for minerals under the mining laws. (Seven variations.)

B-15 Provide for the reclamation of lands the surface of which has been disturbed by prospecting or mining under the mining laws. (Three variations.)

B-16 Provide a statutory definition of the term "valuable mineral deposit".

B-17 Clarify, by legislation, what minerals are subject to location under the mining laws. (Four variations.)

B-18 Remove gem minerals and semiprecious stones from location under the mining laws and place them under a lease or permit system.

B-19 Repeal the Building Stone law.

B-20 Specify location procedures by federal law to the exclusion of state location requirements.

B-21 Restrict the holder of an unpatented mining claim from relocating the ground.

B-22 Provide one kind of mining claim for all locatable minerals.

B-23 Provide that all mining claims will be of a size so that one full mining claim will be all or one-half of the smallest legal subdivision, i.e., all or one-half of a quarter-quarter section (40 or 20 acres) or all or one-half of a lot.

B-24 Eliminate extralateral rights.

B-25 Provide for the recording of location notices and certificates. (Five variations.)

B-26 Require that the locator of a mining claim file either in the county recording office or local Land Office a statement listing the minerals discovered.

B-27 Provide a simple way to clear the public domain of abandoned mining claims and, under Variation No. 3, furnish the Land Office an accurate description of all active unpatented mining claims. (Three variations.)

B-28 Require claim owner to exercise due care in maintaining claim corners.

B-29 Increase the amount required to be expended for assessment work.

B-30 Prevent abuses of the assessment work law. (Four variations.)

B-31 Permit performance of assessment work in one year for several years. (Two variations.)

B-32 Liberalize the law permitting use of modern exploration techniques (geological, geochemical, and geophysical surveys) as assessment work.

B-33 Permit, in lieu of performance of assessment work, payment of the same amount to the County Treasurer for state and local purposes.

B-34 Prohibit administrative agencies from withdrawing mineral deposits from location under the mining laws where surface patents have been issued.

B-35 Provide a procedure for locating mining claims on withdrawn land, subject to appropriate restrictions and stipulations.

B-36 Provide that all rights under unpatented mining claims will terminate if patent application is not made within a prescribed time, e.g., ten years.

B-37 Simplify procedure for obtaining mineral patent.

B-38 Increase purchase price for mineral patent.

B-39 Incorporate a reversionary clause in patents for mining claims.

B-40 Reserve to the United States the surface rights in the lands covered by a mineral patent, subject to (a) the right of the patentee to use the surface for mining and related purposes, and (b) the patentee's option to purchase the surface upon paying its fair market value.

B-41 Provide that mineral patents issued under the mining laws will reserve all leasable minerals contained in the patented lands.

B-42 Where a small tract (up to five acres) of mineral or nonmineral ground is completely surrounded by patented mining claims, authorize its sale to owners of contiguous patented claims surrounding the tract at the fair market price fixed by the Secretary of the Interior.

B-43 Charge fair market value for millsites.

B-44 Provide for the acquisition of public domain land for plant facilities and waste disposal areas for mines. (Four variations.)

C. <u>Alternatives affecting only mineral leasing system</u>.

C-45 Provide for the administration of mineral leasing laws by one or more agencies in the Department of the Interior. (Four variations.)

C-46 Provide a single statute for all leasable minerals.

C-47 Consolidate the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands (1947).

C-48 Authorize the Secretary of the Interior to lease "hard rock" mineral deposits in all acquired lands.

C-49 Eliminate the secretive, ex parte aspects of administrative actions and adjudication in mineral leasing cases.

C-50 Make mineral prospecting permits and leases, and regulations made a part thereof, subject to the same rules of construction that are applied to leases between private parties.

C-51 Provide that the United States will be liable for the negligence of its agents in inspecting and supervising operations under prospecting permits and mineral leases.

C-52 Require all acquired lands of all government agencies to be reported to the appropriate Land Office of the Bureau of Land Management.

C-53 Provide a reward for private enforcement of the mineral leasing acts.

C-54 Establish more liberal rules governing the issuance of prospecting permits. (Two variations.)

C-55 Authorize Secretary of the Interior to issue one prospecting permit or lease for several or all leasable minerals.

C-56 Require that the prospecting permit set forth fully or incorporate by reference the terms and conditions of the lease that will be issued.

C-57 Require issuance of permits and leases on vacant lands not withdrawn or otherwise appropriated if the application is in order.

C-58 Provide that mineral leases shall be subject to renegotiation.

C-59 Eliminate disadvantage of requiring lump sum payment on bonus bidding. (Two variations.)

C-60 Provide for bidding for both prospecting permits and leases. (Three variations.)

C-61 Provide for mined land reclamation under mineral leasing systems. (Six variations.)

C-62 Impose statutory restrictions on overriding royalties.

C-63 Provide in phosphate leases, as in sodium, potassium, and sulphur leases, that if the total of the overriding royalty interests exceeds one percent of the gross value, it may be reduced to one percent in the interest of conservation.

C-64 Require that the consent of the agency having control of the surface must be obtained in every case where a lease or permit is issued.

C-65 Lease for a term of twenty years without right to renew.

C-66 Provide an initial term lease "and so long thereafter as minerals are produced in paying quantities."

C-67 Restrict or prohibit changes in permits and leases without consent of both parties. (Two variations.)

C-68 Amend the mineral leasing laws to provide, instead of specific statutory rates for rentals and royalties, a statement of policies to be implemented by the Secretary of the Interior.

C-69 Eliminate or modify acreage limitations. (Seven variations.)

C-70 Retain acreage limitations but grant certain exceptions. (Three variations.)

C-71 Eliminate certain provisions of the Mineral Leasing Act of 1920 which are now out of date because the subjects are more completely covered by other federal and state legislation.

C-72 Eliminate requirement to obtain a preference right lease under the Mineral Leasing Act of 1920 and Mineral Leasing Act for Acquired Lands that the permittee holding a sodium, potassium or sulphur permit must show that the land is chiefly valuable for the deposit.

C-73 Eliminate the public domain—acquired lands distinction and centralize more mineral leasing authority in the Secretary of the Interior.

C-74 Provide, under the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, for greater exercise of discretion to avoid automatic forfeiture of prospecting permits for nontimely or insufficient payment of rental.

C-75 Provide, under the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, that relinquishments of a lease or lands under a lease be automatic upon the lessee's notifying the Land Office that he relinquishes the lease.

C-76 Simplify the procedure for obtaining a cancellation because of a default occurring in leases issued under the Mineral Leasing Act of 1920 and Mineral Leasing Act for Acquired Lands.

C-77 Authorize the leasing of geothermal steam and associated geothermal resources.

C-78 Distribute a larger share of the revenues from public lands to the states where the revenues were produced.

C-79 Transfer nonfuel leasable mineral resources to the states in which they are located.

C-80 Require payment to a prior lessee for improvements left on the land and used by a subsequent lessee.

D. Alternatives affecting only the materials disposal system.

D-81 Grant to owners of lands subject to a reservation of minerals all those mineral materials subject to disposition under the Materials Disposal Act.

D-82 Allow the administrative agencies greater discretion in making negotiated sales of mineral materials.

D-83 Expand the Materials Disposal Act to authorize not only sales but also the issuance of prospecting permits and leases for these mineral materials.

D-84 Sell mineral materials by contracts with unit sales prices that may not periodically be unilaterally revised by the United States.

E. Alternative affecting disposal of surplus property.

E-85 Include all mineral rights in sales of surplus real property.

INTRODUCTION

Preface

The Public Land Law Review Commission was established by Congress in 1964 "to study existing laws and procedures relating to the administration of the public land laws of the United States". 1/ Section 1 of the Act establishing the Commission made the following "Declaration of Policy":

> "It is hereby declared to be the policy of Congress that the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public." 2/

Section 2 of the Act made the following "Declaration of Purpose":

> "Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what

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1/ 78 Stat. 982.

2/ 43 U.S.C. § 1391 (1964).

extent revisions thereof are necessary." 1/

Section 4 of the Act prescribed the duties of the Commission:

> "The Commission shall (i) study existing statutes and regulations governing the retention, management, and disposition of the public lands; (ii) review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands; (iii) compile data necessary to understand and determine the various demands on the public lands which now exist and which are likely to exist within the foreseeable future; and (iv) recommend such modifications in existing laws, regulations, policies, and practices as will, in the judgment of the Commission, best serve to carry out the policy set forth in section 1 of this Act." 2/

Subject of the study

The material contained in the following pages is a study of the legal systems that provide for the disposition of public land deposits of nonfuel minerals and mineral materials. The term "disposition" includes the entire process by which deposits of minerals and mineral materials are controlled and made available for exploration, development, and production, and are disposed of by location, patent, lease, or sale. This study covers all minerals locatable under the Mineral Location Law of 1872, all mineral materials covered by the Materials Disposal Act of 1947, and the four nonfuel minerals, phosphate, potash, sodium, and sulphur, covered by the Mineral Leasing Act of 1920.

1/ Id. § 1392.

2/ Id. § 1394.

Section 10 of the Act creating the Commission includes within the term "public lands"--

> " . . . (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, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf." 1/

Since an understanding of the laws applicable to acquired lands and a comparison of such laws with those applicable to public lands are essential to a comprehensive review and understanding of the laws applicable to public lands, this study also covers the laws applicable to the disposal of nonfuel minerals and mineral materials in acquired lands.

Description of the study

The mineral land laws fall into three general categories: (1) the mining laws, by which rights may be acquired on the public domain by the location of a mining claim, (2) the various mineral leasing laws, each affording a means by which a mineral lease may be acquired for certain kinds of minerals on the public domain or on acquired lands, and (3) the mineral materials disposal laws.

1/ Id. § 1400. Outer continental shelf lands are the subject of a separate study.

Many government agencies are involved in various aspects of the administration of these laws, but there are three agencies whose functions most directly relate to their administration. They are the Bureau of Land Management and the Geological Survey, in the Department of the Interior, and the Forest Service, in the Department of Agriculture.

Related laws and policies are reviewed and problem areas under the existing mineral land laws are identified.

The appendices to the study contain a listing of alternatives, a comparative review of the mineral laws of eleven states of the United States, the states and territories of Australia, and three of the provinces of Canada, recommendations with respect to mineral resources made by three previous Commissions, 1/ and the forms of prospecting permit, lease and contract used by the agencies administering the mineral leasing and mineral materials disposal laws.

1/ Report of the National Conservation Commission transmitted to President Theodore Roosevelt on Jan. 11, 1909, Task Force Report on Natural Resources prepared for the Commission on Organization of the Executive Branch of the Government, Jan., 1949, and the President's Materials Policy Commission, June, 1952. These are included because of their relevance in this study. Other Commissions are: Public Land Commission, 1879-1880, appointed by President Hayes, 20 Stat. 394 (1879); Public Lands Commission of 1903, appointed by President Theodore Roosevelt; and Commission on the Conservation and Administration of the Public Domain, appointed by President Hoover, 46 Stat. 153 (1930).

PART I

INTRODUCTORY BACKGROUND

CHAPTER 1

BACKGROUND OF THE MINERAL LOCATION LAWS

A. The common law.

At the English common law, the owner of the surface was the owner of whatever was within his surface boundaries extended to the center of the earth, 1/ and was, with certain exceptions, 2/ presumed to own all mines and minerals on and underneath the surface. This presumption could be rebutted by the production of a title distinct from that of the owner of the surface. 3/

All mines of gold or silver were, by sovereign prerogative, the property of the Crown. 4/ Although originally the sovereign prerogative extended not only to mines of gold or silver, but also to mines of base metals which contained any ore of gold or silver, of however small value, it was, before the date of American Independence, firmly established by

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1/ 2 Blackstone, Commentaries 18.

2/ Among the exceptions were the following: mines of gold or silver, which belonged to the Crown, case of Mines, 1 Plowd. 310, 75 Eng.Rep. 472 (Ex.Ch. 1567); mines under highways, which belonged to the adjoining land owner, Goodtitle v. Alker, 1 Burr. 133, 97 Eng.Rep. 231 (K.B. 1757); mines governed by special customs, such as the Cornwall tin mines, see Curtis v. Daniel, 10 East 273, 103 Eng.Rep. 779 (K.B. 1808).

3/ Rich ex dem. Cullen v. Johnson, 2 Strange 1142, 93 Eng.Rep. 1088 (K.B. 1740); Curtis v. Daniel, 10 East 273, 103 Eng.Rep. 779 (K.B. 1808); Barnes v. Mawson, 1 Maul. & Sel. 77, 105 Eng.Rep. 30 (K.B. 1813).

4/ Case of Mines, 1 Plowd. 310, 75 Eng.Rep. 472 (Ex. Ch. 1567); 1 Blackstone, Commentaries 294.

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statute that the sovereign prerogative did not apply to mines of copper, tin, iron, or lead, even though gold or silver was also produced. 1/ Further provision was made for the optional purchase by the Crown of the ores from such mines at fixed rates, and in default of such purchase, the proprietor of the mine was free to sell the ore for his own account. 2/

The American courts generally adopted the common law rules laid down by the English authorities cited above, 3/ and in the absence of statute, these rules are still applicable to mines and minerals on private lands. 4/

Early state legislation on the subject of mines and minerals may be divided into two classes: (1) legislation providing for the sale of state lands with a reservation of minerals, and (2) legislation recognizing or asserting the sovereign prerogative.

An example of the first class of state legislation is the statute enacted in 1781 by Pennsylvania, establishing a land office and providing for the sale of state lands. This legislation contained the following provision:

1/ 1 W. & M., c. 30, § 3 (1688).

2/ 5 W. & M., c. 6 (1693).

3/ See, e.g., Hartwell v. Camman, 10 N.J.Eq. 128, 64 Am.Dec. 448 (1854); Benson v. Miners' Bank, 20 Pa. 370 (1853); Caldwell v. Fulton, 31 Pa. 475, 72 Am.Dec. 760 (1858); Caldwell v. Copeland, 37 Pa. 427, 78 Am.Dec. 436 (1860).

4/ See Brooks v. Shepard, 157 F.Supp. 379 (S.D.Ala. 1957); Dunn v. County of Los Angeles, 155 Cal.App.2d 789, 318 P.2d 795 (1956); Radke v. Union Pac. R., 138 Colo. 189, 334 P.2d 1077 (1959); Winter v. Mackie, 376 Mich. 11, 135 N.W.2d 364 (1965); Smith v. Nyreen, 81 N.W.2d 769 (N.D. 1957). See also State ex rel. Anaconda Copper-Min. Co. v. District Court, 25 Mont. 504, 64 Pac. 1020 (1901) (common law rule prevails where doctrine of extra-lateral rights does not provide for ownership of all segments of vein).

> "And be it further enacted by the authority aforesaid, that all and every of the land or lands granted in pursuance of this act shall be free and clear of all reservations and restrictions as to mines, royalties, quit-rents or otherwise, so that the owners thereof, respectively, shall be entitled to hold the same in absolute and unconditional property to all intents and purposes whatsoever, and to all and all manner of profits, privileges and advantages belonging to or accruing from the same, and that clear and exonerated from any charge or encumbrance whatsoever, excepting only the fifth part of all gold and silver ore for the use of this commonwealth, to be delivered at the pit's mouth, clear of all charges." 1/

The reservation of the fifth part of all gold and silver ore was repealed in 1889. 2/

That the sovereign prerogative has always been asserted in New York appears from the petition of one Richard Morris, who in 1784 represented to the legislature--

> " . . . that he conceives he has discovered a mine in the county of Westchester, which may be so charged with silver as to be subject to the payment of a proportion of it, to the people of this State as sovereign thereof; and if such proportion be demanded it may not, only take away any profit which may arise, but should there not be a profit

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1/ Act of Apr. 9, 1781, ch. 440, § 11, 10 Pa.Stat. 313 (Mitchell & Flanders 1904).

2/ Act of May 9, 1889, No. 197, Pa.Laws 1889, p. 179.

equal to such proportion it may prove ruinous to the workers of it . . . ." 1/

Upon these representations, Morris was—

> " . . . exempted, acquitted, released and discharged from paying or yielding to the people of this State as sovereign, thereof, or to any commissioner, agent, collector or receiver for their use, any part, share, royalty, proportion or dividend whatsoever of a certain mine in the county of Westchester, discovered by him the said Richard Morris, until the first day of May in the year of our Lord one thousand, seven hundred and ninety five." 2/

Several other similar private statutes were enacted, 3/ and in 1789, upon receiving several petitions relative to mines discovered by the various petitioners, 4/ the legislature enacted a law providing generally that the discoverers of mines of gold and silver were exempted for 21 years from paying royalties on such mines. 5/ This law contained a

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1/ Preamble to Act of Apr. 29, 1784, ch. 49, 1 Laws of N.Y. 684 (Cook 1886).

2/ Act of Apr. 29, 1784, ch. 49, 1 Laws of N.Y. 684 (Cook 1886).

3/ Act of Apr. 29, 1784, ch. 50, 1 Laws of N.Y. 685 (Cook 1886); Act of Nov. 24, 1784, ch. 13, 2 Laws of N.Y. 26 (Cook 1886); Act of Mar. 16, 1785, ch. 36, 2 Laws of N.Y. 70 (Cook 1886).

4/ These petitions are discussed in Raymond, New York Mining Law, 16 Trans.A.I.M.E. 770 (1888). Although Raymond regrets that it was impossible to recover the substances of these petitions, it may be presumed that they were to the same effect as those filed by Morris and others, which resulted in the legislation mentioned above.

5/ Act of Feb. 6, 1789, ch. 18, 3 Laws of N.Y. 22 (Cook 1887).

number of other provisions, including one, based upon the English statute 1 W. & M., c. 30, § 3 (1688), which provided that any mine owned by a citizen of the United States producing ore whose value for copper, tin, iron, and lead was greater than two-thirds of the total value of the ore should not be a mine belonging to the people of the state by virtue of their sovereignty.

An attempt to assert the sovereign prerogative in a judicial proceeding was apparently made by Georgia in 1843, 1/ but it was held that if the state made a grant of public lands without reserving the mines and minerals, the grantee could remove silver and gold without being liable to the state in trespass.

In 1846, the Michigan legislature asserted the sovereign prerogative with respect to "all mines of gold and silver, or either of them, now discovered, or hereafter to be discovered within the territorial limits of this State" and to "all mines of other metals or minerals, discovered, or to be discovered, which are connected with, or shall be known to contain gold or silver in any proportion." 2/ This Act further provided, however, that the sovereign right should never be enforced against any citizen of the state in whom the fee of the soil containing such mines or minerals was or might become fully vested by purchase from the federal or state government.

In 1853, California successfully asserted the sovereign prerogative in a judicial proceeding, 3/ but the case was

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1/ State v. Canatoo, reported in the National Intelligencer, Oct. 24, 1843, and discussed in 3 Kent, Commentaries 378, note (b).

2/ Act of Apr. 25, 1846, No. 78, 1846 Mich.Laws 92. This act was declared obsolete and repealed by Act of May 25, 1945, No. 267, 1945 Mich.Pub.Acts 402, 411.

3/ Hicks v. Bell, 3 Cal. 219 (1853).

soon overruled. 1/

B. American mining law prior to 1848.

Federal legislation of the period prior to 1848 may be divided into two classes, legislation reserving minerals to the United States, and legislation authorizing the disposition of reserved minerals by sale, lease, or grant.

1. Reservation of minerals.

a. Ordinance of 1785.

The first Congressional enactment dealing with mines or minerals was the Ordinance of May 20, 1785, entitled "An Ordinance for ascertaining the mode of disposing of lands in the Western Territory". 2/ This ordinance provided for the division of the territory into townships of six miles square, which in turn were to be subdivided into lots one mile square. The lines of the survey were to be measured with a chain and marked by chaps on the trees, and exactly described on a plat, on which was to be noted by the surveyor--

> ". . . all mines, salt springs, salt licks and mill seats that shall come to his knowledge."

The ordinance further provided for the sale of these lands, reserving to the United States out of each township lots 8, 11, 26, and 29, and also reserving out of each township lot 16 for the maintenance of the public schools within the township. The ordinance then reserved--

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1/ Moore v. Smaw, 17 Cal. 199, 79 Am.Dec. 123 (1861); Doran v. Central Pac. R., 24 Cal. 245 (1864).

2/ 28 Jour.Cont.Cong. 375 (Fitzpatrick 1933).

". . . also one third part of all gold, silver, lead, and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct." 1/

Although this ordinance has been described as an assertion of the sovereign prerogative, 2/ it does not in fact do so, as the sovereign prerogative applies to mines on private lands, while the ordinance is merely the exercise by the proprietor of lands of the power of disposing of his lands and reserving a royalty interest. 3/

No further specific reservations of gold, silver, or copper mines were made until 1847.

b. Salines.

The Act of May 18, 1796, ch. 29 4/ provided for the survey and sale of lands in the territory northwest of the Ohio River. This Act established the present rectangular system of public land surveys, 5/ and provided that--

". . .Every surveyor shall note in his fieldbook the true situations of all mines, salt licks, salt springs and mill seats, which shall come to his knowledge."

The Act further provided--

1/ An amendment seeking to strike out this clause was defeated. 28 Jour.Cont.Cong. 284 (Fitzpatrick 1933).

2/ Northern Pac. Ry. v. Soderberg, 188 U.S. 526 (1903).

3/ See Moore v. Smaw, 17 Cal. 199 (1861).

4/ 1 Stat. 464.

5/ See 43 U.S.C. § 751 (1964).

"That a salt spring lying upon a creek which empties into the Sciota River, on the east side, together with as many contiguous sections as shall equal one township, and every other salt spring which may be discovered, together with the section of one mile square which includes it . . . shall be reserved, for the future disposal of the United States."

The Act of March 26, 1804, ch. 35 §§ 5 and 6, 1/ which provided for the disposal of public lands in the Indiana territory, reserved to the United States for future disposal

". . . the several salt springs in the said territory, together with as many contiguous sections as shall be deemed necessary by the President of the United States: and any grant which may hereafter be made for a tract of land, containing a salt spring which had been discovered previous to the purchase of such tract from the United States, shall be considered as fraudulent and null."

A similar reservation was contained in the Act of Apr. 21, 1806, ch. 39, § 11, 2/ which authorized the disposal of lands in the western district of Louisiana, and in the Act of May 6, 1812, ch. 77, 3/ which provided for military bounty lands.

The Act of Mar. 3, 1807, ch. 46, § 2 4/ and the Act of

1/ 2 Stat. 279. See also Act of Mar. 3, 1805, ch. 43, 2 Stat. 343, 345.

2/ 2 Stat. 391, 394. See also Act of Feb. 19, 1811, ch. 14, § 10, 2 Stat. 617, 620; Act of Mar. 3, 1811, ch. 46, § 6, 2 Stat. 662, 664.

3/ 2 Stat. 728.

4/ 2 Stat. 445.

Mar. 25, 1816, ch. 35, 1/ which provided that certain settlers could apply for permission to remain on public lands, provided that where the tract of land applied for included either a lead mine or a salt spring, no permission to work the same should be granted without the approval of the President.

c. Lead mines.

The Act of March 3, 1807, ch. 49, § 5 2/ reserved to the United States for future disposal "the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States." The Act of February 15, 1811, ch. 14, § 10 3/ reserved to the United States the lead mines and contiguous lands in the Louisiana Territory, and a similar reservation was contained in the Act of May 6, 1812, ch. 77, 4/ which provided for military bounty lands. The Acts of Mar. 3, 1807, ch. 46 § 2 5/ and Mar. 25, 1816, ch. 35 6/ have been referred to above. In 1834 an act was passed by Congress creating additional land districts and, without mentioning lead mines, authorizing the President to sell "all the lands lying in said land districts", reserving only certain designated tracts, "any law of Congress heretofore existing to the contrary notwithstanding". 7/ This act was

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1/ 3 Stat. 260.

2/ 2 Stat. 448, 449.

3/ 2 Stat. 617, 620.

4/ 2 Stat. 728.

5/ 2 Stat. 445.

6/ 3 Stat. 260.

7/ Act of June 26, 1834, ch. 76, 4 Stat. 686.

interpreted by the Attorney General as authorizing the President to sell the reserved mineral lands, 1/ and accordingly, the officers charged with disposing of these lands proceeded to sell them without regard to the previous reservations. 2/ This interpretation was struck down by the Supreme Court, which held that the 1834 act could not be regarded as disclosing a purpose on the part of Congress to depart from the policy which had governed its legislation in respect to the lead mines. 3/

d. Hot springs.

The Act of April 20, 1832, ch. 70 4/ reserved to the United States for future disposal the hot springs in the Arkansas Territory, together with four sections of land including the springs.

e. Pre-emption laws.

The pre-emption laws enacted during the early part of the nineteenth century generally provided that there

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1/ 3 Op.Att'y Gen. 277 (1837).

2/ See Cong.Globe, 29th Cong., 1st Sess. 898, 899 (1846) (remarks of Mr. McClernand).

3/ United States v. Gear, 44 U.S. (3 How.) 120 (1845).

4/ 4 Stat. 505.

should not be sold any lands reserved from sale by former acts. 1/ The 1841 act 2/ was the first pre-emption act to except mineral lands generally from its operation. It provided that "no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act". 3/

2. Disposition of minerals.

a. Power of Congress.

The power of Congress to dispose of reserved minerals is granted by Article IV, Section 3 of the Constitution, which provides that--

> ". . . 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."

The power to dispose of property, including mineral lands,

1/ See, e.g., Act of Feb. 5, 1813, ch. 20, § 1, 2 Stat. 797 (Illinois), whose provision in this regard was incorporated by reference in Act of Apr. 12, 1814, ch. 52, § 5, 3 Stat. 121 (Louisiana and Missouri) and Act of Apr. 22, 1826, ch. 28, § 1, 4 Stat. 154 (Alabama, Mississippi, and Florida). See also Act of June 22, 1838, ch. 119, 5 Stat. 251, extended by Act of June 22, 1840, ch. 32, 5 Stat. 383.

2/ Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 455.

3/ Sulfur springs were not regarded as saline or mineral under this act. Decision of the Commissioner, Aug. 25, 1869, Copp, U.S. Mining Decisions 22 (1874).

includes the power to lease. 1/

b. General leasing law.

The Act of May 10, 1800, ch. 55, § 15 2/ provided--

> "That the lands of the United States reserved for future disposition, may be let upon leases by the surveyor-general, in sections or half-sections, for terms not exceeding seven years, on condition of making such improvements as he shall deem reasonable."

It does not appear that this Act was ever regarded as granting the authority to lease the reserved mineral lands, although such a construction would not have been unreasonable.

c. Saline grants to states.

The Ohio Enabling Act 3/ provided--

> "That the six miles reservation, including the salt springs commonly called the Scioto salt springs, the salt springs near the Muskingum river, and in the military tract, with the sections of land which include the same, shall be granted to said state for the use of the people thereof, the same to be used under such terms and conditions and regulations as the legislature of the said

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1/ United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

2/ 2 Stat. 73, 78.

3/ Act of Apr. 30, 1802, ch. 40, 2 Stat. 173. See also Act of Aug. 7, 1953, ch. 337, 67 Stat. 407.

state shall direct: Provided, the said legislature shall never sell or lease the same for a longer period than ten years."

The Indiana Enabling Act 1/ provided —

"That all salt springs within the said territory, and the land reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs, not exceeding, in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said state, the same to be used under such terms, conditions, and regulations as the legislature of the said state shall direct: provided the said legislature shall never sell nor lease the same for a longer period than ten years at any one time."

Substantially similar provisions were contained in the Illinois Enabling Act 2/ and the Alabama Enabling Act. 3/

The Missouri Enabling Act 4/ provided —

"That all salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said state for the use of said state, the same to be selected by the legislature of the said state, on or before the first day of January, in the year one thousand eight hundred and twenty-five; and the same, when so selected, to be used under such terms, conditions and regulations, as the legislature of said state

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1/ Act of Apr. 19, 1816, ch. 57, 3 Stat. 289, 290.

2/ Act of Apr. 18, 1818, ch. 67, 3 Stat. 428, 430.

3/ Act of Mar. 2, 1819, ch. 47, 3 Stat. 489, 491.

4/ Act of Mar. 6, 1820, ch. 22, 3 Stat. 545, 547.

> shall direct: Provided, that no salt spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall, by this section, be granted to the said state: And provided also, that the legislature shall never sell or lease the same, at any one time, for a longer period than ten years, without the consent of Congress." 1/

Similar grants were made to Arkansas, 2/ Michigan, 3/ and Iowa. 4/ A grant not containing restrictions on sale or lease was made to Wisconsin. 5/

Beginning in 1831, the states and territories were granted varying powers to sell or lease the salt springs. 6/ In 1846, Michigan, Illinois, and Arkansas were granted the power to sell the salt springs, 7/ and the same power was granted to Iowa in 1852. 8/ In 1945, Alabama was granted

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1/ See also Act of Mar. 3, 1823, ch. 69, 3 Stat. 787.

2/ Act of June 23, 1836, ch. 120, 5 Stat. 58.

3/ Act of June 23, 1836, ch. 121, 5 Stat. 59.

4/ Act of Mar. 3, 1845, ch. 76, 5 Stat. 789.

5/ Act of Aug. 6, 1846, ch. 89, 9 Stat. 56. See also Act of Dec. 15, 1854, ch. 5, 10 Stat. 597.

6/ Act of Mar. 3, 1831, ch. 116, § 8, 4 Stat. 494 (Missouri: power to sell in fee, proceeds to be applied to education); Act of Jan. 19, 1832, ch. 1, 4 Stat. 496 (Illinois: power to sell, proceeds to be applied as general assembly of Illinois may direct); Act of Apr. 20, 1832, ch. 70, 4 Stat. 505 (Arkansas Territory: power to lease for five years, proceeds to be applied to opening and improving roads).

7/ Act of Mar. 3, 1847, ch. 56, 9 Stat. 181.

8/ Act of May 27, 1852, ch. 52, 10 Stat. 7.

the power to lease, sell, or convey the salt springs, and to apply the proceeds as the legislature may direct. 1/

d. Saline leasing laws.

The Act of March 3, 1803, ch. 28 2/ authorized the President to cause certain salt springs near the Wabash River to be worked at the expense of the United States, or to lease the same for a term not exceeding three years. The Act of March 3, 1807, ch. 46, § 2 3/ authorized the President to cause lead mines or salt springs on the lands of the United States to be leased for a term not exceeding three years. This Act is discussed in more detail below.

e. Lead leasing laws.

The Act of March 3, 1807, ch. 46, § 2 4/ provided that certain persons who, at the time of the passage of the Act, actually inhabited and resided on certain lands might, on certain conditions, apply for permission to remain as tenants at will, and further provided--

> "That in all cases where the tract of land applied for, includes either a lead mine or salt spring, no permission to work the same shall be granted without the approbation of the President of the United States, who is hereby authorized to cause such mines or springs to be leased for a term not exceeding three years, and on such conditions as he shall think proper."

1/ Act of June 29, 1945, ch. 201, 59 Stat. 264.

2/ 2 Stat. 235.

3/ 2 Stat. 445.

4/ Id.

Whether this statute was intended to grant to the President the authority to lease generally, or to the qualified applicant only is not clear. The Attorney General was of the opinion that the President had general authority to lease, 1/ while the Supreme Court of Iowa was of a contrary opinion and so held. 2/ The Act of March 3, 1807, ch. 49, 3/ which reserved to the United States the lead mines in the Indiana territory, also authorized the President to lease any lead mines in the territory for a term of not exceeding five years.

No provision was made in either of these laws, for the appointment of an agent to supervise the leasing, 4/ and in Missouri this duty apparently attached itself to the office of the recorder of land titles at St. Louis, 5/ while in Indiana and Illinois territories, leasing of the lead mines appears to have been supervised by the Governor of the territory. 6/ Available records show that between 1807 and 1817, some fifteen leases were granted. These leases were for terms of one, three, or five years, and

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1/ 1 Op.Att'y Gen. 593 (1822); 4 Op.Att'y Gen. 93 (1842); 4 Op.Att'y Gen. 499 (1846).

2/ Lorimer v. Lewis, 1 Morris. 253, 39 Am.Dec. 461 (Iowa 1843).

3/ 2 Stat. 449.

4/ In his Message to Congress on December 3, 1822, President Monroe recommended the appointment of "an agent skilled in minerology" to superintend the lead mines. Annals of Cong., 17th Cong., 2 Sess. 11, 18 (1855). Nothing appears to have resulted from this recommendation.

5/ Letter from Lt. Martin Thomas to Col. George Bomford, Jan., 1826, S.Doc.No. 45, 19th Cong., 1st Sess. 5-19 (1826).

6/ Letter from Geo. Graham, Commissioner, General Land Office to the President, Jan. 26, 1826, S.Doc.No. 38, 19th Cong., 1st Sess. 18-23 (1826).

reserved to the United States a royalty, variously expressed, of one-tenth to one-twelfth of all mineral raised, $3.00 to $4.00 per thousand pounds of mineral, or 13-1/2% to 26% on all lead raised. 1/ On November 29, 1821, superintendance of the lead mines was transferred from the Treasury Department to the War Department 2/ and the first lease granted by that Department was dated September 30, 1822. 3/ At first the leases included particular mines or lots of ground, but soon the practice was introduced of leasing to some individuals the right to dig the ore on the reserved land, and to license to others the right to smelt it. 4/ The smelting licenses were justified as being subordinate and auxiliary to the mining leases, and as being a means of collecting the rents reserved in those leases. 5/

In 1837, the Attorney General concluded that the President had the power to lease the mineral lands in Wisconsin. 6/ Under this interpretation of the law, hundreds of leases were granted to speculators in the Lake Superior copper region, which was from 1843 until 1846 the scene of "wild and

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1/ Id.

2/ Letter from J. C. Calhoun, Secretary of War to the President, May 3, 1822, 3 American State Papers 492-493.

3/ Letter from Brevet Col. G. Bomford to James Barbour, Secretary of War, Jan. 11, 1826, S.Doc.No. 38, 19th Cong., 1st Sess. 9-10 (1826).

4/ Letter from Lt. Col. George Bomford to Lt. Martin Thomas, Feb. 17, 1825, S.Doc. No. 38, 19th Cong., 1st Sess. 16-17 (1826). For the form of leases, license, and bonds, see Letter from Brevet Col. G. Bomford to P. B. Porter, Secretary of War, Dec. 15, 1828, H.Doc. No. 30, 20th Cong., 2d Sess. 2-7 (1828).

5/ 2 Op.Att'y Gen. 708 (1835).

6/ 3 Op.Att'y Gen. 277 (1837).

baseless excitement". 1/ In 1845 the granting of permits for locations in the Lake Superior copper region was suspended, 2/ and in 1846, after the Attorney General had concluded that the President did not have the power to lease lands which contained mines of copper, gold, or silver as the predominant mineral, 3/ the issue of leases was suspended. 4/

f. Sale of salines in Missouri.

The Act of March 3, 1829, ch. 54 5/ authorized the President to sell the reserved salt springs and contiguous lands in the State of Missouri. The background of this legislation is closely related to that of the act providing for the sale of the lead mines in Missouri, which is discussed below. No further legislation authorizing the disposition of salines (except to the states) was enacted until 1877. 6/

g. Sale of lead mines.

Missouri was admitted to statehood on August 10, 1821,

1/ Hewitt, A Century of Mining and Metallurgy in the United States, 5 Trans.A.I.M.E. 164 (1876).

2/ Report of the Secretary of War, Dec. 5, 1846, Cong. Globe, 29th Cong., 2d Sess., App. 13, 16 (1846).

3/ 4 Op.Att'y Gen. 480 (1846).

4/ Report of the Secretary of War, Dec. 5, 1846, Cong.Globe, 29th Cong., 2d Sess., App. 13, 16 (1846).

5/ 4 Stat. 364.

6/ Act of Jan. 12, 1877, ch. 18, 19 Stat. 221.

and that state's representatives in Congress immediately initiated efforts to obtain a law authorizing the President to sell the reserved lead mines and salt springs in Missouri. In 1822, resolutions were passed by the Senate and House of Representatives requesting from the President certain information concerning the lead mines, 1/ which the President duly provided. 2/ During the ensuing years a number of inquiries were made as to the expediency of selling the lead mines, 3/ and a number of bills for that purpose were introduced. 4/ While the last of these bills was pending, on January 5, 1829, Congress received a Memorial from the General Assembly of Missouri, requesting a law authorizing the sale of the mineral lands lying in the state. 5/ The pending bill was enacted, authorizing the President to sell the reserved lead mines and contiguous lands in Missouri. 6/

As early as 1830, the Ordnance Department, in a report communicated to Congress with the President's Message to Congress, had recommended the survey and sale of the

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1/ Annals of Cong., 17th Cong., 1st Sess. 412 (1822); id. 1627.

2/ 3 American State Papers 492 (1822). The President appears periodically to have been requested to furnish information concerning the lead mines and salt springs. See the materials transmitted by him to Congress in S.Doc.No. 38, 19th Cong., 1st Sess. (1826); 4 American State Papers 799 (1826); and H.Doc.No. 30, 20th Cong., 1st Sess. (1828).

3/ Annals of Cong., 17th Cong., 1st Sess. 97 (1823); Annals of Cong., 18th Cong., 1st Sess. 53, 56 (1823); 2 Cong.Deb. 829 (1825).

4/ Annals of Cong., 17th Cong., 2d Sess. 147 (1823); 3 Cong.Deb. 52-55 (1827); 5 Cong.Deb. 8-9 (1828).

5/ 5 American State Papers 604 (1829).

6/ Act of Mar. 3, 1829, ch. 55, 4 Stat. 364.

remaining lead mines, 1/ and in 1834, a bill was introduced in the House of Representatives providing for the sale of the lead mines in Illinois and Michigan. 2/

In 1830, the Governor of Illinois, in his public message to the legislature, declared the lead leasing law to be unconstitutional and recommended that the people resist leasing and refuse to pay rent. 3/ Apparently this advice was accepted by the people, for by 1836, the refusal to pay rent had become general, and the Secretary of War recommended the sale of the mineral lands as the most effectual mode of terminating the difficulties which existed between the government and the miners. 4/ These recommendations were frequently repeated, 5/ and by 1845 it had become evident that the system of granting leases had proved to be both unprofitable to the government and unsatisfactory to the lessees. 6/ Congress

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1/ Report of Col. G. Bomford, 7 Cong.Deb., App. xxxii (1830).

2/ 10 Cong.Deb. 4388-4390 (1834).

3/ See Report of the Secretary of War, H.R. Ex.Doc.No. 307, 25th Cong., 2d Sess. (1838).

4/ Report of the Secretary of War, Dec. 3, 1836, Cong. Globe, 24th Cong., 1st Sess., App. 1, 3 (1836).

5/ Report of the Secretary of War, Dec. 2, 1837, Cong. Globe, 25th Cong., 2d Sess., App. 3, 6 (1837); Report of the Secretary of War, Nov. 28, 1838, Cong.Globe, 25th Cong., 3d Sess., App. 1,3 (1838); Report of the Secretary of War, Nov. 30, 1839, Cong.Globe, 26th Cong., 1st Sess., App. 23,24 (1839); Report of the Secretary of War, Nov. 26, 1842, Cong.Globe, 27th Cong., 3d Sess., App. 33, 34 (1842); Report of the Secretary of War, Nov. 30, 1843, Cong.Globe, 28th Cong., 1st Sess., App. 10, 12 (1843); Report of the Secretary of War, Nov. 30, 1844, Cong.Globe, 28th Cong., 2d Sess., App. 8, 11 (1844).

6/ Message of the President, Dec. 2, 1845, Cong. Globe, 29th Cong., 1st Sess., App. 1, 7 (1845).

responded by enacting legislation authorizing the President "as soon as practicable" to sell the reserved lead mines and contiguous lands in the States of Illinois and Arkansas and the Territories of Wisconsin and Iowa. 1/

h. Sale of mineral lands in Michigan.

The Act of March 1, 1847, ch. 32 2/ provided for a geological survey of lands in the northern peninsula of Michigan, and authorized the President to sell "such of said lands as may contain copper, lead, or other valuable ores." 3/ Section 5 of this Act transferred the management and control of the mineral lands from the War Department to the Treasury Department. The Act of March 3, 1847, ch. 54 4/ provided for a geological survey of lands in the Chippewa land district in Michigan, and authorized the President to sell "such of said lands as may contain copper, lead, or other valuable ores." These two acts were repealed by the Act of September 26, 1850, ch. 72, 5/ which provided that mineral lands in the mentioned land districts should be sold in the same manner as other public lands of the United States.

3. Summary of policy evidenced by early legislation.

In the early legislation concerning the public lands, it was the practice of Congress to make a distinction between

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1/ Act of July 11, 1846, ch. 36, 9 Stat. 37.

2/ 9 Stat. 146.

3/ The term "other valuable ores" was construed not to include iron ore. 5 Op.Att'y Gen. 247 (1850).

4/ 9 Stat. 179.

5/ 9 Stat. 472.

mineral lands and other lands, to deal with them along separate lines, and to withhold mineral lands from disposal save under laws specially including them. This practice began with the Ordinance of May 20, 1785, 1/ and was observed with such persistency in the early land laws as to lead the Supreme Court to say that--

> "It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States." 2/

In later cases, the Supreme Court held that reserved mineral lands did not become subject to pre-emption and sale under subsequent general pre-emption laws. 3/

The purpose of Congress in reserving saline lands was to preserve them for the use of the future states, and upon the organization of each state, a grant of salt springs was made to it. 4/

Except for salines, there appears to have been no definite policy with regard to the disposition of minerals. The lead leasing law was a stop-gap measure, the three- and five-year limitations being designed not to prohibit renewal of the leases from time to time, but rather to avoid interferring with the power of Congress to make some other disposition of the mineral lands should it think proper to do so. 5/ The sale of the mineral lands resulted not from the formulation by Congress of a policy calling

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1/ Jour.Cont.Cong. 375 (Fitzpatrick 1933).

2/ United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840)

3/ United States v. Gear, 44 U.S. (3 How.) 120 (1845) (lead mines); Morton v. Nebraska, 88 U.S. (22 Wall.) 660 (1874) (salines).

4/ Morton v. Nebraska, 88 U.S. (22 Wall.) 660 (1874).

5/ United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

for their sale, but from the pressures of the citizens most affected by the leasing laws.

C. American mining law from 1848 to 1866.

Following the admission of Texas to the Union in 1845, a dispute over the western boundary of that state flared into the Mexican War. On July 7, 1846, following the outbreak of hostilities between the United States and Mexico, Commodore John Drake Sloat raised the American flag over Monterey and proclaimed California a part of the United States. By Treaty of Guadalupe Hidalgo, signed February 2, 1848 and proclaimed July 4, 1848, a vast territory, comprising all of California, Nevada, and Utah, and portions of Arizona, New Mexico, Colorado, and Wyoming, was ceded by Mexico to the United States. In the meanwhile, in January, 1848, gold had been discovered in California.

In his annual message to Congress on December 5, 1848, President Polk recommended the organization of a territorial government for California. 1/ Legislation providing for civil government in California became bogged down in Congress on the issue of slavery, and aside from two minor pieces of legislation dealing with the postal service, 2/ no legislation relating to California was passed until March 3, 1849, when the revenue laws of the United States were extended to "the territory and waters of upper California". 3/ Not until September 28, 1850, more than two weeks after California was admitted to the Union were the laws of the United States generally extended to that state. 4/

1/ Cong.Globe, 30th Cong., 2d Sess. 1, 3 (1848).

2/ Act of Aug. 3, 1848, ch. 121, 9 Stat. 266, 267-268; Act of Aug. 14, 1848, ch. 175, § 3, 9 Stat. 320.

3/ Act of Mar. 3, 1849, ch. 112, 9 Stat. 400.

4/ Act of Sep. 28, 1850, ch. 86, 9 Stat. 521. California was admitted by Act of Sep. 9, 1850, ch. 50, 9 Stat. 452.

Mexican laws, at least insofar as they related to the disposition of public lands, became inoperative "the moment California was effectually subdued and occupied by the American forces". 1/ During the Mexican War, California was governed by military officers appointed by the War Department, whose duties were rendered most delicate and difficult by their awareness both of their lack of authority to promulgate laws and of their lack of jurisdiction to enforce them.

The first piece of federal "legislation" dealing with the mines in California was the proclamation of the military governor, Col. R. B. Mason, issued on February 12, 1848:

> "From and after this date, the Mexican laws and customs now prevailing in California, relative to the denouncement of mines, are hereby abolished.
>
> "The legality of the denouncements which have taken place, and the possession obtained under them since the occupation of the country by the United States forces, are questions which will be disposed of by the American government after a definite treaty of peace shall have been established between the two republics." 2/

In June, 1848, Col. Mason made a tour of the mines in California. His report indicates one of the practical difficulties which would face any legislation contrary to the customs of the miners:

> ". . . The entire gold district, with very few exceptions of grants made some years ago by the Mexican authorities, is on land belonging to the United States. It was a matter of serious reflection

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1/ Woodworth v. Fulton, 1 Cal. 295 (1850).

2/ Yale, Legal Titles to Mining Claims and Water Rights in California 17 (1867). For a discussion of denouncements, see 1 Lindley, Mines § 13 (3d ed. 1914).

with me, how I could secure to the government certain rents or fees for the privilege of procuring this gold, but upon considering the large extent of the territory, the character of the people engaged, and the small scattered force at my command, I resolved not to interfere, but to permit all to work freely, unless broil and crime should call for interference." 1/

When the news of the Treaty of Guadalupe Hidalgo reached California, on August 7, 1848, Col. Mason issued a proclamation continuing in force the "existing laws of the country". 2/ It was, however, the opinion of the Secretary of War that the civil authority of the military governors had in a great measure disappeared with the transfer of the sovereignty and jurisdiction from Mexico to the United States. 3/

1. Miners' rules.

The discovery of gold in California attracted large numbers of miners, who found neither laws governing the possession or occupation of the mines nor a government capable of executing such laws had they existed. The miners were compelled, from the necessities of their position, to establish regulations for their own government. The principal mineral sections were divided into mining districts, and at meetings of miners, written regulations were adopted by those composing the meetings.

There were, in 1866, not less than 500 mining districts in California, 200 in Nevada, and 100 each in Arizona, Idaho,

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1/ Letter from Col. R. B. Mason to Brig. Gen. R. Jones, Adjutant General, Aug. 17, 1848, Ex.Doc. No. 1, 30th Cong. 2d Sess. 56-64 (1848).

2/ 5 Bancroft, History of California 611 (1886).

3/ Report of the Secretary of War, 22 Cong.Rec., App. 10, 12 (1849).

and Oregon, each with its own set of written regulations. These districts usually did not contain more than 100, and frequently not more than ten square miles, and in places, there were a dozen mining districts within a radius of ten miles. 1/

The authors of this study have contacted mining associations and similar organizations throughout the western United States, and the replies have been universally to the effect that mining districts in which the rules and regulations are established by the miners have passed from the

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1/ Browne, Report Upon the Mineral Resources of the States and Territories West of the Rocky Mountains, Ex.Doc. No. 29, 39th Cong., 2d Sess. (1867).

American scene. 1/ The term "mining district", as presently used, is nothing more than a convenient term of geographical reference to describe the general area in which a mining claim is located.

1/ Letter from James A. Williams, Director, Division of Mines and Minerals, Alaska Department of Natural Resources to Howard A. Twitty, Sept. 1, 1968 ("this era is long gone and there have been no such since sometime before World War II"); Letter from Norman F. Williams, State Geologist, Arkansas Geological Commission to George E. Reeves, Dec. 12, 1968; Letter from George W. Nilsson, President, Southern California Mining Assn. to Howard A. Twitty, Sept. 4, 1968; Letter from A. J. Teske, Secretary, Idaho Mining Assn. to Howard A. Twitty, Sept. 4, 1968; Letter from Uuno M. Sakinen, Associate Director, Montana Bureau of Mines to Howard A. Twitty, Sept. 16, 1968 ("the rules and regulations as established by the miners when the districts were organized served a useful purpose, but as soon as the advent of organized state government in Montana, they were no longer needed"); Letter from Paul Gemmill, Executive Secretary, Nevada Mining Assn., Inc. to Howard A. Twitty, Sept. 9, 1968 ("those now living do not recall such a practice within their lifetimes"); Letter from William F. Darmitzel, Executive Director, New Mexico Mining Assn. to Howard A. Twitty, Sept. 13, 1968; Letter from Paul S. Rattle, Manager, Utah Mining Assn. to Howard A. Twitty, Sept. 12, 1968 ("it is our understanding that the independent districts dissolved following enactment of the mining laws about 100 years ago"); Letter from R. W. Beamer, Executive Secretary, Wyoming Mining Assn. to Howard A. Twitty, Sept. 4, 1968 ("there were several districts organized around 1870 in the South Pass gold mining area but these became defunct many, many years ago"); Letter from Eskil Anderson, President, Northwest Mining Assn. to Howard A. Twitty, Sept. 5, 1968. The authors of this study may vouch for the fact that mining districts in which the rules and regulations are established by the miners are no longer in existence in Arizona.

a. Origin of miners' rules.

The origin of the miners' rules was summarized by Yale as follows: 1/

> ". . . The real mining code, as far as it can be traced by legal earmarks, has sprung from the customs and usages of the miners themselves, with rare applications of common law principles by the Courts to vary them. Most of the rules and customs constituting the code, are easily recognized by those familiar with the Mexican ordinances, the Continental Mining Code, especially the Spanish, and with the regulations of the Stannary Convocations among the Tin Bounders of Devon and Cornwall, in England, and the High Peak Regulations for the lead mines in the county of Derby. These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvion, or rock in situ."

Shinn, anxious to discover a Teutonic Origin, says: 2/

> "To Germanic sources we must trace the most important principles of mining-law. The local customs of the earliest Hartz miners have never ceased to exert an influence upon civilization. . . . All the early German codes express the idea of mining-freedom, of a possible ownership of the minerals apart from the soil, of the right of the individual to search for and possess the precious metals, provided he infringed on no previous rights. This 'mining-freedom' (Bergbaufreiheit) contains the essence of all frontier mining customs ever since. The right to 'prospect,' 'locate' a given claim,

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1/ Yale, Legal Titles to Mining Claims and Water Rights in California 58 (1867).

2/ Shinn, Mining Camps 20 (1884).

and hold it against all comers until abandoned, is the right guaranteed, in one form or another, by the newest mining-camp of Montana. This is the same right, once possessed by the men of the 'seven mining-cities of the Hartz,' and by those of Freiberg, of Truro, of Penance, and of other cities of the middle ages where mining guilds and organizations existed."

There is evidence of the existence of miners' rules in the lead mining regions, long prior to the discovery of gold in California. In a letter from one John Perry, of Potosi, Missouri, to the ordinance office, it is stated that—

"When a person makes a discovery of ore, either on public or private land, all the miners in the neighborhood gather in, and each man marks off a hole, four or five feet square, from which he claims twelve feet (superficial) in every direction, taking care not to interfere with each other." 1/

The lead miners of Dubuque held a meeting on June 17, 1830, and appointed a committee to draft regulations, which were unanimously adopted. They agreed to live under the Code of Illinois, and further agreed—

"Article I. That each and every man shall hold two hundred yards square of ground, working said ground one day in six.

"Article II. We further agree, that there shall be chosen, by a majority of the miners present, a person who shall hold this article and grant letters of arbitration, on application having been made; and that said letters of arbitration shall be obligatory on the parties concerned so applying." 2/

1/ Quoted in Letter from Lt. Martin Thomas to Col. George Bomford, January, 1826, S.Doc.No.45, 19th Cong., 1st Sess. (1826).

2/ Macy, University Studies in Historical and Political Science, 2nd Series, No. 7, quoted in Shinn, Mining Camps 44 (1884).

b. Outline of typical miners' rules.

The main objects of the miners' rules were to fix the boundaries of the district, the size of the claims and the number of claims allowed to an individual, the manner in which the claims should be worked and recorded, the amount of work which must be done to secure title, and the circumstances under which a claim is considered abandoned or forfeited. The following provisions were typical: 1/

Privilege of the discoverer—The discoverer of a new vein or "diggings" was allowed to hold twice the usual amount of mining ground.

Number of claims—But one claim was allowed to a person, except the discoverer, who was allowed two. The number of claims held by purchase was usually unlimited, but the purchase must have been in good faith and upon valuable consideration. Double claims were sometimes allowed where the work was costly.

Capacity of the locator—The privilege of mining was restricted to citizens or Europeans who intended to become citizens. Especially proscribed were Asiatics and South-Sea Islanders.

Size of claim—The size of the claim was a matter of great importance in the miners' rules. Ten feet square was the prevailing size in many districts, with larger claims becoming more common as the richest ground was mined out. Frequently, claims were measured in terms of length along the river, or along the lode.

Notice—Claim notices were provided for, as were the details of posting and maintaining the notices.

1/ Bancroft, 6 History of California 396-402 (1884); Shinn, Mining Camps 232-258 (1884); 1 Snyder, Mines §§ 73-83 (1902); Yale, Legal Titles to Mining Claims and Water Rights in California 73-84 (1867).

Boundaries—Marking of the boundaries of a claim was required, frequently by the digging of a trench or ditch around the perimeter of the claim.

Recorder—A recorder was usually chosen to record claim notices and deeds. It was also his duty to call meetings of the miners, upon receipt of a petition signed by a certain number of miners of the district.

Development and forfeiture—Possessory rights to mining claims were secured by use, and the rules provided for the amount of work required to hold a claim. In some districts this requirement was expressed in terms of labor, such as the rule requiring one full day's work out of every three. In other districts, the requirement was expressed in terms of the value of the work done on a claim, such as the rule requiring the expenditure of twenty-five dollars per week. The period of time during which a miner could hold a claim without working it was usually quite short, three to ten days being perhaps average. In some locations, the effect of the seasons, and particularly the availability of water, was taken into consideration.

Arbitration—Disputes were usually settled by arbitration, or by decision of the miners' meeting.

Virtually all of these provisions have their counterparts in the present federal and state statutes.

2. Federal legislation.

a. Disposition of minerals.

Between 1848 and 1866, very little legislation was enacted by Congress regarding the disposition of minerals or mineral lands.

The policy, initiated prior to 1848, of granting salines

to the various states upon admission was continued. 1/

In 1856 Congress enacted a curious law providing that when a citizen of the United States should discover a deposit of guano on any island not within the lawful jurisdiction of any other government and take peaceable possession of the same, the island may, at the discretion of the President, "be considered as appertaining to the United States", and the discoverer may be allowed, at the pleasure of Congress, the exclusive right of occupation for the purpose of obtaining the guano, in accordance with the various provisions of the statute. 2/ The right granted by this Act is merely a revocable license to occupy the island and remove the guano. 3/ The claim to the right to remove guano must be based upon actual discovery of the guano deposit, possession taken, and actual occupancy of the island. 4/

Legislation enacted by Congress in 1864 and 1865 provided for the sale of coal lands. 5/

b. Recognition of possessory rights.

As early as 1851, Congress officially recognized that

1/ Act of Feb. 26, 1857, ch. 60, 11 Stat. 166 (Minnesota); Act of May 4, 1858, ch. 26, 11 Stat. 269 (Kansas); Act of Jan. 29, 1861, ch. 20, 12 Stat. 126 (Kansas); Act of Feb. 14, 1859, ch. 33, 11 Stat. 383 (Oregon); Act of Apr. 19, 1864, ch. 59, 13 Stat. 47 (Nebraska).

2/ Act of Aug. 18, 1856, 48 U.S.C. §§ 1411-1419 (1964).

3/ Duncan v. Navassa Phosphate Co., 137 U.S. 647 (1891).

4/ 9 Op.Att'y Gen. 364 (1859).

5/ Act of July 1, 1864, ch. 205, 13 Stat. 343; Act of Mar. 3, 1865, ch. 107, 13 Stat. 529.

miners were occupying and mining the public domain, 1/ and two Indian treaties concluded in 1864 recognized and protected the rights of citizens to prospect and mine public lands occupied by Indians. 2/

The Act of February 27, 1865, ch. 64 3/ provided a federal court system for the newly admitted state of Nevada, replacing the territorial courts. The Act further provided that all appeals and writs of error theretofore prosecuted and then pending before the Supreme Court could be heard and determined by that Court. Senator Stewart of Nevada apprehended, in light of Burgess v. Gray, 4/ that the Supreme Court would not recognize the possessory title of the Nevada miners and would, on that ground, decline to determine any controversy arising over the right to possession of the public domain. 5/ He offered an amendment to provide that the rules, customs, and regulations of miners should be regarded as law and enforced by the courts of the United States. This amendment was not accepted by the Senate, but a substitute amendment was passed which recognized the possessory title of miners. This amendment became section 9 of the Act, which provides:

> "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the

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1/ Treaty with Peru on Friendship, Commerce, and Navigation, July 26, 1851, Art. XIV, 10 Stat. 926, 932, T.S. No. 276.

2/ Treaty with Tabegauche Indians, Oct. 7, 1863, Art. III, 13 Stat. 673, 674; Treaty with Shoshonee-Goship Indians, Oct. 12, 1863, Art. IV, 13 Stat. 681, 682.

3/ 13 Stat. 440.

4/ 57 U.S. (16 How.) 48 (1853).

5/ Cong.Globe, 38th Cong., 2d Sess. 949-953 (1865).

United States; but each case shall be adjudged by the law of possession." 1/

The fears voiced by Sen. Stewart turned out to be unfounded, for in Sparrow v. Strong, 2/ a case arising before the effective date of the Act, the Supreme Court accepted jurisdiction of a controversy involving possession of a mining claim, saying:

> ". . . We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country."

c. Recognition of local rules.

The first express Congressional recognition of the force of local rules is found in the Act of May 5, 1866, ch. 73, § 2, 3/ which provides—

> "That all possessory rights acquired by citizens of the United States to mining claims, discovered, located, and originally recorded in compliance with the rules and regulations adopted by miners in Pah-Ranagat and other mining districts in the Territory incorporated by the provisions of this act into the State of Nevada shall remain as

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1/ 30 U.S.C. § 53 (1964).

2/ 70 U.S. (3 Wall.) 97 (1865).

3/ 14 Stat. 43.

valid subsisting mining claims; but nothing herein shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining States and Territories."

D. Lode Law of 1866.

In his report of August 17, 1848, mentioned above, Col. Mason recommended that the mines be leased or sold:

". . . Still the government is entitled to rent for this land, and immediate steps should be devised to collect them, for the longer it is delayed, the more difficult it will become. One plan I would suggest is to send out from the United States surveyors with high salaries, bound to serve specified periods. A superintendent to be appointed at Sutter's Fort with power to grant licenses to work a spot of ground, say 100 yards square, for one year, at a rent of from 100 to 1,000 dollars at his discretion; the surveyors to measure the ground and place the renter in possession.

"A better plan will be, however, to have the district surveyed and sold at public auction to the highest bidder, in small parcels, say from 20 to 40 acres. In either case there will be many intruders, whom, for years, it will be almost impossible to exclude." 1/

President Taylor, in his annual message to Congress on December 4, 1849, made a similar recommendation: 2/

"In order that the situation and character

1/ Letter from Col. R. B. Mason to Brig. Gen. R. Jones, Adjutant General, Aug. 17, 1848, Ex.Doc.No.1, 30th Cong., 2d Sess. 56-64 (1848).

2/ Cong. Globe 31st Cong., 1st Sess., App. 1, 3 (1849).

> of the principal mineral deposits in California may be ascertained, I recommend that a geological and mineralogical exploration be connected with the linear surveys, and that the mineral lands be divided into small lots suitable for mining, and be disposed of, by sale or lease, so as to give our citizens an opportunity of procuring a permanent right of property in the soil. This would seem to be as important to the success of mining as of agricultural pursuits."

The same year Secretary of the Interior Ewing, in his report of December 3, 1849, which accompanied the President's message, recommended a system of seigniorage: 1/

> "When the land is properly divided, it will, in my opinion, be best to dispose of it, whether by lease or sale, so as to create an estate to be held only on condition that the gold collected from the mine shall be delivered into the custody of an officer of the branch mint. Out of the gold so deposited there should be retained, for rent and assay, or coinage, a fixed percent, such as may be deemed reasonable, and the residue passed to the credit of the miner, and paid to him at his option in coin or stamped bullion, or its value in drafts on the Treasury or mint of the United States. The gold in the mine, and after it is gathered until brought into the mint should be and remain the property of the United States."

In 1850, shortly after the admission of California to the Union, Senator Fremont of that state introduced in Congress a number of bills, including one entitled "A bill to make temporary provisions for the working and discovery of gold mines and placers in California, and for preserving order in the gold mine district." 2/ When the bill came up for discussion, the question arose whether the United States should

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1/ Id App. 20, 22-23.

2/ Cong.Globe, 31st Cong., 1st Sess. 1815 (1850).

undertake to obtain a revenue from the mines. Senator Ewing offered an amendment which provided for a system of seigniorage, the gold remaining the property of the United States and the miner receiving payment from the government at a prescribed rate. 1/ This amendment was a revival of the system he had proposed the preceding year when he was Secretary of the Interior. After a discussion of the failure of the leasing system as it was applied to the lead mines and salt springs, the amendment was defeated. The bill passed the Senate, and at the next session of Congress was referred to the House Committee on public lands, but was not considered by the House of Representatives prior to adjournment.

Senator Stewart of Nevada later characterized the effect of the Senate action as follows:

> ". . . This solemn declaration on the part of the Senate in favor of a just and liberal policy to the miners was hailed by them as a practical recognition of their possessory rights, and greatly encouraged and stimulated mining enterprise and laid the foundation for a system of local government now in full force over a vast region of country inhabited by near a million men." 2/

By 1850, the idea of leasing the mineral lands seems to have been abandoned, and President Fillmore, in his Message to Congress on December 2, 1850, recommended the sale of the mineral lands in California, but counselled against the institution of a leasing system:

> "I also beg leave to call your attention to the propriety of extending, at an early day, our system of land laws, with such modifications as may be necessary, over the State of California and the Territories of Utah and New Mexico. The mineral lands of California will, of course, form an exception to any general system which may be adopted.

1/ Id. App. 1363.

2/ Cong.Globe, 39th Cong., 1st Sess. 3226 (1866).

> Various methods of disposing of them have been suggested. I was at first inclined to favor the system of leasing, as it seemed to promise the largest revenue to the Government and to afford the best security against monopolies; but further reflection, and our experience in leasing the lead mines and selling the lands upon credit, have brought my mind to the conclusion that there would be great difficulty in collecting the rents, and that the relation of debtor and creditor, between the Citizens and the Government, would be attended with many mischievous consequences. I therefore recommend that, instead of retaining the mineral lands under the permanent control of the Government, they be divided into small parcels and sold, under such restrictions, as to quantity and time, as will insure the best price, and guard most effectively against combinations of capitalists to obtain monopolies." 1/

In 1851, California enacted legislation declaring that the customs, usages, or regulations of miners could be admitted in evidence in actions respecting mining claims, and when not in conflict with the constitution or laws of the state should govern the decision of the action. 2/ California having thus undertaken to regulate mining on the public domain, the urgency for federal legislation on the matter eased, the attitude of the government being summed up by President Fillmore in his Message to Congress on December 2, 1851:

> "The proper disposal of the mineral lands in California is a subject surrounded by great difficulties. In my last annual message I recommended the survey and sale of them in small parcels, under such restrictions as would effectually guard against monopoly and speculation. But upon further

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1/ Cong.Globe, 31st Cong., 2d Sess. 1, 3 (1850). See also Report of the Secretary of the Interior, id. 5, 7.

2/ Cal.Stats. 1851, ch. 5, § 621.

> information, and in deference to the opinions of persons familiar with the subject, I am inclined to change that recommendation, and to advise that they be permitted to remain, as at present, a common field, open to the enterprise and industry of all our citizens, until further experience shall have developed the best policy to be ultimately adopted in regard to them. It is safe to suffer the inconvenience that now exists for a short period, than by premature legislation, to fasten on the country a system founded in error, which may place the whole subject beyond the future control of Congress." 1/

In the absence of federal legislation, local regulations, as interpreted by the courts, became a comprehensive system of law governing mining claims, not only in California, but throughout the western United States, 2/ and during these years miners conducted their affairs on the assumption that their investment of capital and labor gave them vested rights in the product of their efforts. 3/

In 1858, the Secretary of the Interior advanced the novel scheme of reserving gold, silver, and mercury mines (i.e., the precious metal mines) from sale, for the use and occupancy of the citizens of the United States under such regulations as Congress may prescribe, and disposing of lands containing copper, iron, lead, and coal (i.e., the useful minerals) under the ordinary laws of settlement and sale. 4/

1/ Cong. Globe, 32d Cong., 1st Sess., App. 1, 4 (1851).

2/ See, e.g., Hicks v. Bell, 3 Cal. 219 (1853); Sullivan v. Hense, 2 Colo. 424 (1874); Robertson v. Smith, 1 Mont. 410 (1871); Mallet v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188 (1865). And see [1861] Laws of Nev. Terr., ch. 9, § 77; [1863] Laws of Nev. Terr., ch. 4.

3/ See Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1865).

4/ Report of the Secretary of the Interior, Dec. 2, 1858, Cong.Globe, 35th Cong., 2d Sess., App. 26 (1858).

With the onset of the Civil War in 1861, the increased cost of government resulting from military expenditures, together with a decline in revenues from the sale of public lands, combined to cause the government to look upon the mines as an untapped source of revenue. The introduction in Congress of bills providing for the sale of mineral lands at auction to the highest bidder caused understandable apprehension among those whose enterprise and perseverance had uncovered the mineral wealth now sought to be sold from out their hands.

The circumstances of the enactment of the Lode Law of 1866 and the origin of its misleading title are explained in detail by Gregory Yale in his pioneer treatise in the field of American mining law: 1/

> "How the law was passed, —The miners of California and the States and Territories adjacent thereto have but a very inadequate idea of the imminent peril in which the pursuit in which they are engaged was placed at the commencement of the Thirty-ninth Congress. Two years ago there was a strong disposition in Congress and the East generally to make such a disposition of the mines as would pay the National debt. The idea of relieving the nation of the payment of the enormous taxes which the war has saddled upon us by the sale of the mines in the far distant Pacific slope, about which few people here have any knowledge whatever, was the most popular that was perhaps ever started —compelling other people to liquidate your obligations, has been in all ages and in all nations a highly comfortable and popular proceeding. There were some at the time of which I write who would not be satisfied with the sale of mines. They held that even after the sale the Government should be made a sharer in the proceeds realized from them. The first bill on the subject was introduced in the

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1/ Yale, Legal Titles to Mining Claims and Water Rights in California 10-12 (1867). See also Cong.Globe, 39th Cong., 1st Sess., 2851, 3454, 3951-3952, 4048-4054 (1866).

Senate by Mr. Sherman, of Ohio, and in the House by Mr. Julian, of Indiana. Both of these bills contained the most odious features. Sherman's bill went to the Committee on Public Lands, of which Mr. Stewart is a member. After much consideration it was understood that the committee would report adversely. Julian's bill received a much more favorable consideration in the House. In fact, the House went so far as to pass a resolution indorsing legislation substantially of the character contemplated in Julian's bill. After much canvassing, Mr. Conness and Mr. Stewart came to the conclusion that it was no longer safe to act on the defensive, and that it was necessary to determine what legislation would be acceptable, and to make a bold move to obtain it. The Secretary of the Treasury was then one of the strongest advocates of the sale of the mines, and appeared to be under the impression that it would yield a large revenue. The movement thus far had been encouraged by him, and it was thought that a partial success of his views would be more satisfactory to him than entire defeat. Mr. Conness accordingly suggested to him to have a bill prepared in his department, which would avoid the odious provisions of the other two propositions, and get some Senator to introduce it, assuring him that a liberal measure would receive the favorable consideration of the Pacific Delegation. The result was that the Secretary had prepared the second bill, introduced by Mr. Sherman, which was a great gain on the first bill. This bill went to the Committee on Mines, of which Mr. Conness was chairman and Mr. Stewart a member. After much discussion, these two Senators were appointed a Committee to draft a substitute, which, after several weeks of close study, resulted in the reporting of a bill substantially the same as the one which is now the law. At this time it was not expected that it would be possible to do more than to get a report of the Committee in favor of the measure, which it was thought would be an affirmative position, from which the granting, selling or other calamitous disposition of the mines could be successfully withstood. Upon making the report, however, it was determined to put on the boldest front possible, and try and pass it

through the Senate. It came up on the 18th day of June, 1866, and at first had but two warm advocates—its authors. The discussion occupied the entire day, Mr. Stewart supporting the bill. Mr. McDougall first favored the bill, and then made a speech against it. Mr. Williams, of Oregon, was opposed to all bills of the kind. Nesmith contented himself with voting against it. Nye opposed it, and said it would be good policy to let the whole subject alone, and not legislate upon it at all. This speech left his real position somewhat indefinite. In the course of the debate, however, it became manifest, from the remarks of Senators Sherman, Buckalew, and Hendricks, that the real merits of the bill were beginning to be appreciated by the Senate. The two authors of the bill congratulated themselves on this sign of progress, and resolved to try again. It was called up again on the 28th by Mr. Stewart, and was debated by Senators Stewart, Conness, Sherman, Hendricks, and others. After being amended slightly by Mr. Stewart, the bill passed the Senate. When it was first introduced, the bill had no friends in the House, but after it passed the Senate some of the Pacific Delegation began to regard it favorably. It should have gone in the House to the Committee on Mines, of which Mr. Higby was chairman; but Mr. Julian, who is an old member, and was then Chairman of the Committee on Public Lands, seized on the bill at once, and had it transferred to his Committee. Then the struggle came to get it out of that Committee. Mr. Stewart addressed himself to the members of it, and got every one of them but Julian, but he was intractable. He wanted his bill to go first, and would not let this supersede it. The House, too, was canvassed, and was found to be favorably disposed, but there was no way of getting at the bill. In the mean time, Higby had passed a bill from the Committee on Mines in regard to ditches. It contained only three provisions, and bore no resemblance to the bill in question, but it related to the same subject. When this bill came into the Senate, the mining bill was tacked on as a substitute, and was

passed. It was then sent back to the House, and went on the Speaker's table. In that condition it required a majority to refer it. To get that majority, Julian exerted all his strength, but failed. The bill was passed in the House without amendment, and became a law. This accounts for its being entitled 'An Act granting the right of way to ditch and canal owners through the public lands, and for other purposes.'"

The Lode Law of 1866 established three important principles: (1) that all mineral lands of the public domain should be free and open to exploration and occupation, (2) that rights which had been acquired in mineral land under a system of local rules should be recognized and confirmed, and (3) that the miner could obtain a patent to a lode claim. 1/

E. Placer Law of 1870.

Although the Lode Law of 1866 opened the public domain to exploration and occupation with respect to both lode and placer deposits, only the former could be patented. The Placer Law of 1870 extended to the owners of placer claims the right to obtain a patent, enabling the miner, by virtue of his possession and upon payment of the purchase price, to obtain title to the land.

The purposes of the bill, as advanced in the House of Representatives, were similar to those advanced in support of the Lode Law of 1866: (1) the encouragement of investment of capital in mining operations by assuring the investor of the security of his investment, and (2) the encouragement of permanent settlement by miners by assuring them of the security of their titles. 2/ In the Senate, however, Senator Stewart took another view of the purpose of the bill:

1/ 1 Lindley, Mines § 54 (3d ed. 1914).

2/ Cong.Globe, 41st Cong., 2d Sess., 2028 (1870) (remarks of Mr. Sargent).

" . . . They got no title, and they cannot prosper for that reason. They have got little orchards and little homes, and we want them to get title to their property. They have a little placer mine where they can work a little in the winter, perhaps get a few dollars to keep along, and then they have a little orchard and they want one hundred and sixty acres of this land. Now, for the purpose of allowing them to get these homes the bill extends the principle of preemption to these worn out placer diggings. That is the object of the bill." 1/

The Placer Law of 1870 provided for the sale of placer ground at $2.50 per acre, and permitted an individual to acquire up to 160 acres. 2/ Placer claims were made subject to "entry and patent" under "like circumstances and conditions, and upon similar proceedings" as were provided for lode claims. 3/ Although it seems clear that the last quoted phrase was intended to refer merely to the patent proceedings in the land office and not to the manner of locating placer claims, 4/ a century of judicial and administrative construction has decreed otherwise.

F. Mineral Location Law of 1872.

The Lode Law of 1866 made no provision for tunnel locations or claims, a circumstance which led to the

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1/ Id. 3054.

2/ 16 Stat. 217.

3/ 30 U.S.C. § 35 (1964).

4/ See Cong.Globe, 42d Cong., 2d Sess. 2459-2460 (1872). Two early decisions limiting the statute to patent proceedings are Decision of Acting Commissioner, Apr. 25, 1874, Sickels, U.S. Mining Laws 337 (1881); Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401 (1887).

introduction in Congress of several bills relating to tunnel sites 1/ and which, perhaps as much as any other factor, led to the enactment of the Mineral Location Law of 1872. A forerunner of the Mineral Location Law of 1872 passed the Senate in 1871 2/ but was passed over in the House of Representatives. 3/

The Mineral Location Law of 1872 was, for the most part, a refinement of the Lode Law of 1866. A number of procedural matters were changed or clarified and several substantive changes were made, but the basic concept of the location system remained unaltered.

1. Size of claims; boundaries.

Section 4 of the Lode Law of 1866 granted a locator up to 200 feet in length along the vein, with an additional claim for discovery to the discoverer of the lode, and permitted an association of persons to take up a claim not in excess of 3,000 feet. 4/ Since a person was prohibited from making more than one location on any one lode, 5/ the practice grew up of using "dummy" locators, who were later "bought out". 6/ Section 2 of the Mineral Location Law of

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1/ See, e.g., Cong.Globe, 41st Cong., 3d Sess. 65 (1871).

2/ Id. 1026.

3/ Id. 1805. A similar bill (to judge from its title) had been introduced in the House of Representatives. Id. 997.

4/ 14 Stat. 252.

5/ Id.

6/ Cong.Globe, 42d Cong., 2d Sess. 2458 (1872) (remarks of Senator Stewart).

1872 permitted a location of 1,500 feet in length along the vein, whether located by one or more persons, 1/ but no limitation was placed on the number of claims which could be located by one person. The width of the claim was limited to 300 feet on each side of the vein, 2/ which, incidentally, limited the area of a lode mining claim to a maximum of 20.66 acres.

Section 12 of the Placer Law of 1870 permitted the location of a placer claim not exceeding 160 acres by one person or an association of persons, and provided that, on surveyed land, the entry "shall conform to the legal subdivisions of the public lands." 3/ Section 10 of the Mineral Location Law of 1872 limited the area of a placer claim to 20 acres for each individual claimant, and permitted a placer claim to be located so as to "conform as near as practicable" with the lines of the public land surveys. 4/

2. Tunnel sites and mill sites.

Prior to the enactment of the Mineral Location Law of 1872, the rights of the proprietor of a tunnel dated from his discovery of a lode or vein in the tunnel, and not from the date of the commencement of the tunnel. 5/ Section 4 of the Mineral Location Law of 1872 changed the law in this regard, by providing that the owner of the tunnel should have the right of possession of all veins or lodes, not previously known to exist, within 3,000 feet from the face of the tunnel, provided that the tunnel be prosecuted with

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1/ 30 U.S.C. § 23 (1964).

2/ Id.

3/ 16 Stat. 217.

4/ 30 U.S.C. § 35 (1964).

5/ 2 Lindley, Mines § 467 (3d ed. 1914).

reasonable diligence. 1/ The purpose of this provision was explained by Mr. Sargent:

> "There is another feature of the bill supplemental to the former legislation of Congress, and that is, that where a man or a company starts and runs a prospecting tunnel, which is a work of great labor and of large expense, and they are nearing the object of their search, believing from geological indications that there is a lode of gold or some other mineral in the mountains, they shall not be deprived of the fruits of their labor by some party who comes in after they have prosecuted their work nearly to completion, and locates the lode which was not known to exist at the time they commenced their enterprise. That is to say, if they discover, by their skill, industry, and perseverance, a lode, they shall be entitled to the benefit of it." 2/

The Lode Law of 1866, while not specifically providing for mill sites, did not limit the area which could be acquired by a patent to a lode claim. 3/ The Mineral Location Law of 1872, by limiting the dimensions of a lode claim, and by permitting even further limitations to be imposed by the mining districts, prevented the miner from acquiring as a part of his lode claim, the additional surface area which was frequently necessary to the efficient working of his claim. This restriction was eased somewhat by Section 15 of the 1872 Law, which provides for the patenting of nonmineral ground as a mill site. 4/

1/ 30 U.S.C. § 27 (1964).

2/ Cong.Globe, 42d Cong., 2d Sess. 534 (1872).

3/ Lindley gives a diagram, taken from a patent issued under the Lode Law of 1866, showing a mining claim containing 1,300 feet along the lode, and a total of 215.31 acres. 1 Lindley, Mines § 59 (3d ed. 1914).

4/ 30 U.S.C. § 42(a) (1964).

3. Lodes in placers.

Under the Lode Law of 1866, the locator of a lode was not required to include in his application for patent any appreciable surface area, although in most cases, such surface area would be needed to work the lode and would, of course, be included. However, where a lode ran through placer ground, the owner of the ground could make two applications for patent, one under the Lode Law of 1866 for the lode only, which might encompass a very small surface area, and one under the Placer Law of 1870 for the area permitted by that Act less the area of the lode. Since a patent for a placer claim could be obtained at half the purchase price of a patent for a lode claim, the net result was a loss of revenue to the United States. 1/ Section 11 of the Mineral Location Law of 1872 provided that lodes in placers could be included in the placer application, together with 25 feet of surface on each side of the lode. 2/ The locator was thus saved the expense of making two applications, while the United States in turn received a higher purchase price for the land containing the lode.

4. Annual expenditure for labor and improvements.

One of the most far-reaching provisions of the Mineral Location Law of 1872 was Section 5, which made the performance of annual assessment work on a lode claim a federal requirement. 3/ Although it has been asserted that the 1872 law made the assessment work requirement applicable to placer claims, 4/ it was the courts and the Secretary of Interior,

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1/ See Cong.Globe, 42d Cong., 2d Sess. 534 (1872) (remarks of Mr. Sargent).

2/ 30 U.S.C. § 37 (1964).

3/ 30 U.S.C. § 28 (1964).

4/ 1 American Law of Mining § 1.17 (1960).

rather than Congress, which wrought this change. 1/

5. Possessory rights of lode locator.

Under the Lode Law of 1866, the locator or patentee of a lode claim acquired title only to his discovery lode. 2/ Section 3 of the Mineral Location Law of 1872 granted to the locator of a lode claim the exclusive right of possession of all veins, lodes, and ledges the apex of which is within his surface boundaries extended vertically downward. 3/

1/ The subject is considered in detail in Chapter 13 of this study.

2/ See Atkins v. Hendree, 1 Ida. 107 (1867).

3/ 30 U.S.C. § 26 (1964).

CHAPTER 2

BACKGROUND OF THE MINERAL LEASING LAWS

The Constitution provides that "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 . . . ." 1/ Under this provision Congress may authorize public lands to be leased, sold, or given away upon such terms and conditions as Congress concludes that the public interest requires. 2/ Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in public lands, including leasehold interests, must be traced to a Congressional delegation of authority. 3/

The several mineral leasing laws now in effect were enacted at different times to meet different situations. The Mineral Leasing Act of 1920 4/ is, for several reasons, the most important of the leasing laws to be considered in this study. As amended, this Act now provides for the leasing of

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1/ U. S. Const., Art. IV, § 3.

2/ Ruddy v. Rossi, 248 U.S. 104 (1918)

3/ Sioux Tribe of Indians v. United States, 316 U.S. 317 (1941).

4/ Act of Feb. 25, 1920, 30 U.S.C. § 181 et seq. (1964). The Mineral Leasing Act of 1920 was preceded by the Act of Oct. 2, 1917, ch. 62, 40 Stat. 297, which provided for the leasing of lands valuable for potassium deposits. The latter Act was enacted as an emergency wartime measure. S.Rep. No. 100, 65th Cong., 1st Sess. (1917). The Act of Feb. 7, 1927, 30 U.S.C. § 281 et seq. (1964) repealed the 1917 Act and made the general provisions of the Mineral Leasing Act of 1920 applicable to the leasing of potassium deposits. In this study the provisions of the 1927 Act will be considered as a part of the Mineral Leasing Act of 1920.

phosphate, sodium, and potassium on the public domain in all states, and sulphur on the public domain of Louisiana and New Mexico. Other laws relating to nonfuel mineral leasing are:

(1) Mineral Leasing Act for Acquired Lands (1947), which provides for leasing of the four nonfuel minerals, phosphate, sodium, potassium, and sulphur, in acquired lands of the United States. 1/

(2) Section 402, Reorganization Plan No. 3 of 1946 2/ which transferred from the Secretary of Agriculture to the Secretary of the Interior, subject to certain restrictions, the mineral leasing functions which the Secretary of Agriculture held in certain acquired lands under five acts of Congress. 3/ All nonfuel minerals in these acquired lands are subject to leasing by the Secretary of the Interior under Section 402 except (1) phosphate, sodium, potassium, and sulphur, which may be leased under the Mineral Leasing Act for Acquired Lands (1947), and (2) certain mineral materials (i.e., common varieties of sand, stone and gravel) the authority to dispose of which was transferred to the Secretary of Agriculture by

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1/ 30 U.S.C. §§ 351-359 (1964).

2/ 60 Stat. 1099, 5 U.S.C. note following § 133y-16 (1964), 5 U.S.C.A.App. 188 (1967).

3/ Regulations implementing leasing under Sec. 402, Reorganization Plan No. 3 of 1946, have been made applicable to leasing for minerals in certain acquired lands under the jurisdiction of the Secretary of the Interior where leasing is authorized by law. We have been unable to find any acquired lands under the jurisdiction of the Secretary to which this section would be applicable except those acquired and being administered under the Federal Reclamation laws, the minerals in which may be disposed of as provided in 43 U.S.C. § 387. See 16 U.S.C. § 460q et seq. (Supp. III, 1965-1967); 43 C.F.R. § 3220.0-6(a)(2) (1968); VI B.L.M. Manual, ch. 2.14 (Rel. 34, 10/20/55).

Section 1(1) of the Act of June 11, 1960. 1/

(3) Several other laws authorizing the Secretary of the Interior to lease certain minerals in specified lands. These lands are:

(a) National Forests of Minnesota, which may be leased for all nonfuel minerals except (1) phosphate, sodium, and potassium, which may be leased under the Mineral Leasing Act of 1920, as amended, and (2) mineral materials which may be sold under the Materials Disposal Act of 1947, as amended. 2/

(b) Lands in private land claims confirmed pursuant to decrees of the Court of Private Land Claims, which may be leased for reserved gold, silver, and quicksilver. 3/

(c) Lands in the Lake Mead Recreation Area, which may be leased for all nonfuel mineral deposits except (1) phosphate, sodium, and potassium, which may be leased under the Mineral Leasing Act of 1920, as amended, and (2) mineral materials which may be sold under the Materials Disposal Act of 1947, as amended. 4/

(d) Certain lands patented to the State of Nevada, which may be leased for reserved minerals. 5/

(e) Certain lands in Nevada withdrawn by Executive Order No. 5105, which may be leased for silica sand and other

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1/ Pub.L.No. 86-509, 74 Stat. 205, 5 U.S.C. note following § 511 (1964), 7 U.S.C.A. note following § 2201 (Supp. 1968).

2/ 16 U.S.C. § 508b (1964).

3/ 30 U.S.C. §§ 291-293 (1964).

4/ 16 U.S.C. §§ 460n to 460n-9 (1964).

5/ Act of June 8, 1926, ch. 499, 44 Stat. 708.

nonmetallic minerals. 1/

(f) Lands patented to the State of California for use of the California State Park System, which may be leased for the reserved minerals. 2/

(4) The Act establishing the Whiskeytown-Shasta-Trinity Recreational Area. Under this Act, the Secretary of the Interior has authority to lease the mineral deposits provided that the deposits in the parts of the Area under the jurisdiction of the Secretary of Agriculture may be leased only with his consent and subject to such conditions as he may prescribe. 3/

(5) Section 67 of the Atomic Energy Act of 1954, which grants authority to the Atomic Energy Commission to issued leases and permits for prospecting for, exploration for, mining of, or removal of deposits of source materials in lands belonging to the United States. 4/

A. Mineral Leasing Act of 1920.

Although this study relates only to nonfuel minerals, the enactment of the Mineral Leasing Act of 1920, 5/ and in particular the inclusion in the Act of provisions designed to prevent a monopolistic control of minerals on public lands and price fixing by combinations, was largely the result of prior monopolistic and price-fixing practices of the oil, gas, and coal industries, which brought these industries into public disfavor and caused them to be regarded with suspicion and distrust. An additional reason for the enactment of the

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1/ Act of May 9, 1942, ch. 297, 56 Stat. 273.

2/ Act of Mar. 3, 1933, ch. 209, 47 Stat. 1487, as amended by Act of June 5, 1936, ch. 523, 49 Stat. 1482.

3/ 16 U.S.C. § 460q-5 (Supp. III 1965-1967). Two other laws establishing recreation areas and withdrawing lands from location under the mining laws but authorizing the leasing of the mineral deposits are Pub.L.No. 90-540, 82 Stat. 904 (1968) (Flaming Gorge National Recreation Area) and Pub.L.No. 90-544, 82 Stat. 926 (1968) (Ross Lake and Lake Chelan National Recreation Areas).

4/ 42 U.S.C. § 2097 (1964).

5/ 30 U.S.C. § 181 et seq. (1964).

Mineral Leasing Act of 1920 was a growing concern that it was necessary to conserve what was left of the natural resources of the public domain, whether it be forest, grazing land, water resources, or minerals. With respect to minerals, this concern was mainly directed at the disposition of lands valuable for coal, oil, and gas deposits. Leasing rather than an outright disposal of the lands was advocated as a way to conserve these natural mineral resources in the public domain.

1. Policy with respect to minerals prior to 1900.

By 1900 it was well settled that, except for coal 1/ and salines, 2/ all mineral deposits on the public domain were open to exploration and purchase under the Placer Law of 1870 and Mineral Location Law of 1872. 3/ These laws authorized valuable deposits of minerals to be located as lode or placer mining claims. Such claims gave the locator, before a mineral patent was issued, property rights in the deposit and lands within the boundaries of the location which were good against third parties and the United States. A mineral patent could be obtained upon paying to the United States $5 an acre for land held under a lode location 4/ and $2.50 an acre for land held under a placer location, and when it included a vein or lode, $5 an acre for the land including

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1/ See discussion of coal in Chapter 6 of this study and Schmid, Legal Study of Coal Resources on Public Lands 49-52 (P.L.L.R.C. Study 1968).

2/ See discussion of salines in Chapter 6 of this study.

3/ In 1901, in debate in the House of Representatives on a bill providing for the location of saline deposits by placer mining claims, Mr. Newlands of Nevada, in urging enactment of the bill, stated: "The policy of Congress has been gradually to extend the placer locations to different kinds of mineral lands." 33 Cong.Rec. 1296 (1901).

4/ 30 U.S.C. § 29 (1964).

the vein or lode. 1/

During the decade prior to 1900 and in the year 1901, Congress enacted three laws, in two instances for the purpose of rejecting decisions of the Secretary of the Interior holding that certain minerals were not locatable under the mining laws, 2/ and in the third instance extending the mining laws to salines. 3/ During the first two decades in the twentieth century, the trend was reversed, leading to the enactment of the Mineral Leasing Act of 1920, which removed oil and gas, oil shale, sodium, and phosphate from the mining laws and provided for the leasing of these minerals and coal.

2. Abuses in acquiring coal lands.

In 1907, the Secretary of the Interior reported that serious frauds were being perpetrated in the acquisition of coal lands and recommended that the coal land laws be amended:

1/ Id. § 37.

2/ In Conlin v. Kelly, 12 L.D. 1 (1891), the Secretary held that common building stone was not locatable, and Congress in 1892 enacted the Building Stone Law of 1892, 30 U.S.C. § 161 (1964), providing that lands chiefly valuable for building stone could be located as placers. In Union Oil Company, 23 L.D. 222 (1896), the Secretary held that petroleum was not locatable, and in 1897 Congress enacted the Oil Placer Act of 1897, 29 Stat. 526, providing that lands chiefly valuable for oil could be located as placers.

3/ Act of Jan. 31, 1901, 30 U.S.C. § 162 (1964), extending the mining laws to cover lands that contained salt springs or deposits of salt in any form and were chiefly valuable therefore.

"Much agitation has existed throughout the West respecting the public land laws, and a great divergence of opinion prevails as to what laws should be altered or amended, what repealed, and what new legislation should be enacted. In certain particulars changed conditions have rendered some laws and parts of laws obsolete and absurd in their application and almost impossible of rational enforcement. A correct interpretation and administration will prevent the necessity of amending laws which are adapted to the conditions for which enacted, and while the necessity for amendments in some measure may be dispensed with by administrative regulations there still remain laws incapable of rational enforcement in a wise disposition of the remaining public lands.

"Of first consideration is the coal-land act of March 3, 1873. The futility of this law is shown in the fact that since its enactment less than 500,000 acres of coal lands have been patented under it, while millions of acres of coal lands have been taken under other forms of entry, some of it unwittingly, but large areas in order to avoid the terms of the coal-land act, coal lands being the highest-priced lands offered by the Government.

"This act limits the area to an unreasonably small acreage, prohibiting the prudent investment of capital in coal-mining operations; hence all kinds of subterfuge have been undertaken to avoid the provisions of the law. In the securing of these lands the unscrupulous have not hesitated to resort to perjury and fraud, carrying their schemes of fraud and corruption to such an extent as to amount to national scandal. Title having passed, the Government possesses no guaranty that as a public utility the coal can be made available to supply the market; on the contrary, these lands have almost uniformly passed into the hands of speculators or large combinations controlling the output or the transportation, so that the consumer is at the mercy of both in the greater portion of the West. The inducements for much of the crime and

fraud committed under the present system can be prevented by separating the right to mine from the title in the soil." 1/

3. Abuses in acquiring oil and gas lands.

The discovery and acquisition of oil deposits in the public domain, particularly in California and Wyoming, demonstrated certain weaknesses in the public land laws. 2/ Courts held that only the actual discovery of oil by drilling would satisfy the statutory requirement of discovery essential to validate a mining claim under the mining laws and that mere oil seepages or stains or other surface indications were not sufficient. 3/ This required drilling wells at great cost to validate claims by making a discovery of oil. Frequently, attempts were made to acquire the lands by distorting the land laws providing for acquisition of non-mineral lands in an attempt to defeat the mineral claimant seeking to make an oil discovery. Homesteaders and desert entrymen made filings under laws providing for the sale of agricultural lands and others attempted to make lieu selections of oil lands under laws providing for the acquisition of agricultural lands by an exchange. These laws providing for the acquisition of agricultural land all expressly excluded mineral lands from their operation. Locators under the mining laws, claiming discoveries of gypsum cropping on the surface, were also subject to the valid criticism that they were attempting to gain by subterfuge the valuable oil deposits which they could not acquire directly without the

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1/ 1 Int.Dept.Ann.Rep. 78, 79 (1907).

2/ Colby, The New Public Land Policy with Special Reference to Oil Lands, 3 Cal.L.Rev. 269, 273-275 (1915).

3/ Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899); Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am.St.Rep. 63 (1903), aff'd Chrisman v. Miller, 197 U.S. 313 (1905).

expenditure of time and money. 1/

In controversies between fictitious agricultural claimants to oil lands and bona fide mineral claimants, the decisions of the courts were usually adverse to those making the fictitious filings. 2/ California and Wyoming had most of the oil exploration activity and these states aided the diligent oil locator by a liberal interpretation of the pedis possessio doctrine by holding that a locator before actual discovery of oil would be protected to the full extent of his boundaries from clandestine or forcible invasion by others attempting to locate subsequently. 3/ Large areas of land, adjacent to proven oil lands, were withdrawn by the Department of the Interior from agricultural entry pending classification by government geologists. These withdrawals protected oil locators from agricultural entries during the time locators were seeking to make their discoveries. 4/

1/ Colby, The New Public Land Policy with Special Reference to Oil Lands, 3 Cal.L.Rev. 269, 273-275 (1915).

2/ Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301 (1903); Kern Oil Co. v. Clarke, 30 L.D. 550 (1897), on review 31 L.D. 288 (1902); Hirshfield v. Chrisman, 40 L.D. 112 (1911); State of California, 41 L.D. 592 (1913). See also Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914); Washington Securities Co. v. United States, 234 U.S. 76 (1914); Leonard v. Lennox, 181 Fed. 760 (1910).

3/ Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 44, 98 Am.St.Rep. 63 (1903); Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904); Merced Oil Mining Co. v. Patterson, 153 Cal. 624, 96 Pac. 90 (1908); Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417 (1913); Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966 (1913); Little Sespe Cons. Oil Co. v. Bacigalupi, 167 Cal. 381, 139 Pac. 802 (1914); Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849 (1908).

4/ Colby, Proposed Revision of Mining Law with Respect to Discovery, 2 Cal.L.Rev. 191, 200, 201 (1914); Bulletin 537, U. S. Geological Survey, 38 (1913).

4. The conservation movement.

The conservation movement began late in the nineteenth century because of concern over the alarming rate at which the natural resources were being exploited, wasted, and passing from federal into private ownership. 1/ Initially, the exploitation, waste, and passing into private ownership of the forests commanded the attention of those concerned with conservation. As the conservation movement grew, however, the concern for conservation spread to other surface land resources and the water and mineral resources of the public domain. 2/ President Theodore Roosevelt, near the close of his administration, in June, 1908, created the National Conservation Commission, with Gifford Pinchot as Chairman, to inquire into and advise the President as to the condition of the natural resources and to cooperate with other bodies created for similar purposes by the states. The Commission considered conservation of forests, lands, water resources, and minerals in a report which states that the reduction of wastes and saving of resources are the first but not the last object of conservation because the material resources have an additional value when their preservation

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1/ The concentration of natural wealth in the hands of monopolists was considered as one of the greatest of conservation problems. Gifford Pinchot, in lauding W. J. McGee as the scientific brains of the conservation movement all through its early critical stages, said:

> "For many years I was in effect his pupil. It was McGee who first pointed out to me that the wise conservation and use of natural resources for the benefit of the people involved the whole question of monopoly. At first the idea seemed to me fantastic. Gradually I came to see that McGee was right, that the concentration of natural wealth in the hands of monopolists is one of the greatest of Conservation problems." Gifford Pinchot, Breaking New Ground, 359, 360 (1st ed. 1947).

2/ Robbins, Our Landed Heritage 302 (1942).

adds to the beauty and habitability of the land. 1/ The Commission reported that the supply of coal in the United States would be depleted before the middle of the twenty-first century if the rate of production continued to increase, and the supply of petroleum would not be expected to last beyond the middle of the twentieth century. 2/ The only nonfuel mineral under the Mineral Leasing Act of 1920 given special consideration by the Conservation Commission was phosphate. With respect to this mineral, the Commission reported:

> "Phosphate rock, used for fertilizer, represents the slow accumulation of organic matter during the past ages. In most countries it is scrupulously preserved; in this country it is extensively exported, and largely for this reason its production is increasing rapidly. The original supply cannot long withstand the increasing demand." 3/

One of the conclusions of the minerals part of the Conservation Commission report was the statement:

> "The National Government should exercise such control of the mineral fuels and phosphate

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1/ Report of the National Conservation Commission, S.Doc.No.676, 60th Cong., 2d Sess. 11 (1909). See Appendix IV for some of the recommendations of this Commission.

2/ Id. 15.

3/ Id. 15. This concern with respect to phosphate was based on a Geological Survey estimate of 221,500,000 tons of high-grade phosphate rock and large supplies of low-grade phosphate rock. The Geological Survey stated that data was too incomplete to give a trustworthy estimate. Id. 105, 106. In 1914, the House Committee on Public Lands reported to Congress that there were roughly 20,000,000,000 tons of phosphate rock in public ownership. H.R.Rep.No.668, 63d Cong., 2d Sess. (1914).

rocks now in its possession as to check waste and prolong our supply." 1/

The supporting statements of the report recommended that the laws be amended to provide for reservation of mineral rights in patents that may be issued. 2/ They also recommended that coal lands still in public ownership be disposed of under leases only, and that the Secretary of the Interior be authorized to lease these lands under such regulations as he may deem wise for the protection of the public interest, in such reasonably limited areas, with such charges, and for such reasonable periods as may be fixed and made certain in each lease. The recommendation further provided that, at the discretion of the Government, the lease be renewed or the lessee compensated for his improvements after termination of the lease period by a method fixed in each lease. 3/ The report provided that oil, gas, and other nonmetallic mineral lands be disposed of under practically the same conditions as recommended for coal. 4/

5. Executive withdrawals of public lands.

As the result of abuses under the then existing public land laws, in 1906 the first of many executive withdrawals of coal lands was made for the purpose of classification. By such orders, between July 26, 1906 and December 13, 1907, 66,938,800 acres of land were withdrawn for the purpose of

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1/ Report of the National Conservation Commission, S.Doc.No.676, 60th Cong., 2d Sess. 17 (1909). A supporting statement of the Conservation Commission suggests that one method of conserving such materials would be by such ownership or control as would prevent both exporting and unnecessary waste. Id. 111.

2/ Id. 90, 91.

3/ Id. 91.

4/ Id. 92.

classifying and appraising coal values. 1/ Additional coal withdrawals were made in the following years, and, by 1920, nearly 30,000,000 acres of land had been classified as coal lands, 75,000,000 had been classified as noncoal lands, and nearly 40,000,000 acres—mostly coal lands—remained withdrawn awaiting definite classification and appraisal. 2/

Withdrawals of mineral lands were made not only for classification and appraisal but also under the power, asserted by the Secretary of the Interior to exist in the Executive Branch, to prevent the acquisition of the public domain by private interests if such acquisition might be detrimental to the public welfare. 3/

On December 9, 1908, 4,702,520 acres of lands supposed to contain deposits of phosphate were withdrawn. 4/ By July 1, 1910, there were 54,461,774 acres of coal land withdrawals, 4,546,988 acres of oil land withdrawals, and 2,479,756 acres of phosphate land withdrawals. 5/ These withdrawals were all made under the asserted implied withdrawal authority of the Executive Branch of the Government. President Taft, in a special message to Congress on the

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1/ 1 Int.Dept.Ann.Rep. 13 (1907).

2/ 1 Int.Dept.Ann.Rep. 146-150 (1920).

3/ 1 Int.Dept.Ann.Rep. 12 (1908).

4/ 1 Int.Dept.Ann.Rep. 13 (1909). To save the phosphate lands from monopolists was apparently the reason for withdrawal. President Taft, in a special message to Congress on the "Conservation of Natural Resources" on Jan. 14, 1910, said:

> "The extent of the value of phosphate is hardly realized, and with the need that there will be for it as the years roll on and the necessity for fertilizing the land shall become more acute, this will be a product which will probably attract the greed of monopolists." 45 Cong.Rec. 622 (1910).

5/ 1 Int.Dept.Ann.Rep. 92, 93 (1910).

"Conservation of Natural Resources" on January 14, 1910, expressed doubt whether the Executive Branch had this authority, and called on Congress to validate such withdrawals made by the Secretary of the Interior and the President, and to authorize the Secretary temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arose. 1/ As a result, Congress enacted the Pickett Act, 2/ which provided that the President, in his discretion, could temporarily withdraw any public lands for water power sites, irrigation, classification of lands, and other public purposes to be specified in the orders, but that the lands remained open to exploration, discovery, occupation and purchase under the mining laws so far as the same apply to minerals other than coal, oil, gas, and phosphates. 3/ Litigation arose questioning the authority of the President to make withdrawals prior to the Pickett Act and, in 1915, the United States Supreme Court held that acquiescence by Congress in the Executive Orders over many years withdrawing vast bodies of land in the public interest operated as an implied grant of power in the executive to make such withdrawals, in view of the fact that its exercise was not only useful to the public but also did not interfere with any vested rights of the citizens. 4/

1/ 45 Cong.Rec. 621-622 (1910).

2/ Act of June 25, 1910, 43 U.S.C. §§ 141, 142, 148 (1964).

3/ By the Act of June 25, 1910, ch. 431, 36 Stat. 858, the Pickett Act was amended to add potassium to the minerals withdrawn, and by the Act of Aug. 24, 1912, ch. 369, 37 Stat. 497, the Pickett Act was further amended to make such withdrawals applicable to all minerals other than metalliferous minerals.

4/ United States v. Midwest Oil Co., 236 U.S. 459 (1915).

6. Acts providing for the severance of surface and mineral estates.

The growing conservation movement not only brought on numerous withdrawals of lands from entry both before and after the enactment of the Pickett Act, but also caused the enactment of laws providing for the severance of the surface land resources from the subsurface minerals in public lands. The reason for such laws is stated in President Taft's special message to Congress on "Conservation of National Resources". transmitted to Congress on January 14, 1910:

> "It is now proposed to dispose of agricultural lands as such, and at the same time to reserve for other disposition the treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein. This may be best accomplished by separating the right to mine from the title to the surface, giving the necessary use of so much of the latter as may be required for the extraction of the deposits. The surface might be disposed of as agricultural land under the general agricultural statutes while the coal or other mineral could be disposed of by lease on a royalty basis, with provisions requiring a certain amount of development each year; and in order to prevent the use and cession of such lands with others of similar character so as to constitute a monopoly forbidden by law, the lease should contain suitable provision subjecting to forfeiture the interest of persons participating in such monopoly. Such law should apply to Alaska as well as the United States." 1/

The two earliest of these laws reserved only coal and were the Act of March 3, 1909 2/ and the Act of June 22,

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1/ 45 Cong.Rec. 622 (1910).

2/ 30 U.S.C. § 81 (1964).

1910. 1/ Other laws were enacted reserving other minerals such as the Act of August 24, 1912, ch. 367, 2/ which authorized certain agricultural entries and selections on oil and gas lands in Utah, and the Act of February 27, 1913, ch. 85, 3/ which authorized selections by Idaho of phosphate and oil lands. By the Act of July 17, 1914 4/ Congress provided for the issuance of agricultural patents with a reservation of phosphate, nitrate, potash, oil, gas and asphaltic minerals and the right to remove them. In 1916, Congress enacted the law providing for stockraising homestead patents with a reservation of the coal and other minerals and the right to mine them. 5/

7. Legislative history of the Mineral Leasing Act of 1920.

The first mineral leasing bill which was thoroughly considered by Congress was H.R. 16136 introduced in the Sixty-third Congress. Thereafter, mineral leasing legislation was introduced and thoroughly debated in the Sixty-fourth, Sixty-fifth, and Sixty-sixth Congresses. Problems relating to oil, gas, and coal took up virtually all of the debates in Congress and were the principal subjects discussed in the Committee Reports. Phosphate, sodium, and potassium, the nonfuel minerals included in these leasing bills, received little consideration. In the discussion of

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1/ Id. §§ 83-85. This Act was extended to disposals to states by Act of Apr. 30, 1912, 30 U.S.C. § 90 (1964), and was amended by Act of June 16, 1955, 30 U.S.C. § 83 (1964).

2/ 37 Stat. 496.

3/ 37 Stat. 687.

4/ 30 U.S.C. §§ 121-123 (1964).

5/ Stockraising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1964).

oil and gas and coal, the principal concern was that these natural resources would be controlled by monopolies that would not develop them, in order to overcharge the consumer. The Standard Oil monopoly, which had been broken by litigation culminating in a Supreme Court decision in 1911, 1/ clearly had its effect on Congress and many provisions in the Mineral Leasing Act of 1920 may be traced to efforts of Congress to prevent any trust or monopoly from controlling the natural resources of oil, gas, and coal on the public domain. The threat that the Standard Oil Company would control the oil deposits was a source of concern expressed in debate and committee reports by both the proponents and opponents of the leasing bills.

The reasons for a mineral leasing law are perhaps best stated in the House Committee Report reporting on H.R. 16136 in the Sixty-third Congress, Second Session. 2/ Not only did this report state, with respect to coal 3/ and oil and

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1/ Standard Oil Co. v. United States, 221 U.S. 1 (1911).

2/ H.R.Rep.No.668, 63d Cong., 2d Sess. (1914).

3/ The Report stated:

"Necessity for better coal-land laws is recognized by all.—The leasing system and the intelligent utilization of the coal yet remaining under Government ownership seems now imperative to every thoughtful person who has given the matter thought. It is believed such a policy will (1) afford competition to the coal monopoly and better prices to consumers; (2) divorce transportation from production—a necessity conceded by most students of the subject; (3) serve as a club to insure better prices in areas where the mines are not opened or leased at all; (4) prevent waste and insure better treatment of labor; (5) enable coal companies to lease an area large enough to justify competition with present monopoly, and (6) prevent favoritism, inasmuch as the leases will be awarded through advertisement and competitive bonus bids."

gas 1/ why a leasing bill should be enacted, but (unlike most of the other reports and the debates in Congress) it states why phosphate, potassium, and sodium should be included in a leasing bill.

The Report pointed out that phosphate and potassium were valuable for fertilizers and that the farmers of the United States expended yearly enormous sums of money for mineral fertilizers to replace the plant food elements in the soil depleted by the growth of crops. It stated that the existing mining laws were inadequate to protect the public interests in phosphate and potassium deposits and were not suited to the location of such deposits, particularly those potassium deposits which must be pumped from lake bottoms or wells in the form of brine. The report quoted Secretary of the Interior Lane:

> "Discoveries of vast deposits of phosphate rock in Idaho, Montana, Utah, and Wyoming were made in 1906. In 1908 all the public lands within this area believed to contain phosphate deposits and not included within prior valid mining claims were withdrawn from entry, and have since remained withdrawn, awaiting the enactment of laws which would be better adapted to the development of these deposits and the protection of the public rights and interests involved.
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> "These laws [existing mining laws] are inadequate to protect the public interests and rights in

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1/ The Report stated the objects of the bill relating to oil and gas leasing to be:

> " . . . (1) To free both producer and consumer from monopoly; (2) to insure competition; (3) to prevent speculation and secure in its stead bona fide prospecting; (4) to protect the prospector; (5) to reward the prospector who does the drilling; (6) to insure an adequate supply of fuel oil for the Navy, which has abandoned the use of coal and will from necessity use larger and larger quantities of oil as long as we have a navy."

these deposits. They provide no method for preventing monopoly of holding, or for securing development and continuous working of mines. If disposed of under the present laws, these deposits may be monopolized and withheld from development and use in any manner which may best serve the interests of monopoly, and which would inevitably mean the maintenance of high prices to the consumers.

"This bill provides for the retention of the United States of the title to all phosphate lands and the leasing of the lands for development and production of phosphates. It offers such reward as is expected to encourage exploration and discovery, gives liberal inducement to private enterprise to search out and apply better methods to the production and manufacture of phosphates, and at the same time insures such competition in production as is believed to furnish complete safeguarding of the public against the extortions of monopoly." 1/

The United States, prior to entering World War I in 1917, had imported from Germany a large tonnage of potassium for use as a fertilizer and for use in the manufacture of munitions,

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1/ The Report quoted extensively from a report of the Secretary of the Interior recommending the leasing bill, and, in this report, Secretary Lane stated with respect to the provisions providing for the leasing of potassium deposits:

> "On the other hand, as in the case of coal, oil, and phosphates, it is highly undesirable that these valuable deposits should be allowed to pass, without restriction or restraint, into the hands of private monopoly. They should be worked and the potash produced for use. To this end, private enterprise should be offered every reasonable inducement to locate and develop these deposits; but the inducement must be for operation and development, not for speculation and withholding from use. The present bill meets all these requirements."

soap, glass. Germany had a monopoly on potassium, and when this supply was suddenly cut off, a critical shortage of potassium resulted. 1/ Because of this emergency, the Act of October 2, 1917, ch. 62, 2/ was enacted, which provided for the mineral leasing of potassium deposits.

No attempt will be made to cover the numerous amendments to the Mineral Leasing Act of 1920. Brief mention will be made of two Acts placing two other nonfuel minerals under mineral leasing and making the general provisions of the Mineral Leasing Act of 1920 applicable to permits and leases for these minerals.

In 1926, Congress provided for the leasing of sulphur deposits on the public domain of Louisiana. 3/ At the preceding session of Congress, a bill had been introduced providing for the leasing of sulphur deposits on the public domain lands generally. The Senate Committee amended the bill to limit its application to Louisiana, which was the only state with public domain where sulphur deposits were thought likely to exist. Congress was advised that sulphur deposits were found in Louisiana at a depth of from 500 to 900 feet under the surface, and that the value of sulphur and expense

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1/ The Senate Committee on Public Lands reported:

"The extreme demand for potash is evidenced by the fact that its normal price is about $40 per ton, while at the present time it is about $475 per ton. We must have a supply of potash. Germany now has a monopoly on the product. The German Government, through its officers, has boasted of this monopoly and has stated that the United States has gone into the war with a rope around its neck, and that it will be unable, through the lack of potash fertilizer, to meet its demands for foodstuffs." S.Rep.No. 100, 65th Cong., 1st Sess. (1917).

2/ 40 Stat. 297 (1917).

3/ Act of Apr. 17, 1926, 30 U.S.C. § 271 (1964).

incident to mining prevented a successful operation and development to be conducted within a 20-acre claim allowed under the mining laws. 1/ When a sulphur leasing bill (H.R. 9725) was considered in the 69th Congress, it was amended by the House Committee on Public Lands to apply only to Louisiana because of the objections made in the former session and also because conditions elsewhere, in the event of discovery of sulphur deposits, might differ from those in Louisiana. 2/ In 1932, the provisions of the 1926 Act relating to the leasing of sulphur deposits were extended to New Mexico. 3/

By Act of February 7, 1927, 4/ Congress repealed the 1917 law providing for the leasing of potassium deposits and provided for the leasing of these deposits under an Act which made the general provisions of the Mineral Leasing Act applicable.

Hereafter in this study, unless otherwise apparent from the context, a reference to the Mineral Leasing Act of 1920 is intended to include also the Acts providing for the leasing of potassium and sulphur.

Despite the extensive reports and debates in earlier years, the Mineral Leasing Act of 1920 was enacted only after lengthy debates in the Sixty-sixth Congress, Second Session. These debates, however, dealt almost entirely with special problems relating to oil deposits, particularly those relating to the Naval Oil Reserves and the rights of persons who had located mining claims, but had made no discovery, on lands in California and Wyoming which were later withdrawn from mineral entry. Members of Congress also expressed concern that the valuable natural resources in the federal lands would ultimately fall into the hands of a monopoly,

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1/ H.R. Rep. No. 1508, 68th Cong., 2d Sess. (1925).

2/ H.R. Rep. No. 733, 69th Cong., 1st Sess. (1926).

3/ Act of July 16, 1932, 30 U.S.C. § 271 (1964).

4/ 30 U.S.C. § 281 et seq. (1964).

and amendments were offered providing for fixing the prices of the products mined from leased lands. 1/

Senate Bill 2775, which was enacted into law as the Mineral Leasing Act of 1920, was unlike earlier bills in that it was a straight leasing bill. Earlier bills had provided for the issuance of a patent for part of the lands on which one might make a discovery with respect to certain minerals. For example, the conference reports in 1919 2/ reported a bill which provided that upon making a discovery of oil and gas, or sodium, the holder of a prospecting permit could obtain a patent to one-fourth of the acreage covered by his prospecting permit, and authorized the Secretary of the Interior to sell or lease phosphate lands.

Numerous representatives and senators from the West, in the course of the debate on Senate Bill 2775, stated that they were for a leasing bill because there appeared to be no other way that the withdrawn oil, coal, and phosphate lands could be developed. For example, Senator Smoot of Utah, who introduced Senate Bill 2775 and acted as a principal spokesman for the Bill in the Senate debate, stated:

> "Mr. President, about 12 years ago there was an agitation started in the United States to lease the public lands containing oil, gas, phosphate, sodium, and coal. There has not been a Congress since that time that bills have not been introduced in Congress for the purpose of leasing such public lands.
>
> "In the first place, Mr. President, I wish to say that I have been in the past opposed to a leasing system. I have been honest in my opposition to it, because of the fact that I thought such a policy would not be the best way of developing an increased

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1/ Gates, History of Public Land Law Development 742-744 (1968). The chapter entitled "Legal Aspects of Mineral Resources Exploitation" was written by Robert W. Swenson.

2/ H.R.Rep.No.1059, 65th Cong., 3d Sess. (1919) and S.Doc.No.392, 65th Cong., 3d Sess. (1919).

production of such minerals. I still have that feeling; but, notwithstanding that and knowing the situation as it exists in the United States today which has been brought so forcibly to the attention of the country by the recent war, I realize that there must be some change in the policy of our Government respecting public lands that has been in force for the past 12 years.

. . .

"Mr. President, I have lived with this legislation, as it were, for nearly 10 years. I am in close touch, not only with the men producing oil today, but I have been in close touch with the men who desire to go upon the public domain and prospect for oil and take their chances in discovering oil; but all known oil lands have been tied up by withdrawals for many years past and prospecting upon public lands has been limited indeed. I think now without a moment's hesitation I can truthfully state that there are at least 95 per cent of all the men who have been interested in this subject and who are bitterly opposed to the leasing system, as I was and as I am, are today saying that under the situation as it exists in the country the best thing to do is to try a leasing system, and the best plan is to prepare a bill along the line that will best meet the situation; and that is what I have tried to do.

. . .

"When I was told 12 years ago that such withdrawals would be made, and that no development upon these lands should be allowed until the western Senators had agreed to a leasing system, I doubted at that time whether the program would be carried out. It has been carried out, and today we find that there is an actual scarcity of some of the minerals enumerated in the pending bill. I say now that unless there is a change in policy and the development of the lands for the minerals begins at an early time it will cost the American people millions of dollars and perhaps the loss of a great

portion of their foreign commerce." 1/

B. Mineral Leasing Act for Acquired Lands (1947).

1. Need for legislation.

In 1941, the Attorney General advised the Secretary of the Interior that the Mineral Leasing Act of 1920 did not authorize leases with respect to lands acquired by the War Department in the course of its rivers and harbors improvement

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1/ 58 Cong.Rec. 4111-4112 (1919). One important reason why western Congressmen voted for the bill which became the Mineral Leasing Act of 1920 was that, unlike earlier bills, it provided that a substantial share of the revenues from leasing would be returned to the West. As enacted, § 35 of the Mineral Leasing Act of 1920 provided for distribution of revenues from past production and future production from leased lands as follows: 70% from past production and 52-1/2% from future production to the Reclamation Fund; 20% from past production and 37-1/2% from future production to the states where the leased lands were located and 10% into the Treasury to be credited to miscellaneous receipts. Robbins, Our Landed Heritage 394 (1942), states that this change of policy giving the West a large share of the revenues from mineral leasing resulted in the enactment of the Mineral Leasing Act of 1920.

program. 1/

In 1946, the Secretary of the Interior stated in his annual report:

> "The management of all the minerals in all the Federal lands should be in the experienced mineral agencies in Interior, rather than in several separate Federal departments. Certain changes in the mineral leasing laws should be considered by Congress." 2/

2. Legislative history of the Mineral Leasing Act for Acquired Lands (1947).

The following year Congress enacted the Mineral Leasing Act for Acquired Lands (1947). 3/ This Act is applicable only to the minerals which in 1947 were under the Mineral

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1/ 40 Op.Atty Gen. 9 (1941). This opinion was in response to a request of the Secretary of Interior for an opinion on the question whether the Mineral Leasing Act of 1920 authorized the Secretary of Interior to lease deposits of petroleum and natural gas on lands acquired or public lands reserved by the United States for a specific purpose, where such lands were under jurisdiction of another agency of the Government. The Attorney General treated this request for an opinion as a request for a reconsideration of an opinion of Attorney General Stone of May 12, 1924 (34 Op.Att'y Gen. 171). The 1924 opinion advised the President that certain leases which Secretary of the Interior Fall had issued under the Mineral Leasing Act of 1920 to lands in Executive Order Indian Reservations were executed without authority of law pointing out that the Mineral Leasing Act of 1920 "had peculiar application to the public domain."

2/ 1946 Int.Dept.Ann.Rep. 32.

3/ 30 U.S.C. §§ 351-359 (1964).

Leasing Act of 1920, namely, coal, phosphate, sodium, potassium, oil, oil shale, gas, and sulphur. 1/ As was the case with the Mineral Leasing Act of 1920, interest in the exploration for and development of petroleum resources, not nonfuel minerals, was the principal reason for the enactment of this law. 2/

H.R. Rep. No. 550, 3/ which reports the bill to provide for mineral leasing of acquired lands, states:

> "The Special Senate Committee Investigating Petroleum Resources in its report, dated January 31, 1947 (p. 49), recommended as follows:
>
> 'In addition to the public-domain lands within the United States, the Federal Government also owns extensive areas commonly referred to as "acquired lands." . . . These lands are not subject to the mineral leasing laws covering the public-domain lands. Some of the acquired lands have been leased for oil or gas development, but it is clear from evidence presented to the committee that exploration

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1/ Id. § 352. Thus, native asphalt, solid and semi-solid bitumen, and bituminous rock (including oil impregnated rock or sand from which oil is recovered only by special treatment after the deposit is mined or quarried), which were added to leasable minerals under the Mineral Leasing Act of 1920 by Act of Sept. 2, 1960, Pub.L.No.86-705, 74 Stat. 790, are not under the Mineral Leasing Act for Acquired Lands.

2/ For example, H.R.Rep.550, 80th Cong., 1st Sess. (1947), reporting H.R.3022, which was enacted into law as the Mineral Leasing Act for Acquired Lands, states in explaining the bill that it is designed to stimulate the exploration of new petroleum reserves and to promote the development of oil and gas on acquired lands but does not state that it is designed to accomplish the same purposes for the other leasable minerals.

3/ 80th Cong., 1st Sess. 3 (1947).

of acquired lands has been retarded (a) by lack of statutory authority to lease, (b) by divided jurisdiction among various departments of Government, and (c) by a want of uniformity in policy and leasing procedure. The Senate should give early consideration to the various postwar problems arising from the large amount of recently acquired lands, both as to their disposal and to their mineral deposits.'

"This bill does not provide for the leasing or disposition of gold, silver, copper, or other solid or metalliferous minerals, but applies only to the leasing of coal, phosphate, sodium, potassium, oil, oil shale, gas, and sulfur in acquired lands. The committee agreed with the views of the Senate Committee on Public Lands (as expressed in S. Rept. 161, 80th Cong., 1st Sess. on S. 1081) that minerals other than those covered by this bill should be considered as an entirely separate matter, inasmuch as the drilling for and the extraction of oil and gas and other minerals referred to in this bill differ greatly, from a practical and operating standpoint, from the mining of solid or metalliferous minerals." 1/

The same report states that "in the interest of economy, the bill eliminates several agencies now engaged in the leasing of acquired lands for oil and gas, and centralizes this function in the Department of the Interior." The purpose of the bill and the reason for giving this function to the Department of the Interior is stated as follows:

> "The purpose of this bill is to promote and encourage the development of the ore [sic], gas, and other minerals on the acquired lands of the United States on a uniform basis under the

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1/ Both the Department of the Interior and the Department of Agriculture recommended that the bill apply to all minerals on acquired lands. See S.Rep.No.161, 80th Cong., 1st Sess. 5, 6 (1947).

jurisdiction of the Department of the Interior.

"The Department of the Interior, under the Leasing Act of 1920, as amended, has had long experience in the leasing of lands for oil, gas, and other minerals on the public domain. In 27 years, it has assembled the necessary personnel to handle the many administrative, legal, and technical problems presented under that act. The purpose of this bill is to grant to the Interior Department jurisdiction to lease acquired lands of the United States including those in Alaska, under the same conditions as contained in the leasing provisions of the Mineral Leasing Act; provided that no mineral deposit shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit, in order that any lease issued will be on such conditions as will insure the adequate utilization of the lands for the primary purpose acquired." 1/

C. Section 402, Reorganization Plan No. 3 of 1946.

Prior to 1946, the Secretary of Agriculture had authority to issue mineral leases on certain acquired lands under his jurisdiction under the following laws:

(1) The Weeks Law, as amended, 2/ which authorized the Secretary of Agriculture to purchase forested, cut over, or denuded lands. In 1917 the Secretary of Agriculture was authorized, under such general regulations as he may prescribe, to dispose of the mineral resources of these lands. 3/

1/ H.R.Rep.No.550, 80th Cong., 1st Sess. 2 (1947).

2/ 16 U.S.C. § 513 et seq. (1964).

3/ Act of Mar. 4, 1917, as amended, 16 U.S.C. § 520 (1964).

(2) Act of June 16, 1933, 1/ which created a Federal Emergency Administration of Public Works and authorized the purchase of lands for public works and construction projects and provided for the sale or leasing of the property acquired.

(3) Act of April 8, 1935, ch. 48, 2/ commonly called the Emergency Relief Appropriation Act of 1935, which provided for the acquisition of real property and its disposal.

(4) Act of August 24, 1935, ch. 641, § 55, 3/ which made available, out of funds appropriated by the Emergency Relief Appropriation Act of 1935, such amounts as the President may allot for the acquisition of submarginal lands.

(5) Act of July 22, 1937, as amended, 4/ which provided for land conservation and land utilization and authorized the sale, lease, or other disposal of the lands. 5/

Pursuant to the Reorganization Act of 1945, the President submitted to Congress Reorganization Plan No. 3 of 1946. 6/ The Plan provides in part that jurisdiction over mineral deposits on lands held by the Department of Agriculture be transferred to the Department of the Interior. The President included in his message to Congress the following statement of why such transfer of functions should be made:

1/ 40 U.S.C. §§ 401, 403 (a), and 408 (1964).

2/ 49 Stat. 115, 118.

3/ 49 Stat. 750, 781.

4/ 7 U.S.C. § 1010 (1964).

5/ Section 44 of the Act of July 22, 1937, 50 Stat. 530, provides that any sale or other disposition of lands acquired shall be subject to a reservation in the United States of not less than an undivided three-fourths of the interest of the United States in all coal, oil, gas, and other minerals in and under such property.

6/ H.R.Doc.No.596, 79th Cong., 2d Sess. (1946).

"The Department of the Interior now administers the mining and mineral leasing laws on various areas of the public lands, including those national forests established on parts of the original public domain. The Department of Agriculture, on the other hand, has jurisdiction with respect to mineral deposits on (1) forest lands acquired under the Weeks Act, (2) lands acquired in connection with the rural rehabilitation program, and (3) lands acquired by the Department as a part of the Government's effort to retire submarginal lands.

"Accordingly this reorganization plan provides that these mineral deposits on lands of the Department of Agriculture will be administered by the Department of the Interior, which already has the bulk of the Federal Government's mineral leasing program.

"The plan further provides that the administration of mineral leasing on these lands under the jurisdiction of the Department of Agriculture will be carried on subject to limitations necessary to protect the surface uses for which these lands were primarily acquired."

Reorganization Plan No. 3 of 1946 was submitted to Congress and became effective on July 16, 1946. 1/ Congress has enacted two later laws authorizing the Secretary of the Interior to issue leases and permits for the exploration and development of mineral lands administered by the Secretary

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1/ 60 Stat. 1099, 5 U.S.C., note following § 133y-16 (1964), 5 U.S.C.A. App. 188 (1967).

of Agriculture. 1/

D. Miscellaneous mineral leasing laws.

Acts of Congress have provided for mineral leasing of minerals normally subject to location under the mining laws in certain instances where (1) the lands are not subject to the mining laws, i.e., National Forests in Minnesota, 2/ or (2) the lands have been withdrawn from location under the mining laws either by Act of Congress or Executive Order.

1. National Forests in Minnesota.

By Act of June 30, 1950, 3/ Congress authorized the Secretary of the Interior, under regulations to be prescribed by him and upon such terms and periods as he may specify, to permit the prospecting for and the development and utilization of the mineral resources of lands in the National

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1/ Act of Sept. 1, 1949, 30 U.S.C. § 192c (1964) (applicable to lands added to the Shasta National Forest by the Act of Mar. 19, 1948, ch. 139, 62 Stat. 83); Act of June 28, 1952, ch. 482, § 3, 66 Stat. 284, 285 (1952) (applicable to certain lands located in two New Mexico counties). Although the Act of Sept. 1, 1949, does not refer to Reorganization Plan No. 3 of 1946 or Sec. 402, it vests in the Secretary of Interior the same authority to issue prospecting permits and leases for the lands subject to its provisions as does the Reorganization Plan No. 3 to the lands subject to its provisions. The Act of June 28, 1952, states that the lands subject to its provisions will be administered in the manner prescribed by Sec. 402 of the President's Reorganization Plan No. 3 of 1946.

2/ See 30 U.S.C. § 48 (1964).

3/ 16 U.S.C. § 508b (1964)

Forests in Minnesota, including lands received in exchange for public-domain lands or for timber on such lands. 1/

1/ S.Rep.No. 1778, 81st Cong., 2d Sess. (1950), which recommended passage of this law, states:

> "Permits have been issued for the mining and removal of minerals from the Superior National Forest under a ruling of the Solicitor of the Department of Agriculture. The ruling stated that, since these lands were not subject to entry under the general mining laws, the minerals could be disposed of under the general authority granted to the Secretary of Agriculture by the act of June 4, 1897, 'to make rules and regulations governing the occupancy and use of the national forests.'
>
> "A 5-year permit to quarry and remove granite was issued in 1939 to a private granite company under this ruling. However, in 1945 the Solicitor reversed the former opinion and ruled that the minerals on the lands described before could not be disposed of by any authority. Consequently, in accordance with the latter ruling, the Forest Service has refrained from issuing any more mining permits on lands of this character.
>
> . . .
>
> "The Senate committee desires to emphasize the fact that this is special legislation to meet a special situation existing with respect to investment losses resulting from cancellation of mining permits in the Minnesota forests, and that it is not intended to set a pattern for general legislation applying to States where these peculiar conditions do not exist."

2. Gold, silver, and quicksilver deposits in lands in private land claims confirmed pursuant to decrees of the Court of Private Land Claims.

Section 13 of the Act of March 3, 1891, ch. 539, 1/ entitled "An Act to Establish a Court of Private Land Claims, and to Provide for the Settlement of Private Land Claims in certain States and Territories", provided as follows:

> "No allowance or confirmation of any claim shall confer any right or title to any gold, silver, or quicksilver mines or minerals of the same,unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed under this act without the consent of the owner of such property until specially authorized thereto by an act of Congress hereafter passed."

In 1926, the Secretary of the Interior advised Congress that no law authorized the working of reserved minerals and that it was desirable that the reserved minerals, whether found by themselves or in association with other mineral deposits, be subject to development. 2/ Congress passed the

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1/ 26 Stat. 854. Although the Court of Land Claims had ceased to exist for many years, the law was not repealed until the Act of Sept. 6, 1966, Pub.L.No. 89-554, 80 Stat. 378, 632, which codified Title 5, U.S.C., relating to Government organization and employees.

2/ S.Rep.No. 893, 69th Cong., 1st Sess. (1926).

Act of June 8, 1926, 1/ which authorizes the Secretary of the Interior to lease these reserved mineral deposits to the grantee of the lands, or to those claiming through or under him.

3. Lake Mead National Recreation Area.

By Act of October 8, 1964, 2/ Congress provided for the administration of the Lake Mead National Recreation Area located in Arizona and Nevada. Section 4(b) of this Act provides:

> "In carrying out the functions prescribed by this Act, in addition to other related activities that may be permitted hereunder, the Secretary may provide for the following activities, subject to such limitations, conditions, or regulations as he may prescribe, and to such extent as will not be inconsistent with either the recreational use or the primary use of that portion of the area heretofore withdrawn for reclamation purposes:
>
> (1) General recreation use, such as bathing, boating, camping, and picnicking;
> (2) Grazing;
> (3) Mineral leasing;
> (4) Vacation cabin site use, in accordance with existing policies of the Department of the Interior relating to such use, or as such policies may be revised hereafter by the Secretary."

Mineral regulations have been adopted applicable to mineral deposits subject to location under the general mining laws; 3/

1/ 30 U.S.C. §§ 291-293 (1964).

2/ 16 U.S.C. §§ 460n to 460n-9 (1964).

3/ 43 C.F.R. §§ 3226.0-3 to 3326.7 (1968).

however, with respect to phosphate, potassium, sodium, sulphur and the other leasable minerals, the controlling regulations are those issued under the Mineral Leasing Act of 1920. 1/

4/ Reserved minerals in certain lands patented to the State of Nevada.

The Act of June 8, 1926, ch. 499 2/ provides:

"That the Secretary of the Interior be, and hereby is, authorized, in his discretion, to accept on behalf of the States title to not exceeding thirty thousand acres of land owned by the State of Nevada, and in exchange therefor may patent to said State not more than an equal area of surveyed, unreserved, and unappropriated public lands in said State: Provided, that all patents issued under this Act shall contain a reservation to the United States of all oil, coal, or other mineral at any time found in said lands, together with the right to reenter upon said lands and to prospect for, mine, and remove said mineral, under such conditions and under such rules and regulations as the Secretary of the Interior may prescribe." 3/

Pursuant to this Act, the Secretary of the Interior has issued regulations limited in their application to the disposal of valuable deposits of sand and gravel in such lands. 4/

1/ Id. § 3326.1

2/ 44 Stat. 708.

3/ This exchange was requested by the State of Nevada to secure lands desired by the State of Nevada for state recreation grounds and game refuges. H.R.Rep.No.1269, 69th Cong., 1st Sess. (1926).

4/ 43 C.F.R. §§ 3323.2-1 to 3323.2-7 (1968).

Since there are no regulations providing for the disposition of other minerals, the other minerals in these lands are not subject either to location or leasing. 1/

5. Silica sands and other nonmetallic minerals in described lands located in Nevada withdrawn by Executive Order No. 5105.

By Executive Order No. 5105, dated May 3, 1929, certain lands in the Valley of Fire Region in Nevada, west of Lake Mead, were withdrawn under the authority of the Pickett Act. 2/ This withdrawal did not affect the right to make locations under the mining laws for metalliferous minerals. 3/ In order to permit the mining of nonmetalliferous minerals on the lands, the Act of May 9, 1942, ch. 297 4/ was passed. It provides as follows:

> "That the Secretary of the Interior be, and he is hereby, authorized, under the rules and regulations adopted pursuant to the provisions of the Act entitled 'An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain', approved February 25, 1920, as amended, so far as applicable, to lease for the exploitation of the deposits of silica sand and other non-metallic minerals found thereon, the lands withdrawn by Executive Order Numbered 5105, dated May 3, 1929."

1/ See Superior Sand & Gravel Min. Co. v. Territory of Alaska, 224 Fed.2d 623 (9th Cir. 1955); Dredge Corp. v. Penny, 362 Fed.2d 889 (9th Cir. 1966).

2/ See H.R.Rep.No.2021, 77th Cong., 2d Sess. (1942).

3/ 43 U.S.C. § 142 (1964).

4/ 56 Stat. 273.

In 1948, it was held in the Department of the Interior that the 1942 Act was applicable to all lands withdrawn by Executive Order No. 5105 even if those lands were later restored in whole or in part. 1/ As a result, in 1949 the 1942 Act was amended to provide that it should be effective with respect to any lands so withdrawn only so long as such lands remained withdrawn. 2/

6/ Minerals in lands within the Whiskeytown-Shasta-Trinity Recreational Area.

By Act of November 8, 1965, 3/ Congress established the Whiskeytown-Shasta-Trinity National Recreational Area in the State of California. Section 1 of the Act provides that two of the three units of the area which are largely within the Shasta Trinity National Forest will be under the jurisdiction of the Secretary of Agriculture and the third will be under the jurisdiction of the Secretary of the Interior. 4/ Section 6 of the Act provides that the area is withdrawn from

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1/ Beverly W. Perkins, A-24802, Carson City, 2144066 (Jan. 5, 1958).

2/ Act of Oct. 25, 1949, ch. 704, 63 Stat. 886. See also S.Rep.No.662, 81st Cong., 1st Sess. (1949); H.R.Rep.No. 1405, 81st Cong., 1st Sess. (1949).

3/ 16 U.S.C. § 460q et seq. (Supp. III 1965-1967).

4/ Id. The split jurisdiction between the Departments of the Interior and Agriculture in the administration of the recreation area was a source of concern to the Senate Committee on Interior and Insular Affairs, which feared that there would be an unnecessary duplication of functions. The committee report states: "It was the consensus of the members that approval of this measure would not establish a precedent whereby other proposals providing for similar administrative authority would receive favorable committee consideration." S.Rep.No.992, 89th Cong., 1st Sess. 6, 7 (1965).

location of mining claims under the mining laws but prescribes how mineral deposits may be obtained.

Mineral deposits in the area which are leasable under the Mineral Leasing Act of 1920 or the Mineral Leasing Act for Acquired Lands (1947) may be disposed of under those Acts, but any lease or permit respecting such minerals in lands administered by the Secretary of Agriculture may be issued only with his consent and subject to such conditions as he may prescribe. 1/

Minerals normally locatable under the mining laws on lands under the jurisdiction of the Secretary of Agriculture may be disposed of by the Secretary of the Interior under a lease or permit pursuant to the Act of September 1, 1949, 2/ but only with the consent of the Secretary of Agriculture and subject to such conditions as he may prescribe. 3/ Minerals not under the 1920 Mineral Leasing Act or the Mineral Leasing Act for Acquired Lands which are in the area subject to the jurisdiction of the Secretary of the Interior may be disposed of by the Secretary of the Interior under permits or leases issued pursuant to the Act of August 4, 1939, as amended, 4/ which provides:

> "The Secretary, in his discretion, may (a) permit the removal, from lands or interests in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project, of sand, gravel, and other minerals and building materials with or without competitive bidding. . . ."

1/ 16 U.S.C. § 460q-5 (Supp. III 1965-1967).

2/ 30 U.S.C. § 192c (1964).

3/ 16 U.S.C. § 460q-5 (Supp. III 1965-1967)

4/ 43 U.S.C. § 387 (1964).

7. Reserved minerals in lands patented to the State of California for use of the California State Park System.

In 1933 1/ and 1936, 2/ Congress provided with respect to public domain in certain townships in Southern California that—

> "Upon the submission of satisfactory proof that the land selected contains characteristic desert growth and scenic or other natural features which it is desirable to preserve as a part of the California State park system, the Secretary of the Interior shall cause patents to issue therefor: Provided, that there shall be reserved to the United States all coal, oil, gas, or other mineral contained in such lands, together with the right to prospect for, mine and remove the same at such times and under such conditions as the Secretary of the Interior may prescribe. . . ."

Regulations have been issued for the leasing of mineral deposits in these lands. 3/

8. Laws with special mineral leasing provisions enacted in 1968.

In October, 1968, two laws were enacted with special mineral leasing provisions. One established the Flaming Gorge National Recreation Area 4/ and the other established the Ross Lake and Lake Chelan National Recreation Areas. 5/

E. Leasing under the Atomic Energy Act of 1954.

A discussion of the background and legislative history of this Act is set forth in Chapter 20 of this Study.

1/ Act of Mar. 3, 1933, ch. 209, 47 Stat. 1487, as amended by Act of June 5, 1936, ch. 523, 49 Stat. 1482.

2/ Act of June 29, 1936, ch. 861, 49 Stat. 2026.

3/ 43 C.F.R. Subpart 3324 (1968).

4/ Act of Oct. 1, 1968, Pub.L.No. 90-540, 82 Stat. 904.

5/ Act of Oct. 2, 1968, Pub.L.No. 90-544, 82 Stat. 926.

CHAPTER 3

BACKGROUND OF THE MATERIALS DISPOSAL LAWS

A. Materials Disposal Law of 1947.

Prior to the Act of September 27, 1944, ch. 416 1/ there was no statute except the Timber and Stone Act 2/ which expressly authorized the Secretary of the Interior to dispose of sand, gravel, and stone on the public domain which, because of its quantity or quality, was not subject to location. 3/ The absence of express statutory authority suggests that none was needed because sand, gravel, and stone had been construed to be minerals subject to location under the mining laws. 4/

1/ 58 Stat. 745.

2/ Act of June 3, 1878, ch. 151, 20 Stat. 89, as amended by Act of Aug. 4, 1892, ch. 375, § 2, 27 Stat. 348.

3/ See Letter from Harold L. Ickes, Secretary of the Interior to the Speaker of the House, May 5, 1943, H.R.Rep. No. 610, 78th Cong., 1st Sess. (1943):

> "This Department receives many requests for permission to remove from the public lands materials or resources, including sand, stone, gravel, and timber the disposal of which is not expressly authorized by law. While section 453 of the Revised Statutes (43 U.S.C. sec. 2) vests in the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, broad administrative powers over the public lands, it is deemed advisable, nevertheless, to secure express statutory authority to provide for the disposals."

4/ Stephen E. Day, Jr., 50 L.D. 489 (1924) (trap rock suitable for ballast); Layman v. Ellis, 52 L.D. 714 (1929) (sand and gravel suitable for construction).

Where the mining laws were not applicable because land was withdrawn from mineral entry, the need for express legislation was recognized. The Act of August 4, 1939, 1/ which was applicable to lands withdrawn under the reclamation laws, is an example of legislation expressly providing for the disposal of "sand, gravel, and other minerals and building materials" in lands withdrawn from location under the mining laws.

The Act of September 27, 1944, ch. 416 2/ was enacted as a wartime measure to authorize the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, and timber or other forest products on the public lands under his exclusive jurisdiction if the disposal of such materials was not otherwise expressly authorized by law and if such disposal would not be detrimental to the public interest. This Act, by express terms, did not apply to Indian lands or to national parks and monuments. No disposal could be made until public notice of the proposed disposal had been published in the county where the materials were located. No disposal could be made without payment of adequate compensation for the materials and no materials could be disposed of in excess of $10,000 unless authorized by laws of the United States. The Act did not apply where disposal of such materials had been expressly prohibited by law, and, finally, by its terms, the powers under the Act ceased to exist when the President declared the cessation of hostilities in World War II. The Materials Disposal Act of 1947 is similar in many respects to this temporary Act.

The Act of July 31, 1947, ch. 406, 3/ commonly known as the Materials Disposal Act of 1947, authorized the Secretary of the Interior to dispose of sand, stone, gravel, common clay, and timber and other vegetative products on public lands of the United States if the disposal of such

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1/ 43 U.S.C. § 387 (1964).

2/ 58 Stat. 745.

3/ 61 Stat. 681.

materials (1) was not otherwise expressly authorized by law, including the United States mining laws, (2) was not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Under this 1947 Act adequate compensation must be paid for the material as determined by the Secretary, except, in the discretion of the Secretary, federal and state agencies and persons or nonprofit organizations could take and remove the materials for use for other than commercial or industrial purposes or resale. Where lands were withdrawn in aid of a function of the federal government or agency (other than the Department of the Interior) or of a State or subdivision of a State, the Secretary of the Interior could not make a disposal without consent of the government body for whom the lands were withdrawn. The Act did not apply to lands in National Forests, National Parks or National Monuments or to any Indian lands. Where the appraised value of the material exceeded $1,000, competitive bidding was required after notice of sale was published for four weeks in a newspaper in the county where the materials were located. Where the appraised value of the material was $1,000 or less, the material could be disposed of by the Secretary of the Interior upon such notice and in such manner as he might prescribe. All moneys received from the disposal of materials was to be disposed of in the same manner as moneys received from the sale of public lands.

The Materials Disposal Act of 1947 provided that the Secretary of the Interior "may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products . . . ." 1/ The words "but not limited to" and "yucca, manzanita, mesquite, cactus, common clay" were added on the recommendation of the House Interior and Insular Affairs Committee "to broaden the specification of materials covered by the bill." 2/ The Committee reported that "the enumeration is made illustrative rather than exclusive since

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1/ Id.

2/ H.R.Rep.No. 867, 80th Cong., 1st Sess. (1947).

it would be impossible specifically to name every material for which a valuable use may be found." The imposition in the bill of a condition that the disposal of materials must not be otherwise expressly authorized by law was to prevent this law from conflicting with the forest timber laws and the mining laws. 1/ As enacted, the Materials Disposal Act of 1947 provided as a condition that the "disposal of such materials (1) is not otherwise expressly authorized by law, including the United States mining laws . . . ." The Department of the Interior's executive communications to the Senate and House 2/ each described the kinds of materials to which such a law should apply:

> "2. Sand, stone and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.
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> "4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.
>
> "5. Clay to be used for the manufacture of bricks, tile, pottery and similar products."

Although these minerals were included in the Materials Disposal Act of 1947, the Department of the Interior's executive communications stated that among the materials listed in the bill under consideration, "timber and forest products are by far the most important." Congressmen urging enactment of the bill did not even mention that the bill gave the Secretary

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1/ Id.

2/ See S.Rep.No. 204, 80th Cong., 1st Sess. (1947); H.R.Rep.No. 867, 80th Cong., 1st Sess. (1947).

of the Interior authority to dispose of minerals not under the mining laws, but, instead, devoted their arguments to the importance of providing the Secretary of the Interior with authority to dispose of timber on lands administered by him. 1/

The Materials Disposal Act of 1947 has been amended four times 2/ and two of these amendments, one enacted in 1955 and one in 1962, deserve special comment.

The important amendment, of course, is the Multiple Surface Use Act of 1955, 3/ which amended the Materials Disposal Act of 1947 in the following respects:

(1) It prohibited future location and removal, under the mining laws, of common varieties of sand, stone, gravel, pumice, pumicite, and cinders, and provided for the disposition of these materials under the Materials Disposal Act.

(2) It gave to the Secretary of Agriculture the same authority with respect to mineral materials and vegetative

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1/ 93 Cong.Rec. 9571, 9572 (1947).

2/ Act of Aug. 31, 1950, ch. 830, 64 Stat. 571; Act of July 23, 1955, ch. 375, 69 Stat 367; Act of Sept. 25, 1962, Pub.L.No. 87-689, 76 Stat. 587; and Act of Sept. 28, 1962, Pub.L.No. 87-713, 76 Stat. 652. The Act of Aug. 31, 1950, ch. 830, 64 Stat. 572, authorized the Secretary to dispose of sand, stone, gravel, and vegetative materials located below high-water mark of navigable waters of Alaska and provided how receipts from sales in Alaska should be distributed; and the Act of Sept. 28, 1962, Pub.L.No. 87-713, 76 Stat. 562, provided that no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws, and that the Secretary of the Interior shall provide, by regulation, that limited quantities of petrified wood may be removed without charge from public lands which he shall specify.

3/ 30 U.S.C. § 601 et.seq. (1964).

materials located on lands under his jurisdiction as that which the Secretary of the Interior had with respect to lands under his jurisdiction. 1/

(3) Oregon and California Railroad and Coos Bay Wagon Road Grant lands were made specifically subject to the Materials Disposal Act. 2/

(4) The discretionary authority of the Secretary of the Interior to make available, without charge, materials subject to disposal under the Materials Disposal Act of 1947 was amended to limit this authority to governmental agencies and nonprofit associations. Formerly, it had included individuals when the materials were used for other than commercial or industrial purposes or resale. 3/

1/ The absence of specific authority in the Department of Agriculture to dispose of minerals not subject to the mining laws, except for one provision authorizing the issuance of free use permits for timber and stone upon the National Forests to bona fide settlers, miners, residents, and prospectors (Act of June 4, 1897, 16 U S.C. § 477 (1964)) is illustrated by the legislative history of 16 U.S.C. § 508b (1964) providing for leasing mineral deposits in the National Forests of Minnesota. See S.Rep.No. 1778, 81st Cong., 2d Sess. (1950) and chapter 2 of this study.

2/ The House Committee, in recommending this amendment, stated that otherwise these lands would be excepted from the provisions of §§ 1 and 2 of the Multiple Surface Use Act of 1955. H.R.Rep.No. 730, 84th Cong., 1st Sess. 13 (1955).

3/ Materials needed for highways may also be appropriated for this use pursuant to Act of Aug. 27, 1958, 23 U.S.C § 317 (1964). Under this Act the appropriation is made by the Secretary of Transportation, but rights may be transferred to the State Highway Department or its nominee.

As a result of the extension of the Materials Disposal Act to common varieties of stone and to lands under the jurisdiction of the Secretary of Agriculture, Congress by Act of August 1, 1955, ch. 448 1/ repealed the Timber and Stone Act of 1878 because "the Public Sales Act, the Materials Act, and the mining laws now in full force and effect have rendered the old Timber and Stone Act of 1878, as amended, obsolete." 2/

The 1962 amendment to the Materials Disposal Act of 1947 relates entirely to the procedures for sale of materials under the law. 3/ As enacted in 1947, the Materials Disposal Act required materials appraised in excess of $1,000 to be sold to the highest responsible, qualified bidder at a sale by competitive bidding which had been advertised in the county where the material was located for four successive weeks. Materials appraised at $1,000, or less, could be disposed of by the Secretary "upon such notice and in such manner as he may prescribe." The Secretary of the Interior, by executive communications, advised both the Senate and House that the restrictions imposed upon the sale of materials exceeding $1,000 in value were unrealistic, and had hampered emergency-type operations, and recommended that the disposal of all materials be vested in the Secretary's discretion, without regard to monetary value. 4/ Both the Senate and House Committees agreed that the Materials Disposal Act of 1947 should be amended to provide greater flexibility, but both Committees rejected the Secretary's proposal that "the 1947 Act be amended to permit the Secretary to dispose of materials without advertising for competitive bidding whenever he determines 'that the public interest will not be

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1/ 69 Stat. 434.

2/ S.Rep.No. 875, 84th Cong., 1st Sess. (1955); H.R.Rep.No. 627, 84th Cong., 1st Sess. (1955).

3/ Act of Sept. 25, 1962, 30 U.S.C. § 602 (1964).

4/ See S.Rep.No. 2035, 87th Cong., 2nd Sess. 3 (1962); H.R.Rep.No. 2055, 87th Cong., 2d Sess. 3 (1962).

served' by competitive bidding." 1/ Instead, these Committees recommended and Congress enacted an amendment to the Materials Disposal Act of 1947, which authorizes the Secretaries of the Interior and Agriculture to dispose of materials by negotiated sale rather than competitive bidding if the contract is for the disposal of (1) less than 250,000 board feet of timber, (2) materials required in connection with a program of a public agency and the public exigency does not permit delay for advertising, or (3) property for which it is impracticable to obtain competition. 2/ In addition, the amendment requires semi-annual reports to Congress of sales made under (2) and (3) above setting forth (1) the name of each purchaser, (2) the appraised value of the material involved, (3) the amount of each contract, and (4) a description of the circumstances leading to the determination that the contract should be entered into by negotiation instead of competitive bidding after formal advertising.

The Senate Committee stated with respect to competitive bidding and the requirement for reporting sales to Congress:

> "Your committee joins with the House committee in firmly endorsing the principle of open competitive bidding after advertising with award to the highest responsible, qualified bidder except where such procedures are not practicable. Accordingly, the bill, as amended by the House committee and adopted in the Senate committee, requires the Secretary to dispose of materials to the highest responsible qualified bidder after advertising unless the Secretary authorizes negotiation in certain specific instances. . . .
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> "In order to assure continuing surveillance over the disposal program and to assure compliance with the principle of competitive bidding, the bill has been amended to require annual reports to

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1/ Id.

2/ Act of Sept. 25, 1962, 30 U.S.C. § 602 (1964).

Congress concerning all negotiated contracts except those for less than 250,000 board-feet of timber. The limit of 250,000 board-feet of timber was arrived at as a quantity that represents a medium-size disposal regardless of whether the value thereof goes up or down.

"In recommending this legislation for enactment, the committee gives its assurance that it will review the disposals to assure that there has not been artificial division of sales in increments in order to avoid the requirements of this act concerning advertising or the waiver of advertising."

B. Authority of the Secretary of Agriculture to dispose of mineral materials on certain acquired lands under his jurisdiction.

By Act of June 11, 1960 1/ certain functions of the Secretary of the Interior were transferred to the Secretary of Agriculture, including the authority, with respect to certain lands, to dispose of mineral materials other than coal, phosphate, sodium, potassium, oil, oil shale, gas, or sulphur, or minerals which would be subject to disposal under the mining laws if the mining laws were applicable to such lands. The effect of this statute was to transfer to the Secretary of Agriculture the authority, theretofore held by the Secretary of the Interior, to dispose of those mineral materials, such as common varieties of sand, stone, and gravel, which the Secretary of Agriculture is authorized to dispose of from public domain lands under his jurisdiction under the authority of the Materials Disposal Act. The Act of June 11, 1960, provides that the authority of the Secretary of Agriculture to dispose of these mineral

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1/ Pub.L.No. 86-509, 74 Stat. 205, 5 U.S.C. note following § 511 (1964), 7 U.S.C.A. note following § 2201 (Supp. 1968). This Act enacted the provisions of Reorganization Plan No. 1 of 1959 with certain amendments.

materials extends to the following lands:

(1) Those acquired lands in which the Secretary of the Interior acquired jurisdiction of the minerals under Section 402 of the Reorganization Plan No. 3 of 1946. 1/ Thus the Act of June 11, 1960, reassigned to the Secretary of Agriculture the authority to dispose of common varieties of mineral materials which he lost in 1946.

(2) Acquired lands which were added to the Shasta National Forest by the Act of March 19, 1948, ch. 139. 2/

(3) Lands in National Forests in Minnesota in which the Secretary of the Interior had been authorized to lease minerals by the Act of June 30, 1950. 3/

(4) The North Lobato and El Pueblo tracts added to the Carson and Santa Fe National Forests in New Mexico by Act of June 28, 1952, ch. 482, § 3. 4/

1/ 60 Stat. 1099, 5 U.S.C. note following § 133y-16 (1964), 5 U.S.C.A.App. 188 (1967).

2/ 62 Stat. 83.

3/ 16 U.S.C. § 508b (1964).

4/ 66 Stat. 284, 285.

CHAPTER 4

BACKGROUND OF THE AGENCIES ADMINISTERING THE MINERAL LAND LAWS

The Bureau of Land Management, in the Department of the Interior, has the responsibility for the administration of the mining laws on the public domain and disposals under the Materials Disposal Act of 1947 of those minerals of common occurrence, such as sand, stone, and gravel, on the public domain under the jurisdiction of the Department of the Interior. This agency also performs important functions in the administration of the mineral leasing laws. Other important functions in the administration of the mineral leasing laws are the responsibility of the Geological Survey, also in the Department of the Interior, particularly the functions furnishing scientific or technical information and advice, and supervising prospecting and mining operations under permits and leases.

The Forest Service, in the Department of Agriculture, performs certain functions relating to mining claims on the public domain under its jurisdiction, and has certain responsibilities in connection with the administration of the mineral leasing and materials disposal laws on the public domain and acquired lands under its jurisdiction. Its authority with respect to mining claims (except with respect to lands in National Forest Wilderness areas 1/) relates to the managing and disposing of vegetative surface resources and the managing of other surface resources on unpatented mining claims located on public domain lands in the National Forests. This authority, with respect to unpatented mining claims located since July 23, 1955, has been confirmed and probably enlarged by the Multiple Surface Use Act which became effective on that day. 2/ The responsibilities of the Forest Service under the mineral leasing laws are quite

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1/ 16 U.S.C. § 1133(d)(2) and (3) (1964).

2/ See 30 U.S.C. § 612 (1964).

different. As the administrator of the nonmineral surface resources, the Forest Service may prohibit the issuance of prospecting permits and leases on acquired lands under its jurisdiction, and, when it consents to the issuance of a permit or lease, it may require Forest Service Stipulations to be included in the permit or lease for the protection of the surface resources. 1/ Its authority under mineral leasing laws applying to the public domain, except under laws dealing with special areas, such as National Forests in Minnesota, 2/ is limited to making recommendations to the Bureau of Land Management with respect to the issuance of prospecting permits and leases and the stipulations to be included in such leases and permits. The authority of the Forest Service to make disposal of minerals of common occurrence, such as stone, sand, and gravel, on public domain and acquired lands under its jurisdiction is exclusive and not subject to any controls by the Bureau of Land Management.

Identification of these three agencies—the Bureau of Land Management, the Geological Survey, and the Forest Service—is not intended to imply that other agencies are not involved in matters relating to mining locations, mineral leasing, and mineral materials disposals. The Bureau of Reclamation, the Bureau of Sport Fisheries and Wildlife, in the Department of the Interior, the Federal Power Commission, and the Department of Defense all have jurisdiction over large areas of lands, and, in respect of these areas, these agencies each play a role in the administration of the laws relating to mining, mineral leasing and materials disposals. But the agencies having the greatest authority under these laws are the Bureau of Land Management, the Geological Survey, and the Forest Service, and, for this reason, the background of these agencies and their organization are described.

A. Bureau of Land Management.

1/ Id. § 352.

2/ 16 U.S.C. § 508b (1964).

1. History.

The Bureau of Land Management was established on July 16, 1946 by the consolidation of the General Land Office and the Grazing Service in accordance with Section 403 of the Reorganization Plan No. 3 of 1946. 1/ Before the creation of the General Land Office in 1812, 2/ other government agencies administered the public lands. On August 7, 1789, the Department of War was established, with the Secretary of War being charged with supervision over "the granting of lands to persons entitled thereto, for military services rendered to the United States", 3/ and on September 2, 1789, the Department of the Treasury was established with the Secretary of the Treasury being charged with executing "such services relative to the sale of lands belonging to the United States as may be by law required of him." 4/ The Act of May 18, 1796, ch. 29, provided for the surveying of lands and authorized the President to grant patents for lands, to be countersigned by the Secretary of State and recorded in his office. 5/ The Acts of May 10, 1800, ch. 54, 6/ and March 26, 1804, ch. 35, 7/ established the land offices and provided for property registry and the Act of April 25, 1812, ch. 68, 8/ established the General Land Office in the Department of the Treasury

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1/ 60 Stat. 1100, 5 U.S.C. note following § 133y-16 (1964), 5 U.S.C.A. App. 188 (1967).

2/ Act of Apr. 25, 1812, ch. 68, 2 Stat. 716.

3/ Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

4/ Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

5/ 1 Stat. 464.

6/ 2 Stat. 72.

7/ 2 Stat. 277.

8/ 2 Stat. 716.

and gave the Commissioner of the General Land Office the duty "to supervise, execute, and perform all such acts and things touching or respecting the public lands of the United States." The General Land Office continued under the jurisdiction of the Department of the Treasury until the Act of March 3, 1849, 1/ which created the Department of the Interior, and transferred to the newly created Department not only the General Land Office but also the Office of Indain Affairs, the Pension Office, and the Patent Office. The Department of the Interior's functions have since varied from time to time, but it has continued to be the agency primarily responsible for the disposition of public domain lands and is now charged with the supervision of public business relating to such widely diversified matters as shown by the following listing of the bureaus in the Department: 2/

Bureau of Commercial Fisheries
Bureau of Sport Fisheries and Wildlife
National Park Service
Geological Survey
Bureau of Mines
Bureau of Indian Affairs
Bureau of Land Management
Bureau of Outdoor Recreation
Office of Territories
Bureau of Reclamation
Bonneville Power Administration
Southeastern Power Administration
Southwestern Power Administration
Alaska Power Administration
Federal Water Pollution Control Administration

2. Organization and delegation of authority.

The Secretary of the Interior, as head of the Department,

1/ 43 U.S.C. § 1451 (Supp. II 1965-1966).

2/ Departmental Manual 105 DM 1 (Release No. 1094, 12/26/68)

reports directly to the President and is responsible for the direction and supervision of all activities of the Department. All functions of the officers, agencies, and employees of the Department of the Interior, with two minor exceptions not pertinent to this discussion, were transferred to the Secretary of the Interior by Reorganization Plan No. 3 of 1950. 1/

The Bureau of Land Management is under the Assistant Secretary for Public Land Management, who is responsible not only for the Bureau of Land Management but also for the Bureau of Indian Affairs, the Bureau of Outdoor Recreation, and the Office of the Territories.

The Secretary of the Interior has delegated to the Director of the Bureau of Land Management, with broad powers to redelegate, 2/ the program authority of the Secretary of the Interior with respect to the management of the public domain and the acquired and submerged lands of the Outer Continental Shelf under his jurisdiction, including all associated functions which relate thereto. 3/ There are several exceptions to this broad delegation, two of which are pertinent:

> "(1) Any act not in accordance with the general policies, procedures, or regulations of the Secretary of the Interior.
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> . . .
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> "(10) Any functional assignments or delegations of other bureaus or offices of the Department as

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1/ 64 Stat. 1262, 5 U.S.C. note following § 133z-15 (1964), 5 U.S.C.A. App. 231 (1967). By Order 2563 of May 2, 1950, 15 Fed.Reg. 3193 (1950), the Secretary assigned, until further notice, each function transferred to him by Reorganization Plan No. 3 to the officer, employee, or agency from whom or from which the function had been transferred.

2/ Departmental Manual § 200.2.1 (Release No. 742, 5/20/65).

3/ Id. § 235.1.1 (Release No. 733, 4/3/65).

provided for in the regulations or orders of the Secretary of the Interior." 1/

The first of these two limitations is so general that in a given case it will frequently be questionable whether this limitation is applicable or not. The other limitation seems quite specific but the problem hereinafter mentioned will illustrate that even this limitation may present difficulties.

The problem arises over the identification of the respective functions of the Bureau of Land Management and the Geological Survey in mineral leasing matters. In 1925 the Acting Secretary issued instructions on mineral leasing outlining the respective functions of the Geological Survey and the General Land Office. 2/ These instructions outline the procedures and conclude by stating: " . . . it being the intent that under the direction of the Secretary of the Interior, the General Land Office shall be the office of record, law and collections in mineral leasing matters, while the Geological Survey shall furnish scientific or technical information and advice, supervise prospecting and mining operations, record production, and determine royalties and rentals." The Geological Survey views these 1925 instructions as still in effect. 3/ The 1925 instructions and letters setting forth the views with respect to them, of both the Bureau of Land Management and the Geological Survey, are set out in Appendix V. There has been no revocation of these instructions, although both the Bureau of Land Management and the Geological Survey agree that certain provisions are obsolete and do not conform with the present practice. In any event there have been no later instructions or regulations outlining the respective functions of these two agencies in mineral leasing matters. The views of the Bureau of Land Management are summarized as follows:

1/ Id. § 235.1.2 (Rel. 733, 4/3/65).

2/ 51 L.D. 221 (1925).

3/ Branch of Mining Operations Manual § 626.1.1 (Release No. 1, 6/9/61). The Branch of Mining Operations Manual is Parts 620-629 of a compilation of Geological Survey Manuals.

"In summary, some parts of the 1925 instructions still seem to be followed, and the other parts seem to have been replaced by a large number of both formal and informal 'Instructions.'" 1/

This uncertainty with regard to instructions and regulations by the Secretary outlining the respective functions on mineral leasing matters is bound to result in confusion where both the Bureau of Land Management and the Geological Survey have mineral leasing functions to perform. Such uncertainty may be avoided by issuance of regulations advising each agency of its functions, as was done by the Secretary of Interior in recently issued regulations providing for reclamation of land where the surface is disturbed by operations under mining leases and contracts for the sale of mineral materials. 2/

The Bureau of Land Management, since its establishment in 1946, has been concerned not only with its functions under the mining, mineral leasing, and mineral disposal laws but also with the management of the surface and the nonmineral surface resources of all public domain lands except those lands under the jurisdiction of other agencies, such as the Forest Service, and except those lands which have been patented with a reservation of the minerals to the United States. Its functions are stated as follows:

"As manager of the public domain, the

1/ Letter from Karl S. Landstrom, Staff Assistant, Office of the Secretary of the Interior to Jerry L. Haggard, Public Land Law Review Commission, Jan. 13, 1968. This letter is set out in Appendix V.

2/ 43 C.F.R. Part 23, 34 Fed.Reg. 852 (1969) which is set forth in Appendix V. These regulations should be compared with the proposed regulations (32 Fed.Reg. 10656 (1967)), also set forth in Appendix V, which have the serious vice of failing to specify which agency would be responsible for performing the various mined land reclamation functions.

Bureau of Land Management administers functions concerned with the identification, classification, use, and disposal of public lands, and the development, conservation, and utilization of the natural resources of public lands and the mineral resources of certain acquired lands. These functions can be grouped into three major categories:

"A. Lands and Minerals

"The Bureau is responsible for realty activities on all of the public domain and large areas of public land under other agency surface management (e.g. National Forests). This includes: the adjudication of issuance of mineral leases; the management, with the Geological Survey, of the leasable mineral resources including those of the Outer Continental Shelf; the management of the salable mineral materials; the administration of the General Mining laws, and coordination of mineral use with surface management; the classification of public land for multiple use or for disposition; the disposition of lands for non-federal purposes, such as residential, urban, industrial or commercial development; the improvement of land tenure and land pattern for lands to be held in Federal ownership; the granting and administering of all types of R/W easements and permits for occupancy of public lands, and the maintenance of basic land ownership records for all public lands.

"B. Resource Management and Development

"The Bureau is responsible for a wide variety of land management and development activities directed toward these uses: Domestic livestock grazing, fish and wildlife development and utilization, outdoor recreation, timber production, watershed protection, wilderness preservation, and preservation of public values.

"The management and development activities

are conducted under a multiple use philosophy which attempts to maximize the total public and private benefit gained for the available financial and land resources involved.

"Resource Management and Development activities are supported by a construction and maintenance program which provides and maintains roads, trails, and physical improvements such as recreation facilities with watershed control structures.

"C. Cadastral Survey

"The Bureau maintains the official cadastral engineering service necessary to the identification and description of the public lands. It is authorized to make cadastral surveys of other Federal and intermingled lands under certain conditions. It plats and approves mineral surveys executed by United States Mineral Surveyors and prepares maps necessary to the administration of mineral leasing on the Outer Continental Shelf." 1/

The Bureau of Land Management is headed by a Director who is assisted by an Associate Director and a headquarters organization in Washington, D. C. As of February 2, 1969 the Washington office was reorganized. 2/ The Bureau of Land Management now has four Assistant Directors each reporting to the Director. 3/ One Assistant Director is in charge of Resources and he is responsible for developing and implementing natural resource policy as it relates to the management

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1/ Departmental Manual § 135.1.3 (Release No. 1092, 12/19/68).

2/ Bureau of Land Management Instruction Memo No. 69-31, Jan. 30, 1969.

3/ Departmental Manual § 135.2.2 (Release No. 1092, 12/19/68).

of renewable resources, lands, minerals, recreation, and fire control on the public domain. One of his two Deputy Assistant Directors supervises three divisions called (a) Energy & Minerals, (b) Lands & Realty and (c) Recreation, each headed by a Division Chief. 1/

The Division of Energy and Minerals is responsible for the development and implementation of technology and policy relating to salable minerals, locatable minerals, leasable minerals, marine energy and minerals resources, and minerals realty. It directs and conducts economic and technical energy and minerals and minerals realty studies. 2/

The functions of the Office of Appeals and Hearings in the headquarters organization deserve mention. This office reviews and issues decisions, or makes recommendations on appeals to the Director from decisions of field officials on matters arising under the laws and regulations, including those arising under the mining, mineral leasing, and mineral materials disposal laws. Other functions of this office include providing administrative direction to the work and functioning of Field Hearing Examiner Officers, evaluating the quality and effectiveness of field level adjudicative decision-making, participating in training and issuing guides to improve decision writing, identifying ambiguous or vague provisions of statutes and regulations which produce uncertainty or inconsistency when applied, and evaluating the administrative appellate process in public land cases and making recommendations for changes to improve it. 3/

Broad authority has been delegated by the Director of the Bureau of Land Management to the State Director, and redelegated to the Land Office Managers, to take all actions

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1/ Id. § 135.2.2C. Organization Charts submitted with Bureau of Land Management Instruction Memo. No. 69-31, Jan. 30, 19

2/ Id.

3/ Departmental Manual § 135.2.2A(5) (Release No. 1092, 12/19/68).

of the Director (except that the Land Office Manager is not redelegated authority with respect to cadastral engineering) with respect to the granting of patents and other matters under the mining laws, acting on the issuance and cancellation of mineral permits and leases under the various mineral leasing laws, and disposing of mineral materials by sale under the Materials Disposal Act of 1947. The delegations of authority to the State Director and the Land Office Manager are limited by existing policies, regulations and procedures of the Department of the Interior. The authority of the State Director is also limited to his state and the authority of the Land Office Manager is limited to "his respective areas of responsibility and under the direct supervision of the State Director." The Land Office Manager is also authorized by written order to delegate to any qualified employee of the land office the authority to perform the function of the Land Office Manager in his absence. 1/ The only authority relating to minerals redelegated to the District Manager is the authority to make sales of mineral materials not exceeding $2,000 unless authorized to make sales in greater amounts by virtue of a delegation from the State Director. 2/

For the western states and Alaska, the minerals and other land and resources management programs of the Bureau of Land Management are conducted in the field through eleven State Offices and sixty-three District Offices. 3/ These

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1/ Bureau Order No. 701, as amended by Amendments 1 through 5. Order No. 701, 29 Fed.Reg. 10526 (1964); Amendment No. 1, 29 Fed.Reg. 18393 (1964); Amendment No. 2, 31 Fed.Reg. 6594 (1966); Amendment No. 3, 32 Fed.Reg. 4176 (1967); Amendment No. 4, 32 Fed.Reg. 4176 (1967); Amendment No. 5, 33 Fed. Reg. 15078, 15484 (1968).

2/ Id. However, VI B.L.M. Manual § 4.6.19 (Rel. 98, 1/9/61) still provides that all sales of mineral materials for more than $1,000 must be approved by the State Supervisor (now State Director).

3/ Departmental Manual §§ 135.2.4 and 135.3.1 (Release No. 1092, 12/19/68).

functions with respect to nonfuel minerals in other States are conducted from the Eastern States Land Office. 1/ The State Offices headed by State Directors are the intermediate level supervisory and operations offices. They are responsible for developing and managing renewable and nonrenewable resource programs and maintaining the official land records. They have divisional components for resource management, including Land Office and cadastral engineering functions. Under the supervision of each State Office are two or more District Offices which carry out resource management work programs on the ground. 2/ The eleven western State Offices, each with Land Office functions, and the sixty-three District Offices serve more than eleven states, as is shown by the following list of additional states covered by some of the State Offices.

State Director	Additional States
Montana	North Dakota, South Dakota, and Minnesota
Wyoming	Nebraska and Kansas
New Mexico	Oklahoma and Texas
Oregon	Washington

In the Bureau of Land Management, the public transacts most of its business with the Land Office on mining and mineral leasing matters and with both the Land Office and the District Office on mineral material disposal matters. Applications for mineral leases and for prospecting permits are filed, processed, and adjudicated in the Land Office and permits and leases are issued from that office. Applications for mineral patents are also filed, processed, and adjudicated in that office. Reports of examinations of mining claims on lands other than National Forests are usually made by mineral examiners working out of the District Offices and such reports on lands in National Forests are made by mineral examiners in the Forest Service. These reports are evaluated and approved or disapproved by the

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1/ Id. § 135.2.5A

2/ Id. § 135.2.4.

State Office. 1/ If the report is favorable and all other requirements for a mineral patent have been met, the Land Office will issue a mineral patent. When the report is unfavorable, the State Director determines whether a contest should be brought. 2/

Private and Government contests are commenced by the filing of a contest complaint with the Land Office. 3/ In the case of Government contests, the Land Office prepares the contest complaint either on its own initiative 4/ or on the recommendation for contest proceedings made by other agencies such as the Forest Service. 5/

The Land Office and District Office share in the responsibility for sales of mineral materials. Small sales and free use permits for small quantities of mineral materials

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1/ Formerly, evaluation of these reports was one of the functions of the Division of Land and Minerals Management in the State Office. However, in at least some of the State Offices, the functions of this Division and the Land Office have been merged and the merged office is called the Land Office. Bureau of Land Management Instruction Memo No. 64-353 (July 9, 1964).

2/ VI B.L.M. Manual, ch. 5.3.14 (Rel. 107, 6/21/62).

3/ 43 C.F.R. Subpart 1852 (1968).

4/ Id.

5/ VI B.L.M. Manual ch. 3.1 Illustration 4 (Rel. 107, 6/21/62) and Forest Service Handbook § 2811.11 (Sept. 1958) each sets forth a Memorandum of Understanding of 1957 between the Bureau of Land Management and the Forest Service entitled "Work Procedures Governing Action on Applications or Claims for Lands within National Forests" which, among other matters, prescribes procedures to be followed with respect to applications for mineral patents in National Forest and procedures for recommending contest proceedings under the basic mining laws.

are processed and issued by the District Office. The Land Office participates in the processing of contracts and free use permits for larger quantities of mineral materials. These larger transactions must be shown on the appropriate land status records in the Land Office and some of the contracts and free use permits for larger quantities of mineral materials must be approved by the State Director. 1/ The Land Office has the responsibility for coordinating the administration of the mining, mineral leasing, and mineral materials disposal laws with other federal land managing agencies such as the Forest Service, Bureau of Reclamation, and Bureau of Sport Fisheries and Wildlife. 2/

The Land Office maintains the official Federal land records. 3/ These records are:

(1) Survey records, consisting of field notes and township plats, which provide the means of identifying and describing the surveyed public lands.

(2) Status records, which formerly, in all Land Offices, consisted of various tract books designed primarily for the maintenance by legal subdivisions of all transactions involving the surveyed public lands. These records have been replaced in all States but Idaho and California by a new records system, which will also eventually replace the tract books in these two States. There are no plans to replace the records of the Eastern States Land Office in Washington, D. C. 4/

1/ VI B.L.M. Manual § 4.6.16A (Rel. 98, 1/9/61).

2/ The foregoing enumeration of duties are included in Position Description dated 6/27/67 for Land Office Manager, Phoenix, Arizona. The Phoenix Land Office does not administer the sales of mineral materials. This is the duty of the District Office except on sales over $2000, in which case the approval of the State Director is obtained.

3/ New B.L.M. Manual, Parts 1274 and 1275.

4/ Letter from Fred J. Weiler, State Director, BLM, Phoenix, Arizona, to Howard A. Twitty, Jan. 21, 1969.

The new records system eliminates posting to tract books. In place of the tract books, the new records consist of three parts: 1/

(a) The ownership plat, or master title plat, which shows survey data sufficient to identify vacant public domain, patented lands, reservations, withdrawals, etc.

(b) The use plat, which is a copy of the ownership plat, but, in addition to ownership, contains such information as is necessary to determine current applications, offers, leases, licenses, and permits. Generally, the use plat consists of two parts, one for oil and gas and the other for other uses.

(c) The historical index, which is a chronological narrative of the past and present actions affecting the use of, or which resulted in the issuance of, a lease, permit, right of way, or other grant. The historical index does not include any references to actions which did not result in the issuance of such a right.

(3) The control documents index, consisting of microfilm copies of patents and deeds which convey title to public land to and from United States, and copies of documents which affect or have affected control, limitations, or restrictions of the availability of right or title to or use of public lands and resources. 2/

(4) The Land Office serial case file system, consisting of a Serial Register and a serialized case file for each application or offer and the history of all actions taken

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1/ IV B.L.M. Manual § 131.6 (Rel. 123, 3/3/61).

2/ New B.L.M. Manual, Part 1275 (Release 1-134, 6/4/65).

on it. 1/ There is a case file for each public land transaction regardless of whether or not the transaction ever resulted in a patent, lease, license, or permit. The Serial Register is a part of the permanent records of the Land Office and is readily available for public inspection. Current case files are maintained in the Land Office; closed case files are sent to various locations for storage. 2/

Records for tracts of acquired lands are the responsibility of the federal agency which acquired the lands. The Bureau of Land Management maintains records of its disposition of minerals therein under the various mineral leasing laws. Under the Bureau of Land Management's new records program, acquired lands that it is advised of are shown in the same plats with public domain lands but a separate historical index is maintained for these lands. 3/ The lack of centralized responsibility for the maintenance of records on acquired lands causes the land office records as to such lands to be incomplete and unreliable. 4/ The Bureau of Land Management has authority to require the acquiring agencies to furnish title documents, but there is no uniform policy requiring all acquiring agencies to

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1/ Id. Part 1274 (Release 1-4, 11/14/62). There is no blotter or chronological register maintained of papers filed such as is maintained in a county recording office. For this reason, the public may not be certain that there is not a recently filed application which does not appear upon the Land Office records.

2/ Id. Part 1272 (Release 1-479, 10/1/68).

3/ IV B.L.M. Manual § 131.6.8 (Rel. 123, 3/3/61).

4/ Edwards, The Silk Purse and the Sow's Ear: Benefits and Limitations of the Project to Improve the Federal Land Records, 12 Rocky Mt. Mineral Law Inst. 243, 260 (1967).

report all land acquisitions to the Bureau of Land Management. 1/ An applicant for lease or permit on such lands

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1/ The Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 356 (1964) provides:

> "Upon request by the Secretary, the heads of all executive departments, independent establishments, or instrumentalities having jurisdiction over any of the lands referred to in section 351 of this title shall furnish to the Secretary the legal description of all of such lands, and all pertinent abstracts, title papers, and other documents in the possession of such agencies concerning the status of the title of the United States to the mineral deposits that may be found in such lands.
>
> "Abstracts, title papers, and other documents furnished to the Secretary under this section shall be recorded promptly in the Bureau of Land Management in such form as the Secretary shall deem adequate for their preservation and use in the administration of this chapter, whereupon the originals shall be returned promptly to the agency from which they were received. Duly authenticated copies of any such abstracts, title papers, or other documents may, however, be furnished to the Secretary, in lieu of the originals, in the discretion of the agency concerned."

This provision was opposed by the Department of Agriculture. See H.R. Rep. No. 550, 80th Cong. 1st Sess. 5 (1947), where the Assistant Secretary of Agriculture in a letter stated:

> "This Department is opposed to the provisions of section 7 of H.R. 3022. These records, in large measure, are maintained at the field offices of the agencies of this Department where they are needed in the day-to-day administration of the land and its resources, other than mineral. The transfers contemplated in this section would risk the loss of irreplaceable records. Their volume aggregates several

note continued

should, if practicable, name the Government agency that may have title records covering the ownership of the mineral interest involved. 2/

B. Geological Survey.

1. History.

In 1879, the National Academy of Sciences on Surveys of the Territories submitted to Congress a report which recommended the abolition of the Geological and Geographical Survey of the Territories, and the Geographical and Geological Survey of the Rocky Mountain region, both in the Department of the Interior, and the Geographical Surveys West of the 100th Meridian, in the Department of War, and the consolidation of the activities of these surveys into a single organization to be known as the Geological Survey. 3/ With reference to land classification, this committee report stated:

> "The best interest of the public domain require, for the purposes of intelligent administration, a

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note 1, continued

> thousand tons and the mere problem of assembly and transportation would be formidable. It is estimated that reproduction or duplication of the records would be an extremely costly job and would involve several years of work. It is felt preferable to restrict the supplying of records or information to lands for which specific leasing applications have been received. Such an arrangement is already in satisfactory operation with respect to applications for mineral leases on lands subject to the President's Reorganization Plan No. 3 of 1946."

2/ 43 C.F.R. §§ 3211.2 and 3221.1 (1968).

3/ Hibbard, A History of the Public Land Policies 500 (Reprinted 1939).

thorough knowledge of its geologic structure, natural resources, and products. The domain embraces a vast mineral wealth in its soils, metals, salines, stones, clays, etc. To meet the requirements of existing law in the disposition of the agricultural, mineral, pastoral, timber, desert, and swamp lands, a thorough investigation and classification of the acreage of the public domain is imperatively demanded. . . .

"The Land Office shall also call upon the United States Geological Survey for all information as to the value and classification of lands. . . ." 1/

The Act of March 3, 1879, 2/ provides that the Director of the Geological Survey "shall have the direction of Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." The same Act provided for a Commission to codify the land laws. 3/ This Commission submitted a report which, in effect, left the classification to be based on the plats and field-notes of the official surveys which, however, "shall be subject to correction upon proof of error satisfactory to the Commissioner of the General Land Office, and according to regulations to be prescribed by him". 4/ Thus, contrary to the intent of Congress in vesting the classification of land in the Geological Survey, this recommendation of the Commission would vest the responsibility in the General Land Office. The first Director of the Geological Survey, Clarence King, in his first report to the Secretary of the Interior in 1880, accepted the point of view of the Public Lands Commission and stated:

"I have assumed that Congress, in directing

1/ U.S. Geological Survey Bulletin No. 537, 11 (1913).

2/ 43 U.S.C. § 31 (1964).

3/ 20 Stat. 394.

4/ Ex. Doc. No. 46, 46th Cong., 2d Sess. 63 (1880).

me to make a classification of the public lands, could not have intended to supersede the machinery of the Land Office and substitute a classification to be executed by another bureau of the government without having distinctly provided for the necessary changes within the Land Office and adjustment of relations between the two bureaus. . . .

"I have therefore concluded that the intention of Congress was to begin a rigid scientific classification of the lands of the national domain, not for purposes of aiding the machinery of the General Land Office by furnishing a basis of sale, but for the general information of the people of the country, and to produce a series of land maps which should show all those features upon which intelligent agriculturists, miners, engineers and timbermen might, thereafter, base their operations and which would obviously be of the highest value for all students of the political economy and resources of the United States." 1/

This interpretation prevailed in part until about 1906 when the pressing need of the Department of the Interior for an adequate classification of mineral lands for the purposes of administration led to a revival of this suspended function of the Geological Survey, not by superseding the machinery of the General Land Office, but by cooperation between the General Land Office and the Geological Survey and by a series of orders from the Secretary of the Interior to whom both bureaus reported. These orders so defined the part that each was to bear in public land administration as to make the Geological Survey chiefly responsible for the classification of lands for their mineral character. 2/

As the demands on the Geological Survey for information became more frequent and numerous, a need arose within the

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1/ U.S. Geol. Survey Bulletin No. 537, 12 (1913).

2/ Id. 13.

Survey for a unit responsible for the assemblage of information obtained from field investigations and the conversion of such data into a form suitable for classification. To provide for this activity the Land Classification Board was created by order of the Director on December 18, 1908. 1/

On July 1, 1925, a Conservation Branch was created which assumed the functions of the Land Classification Board and also assumed the supervisory responsibilities under the Mineral Leasing Act of 1920 that previously had been performed by the Bureau of Mines. 2/ Thereafter, the Conservation Branch was made a Division, and, as a unit of this Division, there was created a Branch of Mineral Classification.

2. Delegation by the Secretary of the Interior of functions under the mineral leasing laws to the Geological Survey.

Elsewhere in the study it has been pointed out that the Geological Survey contends that its authority to perform certain functions under the mineral leasing laws is based on Instructions issued by the Secretary in 1925. 3/ The Departmental Manual states that the Geological Survey is assigned the responsibility for performing certain functions, the one pertinent to this study being: 4/

> "A. Classify Federal land as to water storage, water power and mineral value; supervise mining and

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1/ Branch of Mineral Classification Manual § 610.4.1. The Branch of Mineral Classification Manual is Parts 610-619 of a compilation of Geological Survey Manuals.

2/ Id.

3/ 51 L.D. 219 (1925). See also Branch of Mining Operations Manual § 626.1.1 (Release No. 1, 6/9/61) and Memorandum from Russell G. Wayland to Karl S. Landstrom, Jan. 23, 1969, set forth in Appendix V.

4/ Departmental Manual § 120.1.3 (Release No. 845, 6/8/66).

> oil and gas leases on Federal, Indian, Outer Continental Shelf, and certain Naval Petroleum Reserve lands; promote safety and welfare of the workmen; maintain production accounts and collect royalties; prepare maps and reports for publication; provide the Bureau of Land Management and other Federal agencies geologic and engineering advice and services in the management and disposition of the public domain."

The Secretary of the Interior has delegated to the Bureau of Land Management authority to exercise the "program authority of the Secretary of the Interior with respect to the management of the public domain, acquired lands, and the submerged lands of the Outer Continental Shelf under its jurisdiction, including all associated functions which relate thereto." 1/ It is provided that this general authority does not include the following:

> "(1) Any act not in accordance with the general policies, procedures, or regulations of the Secretary of the Interior.
>
> . . .
>
> "(10) Any functional assignments or delegations of other bureaus or offices of the Department as provided for in the regulations or orders of the Secretary of the Interior." 2/

The Departmental Manual does not contain a similar delegation of authority to the Geological Survey, the only delegation of authority relating to mineral leasing being authority delegated to the Geological Survey to approve, finally, applications for suspension of operations or production, or both, filed pursuant to 43 C.F.R. § 3102.4 and

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1/ Id. § 235.1.1 (Release No. 733, 4/3/65).

2/ Id.

§ 3222.6-2, and to terminate suspensions of this kind which have been granted. 1/

It would appear that assignments of functions relating to classification of Federal land for mineral value and supervision of mining leases on Federal land are "functional assignments" within the above quoted limitations on the delegation of authority to the Director, Bureau of Land Management. But what is the effect of the responsibility imposed on the Geological Survey to "provide the Bureau of Land Management . . . geological and engineering advice and services in the management and disposition of the public domain"? If it is a functional assignment to the Geological Survey, it is too general and does not, as do the 1925 Instructions, 2/ provide a clear-cut division of the authority of the Bureau of Land Management and the Geological Survey in the field of mineral leasing. This is particularly true because both agencies have certain functions to perform in the mineral leasing program which clearly are independent of the other agency. Complicating the entire picture are the unrescinded 1925 Instructions which both agencies agree are partially obsolete. Despite this, these Instructions establish clear-cut criteria which are lacking in current regulations. 3/

Elsewhere in the study situations are discussed in which the Bureau of Land Management and Geological Survey have disagreed with respect to the authority of the two agencies. In the past, consideration has been given to proposals that all mineral leasing responsibilities should be assigned to

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1/ Id. § 220.4.1 (Release No. 1026, 4/1/68).

2/ 51 L.D. 219 (1925)

3/ " . . . it being the intent that under the direction of the Secretary of the Interior, the General Land Office shall be the office of record, law, and collections in mineral leasing matters while the Geological Survey shall furnish scientific or technical information and advice, supervise prospecting and mining operations, record production and determine royalties and rentals." 51 L.D. at 221.

agency. One report made by a Committee headed by Sam R. Broadbent, Chief, Commerce and Housing Division, Bureau of Budget, submitted in April 1966, recommended that the entire mineral leasing function not be assigned to the Bureau of Land Management but that each continue to perform the respecti functions assigned to them. 1/

3. Current mineral leasing functions of the Geological Survey.

Current regulations of the Conservation Division state that the objective of the Branch of Mineral Classification is the conservation of the federal mineral estate through:

> "A. Collection of basic data involving thickness, quality, depth, and extent of minerals on Federal lands.
>
> "B. Classification of specific tracts of Federal land through evaluation of basic data as to the actual or probable presence of leasable mineral deposits.
>
> "C. Dissemination of such information by providing: (a) timely notice, requests for withdrawal or restoration, and classification actions to land-administering agencies in order to avoid improvident disposal or use under nonmineral land laws; (b) geologic determinations required by the Mineral Leasing Acts and geologic evaluations and counsel required by Federal agencies involved in the disposal through lease or sale, or development and production under lease of Federal mineral lands." 2/

1/ The Broadbent report is set forth in Appendix V. An earlier report that reached a contrary conclusion is dated Sept. 15, 1950, entitled "A Report on the Field Services of the Department of Interior". It was prepared by the members of the faculty and staff of Princeton University.

2/ Conservation Division Manual § 651.2.6. The Conservation Division Manual is Parts 650 to 699 of a compilation of Manuals of the Geological Survey.

It is interesting that the Branch of Mineral Classification states its role in current regulations somewhat differently:

> "Objectives. The role of the Branch of Mineral Classification in its prime objective is (1) to conduct a scientific classification of the lands under Federal jurisdiction to determine the actual or probable presence of leasable and other mineral deposits of value on such lands anywhere in the United States or its territories; (2) to prepare geologic maps and reports and assemble the data required in the mineral classification of Federal lands; (3) make certain technical determinations of a geologic nature required in the administration of the Mineral Leasing Act of 1920 (as amended); (4) to furnish other Federal administrative and supervising agencies with geologic determinations and counsel requisite to the management of the lands under their jurisdiction; (5) to maintain a file of the data accumulated by field investigations in a manner that the collected geologic data may be readily translated into a classification of the mineral resources of Federal lands, and to prepare for open file or publication the results of these investigations." 1/

The Branch of Mineral Classification is organized with a headquarters in Washington, and the United States, including Alaska, is divided into seven regions with a Regional Geologist in charge in each region. Three of the Regions have districts with a District Geologist in charge. 2/ The field investigations required to conduct the functions of the Branch are performed out of the regional and district offices and in many instances they initiate the formal procedures performed by the Branch. Unlike the Bureau of Land Management, however, final action is not taken out in the field. Instead, the final preparation and recommendation

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1/ Branch of Mineral Classification Manual § 610.4.2.

2/ Id. § 610.4, Exhibits 1 and 2. These exhibits are not up to date since comments accompanying letter dated Aug. 6, 1969, to Wayne N. Aspinall, Ch.Pub.L.L.Rev.Comm., from Mitchell Melich, Solicitor of the Department of the Interior, state that "Branch of Mineral Classification has seven regions onshore including Alaska and has one Outer Continental Shelf (OCS) region. Four of the regions have district offices."

for formal classification or transmittal of recommendation for the withdrawal or restoration of lands are prepared by the Washington office staff. 1/

The present functions of the Branch of Mining Operations were acquired by the Geological Survey on July 1, 1925, when the functions, personnel, records, equipment and appropriations of the Oil Leasing Division and the Mineral Leasing Division of the Bureau of Mines, Department of the Interior, were transferred to the Geological Survey. 2/ The Conservation Branch continued the mineral leasing activities transferred from the Bureau of Mines, 3/ and these functions were carried on in a Mineral Leasing Division within the Branch. On November 1, 1931, the Mineral Leasing Division was divided into the Mining Division and Oil and Gas Leasing Division. These divisions were later renamed and the Mining Division is now the Branch of Mining Operations. 4/ The higher echelon in the Survey, formerly known as the Conservation Branch, was on January 1, 1949, renamed the Conservation Division, 5/ which now has as branches: the Branch of Mining Operations, the Branch of Oil and Gas Operations, the Branch of Mineral Classification, and the Branch of Waterpower Classification. 6/

The Branch of Mining Operations supervises operations and activities for the prospecting, development, and production of various minerals and solid fuels under leases

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1/ Id. § 610.4.4.

2/ Executive Order of June 4, 1925; Departamental Order No. 54, June 25, 1925.

3/ Survey Order No. 115, July 1, 1925.

4/ Branch of Mining Operations Manual § 629.1.1.

5/ Conservation Division Manual § 651.1.1.

6/ Id. § 651.2.1.

on Federal and Indian lands subject to the various leasing laws. 1/ This work is described in the Mining Operations Branch Manual as:

> "Supervision by the Branch includes responsibility for investigating and reporting on applications for mineral leases and prospecting permits, recommending lease terms, enforcing compliance with lease terms and operating regulations governing the conduct of prospecting, mining and the preparation of leased products, the safety and welfare of employees, the protection and conservation of natural resources, ascertaining production and maintaining record thereof, granting and terminating relief from rental and minimum production requirements of leases, determining royalty liability, preparing statements of accounts, and receiving payment of royalties and rentals on productive properties." 2/

The Branch is organized along regional lines into seven regions covering the United States, including Alaska. The officer in charge of each region is called a Regional Mining Supervisor. 3/ The geographical boundaries of the regions of the Branch of Mining Operations do not coincide with the boundaries of the regions of the Branch of Mineral Classification.

C. Forest Service

The Act of August 15, 1876, ch. 287 4/ appropriated funds and directed the Commissioner of Agriculture to appoint a special agent to study forest conditions, and by 1881 this work was being performed by an agency known as the Division

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1/ Id.

2/ Branch of Mining Operations Manual § 629.1.2.

3/ Id. § 629.1.3 (Release No. 1, 6/9/61).

4/ 19 Stat. 167.

of Forestry. 1/

Section 24 of the Act of March 3, 1891 2/ authorized the President to establish forest reserves from the public domain. From 1891 to 1905, sixty forest reserves were created with a total of 56,000,000 acres. These reserves were originally under the administration of the General Land Office in the Department of the Interior. In 1898, Gifford Pinchot was named head of the Division of Forestry and its name was changed and authority expanded by the Act of March 2, 1901, ch. 805. 3/ Section 1 of the Transfer Act of February 1, 1905, 4/ provided for the transfer of the forest reserves from the Department of the Interior to the Department of Agriculture. The agency administering them became known as the Forest Service in 1905, and the name Forest Reserves was changed to National Forests in 1907. 5/

The Forest Service, in addition to having jurisdiction of approximately 160 million acres of public domain lands, also has jurisdiction over approximately 26,000,000 acres of acquired lands. 6/ These lands have been acquired under various programs of the government, including the Weeks Act 7/ and Title III of the Bankhead-Jones Farm Tenant Act. 8/ The

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1/ Forest Service Manual § 1011 (Amendment No. 12, July 1968).

2/ 16 U.S.C. § 471 (1964).

3/ 31 Stat. 929.

4/ 16 U.S.C. § 472 (1964).

5/ Forest Service Manual § 1012 (Amendment No. 12, July 1968).

6/ U.S. Dept. of the Interior, Public Land Statistics, 12 (1967).

7/ 16 U.S.C. § 513 et seq. (1964).

8/ 7 U.S.C. § 1011(c) (1964).

term "National Grasslands" is used to describe part of the lands acquired under Title III of the Bankhead-Jones Farm Tenant Act which was transferred to the Forest Service for administration. The term "National Forest System" includes National Forests, National Grasslands, and other related lands for which the Forest Service is assigned administrative responsibility. 1/

The headquarters of the Forest Service is in Washington, D. C. and there are nine regional field offices. A Regional Forester is responsible to the Chief of the Forest Service for the activities assigned to his Region. Each Region is divided into National Forests, National Grasslands and other areas administered by the Forest Service, with a Forest Supervisor responsible to the Regional Forester for the activities assigned to his unit. The National Forests and National Grasslands are divided into Ranger Districts with a District Ranger responsible to the Forest Supervisor for the activities assigned to his Ranger District. 2/

Except those areas that may be withdrawn from location under the mining laws (or leasing under the mineral leasing laws), all of the public domain under the jurisdiction of the Forest Service is open to mineral location under the mining laws and to mineral leasing under the Mineral Leasing Act of 1920. Acquired lands and some lands withdrawn from mining location are open to leasing under the various mineral leasing laws. By delegation from the Secretary of Agriculture, the Forest Service may dispose of the mineral materials on the public domain under its jurisdiction pursuant to the Materials Disposal Act of 1947 and on acquired lands under the authority of the Act of June 11, 1960 3/ which transferred the authority to make disposal of mineral materials on acquired lands under the jurisdiction of the Secretary of Agriculture to him from the Secretary of the Interior.

Although the Forest Service does not administer the mining and mineral leasing laws, it does have, particularly since July 23, 1955, the right to manage and dispose of the vegetative surface resources on lands under its jurisdiction and to manage

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1/ Forest Service Manual § 1012 (Amendment No. 12, July 1968).

2/ 36 C.F.R. § 200.2 (1968).

3/ Pub.L.No. 86-509, § 1(1), 74 Stat. 205, 5 U.S.C. note following § 511 (1964), 7 U.S.C.A. note following § 2201 (Supp. 1968).

other surface resources thereon except mineral deposits subject to location under the mining laws. 1/ By refusing to consent to the issuance of a prospecting permit or lease on acquired land 2/ and public domain in Minnesota, 3/ it may prevent the issuance of a permit or lease or insist that it be issued subject to stipulations prepared by the Forest Service. Its authority is more restricted under the Mineral Leasing Act of 1920 since its recommendations need not be followed by the Bureau of Land Management, which has the responsibility for issuing permits and leases.

In 1905, jurisdiction over the forest reserves, now known as National Forests, was transferred from the Secretary of the

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1/ 30 U.S.C. § 612 (1964). The Forest Service Manual § 281T.1 (Sept. 1958) states that the Secretary of Agriculture ha authority to issue specific regulations covering prospecting, locating, and developing mineral resources within the National Forests pursuant to 16 U.S.C. § 478 (1964). This section states that persons may prospect, locate and develop the mineral resources in National Forests "provided, that such persons comply with the rules and regulations covering the National Forests." The Forest Service Manual (§ 2811.11) states that no specific regulations have been issued covering prospecting, locating, and developing mineral resources within the National Forests save for a limited area in the Black Hills of South Dakota. These regulations (36 C.F.R. §§ 251.10 and 251.11 (1968)) were not issued pursuant to 16 U.S.C. § 478 but pursuant to 16 U.S.C. § 678a (1964) which specifically authorizes the issuance of the regulations for that part of the Harney National Forest designated as the Custer State Park Game Sanctuary, South Dakota.

See 36 C.F.R. § 251.86 (1968). This regulation is appl cable to Primitive areas. Subsection (a) provides that there sha be no roads or other provision for motorized transportation in Primitive areas, ". . . Provided, That existing roads over Nation Forest lands reserved from the public domain and roads necessary for the exercise of a statutory right of ingress and egress may b allowed under appropriate conditions determined by the Chief, Forest Service." Subsection (b) prohibits for certain uses and restricts for other uses motorized transportation and other motor ized equipment in Primitive areas but concludes by stating: "Thes restrictions are not intended as limitations on statutory rights of ingress and egress or of prospecting, locating, and developing mineral resources."

2/ 30 U.S.C. § 352 (1964); 43 C.F.R. § 3211.2 (1968).

3/ 16 U.S.C. § 508b (1964); 43 C.F.R. § 3325.2 (1968).

Interior to the Secretary of Agriculture who, thereafter, was responsible for the administration of all laws affecting forest reserve lands, except that there was reserved to the Secretary of the Interior the administration of such laws as affect the surveying, prospecting, locating, appropriating, entering relinquishing, reconveying, certifying, or patenting of any of the lands. 1/ The same year the Secretary of the Interior and the Secretary of Agriculture defined the respective jurisdictions of the two departments as vesting in the Secretary of Agriculture jurisdiction to grant permission to occupy and use lands in the forest reserves which was temporary in character and which, if granted, would in nowise cloud the title of the United States should the forest reserve be discontinued, but retaining in the Secretary of the Interior the jurisdiction over all applications which, if granted, would result in an easement that would run with the land. 2/ Since unpatented mining claims are recognized as vested property rights which would not be affected by discontinuing the forest reserve and because of the express provision of law, 3/ the jurisdiction of the Secretary of the Interior to administer the mining laws on the National Forests is clear. But as early as 1906, the Secretary of the Interior recognized that his Department could determine, in the absence of application for patent, whether lands in the forest reserves (National Forests) were of a character subject to occupation and purchase under the mining laws where such a determination appeared necessary to the administration by the Secretary of Agriculture of the laws providing for the protection and maintenance of such forest reserves. 4/ This authority of the Secretary of Agriculture to file and prosecute contests before

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1/ 16 U.S.C. § 472 (1964).

2/ Letter from Secretary of the Interior to the Secretary of Agriculture, 33 L.D. 609 (1905).

3/ 16 U.S.C. § 472 (1964).

4/ Letter from the Secretary of the Interior to the Secretary of Agriculture, July 5, 1906, quoted in H. H. Yard, 38 L.D. 59, 62 (1909).

the land department in the Department of the Interior has been expressly recognized. 1/

In 1915, the Secretary of the Interior and the Secretary of Agriculture jointly issued a circular 2/ setting forth the procedure to be followed by the two agencies whenever a person should file an application to make a mineral or nonmineral entry or amend an existing entry involving lands within a National Forest. The Circular provided that the Forest Service could oppose any such entry by a protest initiated by the Department of Agriculture's filing a complaint in the local Land Office, and that at the hearing a district assistant to the Solicitor of the Department of Agriculture would appear and conduct the Government's side of the case.

In 1957, these regulations were superseded by a Memorandum of Understanding between the Bureau of Land Management and the Forest Service entitled "Work Procedures Governing Action on Applications or Claims for Lands within National Forests." 3/ The procedure to be followed by the Forest Service and Bureau of Land Management, where applications are made for entry or patent of mineral or nonmineral land in National Forests, generally follow the 1915 Circular. One difference is the express recognition that it is the responsibility of the Forest Service to make any necessary examination, including mineral, covering

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1/ Regulations, 35 L.D. 547 (1907); Circular, 35 L.D. 632 (1907); Circular, 36 L.D. 535 (1908).

2/ Circular, 44 L.D. 360 (1915). With only slight changes these regulations became 43 C.F.R. Part 205 (1954).

3/ VI B.L.M. Manual, ch. 3.1, Illustration 4 (Rel. 107, 6/21/62) and Forest Service Handbook § 2811.11 (Sept. 1958). By its terms the Memorandum of Understanding became effective as of the date revised regulations under 43 C.F.R. Part 205 were published, which was May 3, 1957. See 22 Fed.Reg. 3151 (1957).

National Forest lands included in the application. 1/ In addition, the Memorandum of Understanding establishes a procedure for the Forest Service to recommend an adverse proceeding against an unpatented mining claim on lands within a National Forest under the authority of the mining laws. The Memorandum of Understanding also provides procedures for two situations created by laws passed by Congress in 1955. One procedure relates to surface right determinations requested by the Forest Service under the Multiple Surface Use Act of 1955. 2/ The other procedure implements the Mining Claims Rights Restoration Act of 1955 3/ by providing that when the Land Office receives a copy of a placer mining location involving lands on a National Forest which is filed pursuant to the 1955 Act, a copy will be sent to the Forest Supervisor and Federal Power Commission. The regulation then prescribes the action to be taken by the various agencies to carry out the provisions of this 1955 Act.

1/ Memorandum of Understanding § A.3. This part of the Memorandum of Understanding raises the question whether the Secretary of the Interior may properly delegate his statutory authority to make mineral determinations to another agency. The answer probably is that these determinations are all evaluated by the State Offices of the Bureau of Land Management.

2/ 30 U.S.C. § 601 et seq. (1964). The right of the Forest Service to select an adverse proceeding to have the mining claim declared invalid rather than merely a determination of surface rights is pointed out in United States v. Bergdal, 74 I.D. 245 (1967).

3/ 30 U.S.C. § 623 (1964). This is one situation where a copy of the location notice of a mining claim is filed with the Bureau of Land Management as well as with the county recording office.

PART II

EXISTING FEDERAL LEGAL SYSTEMS

SUBPART II-1

LANDS AND MINERALS SUBJECT TO LOCATION, LEASE, OR MATERIALS DISPOSAL

CHAPTER 5

LANDS SUBJECT TO LOCATION, LEASE, OR MATERIALS DISPOSAL

A. Public lands.

The Lode Law of 1866 1/ established the policy, carried forward into the Mineral Location Law of 1872, that--

> ". . . all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . ." 2/

The Mineral Leasing Act of 1920, as amended, applies to--

> "Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil impregnated rock or sands from which the oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and monuments, those acquired under other acts subsequent to February 25, 1920, and lands within the naval

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1/ 14 Stat. 251: ". . . the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared free and open to exploration and occupation . . . ."

2/ 30 U.S.C. § 22 (1964).

petroleum and oil-shale reserves . . . ." 1/

With respect to sulphur deposits, the Mineral Leasing Act of 1920 is applicable only to the States of Louisiana and New Mexico. 2/

The Materials Disposal Act of 1947 applies to public lands of the United States, including the revested Oregon and California Railroad lands and the reconveyed Coos Bay Wagon Road grant lands. 3/

1. The thirteen original states.

The United States acquired no public lands in Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, or Virginia, and the public land laws have never been operative in these states.

2. States carved from the thirteen original states.

Kentucky, 4/ Vermont, 5/ Maine, 6/ and West Virginia 7/ were created from territory belonging to the thirteen original

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1/ Id. § 181.

2/ Id. § 271.

3/ Id. § 601

4/ Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

5/ Act of Feb. 18, 1791, ch. 7, 1 Stat. 191.

6/ Act of Mar. 4, 1820, ch. 4, 1 Stat. 189.

7/ Act of Dec. 31, 1862, ch. 6, 12 Stat. 633.

states and, as with those states, the United States acquired no public lands within these four states upon which the public land laws could operate.

3. Tennessee.

Tennessee originally constituted a part of North Carolina. In 1789, the latter state made a cession, both of soil and sovereignty, to the United States of all the territory now contained within the boundaries of Tennessee. 1/ A portion of this territory was ceded by the United States to Tennessee in 1806, 2/ and the balance was ceded in 1846, 3/ leaving no lands upon which the public land laws could operate.

4. Texas.

Upon annexation, Texas retained all vacant and unappropriated lands within its boundaries, 4/ and the United States acquired no lands upon which the public land laws could operate.

5. Illinois, Iowa, Ohio, and Indiana.

The mineral land laws (except the lead and saline leasing laws) were never of practical operation in Illinois, Iowa,

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1/ Accepted by Act of Apr. 2, 1790, ch. 6, 1 Stat. 106.

2/ Act of Apr. 18, 1806, ch.31, 2 Stat. 381, amended by Act of Feb. 18, 1841, ch. 7, 5 Stat. 412.

3/ Act of Aug. 2, 1846, ch. 92, 9 Stat. 66.

4/ Joint Resolution of Mar. 1, 1845, No. 8, 5 Stat. 797.

Ohio, or Indiana, as most of the public domain in those states had been disposed of prior to 1866. 1/

6. Statutory exclusions.

Michigan, Wisconsin, and Minnesota were excluded from the operation of the Mineral Location Law of 1872 in 1873, 2/ Missouri and Kansas in 1876, 3/ and Alabama in 1883. 4/

7. Oklahoma.

In 1891, all lands in Oklahoma, except as otherwise provided by law, were declared to be agricultural lands. 5/ Certain lands ceded to the United States by Indian tribes were declared open to location in 1895 6/ and 1900. 7/ Except as provided in these two acts, no land in Oklahoma is subject to location. 8/

1/ 1 Lindley, Mines § 20 (3d ed. 1914).

2/ Act of Feb. 18, 1873, 30 U.S.C. § 48 (1964). The Act of June 30, 1950, 16 U.S.C. § 508b (1964) provides for the leasing of certain national forest lands in Minnesota for minerals, which, except for the 1873 Act would have been locatable.

3/ Act of May 9, 1876, 30 U.S.C. § 49 (1964).

4/ Act of Mar. 3, 1883, 30 U.S.C. § 171 (1964).

5/ Act of Mar. 3, 1891, § 16, 43 U.S C. § 1098 (1964).

6/ Act of Mar. 2, 1895, ch. 188, 28 Stat. 876, 899.

7/ Act of Jun. 6, 1900, ch. 813, 31 Stat. 672, 680.

8/ Oklahoma v. Texas, 258 U.S. 574, 601 (1922). And see Benjamin F. Robinson, 35 L.D. 421 (1907) (building stone); Lenertz v. Malloy, 36 L.D. 170 (1907); Knight Placer Mining Association v. Hardin, 47 L.D. 331 (1920).

8. Hawaii.

The resolution annexing Hawaii provided that--

> ". . . the existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Island; but the Congress of the United States shall enact special laws for their management and disposition . . . ." 1/

By this resolution, title to the public lands of Hawaii became vested in the United States. 2/ No laws providing for the reservation or disposition of minerals were enacted by Congress, but rather the laws of Hawaii relating to public lands were continued in force 3/ and remained in force until Hawaii was admitted to statehood. Upon admission, the United States granted to Hawaii title to all public lands then held by the United States, leaving no land upon which the public land laws could operate. 4/

9. States with locatable public domain.

The mining laws are in full effect in Alaska, 5/ Arizona, Arkansas, 6/ California, Colorado, Florida, 7/

1/ Joint Resolution of July 7, 1898, No. 55, 30 Stat.750.

2/ 22 Op.Att'y Gen. 627 (1899).

3/ Act of Apr. 30, 1900, ch. 339, § 73, 21 Stat.141, 154.

4/ Act of Mar. 18, 1959, Pub.L.No. 86-3, 74 Stat. 4.

5/ Act of July 7, 1958, Pub.L.No. 85-508, § 8(d), 72 Stat. 339, 344.

6/ See Instructions, 31 L.D. 135 (1901).

7/ See id.

Idaho, Louisiana, 1/ Mississippi, 2/ Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

B. Acquired lands.

With one minuscule exception, 3/ acquired lands are not subject to location. 4/ Although Section 1 of the Mineral Location Law of 1872 provided that all valuable mineral deposits "in land belonging to the United States" should be subject to location and purchase, 5/ the section was but a re-enactment of Section 1 of the Lode Law of 1866, which provided that "the mineral lands of the public domain" should be subject to location and purchase. 6/ In Oklahoma v. Texas 7/ the Supreme Court discussed the first section of the Mineral Location Law of 1872:

> "This section is not as comprehensive as its words, separately considered, suggest. It is part

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1/ See id.

2/ See id.

3/ A holder of a coal lease issued under the Mineral Leasing Act for Acquired Lands (1947) prior to August 11, 1955, or thereafter if based upon a prospecting permit issued prior to that date, has the exclusive right to locate a mining claim upon the discovery, during the term of the lease, of valuable source material in a bed or deposit of lignite situated within the leased lands. 30 U.S.C. § 341d (1964).

4/ Rawson v. United States, 225 F.2d 855 (9th Cir. 1955); Thompson v. United States, 308 F.2d 628 (9th Cir. 1962).

5/ 30 U.S.C. § 22 (1964).

6/ 14 Stat. 251.

7/ 258 U.S. 574 (1922).

> of a title dealing with the survey and disposal of 'The Public Lands.' To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington, or the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, and the military reservations throughout the western states. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply . . . ."

The Mineral Leasing Act of 1920 does not apply to lands acquired under the Appalachian Forest Act, or lands acquired under other Acts subsequent to February 25, 1920. 1/

The Mineral Leasing Act for Acquired Lands (1947) applies to--

> ". . . all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulphur which are owned or may hereafter be acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks, or monuments, (b) set aside for military or naval purposes, or (c) tidelands or submerged lands) . . . ." 2/

The terms "acquired lands" and "lands acquired by the United States"include all lands acquired by the United States to which the "mineral leasing laws" had not been extended, including lands acquired under the provisions of the Act of

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1/ 30 U.S.C. § 181 (1964).

2/ Id. § 352.

March 1, 1911, 16 U.S.C. § 552 (1964). 1/ By express statutory provision, leasing is authorized of fractional and future interests in minerals which have been or may be acquired by the United States. 2/

The Mineral Leasing Act for Acquired Lands, unlike the Mineral Leasing Act of 1920, applies to sulphur deposits on acquired lands wherever situated. The Mineral Leasing Act for Acquired Lands does not apply to lands (1) acquired for the development of their mineral deposits, (2) acquired by foreclosure or otherwise for resale, or (3) reported as surplus under the Surplus Property Act of 1944. 3/ The word "mineral", as used in the first exclusion enumerated above, has an interesting legislative history. The Department of the Interior had reported to Congress that authority had been granted to the Bureau of Mines to purchase lands valuable for helium, and that development of such lands under lease would jeopardize the helium deposits. 4/ At the time of the hearing on the bill--

> ". . . it was suggested that the word 'mineral' in the above quotation be stricken and the word 'helium' inserted therefor. Representatives of the Department of the Interior and the committee agreed, however, that the word 'mineral,' in this instance, should apply only to helium, fissionable materials, or any other mineral absolutely essential to the defense of the country, but excluding the minerals specifically mentioned in the bill. In the light of this understanding, the committee decided to retain the foregoing amendment as recommended." 5/

1/ Id. § 351.

2/ Id. § 354.

3/ Id. § 352.

4/ S.Rep.No. 161, 80th Cong., 1st Sess. 3-4 (1947).

5/ H.R.Rep.No. 550, 80th Cong., 1st Sess. 3 (1947).

The applicability of the Mineral Leasing Act for Acquired Lands was discussed in a 1950 Opinion of the Solicitor, 1/ in which it was said:

> ". . . The purpose of the Mineral Leasing Act for Acquired Lands was clearly stated by the Committee on Public Lands of the House of Representatives in its report on the bill (H.R. 3022, 80th Cong.) which later became the statute under consideration here. The Committee said that--
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> > '* * * The proposed legislation extends the mineral leasing laws now applicable to public domain lands, to all acquired lands, with certain exceptions. * * * [H. Rept. 550, 80th Cong., p. 2; italics supplied.]
>
> "In view of the clear congressional statement of purpose, I do not believe that this Department would be warranted in reading into the Mineral Leasing Act for Acquired Lands any exceptions to its provisions, other than those expressly stated by the Congress in section 3 of the act."

The Mineral Leasing Act for Acquired Lands does not apply to minerals other than those named in the Act, and authority to lease other minerals must be sought elsewhere. The Act of March 4, 1917, ch. 179, 2/ as originally enacted, 3/ provided:

> "The Secretary of Agriculture is authorized under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the Act of March first, nineteen

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1/ 60 I.D. 441 (1950).

2/ 39 Stat. 1150.

3/ The current version is found in 16 U.S.C. § 520 (1964).

hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty one), known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States. . . ."

Although this is apparently the only statute specifically authorizing the leasing of acquired lands for minerals not covered by the Mineral Leasing Act for Acquired Lands (1947), mineral leasing under the authority of several more general statutes has apparently been acquiesced in by Congress, as is evidenced by the language of Section 402 of Reorganization Plan No. 3 of 1946 1/ which transferred the functions of the Secretary of Agriculture and the Department of Agriculture relative to the leasing of minerals in certain acquired lands to the Secretary of the Interior. Section 402 provides:

"Functions relating to mineral deposits in certain lands.-- The functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to the provisions of the Act of March 4, 1917, Title II of the National Industrial Recovery Act of June 16, 1933, the 1935 Emergency Relief Appropriation Act of April 8, 1935, (48 Stat. 115, 118), section 55 of Title I of the Act of August 24, 1935 (49 Stat. 750, 781), and the Act of July 22, 1937 (50 Stat. 522, 525, 530), as amended July 28, 1942 are hereby transferred to the Secretary of the Interior and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of the Interior as he may designate: Provided, that mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect

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1/ 60 Stat. 1099, 5 U.S.C. note following § 133y-16 (1964), 5 U.S.C.A.App. 188 (1967).

such purposes. The provisions of law governing the crediting and distribution of revenues derived from the said lands shall be applicable to revenues derived in connection with the functions transferred by this section. To the extent necessary in connection with the performance of the functions transferred by this section, the Secretary of the Interior and his representatives shall have access to the title records of the Department of Agriculture relating to the lands affected by this section."

Congress enacted two later laws authorizing the Secretary of the Interior to issue leases and permits for the exploration, development, and utilization of deposits, other than those subject to the Mineral Leasing Act for Acquired Lands, in certain lands administered by the Secretary of Agriculture. 1/

The acquired lands which are the subject of Section 402 are limited to those administered by the following Acts of Congress:

(1) Act of March 4, 1917, as amended. 2/ The lands covered by this Act are those purchased under the Weeks Law, as amended, which authorized the Secretary of Agriculture to purchase certain forested, cut over, or denuded lands. 3/

(2) Act of June 16, 1933, which created a Federal Emergency Administration of Public Works and authorized the purchase of lands for public works and construction projects. 4/

1/ Act of Sept. 1, 1949, 30 U.S.C. § 192c (1964) (applicable to lands added to the Shasta National Forest by the Act of March 19, 1948, ch. 139, 62 Stat. 83); Act of June 28, 1952, ch. 482, § 3, 66 Stat. 284, 285 (applicable to certain lands located in two New Mexico counties).

2/ 16 U.S.C. § 520 (1964).

3/ Id. § 513 et seq.

4/ 40 U.S.C. §§ 401, 403(a), and 408 (1964).

(3) Act of April 8, 1935, ch. 48, commonly called the Emergency Relief Appropiation Act of 1935. 1/

(4) Section 55 of the Act of August 24, 1935, ch. 641, 2/ which was a part of the Emergency Relief Appropriation Act of 1935 and provided for the purchase of real property and authorized the improvement and development, and the sale, lease, or other disposal of purchased property.

(5) Act of July 22, 1937, as amended, which provided for land conservation and land utilization, including the purchase of lands to carry out these purposes. 3/ Section 32 of the Act authorizes the sale, exchange, lease, or disposal of lands so acquired. 4/

C. Lands obtained by gift or exchange.

The Act of March 20, 1922, 5/ authorizes the Secretary of the Interior to accept title to certain lands within the exterior boundaries of the national forests and, in exchange, to issue a patent for an equal value of national forest land, surveyed and nonmineral in character. Lands so acquired are deemed a part of the public domain. 6/

Section 8 of the Taylor Grazing Act 7/ authorizes the

1/ 49 Stat. 115, 118.

2/ 49 Stat. 750, 781.

3/ 7 U.S.C. § 1010 (1964).

4/ Id. § 1011(c).

5/ 16 U.S.C. § 485 (1964).

6/ 40 Op.Att'y Gen. 260 (1943).

7/ 43 U.S.C. § 315g (1964).

Secretary to accept title to certain privately owned lands and, in exchange, to issue a patent for an equal value of surveyed grazing district land or unreserved surveyed public land in the same state or in an adjoining state but within 50 miles of the base lands. The section also provides for the exchange of lands with the states. The section further provides that--

> ". . . lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands . . . ."

The Secretary takes the position that, with respect to these lands--

> ". . . it remains for the Department and for it alone in the absence of congressional direction to determine when and how such lands shall be opened for disposal." 1/

Apparently Section 1 of the Mineral Location Law of 1872 2/ is not considered by the Secretary to be a sufficient "congressional direction".

Lands obtained by private or state exchanges which are restored to the status of public lands are subject to the

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1/ Southern California Petroleum Co., 66 I.D. 61 (1959), quoting from Earl Crecelouis Hall, 58 I.D. 557 (1943). The line of decisions upon which these cases rely are to the effect that land restored to the public domain is not subject to entry until the restoration is noted on the records. See Holt v. Murphy, 207 U.S. 407 (1908); Mayberry v. Hazletine, 32 L.D. 41 (1903). The rule is one designed to further administrative efficiency, and contemplates that the proper steps will be taken in due course. It should not be used as a device for withdrawing from location lands declared by Congress to be open to location.

2/ 30 U.S.C § 22 (1964).

Materials Disposal Act of 1947. 1/

D. Lands classified by the Secretary of the Interior.

The distinction between withdrawal and classification is discussed in 1 Wheatley, Withdrawals and Reservations of Public Domain Lands (P.L.L.R.C. Study). The tendency on the part of both Congress 2/ and the Secretary of the Interior 3/ to trace all authority to classify to Section 7 of the Taylor Grazing Act seems, in the one case, unnecessary, and, in the other, unauthorized.

1. Isolated Tract Act of 1846.

The Isolated Tract Act of 1846, as amended, authorizes the Secretary to order into the market and sell at public auction certain isolated or disconnected tracts or parcels of the public domain. Certain tracts which are mountainous or too rough for cultivation may, in the discretion of the Secretary, be ordered into the market and sold at public auction upon the application of an adjoining landowner or entryman. 4/ Although the Isolated Tract Act does not grant the Secretary the authority to classify, he has provided by regulation that the filing of an application must be accompanied by a "petition for classification". 5/ Such an application does not segregate the land applied for from "other petition-applications under the public land laws", but the publication

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1/ VI B.L.M. Manual § 4.6.2B (Rel. 98, 1/9/1961).

2/ See 43 U.S.C. § 1411 (1964).

3/ See 43 C.F.R. § 2232.1-4(a) (1968).

4/ 43 U.S.C. § 1171 (1964).

5/ 43 C.F.R. § 2411.1-1 (1968).

of a notice placing lands into the market segregates such lands from all appropriations, including location under the mining laws. 1/

2. Taylor Grazing Act of 1934.

Section 7 of the Taylor Grazing Act of 1934, as amended, authorizes the Secretary to examine and classify lands which were withdrawn or reserved by Executive Order No. 6910, November 26, 1934 and Executive Order No. 3964, February 5, 1935, or which are within a grazing district. These lands may be classified as (1) more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, (2) more valuable or suitable for any other use than for the use provided for by the Taylor Grazing Act, or (3) proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant. 2/ The Act goes on to provide:

> "That locations and entries under the mining laws. . . may be made upon such withdrawn and reserved areas without regard to classification and without restriction or limitation by any provision of this chapter." 3/

Notwithstanding the very explicit language of the statute, the Secretary has provided by regulation that--

> ". . .lands in the States classified pursuant to the Recreation and Public Purposes act under section 7 of the act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315f), as amended, will be segregated from all appropriations,

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1/ Id. § 2243.1-6.

2/ 43 U.S.C. § 315f (1968).

3/ Id.

including locations under the mining laws, except as provided in the order of classification or in any modification or revision thereof." 1/

This regulation is directly contrary to the statute. 2/

3. Small Tract Act.

The Small Tract Act of 1938, as amended, authorizes the Secretary, in his discretion, to sell or lease tracts not exceeding five acres of certain public lands and withdrawn lands, which he may classify as chiefly valuable for residence, recreation, business, or community site purposes. 3/ The Secretary considers the classification of lands for disposition as small tracts a withdrawal of such lands from all appropriations, including locations under the mining laws, 4/ with the classification relating back to the date of the application for classification. 5/

1/ 43 C.F.R. § 2013.3-2(a) (1968).

2/ Buch v. Hickel, No.68-1358-PH (C.D. Cal. Mar. 20, 1969).

3/ 43 U.S.C. § 682a (1964). Land embraced within an unpatented mining claim cannot be classified for disposition under the Small Tract Act. Mansell O. LaFox, 71 I.D. 199 (1964).

4/ 43 C.F.R. § 2233.2(b) (1968); Las Vegas Sand & Gravel Co., 67 I.D. 259 (1960); Harry E. Nichols, 68 I.D. 39 (1961); J. R. Henderson, A-28652 (July 18, 1961).

5/ Harry E. Nichols, 68 I.D. 39 (1961).

4. Recreation and Public Purposes Act.

The Recreation Act of 1926 1/ was extensively amended and expanded in 1954. 2/ Although the 1926 Act gave the Secretary general authority to withdraw lands "classified by him as chiefly valuable for recreational purposes", the 1950 Act merely permitted the Secretary to classify "public lands in Alaska" for disposition under the Act, and provided that lands so classified are not subject to location or mineral leasing. 3/ The authority to classify "public lands in Alaska" has been construed by the Secretary to include the authority to classify lands in San Bernardino County, California. 4/ The basis for this construction was stated in R. C. Buch: 5/

> "The legislative history of the Act of June 4, 1954, reveals that this provision regarding classification specifically mentioned Alaska because the classification provisions of section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315f (1964), did not apply there, and such provisions were considered adequate to authorize classification for other public domain lands, but it appears that Congress intended the segregative effect of classification for purposes of the act to be effective generally. For example, the House Committee on Interior and Insular Affairs reported that:

1/ 44 Stat. 741.

2/ 43 U.S.C. § 869 et seq. (1964).

3/ 43 U.S.C. § 869 (1964); see 43 C.F.R. § 2410.0-3(f) (1968).

4/ R. C. Buch, 75 I.D. 140 (1968); C. V. Armstrong, A-30889 (Feb. 28, 1968).

5/ 75 I.D. 140 (1968).

> 'As amended by the Committee, authorization is given by the Secretary of the Interior to classify lands for disposition under the act; when so classified, such lands may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest under applicable law. House Report No. 353, 83d Cong., 1st Sess. 2 (1953).'

"Departmental regulation 43 C.F.R. 2232.1-4, quoted supra, reflects this understanding."

The regulation referred to in Buch provides:

> "Lands in Alaska classified under the act and lands in the States classified pursuant to the act under section 7 of the act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315f), as amended, will be segregated from all appropriations, including locations under the mining laws, except as provided in the order of classification or in any modification or revision thereof." 1/

The Buch case was reversed on review by the District Court for the Central District of California. 2/ The District Court said:

> "The Act did not specifically authorize the Secretary to classify lands in the states for such disposition, and only granted him the authority to determine that the land was to be used for an established or definitely proposed project. Alaska was not a state at the time said Act became effective.
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> . . .

1/ 43 C.F.R. § 2232.1-4(a) (168).

2/ Buch v. Hickel, No. 68-1358-PH (C.D.Cal. Mar. 20, 1969).

"The reference in 43 CFR 2232.1-4(a) to the act of June 28, 1934 was to the Taylor Grazing Act (43 U.S.C. sec. 315 et seq.) hereinafter called the Grazing Act for convenience, and was an attempt by the Secretary to vest in himself the authority, not expressly granted by the Recreation Act, to classify lands in the state for disposition under the Recreation Act, by using the classification authority and procedure found in Section 7 of the Grazing Act (43 U.S.C. sec. 315(f), but adding, as to the states, provisions for segregation from all appropriations, including locations under the mining laws." 1/

5. Classification and Multiple Use Act of 1964.

The Classification and Multiple Use Act of 1964 directs the Secretary to develop and promulgate regulations containing criteria for the classification of public lands and other federal lands, and further directs him to determine which lands shall be classified as suitable for disposal and which lands he considers to contain such values as to make them more suitable for retention in federal ownership for interim management. 2/ At least 60 days prior to classification, the Secretary must give such public notice of the proposed classification as he deems appropriate, including publication in the Federal Register. 3/ Publication of notice of pro-

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1/ Findings of Fact and Conclusions of Law on Motion for Summary Judgment at 2 and 3, Buch v. Hickel, No. 68-1358-PH (C.D.Cal. Mar. 20, 1969).

2/ 43 U.S.C. § 1411 (1964).

3/ Id. § 1412. Publication is not necessary if (1) the area involved is less than 2,560 acres, or (2) the classification will not exclude from the area, either permanently or for a substantial period of time, any of the uses enumerated in 43 U.S.C. § 1411.

posed classification in the Federal Register has the effect of segregating the land from disposal under the public land laws, including the mining and mineral leasing laws, except to the extent that the proposed classification or a subsequent notice specifies that the land shall remain open to location and leasing. The segregative effect of the proposed classification continues for a period of two years from the date of publication unless (1) classification has theretofore been completed or (2) the Secretary terminates it sooner. 1/ The segregative effect of classification itself is not to be found in the Classification and Multiple Use Act, unless the term "proposed classification" includes classification itself, as well as the proposal to classify. 2/ If not to be found in the Act, the segregative effect of classification must be sought in the Taylor Grazing Act, to which the Classification and Multiple Use Act is supplemental. 3/ Classification under the Taylor Grazing Act does not close land to mineral entry. 4/

Lands classified for sale or other disposal must be offered for sale or disposal within two years from the date of publication of the proposed classification, and if not so offered the segregative effect ceases at the expiration of the two years. 5/ The proposed classification or proposed

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1/ Id. § 1414.

2/ Under this interpretation, the phrase "unless classification has theretofore been completed" must have reference to classification as a whole under the Act, not the particular classification.

3/ 43 U.S.C. § 1411 (1964).

4/ Id. §§ 315e, 315g.

5/ Id. This provision remedies the situation presented in R. C. Buch, 75 I.D. 140 (1968) where, under a statute directing the Secretary to restore certain lands to appropriation under the applicable land laws if no application for purchase or lease had been filed within 18 months, such lands had not been restored in over 30 months.

sale or other disposal may be continued beyond the two-year period if notice of such proposed continuance, including a statement of necessity for continued segregation, is (1) submitted to the President of the Senate and the Speaker of the House of Representatives, and (2) published in the Federal Register not more than 90 nor less than 30 days prior to the expiration of the two-year period. The segregative effect is then extended for such additional period as is specified in the notice, not exceeding two years, unless Congress or the Secretary terminated the segregation at a prior date. 1/

In an opinion of the Associate Solicitor for Public Lands, it was concluded that the segregative effect of a classification for retention could be permanent. 2/ The opinion was demonstrably erroneous, as it was contrary to a regulation of the Secretary of the Interior which provided that the segregative effect of a classification for retention expires upon the expiration of the authority for classification. 3/ Subsequently, however, the regulation was amended to conform to the Associate Solicitor's opinion. 4/ No hearings were held on the amendment for the reason among others, that "this amendment merely conforms the regulations to the statute". 5/ That the Act does not require this most recent interpretation was made clear by Mr. Boyd L. Rasmussen, Director of the Bureau of Land Management, in his testimony on the implementation of the Classification and Multiple Use Act of 1964: 6/

1/ 43 U.S.C. § 1414 (1964).

2/ Opinion of Associate Solicitor, A-67-2267.10a (June 19, 1967).

3/ 43 C.F.R. § 2411.2(e)(3)(iv) (1968).

4/ 33 Fed.Reg. 18493 (1968).

5/ Id.

6/ Hearings on Implementation of P.L.88-607 and 88-608 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. 16 (1967).

"Senator Bible. . . . In reference to these lands classified for retention, does the classification cease as of the termination date of the act, or does the classification made prior to that date become permanent?

"Mr. Rasmussen. The act does not specify what will happen. It provides that the authorization requirements of the act shall expire June 30, 1969. It mentions--makes specific reference to the term 'segregation,' but not to the term 'classification.' We would consider these interim classifications until there was some change by Congress on recommendations of the Land Law Review Commission.

"Senator Bible. In other words, then, you do not know exactly what does happen to them after June 30, 1969, insofar as classifications which have already been made?

"Mr. Rasmussen. That is right."

The authority of the Secretary to classify under this Act expires 6 months after the final report of the Public Land Law Review Commission has been submitted to Congress. 1/

Nothing in the Classification and Multiple Use Act restricts prospecting, locating, developing, mining, entering, or patenting the mineral resources of the lands to which it applies under the mining laws pending action inconsistent with such activities under the Act. 2/ However, since the publication of a notice of proposed classification is considered by the Secretary of the Interior to be "action

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1/ 43 U.S.C. § 1418 (1964).

2/ Id. § 1417.

inconsistent with such activities", 1/ the "saving clause" has been rendered a dead letter by administrative interpretation.

E. Withdrawn lands.

The Pickett Act, as amended, authorizes the temporary withdrawal of public lands from settlement, location, sale or entry and the reservation of such lands for water-power sites, irrigation, classification of lands, or other public purposes. 2/ Lands so withdrawn are open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals. 3/

In addition to the withdrawal authority granted by the Pickett Act, the Secretary of the Interior asserts the authority, under Executive Order 10355, May 26, 1952, 3 C.F.R. 873 (Supp. 1953), to make withdrawals of lands even from location for metalliferous minerals. Obviously, such an asserted withdrawal authority could provide a convenient method of making an "end run" around any Act of Congress, such as the Pickett Act, which places restrictions upon the exercise of the withdrawal authority. Whether such asserted authority is valid is beyond the scope of this study 4/ and for the purposes of this study it will be assumed that such withdrawals are valid, for as a practical matter they operate in terrorem, if not ex lege.

The notation in the tract books or on the official plat

1/ See Hearings on Implementation of P.L. 88-607 and 88-608 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. 16 (1967).

2/ 30 U.S.C. § 141 (1964).

3/ Id. § 142.

4/ See Wheatley, Withdrawals and Reservations of Public Domain Lands (P.L.L.R.C. Study).

of the receipt of an application for withdrawal of public lands temporarily segregates such lands from disposal under the mining laws and mineral leasing laws. 1/ No lease will be granted, and no mining claim may be located, on lands withdrawn from mineral entry. 2/

The Act of October 5, 1962, Pub.L.No. 87-747 3/ withdrew from all forms of appropriation, including appropriation under the mining and mineral leasing laws, certain land in Pima County, Arizona. This legislation resulted from the activities of opportunistic but ill-advised persons who sought to capitalize on the fears of well-to-do home owners by staking "mining locations" in fashionable Tucson suburbs. The statute is but a special solution, affecting a particular locality, of the problems created by the separation of the mineral estate from the surface estate.

Lands within withdrawals which do not preclude disposition of the particular leasable mineral are open to prospecting permits and leases. In such cases, however, the agency having control of the lands will be consulted by the Bureau of Land Management, and, if consent to lease is withheld, the application will ordinarily be denied, 4/ subject to the right of appeal to the Secretary of the Interior. If consent is not withheld, special stipulations or conditions designed to protect the particular surface activity in which the agency is engaged may be requested. Thus limited, these lands become available to permits and leases. 5/ There is no similar

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1/ 43 C.F.R. § 2311.1-2(a) (1968).

2/ David W. Harper, 76 I.D. 141 (1967).

3/ 76 Stat. 743.

4/ Denial is not automatic, as it is the Secretary of the Interior and not the administering agency which has the authority to grant or deny a lease. Agricultural Research Service, A-31033 (Jan. 17, 1969).

5/ 43 C.F.R. § 3141.4 (1967) (potassium); id. § 3151.4 (1967) (sodium); and id. § 3181.4 (1967) (sulphur).

regulation applicable to phosphates, although the Secretary clearly has the authority, independent of regulation, to refuse to issue a permit or lease public land when he deems such refusal is in the public interest, 1/ and this authority has been exercised with respect to phosphate permits and leases. 2/

By Executive Order No. 5105, dated May 3, 1929, certain lands in the Valley of Fire Region in Nevada, west of Lake Mead, were withdrawn under the authority of the Pickett Act, as amended. In order to permit the mining of nonmetalliferous minerals on the lands, the Act of May 9, 1942, ch. 297 3/ was passed, which provides:

> "That the Secretary of the Interior be, and he is hereby authorized, under the rules and regulations adopted pursuant to the provisions of the Act entitled 'An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain', approved February 25, 1920, as amended, so far as applicable, to lease for the exploitation of the deposits of silica sand and other nonmetallic minerals found thereon, the lands withdrawn by Executive Order Numbered 5105, dated May 3, 1929."

In 1948, the Secretary held that the 1942 Act was applicable to all the lands withdrawn by Executive Order No. 5105 even if those lands were later restored in whole or in part. 4/ As a result, in 1949 the 1942 Act was amended to provide that the 1942 Act should be effective with respect to withdrawn

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1/ United States ex rel. McLennan v. Wilbur, 283 U.S. 414 (1931).

2/ Agricultural Research Service, A-31033 (Jan. 17, 1969).

3/ 56 Stat. 273.

4/ Beverley W. Perkins, A-24802 (Jan. 5, 1948).

lands only so long as such lands remain withdrawn. 1/

Lands withdrawn from entry and location under the general mining laws for the use of the Atomic Energy Commission may be leased by the Commission under the Atomic Energy Act of 1954. Such leases are known as Circular 8 leases. 2/

F. Restored lands.

1. Revocation of withdrawal.

Section 1 of the Act of September 30, 1913, 3/ gives the President broad discretion in the manner in which withdrawn lands are to be opened to entry:

> "When public lands are excluded from national forests or released from withdrawals the President may, whenever in his judgment it is proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto."

1/ 63 Stat. 886, 887 (1949).

2/ 10 C.F.R. § 60.8 (1968).

3/ 43 U.S.C. § 151 (1964).

The revocation of a withdrawal does not open lands to location until such revocation is noted on the records of the local land office. 1/

2. Cancellation of entry or patent.

As a general rule, whenever an entry has been made of a tract of land, that tract is segregated from the mass of public land subject to entry until the existing entry has been cancelled and the cancellation noted on the records of the local land office. 2/ A similar rule applies with respect to the cancellation of a patent. 3/ The rule is "rule of administration", 4/ the purposes of which are to permit the land to be withheld from entry until the finality and conclusiveness of the decision or decree cancelling an entry or patent appears to the satisfaction of the officers of the land department, 5/ and to prevent confusion and conflict of claims. 6/ The Secretary, however, seems to take the position that lands may be withdrawn from appropriation merely by refusing to cause the proper notation

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1/ See David W. Harper, 74 I.D. 141 (1967).

2/ Holt v. Murphy, 207 U.S. 407 (1908); J. B. Rice, 11 L.D. 213 (1890); Andrew J. Gibson, 21 L.D. 219 (1895); Young v. Peck, 32 L.D. 102 (1903); Circular, 29 L.D. 29 (1899).

3/ Matthews v. Lines, 29 L.D. 178 (1899); Gunderson v. Northern Pac. Ry., 37 L.D. 115 (1908); Hiram M. Hamilton, 38 L.D. 597 (1910).

4/ Gunderson v. Northern Pac. Ry., 37 L.D. 115 (1908).

5/ Alice M. Reason, 36 L.D. 279 (1908). See Maybury v. Hazletine, 32 L.D. 41 (1903).

6/ Holt M. Murphy, 207 U.S. 407 (1908).

to be made on the records of the local land office, 1/ and in one case, apparently representing the accepted practice, the notation was made, but stated "Not subject to appropriation until authorized by B.L.M." 2/

Notwithstanding the uncertainty of the record title, a homestead entryman may acquire rights in the land by settlement, and if it is ultimately determined that the lands were in fact public lands, an entry pursuant to such settlement may be allowed. 3/

Similarly, the rule requiring the cancellation of the entry or patent to be noted on the records of the local land office is not applicable to the initiation of rights under the mining laws by the location of a mining claim, on lands otherwise subject to location, after the cancellation of the entry or patent but before its notation on the records of the local land office. 4/ The reasons for the exception were stated by the Secretary in Jebson v. Spencer: 5/

> " . . . a mining claim is not initiated by application made at the local land office. A right in a mining claim is established by a series of acts including discovery of valuable mineral deposits within the limits of the claim, marking the boundaries of the claim, posting notice on the claim,

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1/ Earl Crecelouis Hall, 58 I.D. 557 (1943).

2/ California Petroleum Corp., 66 I.D. 61 (1959).

3/ Alice M. Reason, 36 L.D. 279 (1908). All vacant public lands, except those in Alaska, with certain exceptions, have been withdrawn from entry, selection, and location under the nonmineral land laws. 43 C.F.R. § 2410.0-3(a) (1968).

4/ Adams v. Polglase, 32 L.D. 477 (1904); Jebson v. Spencer, 61 I.D. 161 (1953); Alumina Development Corp., 67 I.D. 68 (1960).

5/ 61 I.D. 161 (1953).

and recording the claim in the manner required by the regulations of the mining district. 30 U.S.C., 1946 ed., secs. 22-28. There is no requirement under the mining laws that application for the land must be made at the local land office or that notice of the claim must be filed with the United States, either at the local land office or elsewhere."

G. National Parks.

The Acts of Congress by which National Parks are created generally withdraw the land from location, 1/ and it may be stated as a general rule that National Parks are not open to location. 2/ Frequently, Acts relating to National Parks expressly provide that "any valid existing claim, location, or entry" shall not be affected. 3/ Such language is unnecessary, as land already appropriated as a mining claim is not subject to other use or disposal by Congress. 4/ Since a discovery is a prerequisite to the existence of a valid mining claim, a locator of a claim on land subsequently withdrawn for National Park purposes must show a discovery before such withdrawal. 5/

The Act prohibiting further location of mining claims in

1/ These statutes are summarized in 2 Wheatley, Withdrawals and Reservations of Public Domain Lands, Appendix D (P.L.L.R.C. Study).

2/ 36 C.F.R. § 5.14 (1968).

3/ See, e.g., 16 U.S.C. § 161 (1964) (Glacier National Park).

4/ Opinion of Assistant Attorney General, 25 L.D. 48 (1897).

5/ Butte Oil Co., 40 L.D. 602 (1912).

Mount Rainier National Park provided that "existing rights heretofore acquired in good faith under the mineral-land laws of the United States to any mining location or claim" should not be affected. 1/ In applying this language to a mill site whose boundaries had not been marked prior to the date of the above-quoted statute, the Secretary said:

> "Obviously the phrase 'existing rights' means something less than a vested right, such as would follow from a perfected mining location, since such a right would require no exception to insure its preservation." 2/

This decision appears to recognize valid but unperfected mining claims (i.e., claims on which a discovery has been made, but on which the location procedures have not been complied with), but does not go so far as to recognize rights in the nature of pedis possessio.

Neither the Mineral Leasing Act of 1920, the Mineral Leasing Act for Acquired Lands (1947), nor the Materials Disposal Act of 1947 is applicable to lands in National Parks. 3/

A lease or permit may be issued by the Atomic Energy Commission for lands administered for National Park purposes only if the President by Executive Order declares that the requirements of the common defense and security make such action necessary. 4/

1. Mount Rainier National Park.

The Act by which Mount Rainier National Park was created

1/ 16 U.S.C. § 94 (1964).

2/ Eagle Peak Copper Min. Co., 54 I.D. 251 (1933).

3/ 30 U.S.C. § 181 (1964); id. § 352; id. § 601.

4/ 42 U.S.C. § 2097 (1964).

in 1899 extended the mineral land laws to the land within the Park. 1/ In 1908, the location of mining claims in the Park was prohibited, but rights previously acquired in good faith to any mining location were not affected. 2/

2. Mesa Verde National Park.

In 1910, the Secretary of the Interior was authorized to grant permits for the development of the resources in Mesa Verde National Park, 3/ but in 1931, this authority was withdrawn insofar as mineral resources were concerned. 4/

3. Crater Lake National Park.

The Act by which Crater Lake National Park was created in 1902 provided that it should be open to the location and working of mining claims, under such regulations as the Secretary of the Interior may prescribe, 5/ but in 1916, Congress provided that the damage, injury, or spoliation of any mineral deposit was prohibited, except for those heretofore located. 6/

1/ Act of Mar. 2, 1899, ch. 377, § 5, 30 Stat. 993, 995.

2/ 16 U.S.C. § 94 (1964).

3/ Id. § 115.

4/ Id. § 115a.

5/ Id. § 123.

6/ Id. § 127.

4. Grand Canyon National Park.

The Act by which Grand Canyon National Park was created in 1919 authorized the Secretary of the Interior, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources in the park whenever consistent with the primary purposes of the park. 1/ This authority was withdrawn in 1931. 2/

5. Olympic National Park.

The Act by which Olympic National Park was created in 1938 provided that certain mineral deposits should be, "exclusive of the land containing them", subject to disposal under the mining laws for a period of five years from June 29, 1938, "with rights of occupation and use of so much of the surface of the lands as may be required for all purposes reasonably incident to the mining or removal of the minerals and under such general regulations as may be prescribed by the Secretary of the Interior". 3/

6. Mount McKinley National Park.

Mount McKinley National Park is open to location. 4/ The Secretary of the Interior is authorized to prescribe regulations for the surface use of any mineral land locations,

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1/ Act of Feb. 26, 1919, ch. 44, § 7, 40 Stat. 1175, 1178

2/ Act of Jan. 26, 1931, ch. 47, § 1, 46 Stat. 1043.

3/ 16 U.S.C. § 252 (1964). For the regulations, see 43 C.F.R. § 3632.0-3 et seq. (1968).

4/ 16 U.S.C. § 350 (1964).

and may require the registration of all prospectors and miners who enter the park, but no qualified locator may be denied entrance to the park for the purpose of prospecting or mining. 1/

H. National Monuments.

National Monuments may be established either by Presidential proclamation under the authority delegated by Section 2 of the Antiquities Act of 1906, 2/ or by direct Congressional action. A withdrawal under the Antiquities Act has the effect of closing the lands to location under the mining laws. 3/ Some national monuments established by Congressional action remain open to location. Lands excluded from National Monuments by the adjustment of boundaries are usually reopened to location. 4/

Neither the Mineral Leasing Act of 1920, the Mineral Leasing Act for Acquired Lands (1947), nor the Minerals Disposal Act of 1947 is applicable to lands in National Monuments. 5/

A lease or permit may be issued by the Atomic Energy Commission for lands administered for National Monument

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1/ Id. § 350a. For the regulations, see 36 C.F.R. § 7.44 (1968).

2/ Id. § 431. See Historical Note following 16 U.S.C.A. § 431 (1964) for a list of National Monuments created by Presidential proclamation.

3/ Cameron v. United States, 252 U.S. 450 (1920); Oyler v. McKay, 227 F.2d 604 (10th Cir. 1955).

4/ See 16 U.S.C. § 441h (1964) (Badlands National Monument); id. § 450ii-1 (Joshua Tree National Monument).

5/ 30 U.S.C. § 181 (1964); id. § 352; id. § 601.

purposes only if the President by Executive Order declares that the requirements of the common defense and security make such action necessary. 1/

1. Death Valley National Monument.

Death Valley National Monument was established by Presidential Proclamation No. 2028, February 11, 1933. 2/ The Act of June 13, 1933, 3/ provides:

> "The mining laws of the United States are extended to the area included within the Death Valley National Monument in California, or as it may hereafter be extended, subject, however, to the surface use of locations, entries, or patents under general regulations to be prescribed by the Secretary of the Interior." 4/

2. Glacier Bay National Monument.

Glacier Bay National Monument was established by Presidential Proclamation No. 1733, February 26, 1925. 5/ The

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1/ 42 U.S.C. § 2097 (1964).

2/ 47 Stat. 2554.

3/ 16 U.S.C. § 447 (1964).

4/ For the regulations, see 36 C.F.R. § 7.26 (a) (1968).

5/ 43 Stat. 1988.

act of June 22, 1936, ch. 700 1/ provides:

> "That in the areas within the Glacier Bay National Monument in Alaska, or as it may hereafter be extended, all mineral deposits of the classes and kinds now subject to location, entry, and patent under the mining laws of the United States shall be, exclusive of the land containing them, subject to disposal under such laws, with right of occupation and use of so much of the surface of the land as may be required for all purposes reasonably incident to the mining or removal of the minerals and under such general regulations as may be prescribed by the Secretary of the Interior." 2/

3. Coronado National Monument.

The Act authorizing the establishment of the Coronado National Monument provides:

> "The Secretary of the Interior, under such regulations as shall be prescribed by him, which regulations shall be substantially similar to those now in effect, shall permit--
>
> ". . . .
>
> "(b) Prospecting and mining within the memorial area, when not inconsistent with the public uses thereof. Rights to minerals in the area shall not extend to the lands containing such minerals, but the Secretary of the Interior shall grant rights to use so much of the surface of the

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1/ 49 Stat. 1817.

2/ For the regulations, see 43 C.F.R. § 3636.1 (1968).

lands as may be required for all purposes reasonably incident to the mining and removal of the minerals." 1/

4. Organ Pipe Cactus National Monument.

The Organ Pipe National Monument was established by Presidential Proclamation No. 2232, April 13, 1937. 2/ The Act of October 27, 1941, 3/ provides:

"Within the Organ Pipe Cactus National Monument in Arizona all mineral deposits of the classes and kinds now subject to location, entry, and patent under the mining laws of the United States shall be, exclusive of the land containing them, subject to disposal under such laws, with right of occupation and use of so much of the surface of the land as may be required for all purposes reasonably incident to the mining or removal of the minerals and under such general regulations as may be prescribed by the Secretary of the Interior."

Pursuant to this authority, the Secretary has established regulations governing the location of mining claims in the Monument. 4/ Lands containing springs, wells, water holes, other sources of water supply, the monument headquarters, and recreation areas are not open to location. 5/

1/ Act of Aug. 18, 1941, § 3, 16 U.S.C. § 450y-2 (1968).

2/ 50 Stat. 1827.

3/ 16 U.S.C. § 450z (1964).

4/ 43 C.F.R. § 3633.0-3 et seq. (1968).

5/ Id. § 3633.7.

5. Katmai National Monument.

Katmai National Monument was established by Presidential Proclamation No. 1487, dated September 24, 1918. 1/ The Act of April 15, 1954, ch. 140 2/ authorizes the disposal, under the Materials Disposal Act of 1947, of pumicite within certain areas of the Monument, under appropriate contract conditions for the protection of the monument. 3/

I. National Forests.

National Forests are established either by proclamation or executive order of the President under the authority of Section 24 of the Act of March 3, 1891, 4/ or by direct Congressional action. Section 1 of the Act of June 4, 1897, 5/ provides that nothing in that Act shall prohibit any person from entering upon the national forest for all proper and lawful purposes, "including prospecting, locating, and developing the mineral resources" of the national forests. The Act further provides that any public lands embraced within the limits of a national forest which are found to be better adapted for mining purposes than for forest usage may be restored to the public domain. 6/

1/ 40 Stat. 1855.

2/ 68 Stat. 53.

3/ See 43 C.F.R. § 3610.0-3(a) (1968).

4/ 16 U.S.C. § 471 (1964).

5/ Id. § 478.

6/ Id. § 482.

It is well recognized that the legal right of a prospector to locate a mining claim within the boundaries of a National Forest is substantially the same as his legal right to locate a claim elsewhere on the public domain. 1/

A number of areas in National Forest are either closed to mineral location by statute, 2/ or authorized by statute to be closed by executive or administrative action. 3/ Some of these withdrawals are for the purpose of protecting municipal water supplies, while others are for the purpose of protecting recreation areas. 4/

1/ United States v. Rizzinelli, 182 Fed. 675 (D.Ida. 1910); United States v. Deasy, 45 F.2d 108 (D.Ida. 1928); United States v. Mobley, 45 F.Supp. 407 (S.D.Cal. 1942); 38 Op.Att'y Gen. 192 (1935). But see United States v. Dawson, 58 I.D. 670 (1944) and other decisions of the Secretary which impose a greater burden of proof upon locators of claims in National Forests.

2/ Act of Sept. 19, 1914, ch. 302, 38 Stat. 714; Act of Apr. 28, 1922, ch. 152, 42 Stat. 501; Act of May 29, 1924, ch. 206, 43 Stat. 242; Act of Feb. 24, 1925, ch. 304, 43 Stat. 969; Act of May 20, 1928, ch. 868, 45 Stat. 956; Act of May 26, 1934, ch. 356, § 3, 48 Stat. 809; Act of Apr. 20, 1936, ch. 238, 49 Stat. 1234; Act of May 31, 1938, ch. 294, 52 Stat. 587; Act of June 20, 1938, ch. 533, 52 Stat. 797; Act of July 27, 1939, ch. 389, 53 Stat. 1131; Act of Oct. 17, 1940, ch. 894, 54 Stat. 1197; Act of Mar. 22, 1944, ch. 124, 58 Stat. 119; Act of Dec. 21, 1945, ch. 586, 59 Stat. 622.

3/ Act of Mar. 4, 1921, ch. 159, § 2, 41 Stat. 1367; Act of May 31, 1933, ch. 45, § 4, 48 Stat. 109; Act of Aug. 27, 1935, ch. 751, 49 Stat. 895.

4/ See Forest Service Manual § 2811.21 (September 1958) for a list of these areas.

The Mineral Leasing Act of 1920 is applicable to lands in national forests on the public domain. 1/ The Mineral Leasing Act for Acquired Lands (1947) is applicable to lands in national forests on acquired lands. 2/ Similarly, Section 402, Reorganization Plan No. 3 of 1946 is applicable to national forests on those acquired lands which are subject to its provisions. 3/

Certain National forest lands in Minnesota are subject to lease under the provisions of the Act of June 30, 1950. 4/

J. Wilderness areas.

The Wilderness Act of 1964 5/ established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas". This was done pursuant to the announced policy of Congress "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." Congress provided in this Act that no Federal lands could be designated as "wilderness areas" except as provided for in the Act or by a subsequent Act of Congress, thereby assuring that Congress and not an administrative agency would perform this legislative function. 6/

1/ 30 U.S.C. § 181 (1964).

2/ Id. § 352.

3/ 60 Stat. 1099, 5 U S.C. note following § 133y-16 (1964), 5 U.S.C.A. App. 188 (1967).

4/ 16 U.S.C. § 508b (1964).

5/ 16 U.S.C. §§ 1131 et seq. (1964).

6/ Id. § 1131.

The establishment of wilderness areas prior to 1964 was accomplished by administrative action. The House Committee Report recommending enactment of wilderness legislation gives the history: 1/

> "The reservation and retention of some public lands to protect their natural status has long been an objective in the management of the Federal public domain. From among the areas set aside for retention as national forests, the first area specifically designated for wilderness preservation was earmarked in 1924 in the Gila National Forest, N. Mex.
>
> "In 1926 roadless areas were given initial protection in the Superior National Forest, Minn. Subsequently the complex of several areas in this forest was designated as the Boundary Waters Canoe Area.
>
> "The Secretary of Agriculture in 1929, by regulation, established procedures for the designation of primitive areas in the national forests. This regulation was superseded in 1939 by regulations identified as U-1 and U-2, which now are published in 36 CFR 251.20 and 251.21 establishing procedures for the designation of wilderness and wild areas. Under the regulations wilderness areas are those in excess of 100,000 acres and may be designated only by the Secretary of Agriculture; wild areas consist of lands between 5,000 and 100,000 acres and may be designated by the Chief of the Forest Service.
>
> "Simultaneously with the establishment of the new regulations, the Forest Service undertook a review of the 73 primitive areas that had been established between 1929 and 1939 to determine which ones should be designated in whole or in part as either wilderness or wild areas.

1/ H.R.Rep.No. 1538, 88th Cong., 2d Sess. (1964).

"Since 1930 the Secretary of Agriculture and the Chief of the Forest Service have, by administrative action, set aside within the national forests 88 wilderness-type areas, i.e., wilderness, wild, primitive, and canoe.

"A summary of existing national forest areas administratively designated as having wilderness characteristics is as follows:

Type	Acres
Wilderness areas (18)	6,898,014
Wild areas (35)	1,336,254
Canoe areas (1)[1/]	886,673
Subtotal	9,120,941
Primitive areas (34)	5,447,740
Total, wilderness-type areas (88)	14,598,681

1/ The Boundary Waters Canoe Area, Superior National Forest, Minn., is the only one in this category.

"Except for the Boundary Waters Canoe Area, none of the areas has been granted statutory recognition. Having been established by administrative action of the executive branch, any of the wilderness, wild and primitive areas could be similarly declassified and abolished by administrative action. In the alternative the administrators could, if they so desired, change the rules governing the uses allowed or prohibited within such areas.

"A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.

"This committee accordingly endorses the concept of a legislatively authorized wilderness preservation system. Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution

to exercise jurisdiction over the public lands."

The Committee set forth the following basic principles: 1/

> "In approaching the development of specific legislation, the committee was determined to act in the national interest with due regards to regional and local interests. It is submitted that H.R. 9070, as amended, is such a bill. The underlying principles of this measure are:
>
> 1. Areas to be designated as 'wilderness' for inclusion in the wilderness system should be so designated by affirmative act of Congress.
>
> (a) Those areas currently designated as 'wilderness,' 'wild,' and 'canoe' have been defined with precision and could be given statutory designation immediately, if all other criteria are satisfied.
>
> (b) Areas currently designated as 'primitive' have not been defined with precision and should not be considered for inclusion in the wilderness system until completion of a thorough review during which all interested parties have an opportunity to be heard.
>
> (c) Areas within units of the national park system and the national wildlife system that might qualify for inclusion in the wilderness system should not be considered for inclusion in the wilderness system until completion of a thorough review during which all interested parties have an opportunity to be heard.

1/ Id.

2. Uses not incompatible with wilderness preservation should be permitted in areas included within the wilderness system.

3. Currently authorized uses that are incompatible with wilderness preservation should be phased out over a reasonable period of time."

The Wilderness Act provides that all areas within the national forests classified at least thirty days before September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe", are designated as wilderness areas. 1/ The Secretary of Agriculture has the obligation, within ten years after September 3, 1964, to review, as to suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on said date as "primitive", and to report his findings to the President. A schedule is established for making this review and reporting to the President. The President will advise both branches of Congress of his recommendations with respect to the designation as "wilderness" or other reclassification of each area for which a review is completed. However, the recommendations of the President for designation of an area as "wilderness" become effective only if Congress so provides by legislative action. Areas classified as "primitive" on September 3, 1964, continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress determines otherwise. 2/

The Act further provides that within ten years after September 3, 1964, the Secretary of the Interior must review every roadless area of 5,000 contiguous acres, or more, in the national parks, monuments, and other units of the national park system and every such area and every roadless island within the national wildlife refuges and game ranges under his jurisdiction. He is required to make reports to

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1/ 16 U.S.C. § 1132(a) (1964)

2/ Id. § 1132(b).

the President similar to those the Secretary of Agriculture must make for primitive areas. As in the case of primitive areas, the President will make his recommendations to Congress and the recommendations become effective only if so provided by Act of Congress. 1/

Each agency administering any area designated as wilderness is required by the Act to assume responsibility for preserving the wilderness character of the area and to administer such area for the purposes for which it may have been established so as to preserve its wilderness character. 2/

Section 4(d)(3) of the Wilderness Act 3/ provides that until midnight December 31, 1983, the mining and mineral leasing laws "shall, to the same extent applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as 'wilderness areas'", subject to the other provisions of the subsection.

As has been mentioned above, the Wilderness Act provides that additional areas may be designated by Congress as wilderness areas. As to such areas, it seems to be the intent of Congress, as evidenced by sections 4(c) and 4(d) of the Act, that the Act of Congress designating such areas must also state that the mining and mineral leasing laws shall be applicable to the areas designated as "wilderness" in order to make these laws applicable to the area. 4/ This was the

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1/ Id. § 1132(c).

2/ Id. § 1133(b).

3/ Id. § 1133(d)(3).

4/ The Secretary of the Interior has also expressed this view. Letter from Secretary of the Interior Udall to Secretary of Agriculture Freeman, Nov. 23, 1966. See also Statement of Charles F. Luce, Under Secretary of the Interior, Hearings on H.R. 5494 and S. 889 To Designate the San Rafael Wilderness, Los Padres National Forest, in the State of California, 90th Cong., 1st Sess. 51, 54 (1967); Communication of John A. Carver, Jr., Assistant Secretary of the Interior, H.R.Rep.No. 1538, 88th Cong., 2d Sess. 15 (1964).

interpretation of the Conference Committee that considered the bill which became the Wilderness Act:

> "The applicability of the mining and mineral leasing laws to wilderness areas designated by S. 4 was modified by the conference committee to expire December 31, 1983 (instead of 1989 as provided in S. 4 as passed by the House), with all minerals withdrawn effective January 1, 1984.
>
> "In consonance with the general philosophy of the act, the conference committee limited this provision to those lands designated by S. 4 as wilderness areas. However, the conference committee noted that, in the absence of compelling reasons to the contrary, a similar limitation of time should be placed on those primitive areas or portions of primitive areas that are in the future designated as wilderness areas. The conference committee expects that the mining industry and the agencies of the Department of the Interior will explore existing primitive areas so that when legislation pertaining to such primitive areas is considered at a later date Congress will have the benefit of professional technical advice as to the presence or absence of minerals in each area."

It should be noted that the mining and mineral leasing provision of the Wilderness Act is not the only provision of the Act whose application is limited to the particular wilderness areas designated by the Act. Indeed, most of the provisions of the Act are limited to "wilderness areas designated by this Act". Thus, in the statute designating the San Rafael Wilderness, 1/ if the provision that "the San Rafael Wilderness shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act governing areas designated by that Act" does not operate to incorporate section 4(d)(3) of the Wilderness Act, it would

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1/ Act of Mar. 21, 1968, Pub.L.No. 90-271, 82 Stat. 51.

appear also not to include any of the other similarly restricted provisions of that Act. Therefore, it is at least arguable that the San Rafael Wilderness is open to mining and mineral leasing until December 31, 1983. 1/

K. Lands containing hot springs or geothermal steam.

Executive Order No. 5389, July 7, 1930, withdrew from settlement, location, sale, or entry "every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and which contains a hot spring, or a spring the waters of which possess curative properties, and all land within one-quarter of a mile of every such spring located on unsurveyed public land". This withdrawal was under the authority of the Pickett Act, as amended, thus leaving the land subject to location for metalliferous minerals. 2/

In recent years, interest in the development of geothermal steam has increased. In Joseph I. O'Neill, Jr. 3/ the Secretary rejected an application for sodium and potassium prospecting permits for lands containing geothermal steam on the ground that—

> " . . . it would appear to be a wise and proper exercise of discretion for the Department to refrain, at this time from issuing prospecting permits for the lands applied for even if it should be determined that

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1/ Similar uncertainties exist with respect to the San Gabriel Wilderness, created by Act of May 24, 1968, Pub.L.No. 90-318, 82 Stat. 131, and the North Cascades National Park, Recreation and Wilderness Areas, created by Act of Oct. 2, 1968, Pub.L.No. 90-544, 82 Stat. 926.

2/ 43 U.S.C. § 142 (1964).

3/ A-30488 (Apr. 19, 1966).

the mineral deposits sought are subject to the provisions of the Mineral Leasing Act notwithstanding any ruling with respect to the use of geothermal steam."

L. Waterholes and stock driveways.

1. Waterholes.

Section 10 of the Stockraising Homestead Act of 1916 1/ provides that—

"Lands containing waterholes or other bodies of water needed or used by the public for watering purposes shall not be designated under sections 291-301 of this title but may be reserved under the provisions of [the Pickett Act] and such lands, prior to December 29, 1916, or thereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under general rules and regulations as the Secretary of the Interior may prescribe. . . ."

By an Executive Order dated April 17, 1926, it was ordered that—

" . . . every smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved, public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or waterhole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the act of December 29, 1916 (39 Stat. 865; 43 U.S.C. 300), and in aid of pending legislation." 2/

1/ 43 U.S.C. § 300 (1964).

2/ 43 C.F.R. § 2321.1-1(a) (1968).

This Executive Order is not applicable to lands in Alabama, Arkansas, Florida, Louisiana, Michigan, Minnesota, Missouri, Mississippi, or Wisconsin. 1/ A number of withdrawals, specifically designating the lands withdrawn as Public Water Reserves, have also been made, both before and after the "floating" withdrawal of April 17, 1926. 2/

Since the withdrawals are made pursuant to the authority granted by the Pickett Act, as amended, the lands remain open to exploration, discovery, occupation, and purchase under the mining laws, insofar as they apply to metalliferous minerals. 3/

2. Stock driveways.

Section 10 of the Stockraising Homestead Act of 1916 4/ also provides:

> " . . . That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands . . ."

The Act of January 29, 1929, 5/ added the following provision:

1/ Id. § 2321.1-1(c)(2).

2/ See 1 Wheatley, Withdrawals and Reservations of Public Domain Lands 188-189.

3/ 43 U.S.C. § 142 (1964).

4/ Id. § 300.

5/ Id.

> "That the withdrawal from entry of lands necessary to insure access by the public to watering places reserved hereunder shall not apply to deposits of coal and other minerals in the lands so withdrawn, and that the provisions of section 299 of this title are hereby made applicable to said deposits in lands embraced in such withdrawals heretofore or hereafter made, but any mineral location or entry made hereunder shall be in accordance with such rules, regulations, and restrictions as may be prescribed by the Secretary of the Interior."

Mining claims located prior to May 4, 1929, and after the withdrawal of lands as a stock driveway, may be held and perfected subject to the conditions of the Act. 1/

Prospecting and location in stock driveways are subject to the provisions and conditions of the mining laws and regulations, 2/ and prospecting must be conducted in such manner as to cause no interference with the use of the surface of the land for stock driveway purposes, except such as may actually be necessary. 3/

M. Power sites.

1. Classification and withdrawal.

The Act of March 3, 1879, 4/ authorizes the Director of the Geological Survey to classify public lands, and under this statute he may classify public lands as valuable for

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1/ 43 C.F.R. § 3400.3(g) (1968).

2/ Id. § 3400.3(f).

3/ Id. § 3400.3(b).

4/ 43 U.S.C. § 31 (1964).

power purposes. 1/ The Pickett Act authorizes the temporary withdrawal of public lands for power sites. Lands so withdrawn were at first open to exploration, discovery, occupation, and purchase under the mining laws, so far as they applied to minerals "other than coal, oil, gas or phosphate", 2/ this restriction being changed by the Act of August 24, 1912, to "metalliferous minerals". 3/

Section 24 of the Federal Water Power Act of 1920 4/ provides, in part, that—

> "Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress."

Claims located while the land is withdrawn are void, 5/ and subsequent restoration of the land to location does not validate them. 6/ Mining claims located prior to the date of withdrawal or reservation are not affected. 7/

1/ See 1 Wheatley, Withdrawals and Reservations of Public Domain Lands 361 (P.L.L.R.C. Study).

2/ 36 Stat. 847

3/ 43 U.S.C. § 142 (1964).

4/ 16 U.S.C. § 818 (1964).

5/ Armin Speckert, A-30854 (Jan. 10, 1968); Minner v. Sadler, 59 Cal. App.2d 590, 139 P.2d 356 (1943); White v. Ames Min. Co., 82 Ida. 71, 349 P.2d 550 (1960). See Instructions, 47 L.D. 595 (1920).

6/ John Roberts, 55 L.D. 430 (1935).

7/ See 30 U.S.C. § 624 (1964).

Restoration to location of lands withdrawn under the Act required, first, that the Federal Power Commission determine that the lands to be restored will not be injured or destroyed by such location, and second, that an appropriate order be made by the Secretary of the Interior restoring the lands to location. 1/ Both the Federal Power Commission and the Secretary of the Interior considered each proposed restoration individually, on its merits, a procedure which resulted in expense and delay and proved ineffective in permitting development of the mineral resources of the withdrawn areas. In practical operation, the procedure proved unworkable, and areas once withdrawn remained closed to mining locations. By 1955, more than 7 million acres of public lands in the western United States had been reserved or withdrawn for power purposes, and approximately 95 percent of this land had been "temporarily" withdrawn since 1910, although the chances of utilization of these lands for power purposes was remote. 2/

Giving immediate impetus to the demand for legislation permitting the location of mining claims within power site reserves was the belief that large uranium deposits existed in areas withdrawn for power purposes and the recognition of the fact that the domestic uranium programs of the Atomic Energy Commission depended to a great extent upon the discovery and development work of private individuals operating under the mining laws. 3/

1/ 16 U.S.C. § 818 (1968); Coeur d'Alene Crescent Min. Co., 53 I.D. 531 (1931); Harry A. Schultz, 61 I.D. 259 (1953).

2/ H.R. Rep. No. 86, 84th Cong., 1st Sess. 3 (1955).

3/ Id.

2. Mining Claims Rights Restoration Act of 1955.

The stated purpose of the Mining Claims Rights Restoration Act of 1955 was—

> "To permit the mining, development, and utilization of the mineral resources of all public lands withdrawn or reserved for power development . . ." 1/

The Act provides that—

> "All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal and utilization of the mineral resources of such lands under applicable Federal statutes . . ." 2/

The Act did not open for location any lands (1) included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other act of Congress, or (2) under examination and survey by a prospective licensee of the Federal Power Commission who holds an uncancelled preliminary permit (not renewed more than once) issued under the Federal Power Act authorizing him to conduct such examination and survey. 3/ The license or permit need not be one which was in effect on the date of the Act. 4/

1/ 69 Stat. 681.

2/ 30 U.S.C. § 621(a) (1964).

3/ Id.

4/ A. L. Snyder, 75 L.D. 33 (1968).

In contrast to prior acts, 1/ this Act did not provide for the validation of mining claims located while the lands were withdrawn or reserved. 2/

Prospecting and exploration for mineral resources in power sites are at the financial risk of the prospector. 3/

A placer mining claimant may not conduct mining operations for a period of sixty days after the filing for record of his location notice in the land office. 4/ Upon receipt of a notice of location of a placer claim, a determination is made by the authorized officer of the Bureau of Land Management as to whether placer mining operations on the land may substantially interfere with other uses. 5/ If it is determined that placer operations may substantially interfere with other uses of the land included within the placer claim, a notice of intention to hold a public hearing is sent to the locator by registered or certified mail within 60 days from the date of the filing for record of the location notice, 6/ and mining operations on the claim must be further suspended

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1/ Act of Aug. 12, 1953, 30 U.S.C. § 501 et seq. (1964); Multiple Mineral Development Act of 1954, 30 U.S.C. § 521 et seq. (1964); Uraniferous Lignite Act of 1955, 30 U.S.C. § 541 et seq. (1964).

2/ H.R. Rep. No. 86, 84th Cong., 1st Sess. 5 (1955); 43 C.F.R. § 3536.1(b) (1968); Day Mines, Inc., 65 I.D. 145 (1958); A. W. Kimball, 65 I.D. 166 (1958); Ethel T. Myers, 65 I.D. 207 (1958); Marion Q. Kaiser, 65 I.D. 485 (1958).

3/ 30 U.S.C. § 622 (1964).

4/ Id. § 621(b).

5/ 43 C.F.R. § 3532.1(b) (1968).

6/ 30 U.S.C. § 621(b) (1964); 43 CFR § 3532.1(b) (1968).

until the Secretary has held a hearing and has issued an appropriate order. 1/ The order issued by the Secretary must provide for either (1) a complete prohibition of placer mining, (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations, or (3) a general permission to engage in placer mining. 2/ No other order may be entered by the Secretary, and once he has issued an order, he cannot act again by issuing a different order. 3/ The Secretary's order is not valid unless a certified copy is filed "in the same State or county office in which the locator's notice of location has been filed in compliance with the United States mining laws." 4/

The term "other uses" is not limited to uses related to power development or power sites. 5/ However, mere conjecture that lands might be put to use for such other uses, in the absence of actual plans for doing so, is not sufficient to prohibit placer mining on the ground that it would interfere with such other uses. 6/ The "other uses" to be considered are "uses of the land included within the boundaries of the placer claim", 7/ although there appears to be

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1/ 30 U.S.C. § 621(b) (1964).

2/ Id.

3/ United States v. Bennewitz, 72 I.D. 183 (1965).

4/ 30 U.S.C. § 621(b) (1964).

5/ See United States v. Bennewitz, 72 I.D. 183 (1965) (state park and fishing uses).

6/ United States v. Cohan, 70 I.D. 178 (1963).

7/ 30 U.S.C. § 621(b) (1964); Pacific Gas & Electric Co., 66 I.D. 264 (1959).

a tendency on the part of the Secretary to expand the language to include adjoining land. 1/

The Act does not affect the validity of withdrawals or reservations for purposes other than power development, 2/ and if the power site lands are also affected by any other type of withdrawal which prevents mining location in whole or in part, the Act applies only to the extent that the lands are otherwise open to location. 3/

N. Revested Oregon and California Railroad lands and reconveyed Coos Bay Wagon Road grant lands.

In 1866, Congress granted to the Oregon & California Railroad Co. certain lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, Oregon. 4/ The lands granted by this Act were required to be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre. 5/ The Railroad violated these terms, by

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1/ See United States v. Cohan, 70 I.D. 178 (1963).

2/ 30 U.S.C. § 621(c) (1964); A. W. Kimball, 65 I.D. 166 (1958); Ethel T. Myers, 65 I.D. 207 (1958); Marion Q. Kaiser, 65 I.D. 485 (1958); cf. Harry A. Schultz, 61 I.D. 259 (1953).

3/ 43 C.F.R. § 3534.1(b) (1968); see John D. Archer, 67 I.D. 181 (1960) (Indian reservation); Carl F. Murray, 67 I.D. 132 (1960)(recreational lease).

4/ Act of July 25, 1866, ch. 242, 14 Stat. 239. Additional grants were made to the Oregon Central Railroad Co. by the Act of May 4, 1870, ch. 69, 16 Stat. 94.

5/ Act of Apr. 10, 1869, ch. 27, 16 Stat. 47.

selling land for more than $2.50 per acres, and by refusing to sell lands to actual settlers at any price. After litigation in which the railroad company was enjoined from further sales of land or timber, 1/ Congress enacted legislation revesting certain of the granted lands in the United States. 2/ The revested lands were classified as power site lands, timber lands, and agricultural lands, 3/ and the lands, except the power site lands, were opened to mineral location. 4/

In 1869, Congress granted to the State of Oregon certain lands to aid in the construction of a military wagon road from Coos Bay to Roseburg. 5/ These lands, commonly known as the Coos Bay Wagon Road grant lands, became involved in litigation between the Southern Oregon Co. and the United States, and in settlement of the litigation, Congress passed an act accepting from the Southern Oregon Co. a reconveyance of these lands. 6/ The lands were to be classified and disposed of in the manner provided for the revested Oregon and California Railroad Co. lands. 7/

The Act of August 28, 1937, 8/ provided that those portions of the revested Oregon and California Railroad

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1/ Oregon & California R. v. United States, 238 U.S. 393 (1915) (holding the terms to be covenants, not conditions subsequent).

2/ Act of June 9, 1916, ch. 137, § 1, 39 Stat. 218.

3/ Id. § 2, 39 Stat. 219.

4/ Id. § 3, 39 Stat. 219.

5/ Act of Mar. 3, 1869, ch. 150, 15 Stat. 340.

6/ Act of Feb. 26, 1919, ch. 47, § 1, 40 Stat. 1179.

7/ Id. § 3, 40 Stat. 1180.

8/ 43 U.S.C. § 1181a (1964).

lands and the reconveyed Coos Bay Wagon Road grant lands theretofore or thereafter classified as timberlands, and power site lands valuable for timber, should be managed for permanent forest production. This Act had the effect of closing to mineral entry those lands classified as timberlands and powersite lands valuable for timber. 1/ These lands except power sites, were re-opened to location by the Act of April 8, 1948, ch. 179, 2/ which also provided for the validation of claims located on and after August 28, 1937.

O. Reservoir sites.

Section 3 of the Reclamation Act of 1902 3/ authorizes the Secretary of the Interior to withdraw certain lands from public entry. First form withdrawals are those of lands required for irrigation works contemplated under the provisions of the Act. Second form withdrawals are of lands believed to be susceptible of irrigation from the irrigation works. 4/ The Act was interpreted by the Secretary as withdrawing from location lands contained within both first and second form withdrawals, 5/ but later it was concluded that lands contained within second form withdrawals were open to location. 6/ First form withdrawals have uniformly been

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1/ Instructions, 57 I.D. 365 (1941).

2/ 62 Stat. 162.

3/ 43 U.S.C. § 416 (1964).

4/ Second form withdrawals are subject to entry under the homestead laws. Id.

5/ Instructions, 32 L.D. 387 (1904).

6/ Instructions, 35 L.D. 216 (1906).

held to preclude location, 1/ while second form withdrawals have been held to apply only to lands subject to entry under the homestead laws. 2/

Section 10 of the Act of August 4, 1939, 3/ gives the Secretary of the Interior the authority to permit the removal from lands withdrawn under the reclamation laws of "sand, gravel, and other minerals and building materials" with or without competitive bidding.

The Act of April 23, 1932, 4/ provides:

> "Where public lands of the United States have been withdrawn for possible use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the land to location, entry, and patent under the general mining laws, reserving such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate, including the right to take and remove from such lands construction materials for use in

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1/ James C. Reed, 50 L.D. 687 (1924); United States v. Dawson, 58 I.D. 670 (1944); Harry A. Schultz, 61 I.D. 259 (1953); Grace Kinsela, 74 I.D. 386 (1967) ("temporary" withdrawal held still in effect 62 years later); see Loney v. Scott, 57 Ore. 378. 112 Pac. 172 (1910).

2/ See Albert M. Crafts, 36 L.D. 138 (1907) (coal lands not affected by withdrawal).

3/ 43 U.S.C. § 387 (1964).

4/ Id. § 154.

the construction of irrigation works, and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him, when in the opinion of the Secretary same may be necessary for the protection of the irrigation interest".

Application to open lands to location under the 1932 Act may be filed by a person, association, or corporation qualified to locate and purchase claims under the general mining laws. The application must describe the land the applicant desires to locate, by legal subdivision if surveyed, or by metes and bounds if unsurveyed, and must set out the facts upon which is based the knowledge or belief that the lands contain valuable mineral deposits, giving such detail as the applicant may be able to furnish as to the nature of the formation and the kind and character of the mineral deposits. The application is transmitted to the Bureau of Reclamation with a request for a report and recommendation. If the Bureau of Reclamation makes an adverse report, the application is rejected. If in the opinion of the Bureau of Reclamation the lands may be opened to location without prejudice to the United States, the report will recommend the reservation of such ways, rights, and easements considered necessary or appropriate, and the form of contract to be executed by the prospective locator as a condition precedent to the vesting of any rights in him, which may be necessary for the protection of irrigation interests. 1/

P. Recreation areas.

1. Recreation Act of 1926.

The Recreation Act of 1926 2/ authorized the Secretary

1/ 43 C.F.R. § 3400.4(b) (1968).

2/ 44 Stat. 741.

to withhold from all forms of appropriation unreserved non-mineral public lands which had been classified by him as chiefly valuable for recreational purposes. This Act was extensively amended and expanded by the Act of June 4, 1954. 1/ Under the present law, lands in Alaska classified for disposition for recreational or public purposes may not be appropriated under any other public land law unless the Secretary revises the classification or authorizes the disposition of an interest in the lands under other applicable law. 2/ The law further provides:

> " . . . If, within eighteen months following such classification, no application has been filed for the purpose for which the lands have been so classified, then the Secretary shall restore such lands to appropriation under the applicable public land laws."

This provision has been ignored by the Secretary, who held in R. C. Buch 3/ that notwithstanding the language of the statute, lands classified for disposal are not open to location until the Secretary chooses to restore them. The Buch case was reviewed by the District Court for the Central District of California, which held that—

> "In any event, eighteen months having passed after August 12, 1964, the date on which the classification statement was filed in the local land office, and no application having been made by any entity or body for lease of the subject area, the same was deemed by law to have been freed from the classification and any restrictive or segregative effect thereof and open to entry under the general mining law at the expiration of such eighteen month period,

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1/ 43 U.S.C. § 869 et seq. (1964).

2/ Id. § 869(a).

3/ 75 I.D. 140 (1968).

irrespective of the failure of the personnel of the Department of the Interior to terminate the classification as required or contemplated by the Recreation and Public Purposes Act." 1/

2. National recreation areas.

National recreation areas have generally been established by agreement between the National Park Service and the Bureau of Reclamation on lands withdrawn for reclamation purposes. 2/

Section 8 of the Colorado River Storage Project Act of 1956 3/ authorizes the Secretary of the Interior to withdraw public lands from entry or other disposition under the public land laws as may be necessary for the construction, operation, and maintenance of public recreational facilities authorized in connection with the Project.

The Act of October 8, 1964, created the Lake Mead National Recreation Area. All minerals within the Recreation Area (including minerals which, but for the withdrawal, would have been subject to location under the mining laws) are subject to lease under the provisions of Section 4(b) of the Act. 4/

The Act creating the Whiskeytown-Shasta-Trinity National

1/ Findings of Fact and Conclusions of Law on Motion for Summary Judgment at 9-10, Buch v. Hickel, No. 68-1358-PH (C.D.Cal. Mar. 20, 1969).

2/ 1 Wheatley, Withdrawals and Reservations of Public Domain Lands 265 (P.L.L.R.C. Study).

3/ 43 U.S.C. § 620g (1964).

4/ 16 U.S.C. § 460n-3 (1964). See also 43 U.S.C. § 387 (1964).

Recreation Area provides that, subject to existing rights, the lands within the Recreation Area are withdrawn from location, entry, and patent under the mining laws. The Secretary of the Interior may permit the removal of leasable minerals in accordance with the provisions of the Mineral Leasing Act of 1920 or the Mineral Leasing Act for Acquired Lands (1947) if he finds that such disposition would not have significant adverse effects on the purposes of the Central Valley project or the administration of the recreation area. The Secretary of the Interior, under such regulations as he may prescribe, 1/ may permit the removal of nonleasable minerals under the provisions of 43 U.S.C. § 387 (1964) and 30 U.S.C. § 192c (1964). A lease or permit respecting minerals in lands administered by the Secretary of Agriculture may be issued only with his consent and subject to such conditions as he may prescribe. 2/

The Act creating the North Cascades Recreation Area 3/ has provisions governing mining and mineral leasing which are similar to the provisions governing such activities in the Whiskeytown-Trinity-Shasta National Recreation area.

3. Special Acts.

A number of special acts creating or authorizing the creation of recreation areas provide that the lands within such areas shall not be subject to the mining laws. 4/

1/ The regulations are found in 43 C.F.R. Subpart 3328 (1968).

2/ 16 U.S.C. § 460q-5 (Supp. III, 1965-1967).

3/ Act of Oct. 2, 1968, Pub.L.No. 90-544, 82 Stat. 926.

4/ Act of May 29, 1924, ch. 206, 43 Stat. 242; Act of Feb. 24, 1925, ch. 304, 43 Stat. 969; Act of Aug. 27, 1935, ch. 751, 49 Stat. 895.

Q. Wildlife refuge areas.

Wildlife refuge areas may be established either by executive action, including action taken by "authority of the President" or by direct Congressional action. 1/ The question of the sources of authority for withdrawals made by the President is a matter of some complexity and is discussed in detail in the P.L.L.R.C. Study Withdrawals and Reservations of Public Domain Lands. Prior to 1944 it was not always clear whether it was intended that lands withdrawn for wildlife purposes be open to location, and if open, whether they be open to location generally or only with respect to the metalliferous minerals pursuant to the proviso contained in the 1912 amendment of the Picket Act. 2/ Since 1944, it has been the practice to include in public land orders establishing or adding to wildlife refuge areas the provision that the lands are "withdrawn from all forms of appropriation under the public land laws, including the mining laws", 3/ and the regulations prohibit "prospecting for metal deposits or locating or filing mining claims" in wildlife refuge areas. 4/

The Act of June 5, 1920, 5/ authorized the establishment of the Custer State Park Game Sanctuary in South Dakota. 6/

1/ Wheatley, Withdrawals and Reservations of Public Domain Lands 245 (P.L.L.R.C. Study).

2/ Id.

3/ Id.

4/ 50 C.F.R. § 26.29 (1968).

5/ 16 U.S.C. § 675 (1964).

6/ The name was changed to "Norbeck Wildlife Preserve" in 1949. Act of Oct. 6, 1949, ch. 620, § 1, 63 Stat. 708.

Section 1 of the Act of June 24, 1948, 7/ provides:

> "Subject to the conditions herein provided, mining locations may be made under the general mining laws of the United States on lands of the United States situated within the exterior boundaries of that portion of the Harney National Forest designated as the Custer State Park Game Sanctuary, South Dakota, created pursuant to the provisions of sections 675-678 of this title. . . .Provided, however, That the mining operations herein authorized shall be subject to such rules and regulations as the Secretary of Agriculture may deem necessary in furtherance of the purposes for which the said sanctuary was established. . . .Provided further, That the Secretary of Agriculture in his discretion may prohibit the location of mining claims within six hundred and sixty feet of any Federal, State, or county road, and within such other areas where the location of mining claims would not be in the public interest: And provided further, That no patent shall be issued by the United States on any location filed pursuant to the authority contained in this section."

Pursuant to this authority, the Secretary of Agriculture has prohibited the location of mining claims "within 660 feet of any Federal, state or county road and within such other areas where the location of mining claims would not be in the public interest" as designated by the appropriate Forest Service officer. 2/

In Udall v. Tallman 3/ it was held that unless the

1/ 16 U.S.C. § 678a (1964).

2/ 36 C.F.R. § 251.10 (1968).

3/ 380 U.S. 1 (1965).

withdrawal order creating a wildlife refuge area closed the lands to leasing, the lands could be leased if authorized by applicable regulations. The regulations restrict oil and gas leasing in wildlife refuge areas. 1/ Similar restrictions have not been adopted for the nonfuel minerals, but in any event such leases would be discretionary with the Secretary.

A lease or permit may be issued by the Atomic Energy Commission for lands administered for wildlife purposes only if the President by Executive Order declares that the requirements of the common defense and security make such action necessary. 2/

R. Military reservations.

1. Withdrawal.

From an early period in the history of the United States it had been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses, and the authority of the President in this respect was recognized in numerous Acts of Congress. 3/ In creating a military reservation, the President was regarded as acting by authority of the Congress, 4/ and if the reservation was made by the head of an executive department, it was presumed that the President acted through him. 5/ Prior to February 28, 1958, mineral

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1/ See 43 C.F.R. § 3120.3-3 (1968).

2/ 42 U.S.C. § 2097 (1964).

3/ See Grisar v. McDowell, 73 U.S. (6 Wall.) 363 (1867).

4/ 17 Op.Att'y Gen. 168 (1881).

5/ See 17 Op.Att'y Gen. 258 (1882).

lands reserved from sale by the Mineral Location law of 1872 could be reserved for military purposes by order of the President, and when so reserved, were withdrawn from exploration, location, and purchase under the mining laws. 1/ After February 28, 1958, no public land could be withdrawn from location, sale, or entry for use of the Department of Defense, or reserved for such use, except by Congressional action, if such withdrawal or reservation would result in the withdrawal or reservation of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense. 2/ All withdrawals or reservations are subject to the condition that all minerals in the land so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior. Disposition of, or exploration for, any minerals in such lands may be made only under the applicable mining and mineral leasing laws, but no disposition of, or exploration for, any minerals may be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved. 3/

The rights of a locator to a valid mining claim, existing prior to the creation of a military reservation, cannot be affected so long as the claim is maintained in accordance

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1/ Behrends v. Goldsteen, 1 Alaska 518 (1902); Fort Maginnis, 17 Op.Att'y Gen. 230, 1 L.D. 553 (1881). See David W. Harper, 74 I.D. 141 (1967) (lands accreted to military reservation).

2/ 43 U.S.C. § 156 (1964). The object of this Act was to return to Congress from the Executive branch of the Government the responsibilities imposed by the Constitution on Congress for the management of the public lands and associated resources of the United States. S. Rep. No. 1297, 85th Cong., 2d Sess. (1958).

3/ 43 U.S.C. § 158 (1964).

with law. 1/

2. Restoration and disposal.

Congress has specifically authorized the revocation of military withdrawals and disposal of lands reserved for military purposes which are no longer needed for these purposes. 2/ In the absence of an Act of Congress, lands reserved for military purposes cannot be restored to the public domain, 3/ nor can they be transferred to another department. 4/

The Act of July 5, 1884, ch. 214 5/ provided for the disposal of abandoned and useless military reservations, and Section 5 of that Act (now 43 U.S.C. § 1074 (1964)) provides that—

> "Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral laws of the United States."

S. Indian Reservations.

After a thorough consideration of the law governing the

1/ Fort Maginnis, 17 Op.Att'y Gen. 230, 1 L.D. 553 (1881); cf. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306 (1930). Contra, Camp Bowie, Decision of the Acting Commissioner, Sept. 30, 1879, Sickels, U.S. Mining Laws 520 (1881).

2/ Act of June 30, 1949; 40 U.S.C. § 471 et seq. (1964). See Chapter 23 of the Study at 933 and 43 C.F.R. Subpart 2312 (1968).

3/ 10 Op.Att'y Gen. 359 (1862); 16 Op.Att'y Gen. 121 (1878); 17 Op.Att'y Gen. 168 (1881).

4/ 28 Op.Att'y Gen. 143 (1910).

5/ 23 Stat. 103.

location of mining claims on Indian reservations, Lindley announces the following conclusions:

> "No right to appropriate a mining claim within the limits of an Indian reservation can be initiated so long as the Indian title remains unextinguished. Acts which in the absence of such reservation might be valid may be adopted upon the extinguishment of the Indian title, if such adoption is manifested by perfection of the location and the performance of the required work or making improvements. Otherwise, the claim may be located by the first-comer, regardless of the acts done by others while the land was withdrawn from the public domain. A mining claim valid and subsisting at the time an Indian reservation is created is not affected by such reservation, nor are the rights of the prior locator impaired, so long as he perpetuates his estate by the performance of the requisite annual labor; and upon the abandonment or forfeiture of the claim, it does not become subject to the reservation; the estate of the original locator may be restored by resumption of work, or the claim may in default of this be relocated." 1/

The conclusions announced by Lindley are subject to certain exceptions, which, due to the fact that Indian reservations are not properly a part of this study, will not be

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1/ 1 Lindley, Mines § 186 (3d ed. 1914). Accord, Noonan v. Caledonia Gold Min. Co., 121 U.S. 393 (1887); Kendall v. San Juan Silver Min. Co., 144 U.S. 658 (1891); King v. MacAndrews, 111 Fed. 860 (8th Cir. 1901); Gibson v. Anderson, 131 Fed. 39 (9th Cir. 1904); Decision of the Commissioner, Jan. 20, 1879, Copp, U.S. Mineral Lands, 253 (1881); Decision of the Acting Commissioner, Feb. 4, 1880, Sickels, U.S. Mining Laws 355 (1881); High Meeks, 29 L.D. 456 (1900); Navajo Indian Reservation, 30 L.D. 515 (1901); John D. Archer, 67 I.D. 181 (1960). See Acme Cement and Plaster Co., 31 L.D. 125 (1901).

considered here other than to indicate their existence. 1/

The Mineral Leasing Act of 1920 is not applicable to lands within Indian reservations. 2/ Such lands may be subject to special leasing acts. 3/

The Materials Disposal Act of 1947 is not applicable to Indian lands. 4/

T. Rights of way.

A mining claim may be located on lands over which an easement has been acquired by another, 5/ but the mining claim is subject to the rights of the holder of the easement. 6/ In particular, the mining claimant may extract the minerals from beneath the surface of the easement, 7/ but

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1/ See generally 1 American Law of Mining §§ 2.31-2.41 (1960).

2/ 34 Op.Att'y Gen. 171 (1924).

3/ See, e.g., Act of June 30, 1919, ch. 4 § 26, 41 Stat. 3, 31.

4/ 30 U.S.C. § 601 (1964).

5/ Eugene McCarthy, 14 L.D. 105 (1892); Grand Canyon Ry. v. Cameron, 35 L.D. 495 (1907); Schirm-Carey and Other Placers, 37 L.D. 371 (1908); Opinion of the Acting Solicitor, 67 I.D. 225 (1960). See 30 U.S.C. § 52 (1964).

6/ Welch v. Garrett, 5 Ida. 639, 51 Pac. 405 (1897); Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656 (1887); Murray v. City of Butte, 31 Mont. 177, 77 Pac. 527 (1904); City of Butte v. Mikosowitz, 39 Mont. 350, 102 Pac. 593 (1909).

7/ Cf. Barclay v. Howell's Lessee, 31 U.S. (6 Pet.) 498 (1832).

he is subject to an obligation to support the surface. 1/ Similarly, lands subject to an easement are open to leasing under the Mineral Leasing Act of 1920, and permits and leases may include such lands, provided that there is no interference with the use of the land for the purpose for which the easement was granted. 2/

Conversely, if the right of way is not an easement but a determinable fee without the reservation of minerals, the lands within the right of way are not subject to location or leasing. 3/

Determining whether a right of way is an easement or a determinable fee is frequently difficult, and the reservation of minerals from a grant of the fee further complicates the problem.

1. Highway rights of way.

Section 8 of the Lode Law of 1866 4/ provides:

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

1/ See City of Butte v. Mikosowitz, 39 Mont. 350, 102 Pac. 593 (1909); Breisch v. Locust Mountain Coal Co., 267 Pa. 546, 110 Atl. 242, 9 A.L.R. 1330 (1920).

2/ Opinion of the Acting Solicitor, 67 I.D. 225 (1960). With respect to oil and gas leases, however, the Mineral Leasing Act of 1920 is superseded by the Act of May 21, 1930, 30 U.S.C. § 301 (1964).

3/ A. Otis Birch, 53 I.D. 339 (1931).

4/ 43 U.S.C. § 932 (1964).

This section grants an easement only. 1/

2. Railroad rights of way.

a. The "limited fee" theory.

From 1850 to 1871, railroad construction was subsidized by Congressional grants of public domain lands, each grant being the subject of a special Act of Congress. 2/ The estate which passed to the railroads by these grants was generally held to be a fee simple determinable, 3/ with a possibility of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. 4/

From 1871 to 1875, rights of way were granted to the railroads by special acts. 5/ The burden of this special legislation prompted Congress to adopt the general Right of

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1/ Decision of the Commissioner, Dec. 29, 1871, Copp, U.S. Mining Decisions 76 (1874); Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656 (1887).

2/ See, e.g., Act of Sept. 20, 1850, ch. 61, 9 Stat. 466 (Illinois Central); Act of July 1, 1862, ch. 120, 12 Stat. 489 (Union Pacific); Act of July 2, 1864, ch. 217, 13 Stat. 365 (Northern Pacific).

3/ The term "limited fee" is customarily used by the courts and the Secretary to refer to a fee simple determinable.

4/ See Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1903).

5/ See, e.g., Act of June 1, 1872, ch. 258, 17 Stat. 202 (Dakota Grand Trunk Ry.); Act of June 8, 1872, ch. 364, 17 Stat. 343 (New Mexico and Gulf Ry.).

Way Act of 1875. 1/ Section 4 of this Act prescribed the method to be followed by a railroad company in obtaining a right of way, and then provides that—

> " . . . thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. . . ." 2/

This section was consistently interpreted by the Commissioner and the Secretary as providing for the grant of an easement only 3/ until the decision of the Supreme Court in Rio Grande Western Ry. v. Stringham, 4/ holding that the Right of Way Act of 1875 granted a fee simple determinable. The Court said:

> "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

Under this theory, the grant of a right of way is "a present absolute grant, subject to no conditions except those

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1/ 43 U.S.C. §§ 934-939 (1964).

2/ Id. § 937.

3/ Circular, 12 L.D. 423 (1888); Right of Way Regulations, 14 L.D. 338 (1892); Fremont, Elkhorn & Missouri Valley Ry., 19 L.D. 588 (1894); Mary G. Arnett, 20 L.D. 131 (1895); Right of Way Regulations, 27 L.D. 663 (1898); John W. Wehn, 32 L.D. 33 (1903); Grand Canyon Ry. v. Cameron, 35 L.D. 495 (1907); Right of Way Regulations, 37 L.D. 787 (1909). Contra, Right of Way Regulations, 32 L.D. 481 (1904), relying, no doubt, on Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1903).

4/ 239 U.S. 44 (1915).

necessarily implied, such as that the road shall be constructed and used for the purposes designed", 1/ and since the right of way grant is of the fee, a subsequent patent of the subdivision traversed by the right of way would not operate to convey to the patentee the land within the limits of the right of way. 2/ Furthermore, since one of the "incidents . . . usually attending the fee" is the ownership of minerals in place, 3/ a subsequent patent or other disposition of the land traversed by the right of way would not convey to the patentee, locator, or lessee the minerals under the right of way or the right to extract them. 4/ Upon the abandonment or forfeiture of the right of way, the fee would not pass to the subsequent patentee, locator, or lessee, but would revert to the United States, 5/ thus leaving long narrow strips of vacant public domain land. To avoid this situation Congress enacted the Act of March 8, 1922, 6/ which provides that upon the abandonment or forfeiture of a railroad right of way grant, the lands contained within the right of way shall (with certain exceptions) be transferred to and vested in the grantee (or his successors in interest) of the "the whole of the legal

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1/ Railroad Co. v. Baldwin, 103 U.S. 426 (1888).

2/ Id.; Northern Pac. R. v. Townsend, 190 U.S. 267 (1903); E. A. Crandall, 43 L.D. 556 (1915); State of Wyoming, 58 I.D. 128 (1942).

3/ Turner v. Wright, 2 Deg. F. & J. 234, 45 Eng.Rep. 612 (Ch. 1860); Pavkovich v. Southern Pac. Ry., 150 Cal. 39 87 Pac. 1097 (1906); Hillis v. Dils, 53 Ind.App. 576, 100 N.E. 1047 (1913); Frensley v. White, 208 Okl. 209, 254 P.2d 982 (1953).

4/ United States v. Bullington, 51 L.D. 604 (1926); Charles A. Son, 53 I.D. 270 (1931); A. Otis Birch, 53 I.D. 339 (1931).

5/ E. A. Crandall, 43 L.D. 556 (1915).

6/ 43 U.S.C. § 912 (1964).

subdivision or subdivisions traversed or occupied by such railroad or railroad structure", subject to—

> " . . . reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same."

When Congress enacted this statute, it was operating under the assumption, based on holding of the Supreme Court in Rio Grande Western Ry. v. Stringham, 1/ that railroad rights of way generally were held as estates in fee simple determinable rather than as easements. 2/

In summary, under the limited fee theory, lands granted as rights of way are not subject to location so long as the right of way is not abandoned or forfeited, 3/ but upon abandonment or forfeiture, the land then becomes subject to location. 4/ The holdings of the Supreme Court in Great Northern Ry. v. United States 5/ and United States v. Union Pac. R., 6/ discussed below, render the limited fee theory of little, if any, practical importance insofar as railroad rights of way are concerned.

1/ 239 U.S. 44 (1915).

2/ S.Rep.No. 388, 67th Cong., 2d Sess. (1922).

3/ A. Otis Birch, 53 I.D. 339 (1931).

4/ 43 U.S.C. § 912 (1964).

5/ 315 U.S. 262 (1942).

6/ 353 U.S. 112 (1957).

b. Rights of way as limited fees with reservations of minerals.

In United States v. Union Pac. R. 1/ the Supreme Court held that under the Act of July 1, 1862, ch. 120, 2/ the railroad did not acquire ownership of the minerals under the right of way. Although the decision is not as specific as one might desire, the Court seems to say that the estate which the railroad takes by virtue of its grant is a fee simple determinable, subject to (1) a reservation of minerals, and (2) a possibility of reverter in the event that the railroad ceases to use or retain the land for the purposes for which it was granted. A subsequent patent of the subdivisions traversed by the right of way grant does not operate to convey to the patentee either the land within the limits of the right of way, or the minerals under the right of way or the right to extract them. 3/ Upon the abandonment or forfeiture of the right of way, the lands contained within the right of way are transferred to the subsequent patentee of the subdivision, subject to a reservation in the United States of "all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove the same". 4/

Since a fee, albeit a "limited" fee, passes to the grantee, rights of way granted prior to 1871 are probably not open to location or leasing, notwithstanding the reservation of the minerals, for the reason that the right to

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1/ Id.

2/ 12 Stat. 489.

3/ Union Pac. R., 72 I.D. 76 (1965), aff'd sub nom. Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967).

4/ 43 U.S.C. § 912 (1964).

"prospect for, mine, and remove" the minerals was not reserved. 1/

c. Rights of way as easements.

As has been stated, the General Right of Way Act of 1875 was at first interpreted by the Commissioner and the Secretary as providing for an easement only. After a number of decisions holding the right of way to be an estate in fee simple determinable, and the enactment of legislation based on that theory, the Supreme Court held, in 1942, that the Act granted only as easement, and that the railroad obtained no right to the minerals. 2/

Where the right of way is an easement, the minerals belong to the owner of the fee, 3/ and, unless reserved, pass to the patentee of the land traversed by the right of way even if the patent is subsequent to the right of way grant. 4/ So long as the fee remains in the United States, the lands containing the minerals, if not otherwise withdrawn, remain open to location, 5/ and the locator has the

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1/ See Superior Sand & Gravel Min. Co. v. Territory of Alaska, 224 F.2d 623 (9th Cir. 1955).

2/ Great Northern Ry. v. United States, 315 U.S. 262 (1942).

3/ Humble Oil & Refining Co. v. Wagener, 19 S.W.2d 457 (Tex.Civ.App. 1929); see Barclay v. Howell's Lessee, 31 U.S. (6 Pet.) 498 (1832).

4/ See Haines v. McLean, 154 Tex. 272, 276 S.W.2d 777.

5/ Grand Canyon Ry. v. Cameron, 35 L.D. 495 (1907); Schirm-Carey and Other Placers, 37 L.D. 371 (1908); Opinion of the Acting Solicitor, 67 I.D. 225 (1960).

right to extract the minerals from beneath the surface of the easement so long as he does not interfere with the railroad's use of the easement. 1/

3. Canal and ditch rights of way.

The Act of March 3, 1891, 2/ grants rights of way to canal and ditch companies. Section 19 of the Act prescribes the method to be followed by a canal or ditch company in obtaining a right of way, and then provides that—

> ". . . thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." 3/

The interpretation of this section has paralleled the interpretation of the Section 4 of the General Right of Way Act of 1875, after which it was modeled. Thus, after the decision of the Supreme Court in Rio Grande Western Ry. v. Stingham 4/ holding that the railroad right of way was a limited fee, it was held in Kern River Co. v. United States, 5/ that a canal right of way was a limited fee. 6/ However, as a result of the decision of the Supreme Court in Great Northern Ry. v.

1/ See Booth v. McLean, 267 S.W.2d 158 (Tex.Civ.App. 1954).

2/ 43 U.S.C. §§ 946-949 (1964).

3/ Id. § 947.

4/ 239 U.S. 44 (1915).

5/ 257 U.S. 147 (1921).

6/ Accord, Windsor Reservoir & Canal Co. v. Miller, 51 L.D. 305 (1925).

United States, 1/ rights of way for canals and ditches are now regarded as easements. 2/

U. Lands patented with reservation of minerals.

The provisions of the Mineral Leasing Act extend to lands disposed of under laws reserving to the United States minerals which are leasable under the Act, together with the right to prospect for, mine and remove the same, subject to such conditions as may be provided by the laws reserving such deposits. 3/ Regulations applicable to potassium, sodium, and sulphur leasing provide that the lessee or permittee must make full compliance with the law under which such reservation was made. 4/ There is no similar regulation applicable to phosphate leasing, although in the absence of such regulations a holder of a phosphate lease or permit would, nevertheless, be obligated to comply with the law under which such reservation was made.

1. Acts reserving specific minerals.

Beginning in 1909, Congress enacted a number of statutes providing for the sale of lands with the reservation to the United States of certain specified minerals.

The Act of March 3, 1909, 5/ dealing with lands "classified, claimed, or reported as being valuable for coal"

1/ 315 U.S. 262 (1942).

2/ Opinion of the Acting Solicitor, 67 I.D. 225 (1960).

3/ 30 U.S.C. § 182 (1964).

4/ 43 C.F.R. § 3141.3 (1968) (potassium); id. § 3151.3 (sodium); id. § 3181.3 (sulphur).

5/ 30 U.S.C. § 81 (1964).

subsequent to a non-mineral entry, reserves to the United States "all coal in said lands, and the right to prospect for, mine, and remove the same". The coal deposits are subject to disposition "in accordance with the provisions of the coal land laws in force at the time of such disposal".

The Act of June 22, 1910, 1/ permits entry of lands which "have been withdrawn or classified as coal lands or are valuable for coal" and validates certain entries theretofore made. The Act reserves to the United States "all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same". The coal deposits are subject to disposition "in accordance with the provisions of the coal-land laws in force at the time of such disposal". 2/ The Act of April 30, 1912, 3/ made the 1910 Act applicable to state selections. The Act of Feb. 27, 1917, 4/ containing substantially similar provisions, applied to coal lands in Indian reservations opened to settlement.

The Act of July 17, 1914, 5/ permitted agricultural entry of lands "withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for these deposits", reserving to the United States "the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same". Persons qualified to acquire the reserved deposits may enter such lands "with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed by him as security for the

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1/ Id. § 83.

2/ Id. § 85.

3/ Id. § 90.

4/ Id. §§ 86-89.

5/ Id. § 121.

payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction." 1/

In 1949, the liability of the mineral claimant was extended to damage, caused by prospecting, to the value of the land for grazing. 2/

With the possible exception of a few nitrate minerals of little economic importance, 3/ all minerals reserved by the 1914 Act are now leasable, and the lands are subject to lease under the provisions of the Mineral Leasing Act of 1920. 4/ The minerals not reserved have passed to the patentee. Hence the lands patented under the 1914 Act are not open to location.

2. Stockraising Homestead Act of 1916; Pittman Underground Water Act of 1919.

The Stockraising Homestead Act does not restrict exploration or prohibit location on lands patented or entered by nonmineral claimants under its provisions, 5/ but it does place certain obligations upon the prospector. Section 9

1/ Id. § 122.

2/ Id. § 54.

3/ E.g., gerhardtite, a basic cupric nitrate, $Cu(NO_3)_2 . 3\ Cu(OH)_2$, found in the copper mines at Jerome, Arizona.

4/ 30 U.S.C. § 182 (1964).

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

of the Act 1/ provides:

> ". . . all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of 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. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting."

As in the case of prior reserved mineral acts, 2/ the Stockraising Homestead Act divides lands valuable for minerals into two estates, one including the underlying minerals and the other, including the surface, to be used for stockraising and agricultural purposes. 3/ A prospector may at all times enter the lands to prospect for minerals, and may, under the appropriate mining laws, locate such locatable minerals as he may discover, subject only to his liability to the homestead

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1/ 43 U.S.C. § 299 (1964).

2/ See Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928).

3/ Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931).

entryman for the damages specified in the statute. 1/ In order to prospect and locate, the prospector need not obtain the consent of the patentee nor need he post a bond, these being matters incident to mining operations, not exploration and location. 2/

Section 5 of the Pittman Underground Water Act of 1919 3/ provided for the issuance of a patent for certain lands on which an underground water supply had been discovered and developed. Section 8 of the Act contained provisions substantially identical to those contained in the Stockraising Homestead Act, quoted above.

Lands patented under the Stockraising Homestead Act and the Pittman Underground Water Act are subject to lease under provisions of the Mineral Leasing Act of 1920. 4/

3. Act of January 26, 1921.

The Act of January 26, 1921, provides that certain lands withdrawn under the Pickett Act "for the purpose of exploratory drilling to discover water supplies for irrigation or for other purposes" may be sold at public auction, 5/ and that any patent issued shall contain a reservation to the United States of "all oil, gas, coal, and other mineral". 6/

1/ McMullin v. Magnuson, 102 Colo. 230, 78 P.2d 964, 973 (1938).

2/ Id.

3/ 41 Stat. 294, repealed by Act of Aug. 11, 1964, Pub.L.No. 88-417, 78 Stat. 389.

4/ 30 U.S.C. § 182 (1964).

5/ 43 U.S.C. § 145 (1964).

6/ Id. § 146.

In the absence of the reservation of the right to "prospect for, mine, and remove" the reserved minerals, these lands are not subject to location 1/ or lease 2/.

4. Act of March 20, 1922.

The Act of March 20, 1922 3/ authorizes the Secretary of the Interior to accept title to certain lands within the exterior boundaries of the national forests and, in exchange, to issue a patent for an equal value of national forest land, surveyed and nonmineral in character. The United States may make a reservation of minerals, and if a reservation is made, it must be so stipulated in the patent. 4/ The Act also provides for the recognition in the patent of the rights of "any person who acquires the right to mine and remove the reserved deposits".

5. Recreation and Public Purposes Act.

The Recreation Act of 1926 5/ authorized the Secretary to withhold from all forms of appropriation unreserved nonmineral public lands which had been classified by him as chiefly valuable for recreational purposes. This Act was

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1/ See Superior Sand & Gravel Min. Co. v. Territory of Alaska, 224 F.2d 623 (9th Cir. 1955).

2/ See 30 U.S.C. § 182 (1964).

3/ 16 U.S.C. § 485 (1964).

4/ Id. § 486.

5/ 44 Stat. 741

extensively amended and expanded by the Act of June 4, 1954. 1/ Under the present law, the Secretary is authorized, upon application, to dispose of lands to public or non-profit organizations for recreational or public purposes. 2/ Both the 1926 Act and the present law provide:

> ". . . Each patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right to mine and remove the same, under applicable laws and regulations to be established by the Secretary." 3/

Although 42 years have passed since the enactment of the Recreation Act of 1926, the Secretary has not yet acted, and the "regulations to be established by the Secretary" are as non-existent today as they were on the date of the Act. The Secretary takes the position that until he chooses to issue regulations, these lands are not subject to prospecting, location, or lease. 4/

In commenting on this study, the Department of the Interior has stated:

> "The Department has issued regulations that patented or leased [lands] under the Small Tract Act and the Recreation and Public Purposes Act are not open to location under the mining laws. The Congress has provided such lands be kept open to mining location only in accordance with regulations. The problems involved in mining locations on homesites and recreation areas should readily be apparent to the authors. Informed administrative personnel have no knowledge of any industry or individual suggestion that such lands be opened to location except in connection with alleged fissionable materials in Florida. In that case, Geological Survey testing showed no values. However, the incident

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1/ 43 U.S.C. § 869 et seq. (1964).

2/ Id. § 869.

3/ Id. § 869-1.

4/ 43 C.F.R. § 2232.2-5 (1968); Carl F. Murray, 67 I.D. 132 (1960).

> indicates the Department's willingness to consider opening of such areas to mineral location if sufficient need exists." 1/

The above statement illustrates the unreliability of statements based on memory rather than on records. At least one such application was filed in Arizona by a mining company. This application was made by Banner Mining Company by a letter dated August 6, 1955, to the State Supervisor of the Bureau of Land Management at Phoenix, Arizona. This letter requested the Secretary of the Interior to issue regulations for approximately 1,000 acres which were in the Amole Mining District, Pima County, Arizona, and had been included in Recreational Withdrawal No. 21 dated April 29, 1929, issued pursuant to the Recreation and Public Purposes Act. 2/ The way in which this application, which was pending for more than four years, was handled would certainly discourage the filing of such applications.

Showing reluctance to follow the statutory provisions of the Recreation and Public Purposes Act by issuing regulations adequately to protect the surface of the land and providing for mining locations, the Department of the Interior requested an opinion of its Solicitor whether the Secretary of the Interior had the authority to promulgate regulations permitting the issuance of leases for locatable minerals on these lands and he replied on January 25, 1957:

> "My conclusion is that the Secretary has no authority to approve regulations for the leasing of the copper deposits reserved to the United States in lease 078598 or other leases issued under the act of 1926. Such deposits may be disposed of only by opening the lands to location under the United States mining laws through the issuance of regulations providing for mining locations on the leased areas and for the adequate protection of the surface rights of the lessee. A further prerequisite to opening any of the leased areas to mining

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1/ Comments accompanying letter dated Aug. 6, 1969, to Wayne N. Aspinall, Ch.Pub.L.L.Rev.Comm., from Mitchell Melich, Solicitor of the Department of the Interior.

2/ 44 Stat. 741 (1926).

location would be a modification of the withdrawal of the lands made by the Secretary's Order of April 29, 1929, issued under authority of the act of June 14, 1926, supra, so as to permit mining locations being made." 1/

The Secretary of the Interior failed to issue the regulations for the adequate protection of the surface rights as requested in the application and as specifically mentioned in the Solicitor's opinion as a prerequisite to providing for mining locations, 2/ but, on August 25,

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1/ Opinion of Solicitor, M-36403, Jan. 25, 1957.

2/ Edward Woozley, Director of the Bureau of Land Management, in a memorandum dated Feb. 13, 1958 to the Area Administrator, Area 2, erroneously relied on Solicitor's Opinion (M-36308, Oct. 28, 1955), and stated with respect to the issuance of regulations to protect the surface pursuant to the authority granted in the Recreation and Public Purposes Act: "If regulations are to be written to permit mining operations under the mining laws of 1872 they cannot be inconsistent with that law, therefore, such limitations as you suggest cannot be incorporated into regulations, but would require new legislation." This was not the view of the Associate Solicitor, Division of Public Lands, who on Jan. 14, 1959, advised Edward Woozley, Director of the Bureau of Land Management (A-59-2065.10a) with respect to recreation and mining use conflict in Tucson Mountain Park:

"If it is desirable to retain the control of the land so as to permit of multiple mining and recreational use, this also may be done by modifying the withdrawal order so that it will provide that once a lease or patent has been issued under the Recreation Act the reserved minerals will be subject to any existing or future regulations opening such deposits to disposal under 'applicable laws.' If the purpose is to permit immediate mining operations following lease or patent this can be effected by issuing regulations at the same time that the withdrawal order is modified.

"Should regulations be issued it probably would be administratively desirable to have them provide that the reserved minerals in any particular tract would become subject to location only upon a determination that mining would not unreasonably interfere with the use of the surface as authorized by the Recreation Act lease or patent and then only subject to suitable stipulations for the adequate protection of such surface use."

1959, modified the withdrawal to the extent necessary to permit mining locations on 7,600 acres included within the recreational withdrawal. 1/ The Bureau of Land Management had previously determined that these 7,600 acres were mineral in character. The citizenry of Tucson and vicinity were aroused by this modification of the withdrawal which made no provision for protection of the surface resources, and, after a hearing on December 8, 1959, 2/ conducted by Assistant Secretary of the Interior, Roger Ernst, the Public Land Order of August 25, 1959, was revoked on December 22, 1959. 3/ On November 15, 1961, these lands were incorporated in an enlargement of the Saguaro National Monument. 4/

6. Act of February 19, 1925; Color of Title Act of 1928; Act of February 23, 1932.

The Act of February 19, 1925, 5/ provides for the issuance of patents for certain lands in Louisiana held under

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1/ 24 Fed.Reg. 7037 (1959).

2/ 24 Fed.Reg. 8468 (1959).

3/ 24 Fed.Reg. 10446 (1959).

4/ 26 Fed.Reg. 10899 (1961).

5/ 43 U.S.C. § 993 (1964).

color of title, and provides:

> "All purchases made and patents issued under the provisions of this section shall be subject to and contain a reservation to the United States of all the coal, oil, gas, and other minerals in the lands so purchased and patented, together with the right to prospect for, mine, and remove the same."

The Color of Title Act 1/ provides that the Secretary shall issue a patent for not to exceed 160 acres whenever it is shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title, for more than 20 years, and that valuable improvements have been placed on the land, or some part of it has been reduced to cultivation. A 1953 amendment gave the Secretary discretionary authority to issue patents to those who have held a tract of land in good faith and in peaceful adverse possession under claim or color of title since 1901. 2/

The Color of Title Act further provides:

> ". . . That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits. . . ." 3/

The 1953 amendment provides that no mineral reservation shall

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1/ Id. § 1068.

2/ Id.

3/ Id.

be made when the claimant has held the tract of land since 1901, unless the land is contained within a mineral withdrawal or subject to an outstanding mineral lease. 1/

The Act of February 23, 1932, 2/ provides for the issuance of patents for certain lands in New Mexico held under color of title, and contains a reservation of coal and other minerals substantially identical to that contained in the Color of Title Act, quoted above.

Lands patented under these Acts are open to location and leasing.

7. Act of May 16, 1930; Act of March 31, 1950.

Section 1 of the Act of May 16, 1930, 3/ authorizes the Secretary of the Interior, in connection with federal irrigation projects, to dispose of certain lands designated as temporarily or permanently unproductive.

Section 1 of the Act of March 31, 1950, 4/ authorizes the Secretary of the Interior, in connection with federal irrigation projects, to dispose of certain tracts too small to be classified as farm units.

Patents for lands disposed of under these Acts must contain reservations of "coal or other mineral rights to the same extent as patents issued under the homestead laws". 5/ Presumably the reference to "the homestead laws" is to the Stock-raising Homestead Act of 1916 and the Pittman Underground

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1/ Id. § 1068b.

2/ Id. § 178.

3/ Id. § 424.

4/ Id. § 375b.

5/ Id. § 424c; id. § 375d.

Water Act of 1919 which reserve 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." 1/

Thus lands patented under the Act of May 16, 1930 and the Act of March 31, 1950 are open to location and leasing to the same extent and, presumably, under the same conditions, as lands patented under the Stockraising Homestead Act.

8. Taylor Grazing Act of 1934.

Section 8 of the Taylor Grazing Act 2/ permits the Secretary to accept title to privately owned lands and to issue a patent for other lands in exchange. The same section also prescribes the procedure for the exchange of lands by states, and provides:

> "When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States . . . ."

Section 8 further provides:

> ". . . That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it

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1/ Id. § 299 (Stockraising Homestead Act).

2/ Id. § 315g.

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 thereof."

Section 6 of the Act 1/ provides:

". . . nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto."

These provisions make it clear that lands granted or patented under the Taylor Grazing Act with a reservation of minerals are not closed to location or leasing by that Act.

9. Small Tract Act.

The Small Tract Act of 1938, as amended, authorizes the Secretary, in his discretion, to sell or lease tracts not exceeding five acres of certain public lands and withdrawn lands, which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes. 2/

The Small Tract Act provides that patents for all tracts purchased under the provisions of the Act shall contain a reservation of--

". . . the oil, gas, and all other mineral deposits, together with the right to prospect for,

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1/ Id. § 315e.

2/ Id. §§ 682a-682b.

mine, and remove the same under applicable law and such regulations as the Secretary may prescribe." 1/

Although the right to prospect for, mine, and remove locatable minerals is thus specifically recognized by Congress, the Secretary takes the position that until he chooses to issue regulations, these lands are not subject to prospecting or location. 2/ The Secretary's position in this regard has been sustained by the Ninth Circuit in Dredge Corp. v. Penny, 3/ on the ground that the Small Tract Act does not provide that the lands shall be open to entry and location. This reasoning ignores the fact that Congress had declared that, except as otherwise provided, "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase". 4/ Although in Dredge Corp. the court relied on Superior Sand and Gravel Min. Co. v. Territory of Alaska, 5/ the latter case does not support the holding of Dredge Corp. In Superior Sand & Gravel the court distinguished statutes reserving the right to prospect from those which do not, holding that under the latter type of statute the land is not subject to location. This distinction was ignored in Dredge Corp. Where the right to prospect is reserved, as in the Small Tract Act, a proper interpretation of the statute would seem to be that such lands are open to location under the general mining laws, subject to whatever reasonable restrictions may be contained in such regulations as the Secretary, in his discretion, may promulgate.

1/ Id. § 682b.

2/ 43 C.F.R. § 2233.6(a) (1968); Dredge Corp., 64 I.D. 368 (1957); Frank Melluzo, 72 I.D. 21 (1965); Leo J. Kottas, 73 I.D. 123 (1966).

3/ 363 F.2d 889 (9th Cir. 1966).

4/ 30 U.S.C. § 22 (1964).

5/ 224 F.2d 623 (9th Cir. 1955).

Lands patented or leased under the Small Tract Act are subject to the mineral leasing laws. 1/

10. Act of August 7, 1946; Act of August 3, 1955.

Section 1 of the Act of August 7, 1946, 2/ provides for the disposition of lands south of the Cimarron base in Oklahoma, and further provides:

> ". . . That oil, gas, or other mineral deposits contained therein are reserved to the United States; that said minerals shall be and remain subject to sale or disposal by the United States under applicable laws; and that permittees, lessees, or agents of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining said minerals . . . ."

Section 2 of the Act of August 3, 1955, 3/ authorizes the Secretary, in order to facilitate the administration of certain reconveyed Choctaw and Chickasaw Indian lands in Oklahoma, to sell any tract of the lands at public or private sale. Patents for lands disposed of under this Act must contain reservations to the United States of "all mineral deposits, together with the right to prospect for, mine, and remove the same under applicable provisions of law". 4/

Except as provided in the Act of March 2, 1895, ch. 188 5/

1/ 43 C.F.R. § 2233.6(a)(1968).

2/ 43 U.S.C. § 1100 (1964).

3/ Id. § 1102a.

4/ Id. § 1102c.

5/ 28 Stat. 876, 899.

and the Act of June 6, 1900, ch. 813, 1/ land in Oklahoma is not open to location. 2/ Neither the Act of August 7, 1946 nor the Act of August 3, 1955 appears to open to location any additional lands in Oklahoma. The lands covered by these two Acts are, however, subject to leasing under the applicable mineral leasing laws.

11. Public Land Sale Act of 1964.

Section 1 of the Public Land Sale Act of 1964 3/ authorizes the Secretary of the Interior to dispose of certain public lands that have been classified for disposal. All patents or other evidences of title issued under the Public Land Sale Act must contain a reservation to the United States of all mineral deposits, which thereupon are withdrawn from appropriation under the public land laws, including the mining and mineral leasing laws. 4/

12. Miscellaneous acts.

Section 1 of the Act of May 19, 1948, 5/ authorizes the transfer of real property for wildlife or other purposes and reserves to the United States "all oil, gas, and mineral rights". In the absence of the reservation of the right to "prospect for, mine, and remove" the reserved minerals, these

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1/ 31 Stat. 672, 680.

2/ Oklahoma v. Texas, 258 U.S. 574, 601 (1922).

3/ 43 U.S.C. § 1421 (1964).

4/ Id. § 1424.

5/ 16 U.S.C. § 667b (1964).

lands are not subject to location 1/ or leasing. 2/

The Act of June 4, 1953, 3/ authorizing the Secretary to convey certain school properties to local school districts or public agencies, provides for the reservation of "all mineral deposits in the land and the right to prospect for and remove such deposits under rules and regulations prescribed by the Secretary of the Interior". The Secretary will no doubt take the position that until he chooses to issue regulations, these lands are not subject to location. 4/

13. Special acts.

A large number of special acts have granted lands with a reservation of minerals to the United States. Typical of such acts are the following:

The Act of August 25, 1914, ch. 286 5/ granting public lands to the City and County of Denver, Colorado, for public park purposes, reserves to the United States "all oil, coal, and other mineral deposits that may be found in the land so granted and all necessary use of the land for extracting same . . . ."

The Act of April 15, 1924, ch. 106 6/ authorizing the

1/ See Superior Sand & Gravel Min. Co. v. Territory of Alaska, 224 F.2d 623 (9th Cir. 1955).

2/ See 30 U.S.C. § 182 (1964).

3/ 25 U.S.C. § 293a (1964).

4/ See City of Phoenix, 53 I.D. 245 (1931); Dredge Corp., 64 I.D. 368 (1957); Frank Melluzo, 72 I.D. 21 (1965); Leo J. Kottas, 73 I.D. 123 (1966).

5/ 38 Stat. 706.

6/ 43 Stat. 96.

conveyance of certain land to the city of Miles City, Montana, for park purposes, provides that the patent shall contain a reservation to the United States of "all gas, oil, coal, and other mineral deposits as may be found in such land and the right to use of the land for extracting and removing the same." The Act of August 8, 1946, ch. 913 1/ granting certain land to the city of Miles City, Montana for industrial and recreational purposes and as a museum site, contains an identical reservation, as does the Act of June 16, 1950, ch. 270 2/ authorizing the conveyance of certain lands to the city of Miles City, Montana.

The Act of June 7, 1924, ch. 334 3/ and the Act of March 3, 1925, ch. 470 4/ granting certain public lands to the city of Phoenix, Arizona, for municipal park and other purposes reserves to the United States "all oil, coal, or other mineral deposits found at any time in the land, and the right to prospect for, mine, and remove the same . . . ." It was feared that the location of mining claims would impair the use of the lands for park purposes, 5/ and the above quoted reservations were amended by adding the words "under such rules and regulations as the Secretary of the Interior shall prescribe". 6/ Under this statute the Secretary has the duty to prescribe such rules and regulations for prospecting and mining as will adequately safeguard the use of the lands for park purposes. Notwithstanding the express mandate of Congress that the Secretary "shall prescribe" such rules, 42 years have passed since the enactment of the 1927 amendment, and the "rules and regulations" are as non-existent

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1/ 60 Stat. 946.

2/ 64 Stat. 233.

3/ 43 Stat. 643.

4/ 43 Stat. 1213.

5/ H.R. Rep. No. 233, 69th Cong., 1st Sess. (1926); S. Rep. No. 1212, 69th Cong., 2d Sess. (1927).

6/ Act of Feb. 8, 1927, ch. 79, 44 Stat. 1061.

today as they were on the date of the Act. The Secretary takes the position that until he chooses to issue regulations, these lands are not subject to location. 1/ A proper interpretation of the statute would seem to be that such lands are open to location under the mining laws, subject to whatever reasonable restrictions are contained in the regulations required to be promulgated by the Secretary.

The Act of June 8, 1926, ch. 499, 2/ authorizing an exchange of lands between the United States and the State of Nevada provides that the patent shall contain a reservation to the United States of "all oil, coal, or other mineral at any time found in said lands, together with the right to reenter upon said lands and to prospect for, mine, and remove said mineral, under such conditions and under such rules and regulations as the Secretary of the Interior may prescribe." Pursuant to this authority, the Secretary has issued regulations governing the disposal of valuable deposits of sand and gravel. 3/ Since there are no regulations providing for the disposal of other minerals, the Secretary would no doubt hold that such other minerals are not subject to either location or lease. 4/

The Act of January 29, 1929, ch. 112 5/ ceding certain lands to the State of Idaho for fish-culture purposes reserves to the United States "all coal, oil, gas, and other minerals, together with the right of the United States, its grantees or permittees, to prospect for, mine, and remove the same."

1/ City of Phoenix, 53 I.D. 245 (1931).

2/ 44 Stat. 708.

3/ 43 C.F.R. § 3323.2-1 et seq. (1968).

4/ See Leo J. Kottas, 73 I.D. 123 (1966).

5/ 45 Stat. 1142.

The Act of May 21, 1934, ch. 318 1/ providing for the selection of certain lands for the use of the University of Arizona reserves to the United States "all coal, oil, gas, or other mineral contained in such lands together with the right to prospect for, mine, and remove the same at such times and under such conditions as the Secretary of the Interior may prescribe."

The Act of June 29, 1936, ch. 861 2/ and the Act of June 29, 1936, ch. 862, 3/ both providing for the selection of certain lands for the use of the California State Park system, contain a reservation identical to the one last quoted. The Secretary has promulgated regulations applicable to the reserved minerals, providing that all disposal of such minerals must be by lease. 4/

V. Lands granted to states for common schools and internal improvements.

Each new state admitted to the United States has received a grant of public land, identified as certain numbered sections in each township, to be used for common school purposes. 5/ Numbered sections which, for one reason or another were unavailable to the state were replaced by

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1/ 48 Stat. 786.

2/ 49 Stat. 2026.

3/ 49 Stat. 2027.

4/ 43 C.F.R. § 3324.1-2 (1968).

5/ E.g., Act of Aug. 14, 1848, ch. 177, 9 Stat. 323 (Oregon) (sections 16 and 36); Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah) (sections 2, 16, 32, and 36); Act of June 20, 1910,ch. 310, 36 Stat. 557, 572 (Arizona) (sections 2, 16, 32, and 36).

indemnity sections or lieu selections, to be selected by the state. 1/

The Act of September 4, 1841 2/ grants to each state 500,000 acres of public land to be used for internal improvement purposes, to be selected by the states at any time after the public lands have been surveyed.

Despite an earlier decision to the contrary, 3/ it was held in Ivanhoe Min. Co. v. Keystone Consol. Min. Co. 4/ that lands known to be mineral lands at the time the grant took effect did not pass to the state, but remained a part of the public domain. 5/ A statutory exception exists with respect to lands chiefly valuable for building stone. 6/ The exception applies only to lands locatable only under the Building Stone Law of 1892, so that lands valuable for limestone, and locatable under the general mining laws, do not pass to the states. 7/ Lands not known to be mineral lands at the time the grant took effect passed to the states and became subject to disposition in accordance with state laws. 8/ The grant does not take effect prior to the approval of the public land survey. 9/

1/ Act of Feb. 28, 1891, 43 U.S.C. § 851 (1964).

2/ 43 U.S.C. § 857 (1964).

3/ Cooper v. Roberts, 59 U.S. (18 How.) 173 (1856).

4/ 102 U.S. 167 (1880).

5/ Accord, Mullan v. United States, 118 U.S. 271 (1886) (coal lands); United States v. Sweet, 245 U.S. 562 (1918) (coal lands).

6/ 30 U.S.C. § 161 (1964).

7/ Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F.2d 351 (1926).

8/ Wyoming v. United States, 255 U.S. 489 (1921).

9/ United States v. Morrison, 240 U.S. 192 (1916).

The Act of April 30, 1912 1/ permitted the selection of coal lands by the states, and the Act of July 17, 1914, 2/ permitted the selection of "lands withdrawn or classified as phosphate, nitrate, oil, gas, or asphaltic minerals, or which are valuable for those deposits". Under these acts, the named minerals were reserved to the United States, together with the right to prospect for, mine, and remove the same.

Finally, in 1927, grants to the states for the support or in aid of common or public schools were extended to embrace lands mineral in character, upon the express condition that all sales, grants, deeds, or patents for any land so granted are subject to, and must contain, a reservation to the state of all the coal and other minerals in such lands, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits are subject to lease by the state as the state legislature may direct, but any lands or minerals disposed of contrary to the provisions of this law are forfeited to the United States. 3/

W. Miscellaneous.

Land in the actual use and possession of the United States is not subject to location. 4/

A material site permit, regularly issued under Section 17 of the Federal Highway Act of 1921 5/ precludes location of a

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1/ 30 U.S.C. § 90 (1964).

2/ Id. 121.

3/ Act of Jan. 25, 1927, 43 U.S.C. § 870 (1964).

4/ United States v. Schaub, 103 F.Supp. 873 (D.Alaska 1952) (gravel pit in national forest).

5/ 23 U.S.C. § 317 (1964).

mining claim on the same land. 1/

Tidelands, submerged lands, lands within incorporated towns and villages or within naval petroleum and oil shale reserves are not subject to mineral leasing under either the Mineral Leasing Act of 1920 or the Mineral Leasing Act for Acquired Lands (1947). 2/

Gold, silver, and quicksilver deposits on lands embraced in certain land claims confirmed by decree of the Court of Private Land Claims are subject to lease under the provisions of the Act of June 8, 1926. 3/

Certain lands which are not open to location and which are not subject to lease for prospecting or mining purposes by the Federal agencies administering such lands or by the Department of the Interior may be leased by the Atomic Energy Commission. Such leases are known as Circular 9 leases. 4/

1/ Sam D. Dawson, 61 I.D. 255 (1953); Carl M. Shearer A-30838 (Dec. 21, 1967).

2/ 30 U.S.C. § 181; id. § 352.

3/ Id. § 291.

4/ 10 C.F.R. § 60.9 (1968).

CHAPTER 6

MINERALS SUBJECT TO LOCATION, LEASE, OR MATERIALS DISPOSAL

A. Definition of the word "mineral".

Shortly after the enactment of the Mineral Location Law of 1872, Commissioner Drummond of the General Land Office was called upon to decide whether borax, nitrate of soda, carbonate of soda, sulphur, alum, and asphalt were locatable minerals. In holding that these minerals were locatable the Commissioner said:

> "In the sense in which the term mineral was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. The several authorities consulted in this connection seem to find it an easier task to determine what is not, than what is, mineral. However, in all the works on mineralogy that have come under my notice, borax, nitrate and carbonate of soda, sulphur, alum, and asphalt are classified and discussed as minerals.
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> "Alger's edition of Phillips' Mineralogy speaks of 'the crust of the globe as consisting chiefly of earths and earthy minerals.' Between earths and minerals there is a clear line of demarkation, and, though difficult to express in a few words, chemical composition and crystallization are the principal means of tracing the distinction. Webster seems to be the most accurate in his definition of a mineral, for he recognizes chemical composition as the important consideration. He defines a mineral to be 'any inorganic species having a definite chemical composition.'
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> "From a careful examination of this matter, the conclusion I reach as to what constitutes 'a valuable mineral deposit' is this:

"That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

"The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, 'to promote the development of the mining resources of the United States,' and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except where a special law might intervene, reserving from sale, or regulating the disposal, of particularly specified mineral-bearing lands." 1/

This definition of a mineral is now found in the mining regulations in a slightly altered form:

> "Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws." 2/

A more complete definition of the word "mineral", taken from Lindley, 3/ is found in the regulations of the Secretary of the Interior dealing with public sales:

1/ Circular, July 15, 1873, Copp, U. S. Mining Decisions 316 (1874).

2/ 43 C.F.R. § 3400.2 (1968).

3/ 1 Lindley, Mines § 98 (3d ed. 1914).

". . . A 'mineral' is a substance that (1) is recognized as mineral, according to its chemical composition, by the standard authorities on the subject or (2) is classified as mineral product in trade or commerce; or (3) possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts." 1/

B. Metallic minerals.

The disposal of deposits of metallic minerals is for the most part governed by the mining laws, although in areas where such deposits are not locatable, disposal may be governed by special statutes. 2/

Section 2 of the Lode Law of 1866 3/ provided for the location of a vein or lode of quartz or other rock in place bearing 'gold, silver, cinnabar, 4/ or copper'. Section 2 of the Mineral Location Law of 1872 5/ added lead and tin to

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1/ 43 C.F.R. § 2243.0-5(e) (1968).

2/ See, e.g., Act of Mar. 4, 1917, 16 U.S.C. § 520 (1964) and other Acts mentioned in Section 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1099, 5 U.S.C. note following § 133y-16 (1964), 5 U.S.C.A.App. 188 (1967) (all minerals except those subject to the Mineral Leasing Act for Acquired Lands); Act of Aug. 4, 1939, § 7, 43 U.S.C. § 387 (1964) (all minerals); Act of June 8, 1926, 30 U.S.C. § 291 (1964) (gold, silver, and quicksilver); Act of Oct. 8, 1964, § 4(b), 43 U.S.C. § 620g (1964) (all minerals).

3/ 14 Stat. 251.

4/ Cinnabar (mercuric sulfide, HgS) is the only common mineral of mercury, and with rare exceptions constitutes the ore of the metal.

5/ 30 U.S.C. § 23 (1964)

the metals named, together with the words "other valuable deposits". There is seldom any question that metallic minerals other than those specifically mentioned are minerals subject to location under the mining laws. Whether lands containing these minerals are subject to disposition under the mining laws depends upon whether the minerals are present in such quantity and quality as to constitute a "valuable mineral deposit". 1/

1. Iron.

In an opinion construing the Act of March 1, 1847, ch. 32, 2/ which authorized the President to sell certain lands containing "copper, lead, or other valuable ores", the Attorney General concluded that lands containing iron ore were not mineral lands, that iron ore was not included within the term "other valuable ores", and that lands containing iron ore should be disposed of under the general public land laws. 3/

Iron was not one of the metals mentioned in the Lode Law of 1866. However, after the enactment of the Mineral Location Law of 1872, it was held that iron deposits in the public lands are subject to location and purchase only under the mining laws. 4/

1/ Hare v. French, 44 L.D. 217 (1915) (aluminum); United States v. Duvall, 65 I.D. 458 (1958) (tungsten and zirconium); United States v. Denison, 71 I.D. 144 (1964) (manganese).

2/ 9 Stat. 146.

3/ 5 Op.Att'y Gen. 247 (1850).

4/ Decision of the Commissioner, July 26, 1873, Copp, U. S. Mining Decisions 214 (1874); Decision of the Commissioner, Nov. 18, 1873, Copp, U. S. Mining Decisions 235 (1874); Decision of the Acting Commissioner, May 2, 1874, Copp, U. S. Mineral lands 152 (1881).

2. Uranium.

As originally enacted, Section 2 of the Pickett Act of 1910 1/ provided that "minerals other than coal, gas, and phosphates" were subject to location on lands withdrawn pursuant to that Act. 2/ The Act of June 25, 1910, ch. 431, 3/ added potassium to the excepted minerals. The 1912 amendment 4/ substituted the words "metalliferous minerals". 5/ In Consolidated Mines Co., 6/ the Secretary discussed the distinction between metalliferous minerals and non-metalliferous minerals:

> "It may well be that a deposit may be classified in accordance with the way the valuable elements are primarily and generally recovered and utilized. If the mineral deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal which is extracted and used in the trades as such, the deposit should be classed as metalliferous. On the other hand, where the metals contained in the deposit, or ore, are extracted and used mainly in the form of compounds with other elements, the classification should be non-metalliferous. This will well comport with the dictionary definition of metalliferous, i.e., yielding or producing metal. Thus a limestone bed would be classed as nonmetalliferous although containing approximately 40% calcium, one of the most

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1/ 36 Stat. 847.

2/ See Ralph T. Richards, 52 L.D. 336 (1928) (asphaltum).

3/ 36 Stat. 858.

4/ Act of Aug. 24, 1912, 43 U.S.C. § 142 (1964).

5/ See United States v. Dawson, 58 I.D. 670 (1944) (pumice).

6/ 46 L.D. 468 (1918).

abundant metals in nature; likewise a gypsum deposit, although carrying about 23% of calcium, and a rock salt deposit even if consisting of 40% of the very abundant metal sodium, would be non-metalliferous."

The particular question presented was whether carnotite (a potassium, uranium vanadate containing small amounts of radium) was metalliferous mineral. In holding that it was not, the Secretary said:

"The elements radium, uranium, and vanadium are not dealt with in the metal market or the trades in their elemental forms, as metals, and are not so produced or recovered immediately in the reduction of carnotite ore. While the two substances last named appear in some forms of special steels, the percentage so used is very small. The compounds or oxides of the two elements are the forms used in the production of such steels. It follows therefore that carnotite is not a metalliferous mineral."

Section 5(b)(7) of the Atomic Energy Act of 1946 1/ provided:

"All uranium, thorium, and all other materials determined pursuant to paragraph (1) of this subsection to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the public lands are hereby reserved for the use of the United States subject to valid claims, rights, or privileges existing on the date of the enactment of this Act. . . ."

At first the Secretary of the Interior interpreted this reservation as a bar to the location of a mining claim based upon a discovery of source material. 2/ By the end of 1948,

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1/ 60 Stat. 762.

2/ Jesse C. Clark, A-24521 (Jan. 14, 1947).

however, it had been determined by the Atomic Energy Commission and concurred in by the Secretary of the Interior that the reservation of source material contained in the Atomic Energy Act must be read in connection with the mining laws, and that thus read, the reservation did not prevent the location of mining claims based upon the discovery of source material. 1/

With the advent of the use of uranium for the production of atomic energy, the 1918 decision of the Secretary of the Interior holding that carnotite was a non-metalliferous mineral had become obsolete, and in 1954 it was concluded that carnotite was a metallic mineral. 2/

C. Nonmetallic minerals.

Whether certain nonmetallic substances are minerals subject to disposal under the mining laws is a question which grades, by virtually imperceptible degrees, into the question of whether the lands containing such substances are mineral in character, which question in turn grades into the question of whether a valid discovery has been made under the mining laws. The dividing line between the concepts of "minerals subject to location" and "discovery" is, especially in respect of nonmetallic minerals, somewhat arbitrary. The discussion contained in this portion of the study is therefore, to a certain extent, duplicated by the discussion in the portion treating of discovery.

Shortly after the enactment of the Mineral Location Law of 1872 the Acting Secretary of the Interior requested of the Attorney General an official opinion as to whether land

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1/ Letter from the Chairman, Atomic Energy Commission, to the Secretary of the Interior, Sept. 23, 1948; Letter from Assistant Secretary of the Interior to the Chairman, Atomic Energy Commission, Nov. 12, 1948.

2/ Opinion of the Acting Solicitor, M-36225 (Sept. 8, 1954).

containing diamonds could be located and purchased under the mining laws. The Attorney General said: 1/

> ". . . Diamonds then, are clearly, 'valuable mineral deposits,' and the provisions of said act are as applicable to land containing them, as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterward be discovered, as what might be overlooked in an enumeration of minerals in the statute. . . . I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands, for in that way and not otherwise, can they be made to contribute something to the revenues of the government, and controversy and litigation in mining localities, to a great extent, prevented."

This opinion was transmitted by the Acting Secretary of the Interior to the Commissioner of the General Land Office, with instructions that the views expressed in the opinion should "guide your official action in cases of this character". 2/ Accordingly, the early decisions of the Commissioner uniformly held that nonmetallic minerals were subject to location under

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1/ 14 Op.Att'y Gen. 115 (1872).

2/ Letter from Acting Secretary Smith to Commissioner Drummond, Sept. 3, 1873, Copp, U. S. Mining Decisions 140 (1874).

the mining laws. 1/

1. Building stone.

The early decisions of the Commissioner of the General Land Office held that lands valuable for building stone, 2/ or more valuable for building stone than for agriculture, 3/ were locatable under the mining laws. After the passage of the Timber and Stone Act of 1878, 4/ the Commissioner held that lands valuable for building stone were not mineral lands, saying that—

> ". . . in view of the fact that . . . Congress has by legislation provided a special mode for the sale of such lands, I am not inclined to treat them

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1/ Decision of the Commissioner, Apr. 18, 1873, Copp, U.S. Mining Decisions 194 (1874) (borax); Decision of the Commissioner, July 10, 1873, Copp, U.S. Mining Decisions 209 (1874) (fire clay); Decision of the Commissioner, Oct. 23, 1874, Copp, U.S. Mineral Lands 161 (1881) (slate); Decision of the Commissioner, Jan. 30, 1875 (No. 1), Copp, U.S. Mineral Lands 179 (1881) (petroleum); Decision of the Commissioner, Jan. 30, 1875 (No. 2), Copp, U.S. Mineral Lands 179 (1881) (umber); Decision of the Commissioner, June 28, 1875 (No. 1), Copp, U.S. Mineral Lands 194 (1881) (limestone and marble); Decision of the Commissioner, June 28; 1875 (No. 2), Copp, U.S. Mineral Lands 194 (1881) (kaoline); Decision of the Commissioner, Dec. 3, 1875, Copp, U.S. Mineral Lands 201 (1881) (mica). See Circular, July 15, 1873, Copp, U S. Mining Decisions 316 (1874) (borax, carbonate of soda, nitrate of soda, sulfur, alum, asphalt).

2/ Decision of the Commissioner, Oct. 23, 1874, Copp, U.S Mineral Lands 161 (1881) (slate).

3/ Decision of the Commissioner, June 28, 1875 (No. 1), Copp, U.S. Mineral Lands 194 (1881) (marble).

4/ 20 Stat. 89.

as mineral." 1/

In H. P. Bennet, Jr., 2/ however, the Secretary held that land valuable only for building stone was locatable under the placer mining laws. 3/

In Conlin v. Kelly 4/ the Secretary reviewed the earlier decisions and concluded that building stone was not locatable under the mining laws. The stone involved in that decision was described as ---

> ". . . a ledge of unstratified, extremely hard, flesh colored rock, a species of granite, which contains no trace of any valuable metal. It is a common stone in South Dakota, is of some value as a building stone, being used for foundations of buildings, cellar walls, bridge abutments and other places where strong, rough, work is required; but owing to its extreme hardness and the fact that it is unstratified and breaks with an irregular fracture, its commercial value is not very great, as yet, although it is claimed that this will soon be greatly increased."

The Secretary's decision rested on two grounds: (1) Congress, in enacting the Timber and Stone Act of 1878 had recognized that building stone was not locatable, and (2) building stone has "no peculiar property or characteristic that gives it especial value, such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, auriferous cement, fire clay, kaolin or petroleum".

1/ Southern Pac. R. v. Kaweah Limestone Ledge, Decision of the Commissioner, Aug. 5, 1880, Copp, U. S. Mineral Lands 297 (1881).

2/ 3 L.D. 116 (1884).

3/ Accord, Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20 (1889).

4/ 12 L.D. 1 (1891).

This decision resulted in the enactment of the Building Stone Law of 1892, 1/ which provides that—

> "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mining claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. . . ."

The Building Stone Act of 1892 also extended the Timber and Stone Act of 1878, which had applied only to the states of California, Oregon, and Nevada, and the Territory of Washington, to all "public land states." 2/

Senator Pettigrew of South Dakota introduced the bill which, as amended, became the Building Stone Law of 1892, and in explaining a proposed amendment, he stated the purpose of the bill: 3/

> "MR. PETTIGREW. I wish to offer an amendment to the bill. There is a law relating to four of the States for the entry of stone and timber lands, and it is feared on the part of Senators from those States that perhaps this bill, if it becomes a law as it is, may effect the repeal of that in some way. Under that law only surveyed lands can be entered, while the stone lands that are worth anything in my State are unsurveyed, and they have been taken under the placer-mining laws, and some of them have been patented; but during the last three years the Department has decided that the placer-mining law does not apply to land which is suitable only for building stone. So I offer this amendment in order not to effect the repeal of the law."

1/ 30 U.S.C. § 161 (1964).

2/ 20 Stat. 89.

3/ 23 Cong.Rec. 3376 (1892).

After referring to the decisions of the Department of the Interior prior to 1891 to the effect that stone which could be quarried and used for building purposes was a mineral and subject to location under the mining laws, the House Committee on Public Lands recommended passage of the bill with amendments and stated: 1/

> "The above has been the construction given the mining laws of the United States by the Interior Department since the act of 1872 was passed, until a very recent date, and even now all kinds of stone are held to be subject to mineral entry except building stone, the test applied being uniform with regard to all mineral substances, viz, whether or not the land containing such substance is more valuable therefor than for agricultural purposes. In the case of Conlin v. Kelly, decided in the Department January 2, 1891, and reported in 12 Land Decisions, 1, however, it was held that lands which contain deposits of building stone only are not subject to entry under the mining laws. This decision has brought dismay and threatened ruin and disaster to many citizens who in good faith, relying on the settled and long-continued procedure of the General Land Office, had invested large sums of money in the development of stone quarries upon the public lands, expecting to obtain patents under the mining laws. It changes what had become a recognized rule of property, and the committee thinks this is a matter which justly demands the action of Congress to fix the status of such lands without the possibility of doubt."

After the enactment of the Building Stone Law of 1892, the Secretary continued to recognize two classes of building stone: (1) common building stone, locatable only under the Building Stone Act of 1892 2/ and (2) building stone possessing special characteristics, locatable under the general

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1/ H.R.Rep.No. 1203, 52d Cong., 1st Sess. 1-2 (1892).

2/ Clark v. Erwin, 16 L.D. 122 (1893); Hayden v. Jamison, 16 L.D. 537 (1893).

mining laws. 1/ Illustrative of these decisions is McGlenn v. Wienbroeer, 2/ which, although decided after the enactment of the Building Stone Law of 1892, involved a placer mining claim located prior to its enactment. The deposit involved was "a very superior sandstone" which not only was useful for general building purposes, but also was very valuable for ornamentation of buildings, and for monuments and other commercial purposes. The Secretary held such a deposit on land having slight value for agricultural and grazing purposes was locatable as a placer claim prior to the 1892 Act. 3/ Conlin v. Kelly was distinguished on the ground that, in that case, the stone was useful only for general building purposes and possessed little commercial value, and the decision in McGlenn v. Wienbroeer recognized that the Building Stone Law was enacted "to allow the entry of lands, such as described in the Conlin case under the placer mining law". The purpose of the Building Stone Law was again mentioned in Pacific Coast Marble Co. v. Northern Pac. R., 4/ where the Secretary said, with respect to Conlin v. Kelly:

> ". . . It would thus seem that Congress regarded even the ruling in that case as a departure from the liberal construction theretofore adopted by the Land Department, to such an extent as to demand legislative action disapproving the result thereof."

Whether locatable under the general mining laws or under the Building Stone Law of 1892, lands more valuable for building stone than for agricultural purposes were held to

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1/ McGlenn v. Wienbroeer, 15 L.D. 370 (1892); Pacific Coast Marble Co. v. Northern Pac. R., 25 L.D. 233 (1897) (marble); Henderson v. Fulton, 35 L.D. 652 (1907) (marble) (semble).

2/ 15 L.D. 370 (1892).

3/ Accord, Van Doren v. Plested, 16 L.D. 508 (1893).

4/ 25 L.D. 233 (1897).

be excepted from railroad grants 1/ and other non-mineral disposals. 2/ In this regard it should be noted that the 1892 law specifically provided that "lands reserved to the benefit of the public schools or donated to any state shall not be subject to entry under this Act." 3/ This provision differs from the general mining laws, and makes an exception to the general rule that every grant of public land, whether to a state or otherwise, should be taken as reserving and excluding mineral lands in the absence of an express provision including them. 4/ Lands chiefly valuable for building stone are mineral lands and, as indicated above, are excepted from non-mineral grants, but because of the quoted provision of the Building Stone Law, these lands do pass to the states.

It is not clear why Congress provided that lands reserved for the benefit of the public schools or donated to a state should not be locatable under the Building Stone Law even though such lands were chiefly valuable for building stone. At the time of the enactment of the Building Stone Law, state sections vested in the state upon statehood if the land was non-mineral in character and if a survey of the section had previously been approved. If on statehood a survey of a state section had not been approved, then title would not vest until the survey was approved. 5/ Congress may have intended, by the proviso that state sections would

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1/ Northern Pac. R. v. Soderberg, 188 U.S. 526 (1903) (granite); Pacific Coast Marble Co. v. Northern Pac. R., 25 L.D. 233 (1897) (marble); Beaudette v. Northern Pac. R., 29 L.D. 248 (1899) (sandstone); Schrimpf v. Northern Pac. R., 29 L.D. 327 (1899) (slate, marble).

2/ Meiklejohn v. F. A. Hyde & Co., 42 L.D. 144 (1913) (granite) (forest lieu selection).

3/ 30 U.S.C. § 161 (1964).

4/ See United States v. Sweet, 245 U.S. 563 (1918).

5/ United States v. Morrison, 240 U.S. 192 (1916); F. A. Hyde & Co., 37 L.D. 164 (1908).

not be subject to the Building Stone Law, to insure that as future surveys of state sections were approved, title to those sections chiefly valuable for building stone would then pass to the state. Congress may have felt that since common building stone, which was the material covered by the Building Stone Law, was a mineral of such widespread occurrence in the West that the reasons for the Congressional policy of reserving mineral lands in grants to states were not compelling when the chief value of the lands was for such building stone.

There may have been another reason why Congress provided that lands reserved for the benefit of the public schools or donated to a state should not be subject to the Building Stone Law, even though such lands were chiefly valuable for building stone. During the years from 1887 to 1890, South Dakota, 1/ North Dakota, 2/ Montana, 3/ Washington, 4/ Idaho, 5/ and Wyoming, 6/ were admitted to statehood. Although much of the vacant public lands were unsurveyed, millions of acres in each of these states had been surveyed in 1892. 7/ If Conlin v. Kelly correctly stated the law, title to sections reserved for the benefit of the public schools or donated to a state would vest in the state upon statehood and approval of the survey, even though such sections contained lands chiefly valuable for common building stone. On the other hand, if it should be determined that Conlin v. Kelly erroneously stated the law and that the Building Stone Law was declaratory of what the law was prior to

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1/ Act of Feb. 22, 1889, ch. 180, 25 Stat. 676.

2/ Id.

3/ Id.

4/ Id.

5/ Act of July 3, 1890, ch. 656, 26 Stat. 215.

6/ Act of July 10, 1890, ch. 664, 26 Stat. 222.

7/ See Annual Report of the Secretary of the Interior, H.R.Exec.Doc.No. 1, 52d Cong., 2d Sess. 218 (1892).

Conlin v. Kelly, then the states would lose title to many sections containing lands chiefly valuable for common building stone. Two decisions of the Secretary in 1893 1/ suggest some of the confusion which would have arisen had not such a provision been included in the Building Stone Law. Each of these decisions involved ordinary building stone which, prior to the Building Stone Law, was not locatable under the mining laws under the rule of Conlin v. Kelly. In each case, statehood was obtained prior to the enactment of the Building Stone Law, although it is not stated whether the survey had been approved before or after statehood. In each case, the Secretary held that since the land involved was subject to the provision in the Building Stone Law, it was not subject to entry as a placer mining claim.

In Stephen E. Day, Jr., 2/ a showing of the marketability of trap rock was sufficient to sustain a location under the general mining laws, but in United States v. Shannon 3/ and later cases a showing of marketability is made necessary to sustain a location.

2. Common stone.

Section 1 of the Timber and Stone Act 4/ provided for the sale of surveyed lands, chiefly valuable for stone, in California, Oregon, Nevada, and Washington. Section 2 of the Building Stone Law of 1892 extended the Timber and Stone Act to all public land states.

1/ Joseph H. Harper, 16 L.D. 110 (1893); South Dakota v. Vermont Stone Co., 16 L.D. 263 (1893).

2/ 50 L.D. 489 (1924).

3/ 70 I.D. 136 (1963).

4/ 20 Stat. 89.

The Act of September 27, 1944, ch. 416 1/ provided for the disposal of stone on public lands of the United States if such disposal was not otherwise expressly authorized by law. By its own provisions, this Act expired on December 31, 1946, when the President proclaimed the cessation of hostilities in World War II. The Materials Disposal Act of 1947 2/ similarly provided for the disposal of stone on public lands if such disposal was not otherwise expressly authorized by law. Section 1 of the Multiple Surface Use Act of 1955 amended the Materials Disposal Act to provide for the disposal of "common varieties of . . . stone". 3/

Shortly after the enactment of the Multiple Surface Use Act, the Timber and Stone Act was repealed. 4/

3. Limestone and gypsum.

In an early decision, the Commissioner of the General Land Office held that lands more valuable for limestone than for agriculture were locatable under the mining laws, 5/ but after the passage of the Timber and Stone Act of 1878 6/ he held that lands valuable for limestone were not mineral lands. 7/ In a similar decision holding that certain lands

1/ 61 Stat. 681.

2/ 30 U.S.C. § 601 (1964).

3/ Id.

4/ Act of Aug. 1, 1955, ch. 448, 69 Stat. 434.

5/ Decision of the Commissioner, June 28, 1875 (No. 1), Copp, U. S. Mineral Lands 194 (1881).

6/ 20 Stat. 89.

7/ Southern Pac. R. v. Kaweah Limestone Ledge, Decision of the Commissioner, July 15, 1880, Copp, U. S. Mineral Lands 296 (1881).

containing deposits of gypsum were not subject to location, the Commissioner said:

> ". . . Limestone underlies a great portion of the territory west of the Missouri River, and to reserve such lands from sale as mineral would entirely prevent its development for agricultural purposes.
>
> "The term 'mineral' in its most comprehensive sense, includes all inorganic substances having a definite chemical composition, and so applied in the construction of section 2318 Revised Statutes, would subject all of the public domain to sale under the mining act. A more reasonable construction of said section, I conclude, will hold it to embrace only such lands as contain valuable deposits of metals, and other substances which give the same a special value greater than that of land containing limestone deposits in any of its forms." 1/

In W. H. Hooper, 2/ however, the Secretary held that gypsum was locatable if the land containing it was thereby rendered more valuable for mineral than for agricultural purposes. 3/

Lands more valuable for limestone deposits than for agricultural purposes were held to be mineral lands, and as such were reserved from railroad grants 4/ and grants to

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1/ Decision of the Commissioner, Dec. 15, 1880, Copp, U. S. Mineral Lands 320 (1881).

2/ 1 L.D. 560 (1881).

3/ Accord, Shepherd v. Bird, 17 L.D. 82 (1893) (limestone); see Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176 (1908) (gypsum).

4/ Morril v. Northern Pac. R., 30 L.D. 475 (1901).

states. 1/

In Gray Trust Co. 2/ the Secretary apparently abandoned the test of whether the limestone rendered the land more valuable on that account than for agriculture, and adopted the test of whether the limestone was of such quality as to give it substantial value over and above other limestone deposits of the region.

The prudent man test was, in effect, applied to limestone deposits in Big Pine Min. Corp., 3/ where the Secretary said:

> ". . . Lands containing limestone or other mineral, which under the conditions shown cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining laws." 4/

In Vivia Hemphill, 5/ a deposit of limestone existing in such quality and quantity and in such a situation as to render it economically practical to mine and devote to commercial uses was found to be patentable. 6/ In more

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1 Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F.2d 351 (8th Cir.1926) (limestone locatable under general mining laws, not under Building Stone Law of 1892).

2/ 47 L.D. 18 (1919).

3/ 53 I.D. 410 (1931).

4/ Accord, United States v. Mulkern, A-27746 (Jan. 19, 1959).

5/ 54 I.D 80 (1932).

6/ The principal issue in Vivia Hemphill was whether the deposit was subject to location as a lode claim.

recent decisions, the marketability at a profit rule has been applied. 1/

4. Clay.

The early decisions of the Commissioner and the Secretary held that lands valuable for clay were subject to location under the mining laws. 2/ But in Dunluce Placer Mine, 3/ the Secretary held that even though land was more valuable for brick clay than for any other purpose, it was not subject to location under the mining laws. 4/ In Alldritt v. Northern Pac. R., 5/ a location was allowed on "fire clay of a superior quality" which rendered the land more valuable for such clay than for other purposes. Even though a deposit of clay may render the land more valuable for such clay than for any other purpose, the Secretary held that it was not locatable unless the clay was of "unusual or exceptional value as compared with the great mass of the earth's substance." 6/ In United

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1/ United States v. Lopez, A-28127 (Jan. 28, 1960); United States v. DeZan, A-30515 (July 1, 1968); United States v. Wurtz, A-30945 (Jan. 23, 1969).

2/ Decision of the Commissioner, July 10, 1873, Copp, U.S. Mining Decisions 209 (1874) (fire clay); Decision of the Commissioner, June 28, 1875 (No. 2), Copp, U.S. Mineral Lands 194 (1881) (kaolin); Dobbs Placer Mine, 1 L.D. 565 (1883).

3/ 6 L.D. 761 (1888).

4/ Accord, King v. Bradford, 31 L.D. 108 (1901).

5/ 25 L.D. 349 (1897).

6/ Holman v. State of Utah, 41 L.D. 314 (1912). In Fred B. Ortman, 52 L.D. 467 (1928) placer claims based on clay valuable for filtering oil in a refining process were permitted to go to patent.

States v. Barngrover, 1/ the Secretary said:

> " . . . the test as to whether a substance is a mineral under the mining laws depends on its marketability, or, as it is sometimes expressed, on its positive commercial value. Since the evidence was not controverted that the deposit in question was being marketed at a profit, it would appear that it is clearly subject to location and entry under the mining laws."

More recently, the rule that a showing of marketability at a profit is not merely sufficient but necessary to sustain a location has been applied 2/ and in one of the most recent decisions dealing with clay, the Secretary holds that before lands valuable for clay are subject to location it must be shown (1) that the clay is of an exceptional nature, (2) that the clay is in present demand, and (3) that the clay is marketable. 3/

5. Sand and gravel.

In Florence D. Delaney 4/ a patent application based upon deposits of glass sand and building stone was rejected without discussion of the locatability of glass sand under the mining laws, but, by implication, holding that it could not be located. In Zimmerman v. Brunson, 5/ the Secretary refused to classify as mineral in character land containing a deposit of sand and gravel (1) which was not recognized by the standard

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1/ 57 I.D. 533 (1942).

2/ United States v. Kathe, A-27744 (Nov. 19, 1958).

3/ United States v. Mattey, 67 I.D. 63 (1960).

4/ 17 L.D. 120 (1893).

5/ 39 L.D. 310 (1910).

authorities as a mineral, 1/ (2) whose sole use was for general building purposes, and (3) whose chief value was its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain. The Oregon court, on the other hand, held that land more valuable for the building sand it contains than for agriculture is mineral land within the meaning of the mining laws, and is subject to location. 2/

Zimmerman v. Brunson, was overruled in Layman v. Ellis, 3/ in which the Secretary said that (1) gravel is definitely classified as a mineral product in trade and commerce, 4/ and has a pronounced and widespread economic value because of the demand for it in trade, manufacture, or in the mechanical arts, (2) whether a given substance is locatable is not to be resolved by the test of whether the substance has a definite chemical composition expressible in a chemical formula, and (3) while the distinguishing properties of gravel are purely

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1/ Cf. Bennett v. Moll, 41 L.D. 584 (1912):

"The protestants testified that it is 'silica' and the Commissioner refers to it merely as 'sand.' A microscopic examination of the same, however, shows that it is not silica or, in the proper sense of the term, sand, but a finely divided pumice or volcanic ash, which is a silicate and not silica. But, for the purpose of the determination of this case, it is immaterial whether it is 'silica' or pumice. It is clearly a mineral substance . . . ."

2/ Loney v. Scott, 57 Ore. 378, 112 Pac. 174 (1910).

3/ 52 L.D. 714 (1929).

4/ See T.D. 25627, 8 Treas.Dec.356 (1904):

"Gravel is certainly a mineral substance in the ordinary meaning of the word 'mineral' and there is no reason for supposing that such is not the meaning in which the word is used in the tariff law."

physical, notably small bulk, rounded surfaces, and hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock, and are the very characteristics or properties that impart utility and value to gravel in its natural state.

The showing of marketability as sufficient to sustain a location was recognized in Laymen v. Ellis as follows:

> ". . . There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit."

A few years later the rule that a showing of marketability was necessary to sustain a location was announced: 1/

> "The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurence and extent which under the same limitations and qualifications are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit."

1/ Opinion of the Solicitor, 54 I.D. 294 (1933).

In United States v. Foster 1/ and later cases marketability is used as a rule of discovery. Although marketability is now necessary to sustain a location made prior to the Multiple Surface Use Act of 1955, it is no longer sufficient to show that sand and gravel from the claim is being marketed at a profit, 2/ and thus Layman v. Ellis is no longer authoritative.

The Act of September 27, 1944, ch. 416 3/ provided for the disposal of sand and gravel on public lands of the United States, if such disposal was not otherwise expressly authorized by law. By its own provisions, this Act expired on December 31, 1946, when the President proclaimed the cessation of hostilities in World War II. The Materials Disposal Act of 1947 4/ similarly provided for the disposal of sand and gravel on public lands, if such disposal was not otherwise expressly authorized by law. Section 1 of the Multiple Surface Use Act of 1955 amended the Materials Disposal Act to provide for the disposal of "common varieties of . . . sand . . . [and] gravel". 5/

6. Coal.

Coal has never been subject to location under the mining laws, the first coal land laws 6/ being enacted prior to the enactment of the Lode Law of 1866.

1/ 65 I.D. 1 (1958).

2/ United States v. Chornous, A-28577 (July 14, 1961).

3/ 58 Stat. 745.

4/ 30 U.S.C. § 601 et seq. (1964).

5/ Id. § 601.

6/ Act of July 1, 1864, ch. 205, 13 Stat. 343; Act of Mar. 3, 1865, ch. 107, 13 Stat. 529.

Coal deposits are subject to lease under the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands (1947). 1/

7. Petroleum.

In an early decision of the Commissioner of the General Land Office, it was held that petroleum claims could be located under the mining laws. 2/ However, in Union Oil Co. 3/ the Secretary held that petroleum was not subject to location, and that it was not a mineral within the mineral exception of an Act of Congress granting certain land to a railroad:

> "In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2302, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded."

On review, this decision was reversed, 4/ but only after the enactment of the Oil Placer Act of 1897 5/ which provided:

1/ 30 U.S.C. § 181 (1964); id. § 352.

2/ Decision of the Commissioner, Jan. 30, 1875 (No. 1), Copp, U.S. Mineral Lands 179 (1881). See also Burke v. Southern Pac. R., 234 U.S. 669 (1914) (holding that petroleum was a "mineral" under Acts of Congress reserving mineral land from railroad land grants).

3/ 23 L.D. 222 (1896).

4/ Union Oil Co., 25 L.D. 351 (1897).

5/ 29 Stat. 526.

"That any person authorized to enter lands under the mining laws of the United States, may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims . . . ."

Section 37 of the Mineral Leasing Act of 1920 provides that oil and gas shall be disposed of only under the mineral leasing laws, except as to valid claims existing on February 25, 1920, and thereafter maintained in compliance with the laws under which they were located. 1/

8. Oil shale.

Oil shale deposits are subject to lease under the Mineral Leasing Act of 1920 and the Mineral Leasing Act of Acquired Lands (1947). 2/

9. Potassium (potash).

The Act of October 2, 1917, ch. 62 3/ provided for the issuance of permits to prospect for deposits of potassium, and for leasing and patenting of such deposits. The Act of February 7, 1927 brought potassium under the Mineral Leasing Act of 1920, and authorized the Secretary to lease "chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium". 4/ Potassium may be disposed of only under the

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1/ 30 U.S.C. § 193 (1964).

2/ Id. § 181; id. § 352.

3/ 40 Stat. 297.

4/ 30 U.S.C. § 281 (1964).

mineral leasing laws. 1/

If the interests of the United States and of the lessee will be subserved, a potassium lease may include covenants providing for the development by the lessee of chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, magnesium, aluminum, or calcium associated with the potassium deposits leased. 2/

The rule that lands subject to a permit or lease are not subject to location 3/ was, with respect to potassium, abrogated by statute. Section 4 of the Act of February 7, 1927 4/ provides:

> " . . . where valuable deposits of mineral now subject to disposition under the general mining laws are found in fissure veins on any of the lands subject to permit or lease under sections 281-285 of this title, the valuable minerals so found shall continue subject to disposition under the said general mining laws notwithstanding the presence of potash therein."

10. Salines and sodium minerals.

The early decisions of the Commissioner of the General Land Office seem to have made a distinction between lands valuable for salt springs and those valuable for deposits of salt. Lands valuable for salt springs were held to be

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1/ Id. § 182 as made applicable to potassium by id. § 285.

2/ Id. § 284.

3/ See Joseph E. McClory, 50 L.D. 623 (1924).

4/ 30 U.S.C. § 284 (1964).

disposable only by special Act of Congress and not under the mining laws. 1/ Lands valuable for salt deposits, on the other hand, were in one decision, held to be locatable 2/ but this decision was apparently never followed either by the Commissioner or the Secretary.

The Act of Jan. 12, 1877, ch. 18 3/ provided for the sale of saline lands, but as the Act applied only to states or territories which had received a grant of salines, it had no effect in many of the western states. 4/ It was uniformly held that, except as provided in this Act, no location could be made or patent obtained on saline lands. 5/

The Saline Placer Act of 1901 6/ provides:

> "All unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, shall be subject to location and purchase under the provisions of the law relating to placer-mining claims."

1/ Decision of the Commissioner, July 28, 1873, Copp, U.S. Mining Decisions 214 (1874); Hall v. Litchfield, Decision of the Commissioner, Mar. 2, 1876, Copp, U.S. Mineral Lands 321 (1881).

2/ J. A. Rollins, Decision of the Commissioner, Apr. 27, 1874, Copp, U.S. Mineral Lands 321 (1881).

3/ 19 Stat. 221.

4/ Eagle Salt Works, Decision of the Commissioner, Dec. 12, 1877, Copp, U.S. Mineral Lands 324 (1881) (Nevada); Salt Bluff Placer, 7 L.D. 549 (1888) (Utah); Territory of Oklahoma v. Brooks, 29 L.D. 533 (1900) (Oklahoma).

5/ Salt Bluff Placer, 7 L.D. 549 (1888); Southwestern Min. Co., 14 L.D. 597 (1892).

6/ 30 U.S.C. § 162 (1964).

The terms "salt" and "saline" as used in this and previous acts refers only to common table salt, or sodium chloride. 1/

It has always been recognized that lands chiefly valuable for deposits of borax 2/ and other sodium minerals are mineral lands and that, prior to 1920, they were subject to location. 3/

Sections 23 and 24 of the Mineral Leasing Act of 1920 authorize the Secretary to lease "chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium". 4/ Section 37 of the Act provides that sodium shall be disposed of only under the mineral leasing laws, except as to valid claims existing on February 25, 1920, and thereafter maintained in compliance with the laws under which they were located. 5/ The 1920 Act originally applied only to sodium minerals "dissolved in and soluble in water, and accumulated by concentration", 6/ and contained an exception for "lands in San Bernardino County, California". In 1928, the Act was amended to make it applicable to sodium minerals generally,

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1/ Territory of New Mexico, 35 L.D. 1 (1906).

2/ Borax is a hydrous sodium borate, $Na_2B_4O_7 \cdot 10H_2O$ or $Na_2O \cdot 2B_2O_3 \cdot 10H_2O$.

3/ Decision of the Commissioner, Apr. 18, 1873, Copp, U.S. Mining Decisions 194 (1874); Circular, July 15, 1873, Copp, U.S. Mining Decisions 316 (1874) (borax); Circular, July 15, 1873, Copp, U.S. Mining Decisions 316 (1874) (borax, sodium nitrate, sodium carbonate); Elliott v. Southern Pac. R., 35 L.D. 149 (1906) (sodium carbonate, sodium sulfate).

4/ 30 U.S.C. §§ 261-262 (1964). Section 262 mentions "sodium compounds and other related products" in connection with the royalty rate.

5/ Id. § 193.

6/ Burnham Chemical Co. v. U.S. Borax Co., 54 I.D. 183 (1933); cf. United States v. U.S. Borax Co., 58 I.D. 426 (1943).

and in San Bernardino County, California. 1/ The deletion of the words "dissolved in and soluble in water, and accumulated by concentration" was prompted by one aspect of a controversy which arose in 1928 as to whether a certain deposit of sodium came within the above-quoted language. The Secretary determined that kernite 2/ was not subject to the mineral leasing law because it was not "dissolved in and soluble in water, and accumulated by concentration". 3/ In a subsequent decision, the Secretary reached the opposite conclusion with respect to the same deposit, based on new evidence. 4/

Another aspect of the Burnham case was whether minerals containing sodium, but valuable for their content of other elements, were subject to the mineral leasing law. It was contended that the commercial products made from kernite—borax and boric acid—were valued because of their boron content, and that the sodium in borax is not important in the uses to which borax is put. This argument was rejected on the ground that—

> ". . . The act specifies among the salts named 'sodium borate', and relates to the deposit found in the ground, and it is immaterial what constituents thereof are the most useful after it has been made into a commercial commodity." 5/

More recently, the Secretary has held that dawsonite 6/

1/ Act of Dec. 11, 1928, ch. 19, 45 Stat. 1019.

2/ A hydrous sodium borate, $Na_2O \cdot 2B_2O_3 \cdot 5H_2O$.

3/ Burnham Chemical Co. v. U.S. Borax Co., 54 I.D. 183 (1933).

4/ United States v. U.S. Borax Co., 58 I.D. 428 (1943).

5/ Burnham Chemical Co. v. U.S. Borax Co., 54 I.D. 183 (1933).

6/ A basic carbonate of aluminum and sodium, $Na_3Al(CO_3)_3 \cdot 2Al(OH)_3$.

is subject to the mineral leasing laws:

> "The Act speaks broadly of carbonates of sodium. There is no limitation that the form or mode of occurrence be simple salts of sodium. To the contrary, in a hearing on the Potassium Act of 1927, as amended, 30 U.S.C. §§ 282 et seq. (1964), the Director of Geological Survey gave examples of double salts and complex silicates of potassium as leasable minerals; alunite, a potassium aluminum sulphate, $KAl_3(OH)_6(SO_4)_2$; and leucite, a potassium aluminum silicate, ($KAlSi_2O_6$). Hearings before the House Committee on the Public Lands on H.R. 9029, 68 Cong. 2d Sess., 39 (1925); See Wayland, Is the Mineral Locatable or Leasable?, Mining Congress Journal, pp. 36-40, July (1967)." 1/

Both Wolf Joint Venture, quoted above, and Kaiser Aluminum & Chemical Corp., 2/ involved applications, by the holders of sodium prospecting permit applications, for leases for lands withdrawn for oil shale. The Secretary sent the cases back for a further hearing on the issues resulting from the withdrawal and the existence of the oil shale deposit. These issues are stated in Wolf Joint Venture as follows:

> "1. What was the nature of the occurrence of the minerals alleged to have been discovered in said deposits within areas covered by the applications?
>
> (a) Is the dawsonite that was found a constituent of, or commingled with, or separate from the oil shale?
>
> (b) Is the nahcolite that was found a constituent of, or commingled with, or separate from the oil shale?

1/ Wolf Joint Venture, 75 I.D. 137 (1968).

2/ A-30982 (May 3, 1968).

(c) Can either the nahcolite or the dawsonite be mined, i.e., physically taken out of the ground, without also mining, or interfering with, or disturbing the oil shale?

2. Are said deposits, or any of them, available for leasing in view of the Executive Order No. 5327 of April 15, 1930, as modified by Executive Order No. 7038 of May 13, 1935?

3. Are said deposits, or any of them, oil shale, sodium, or both?

4. Are said deposits leasable under the sodium provisions or under the oil shale provisions, neither, or both, of the Mineral Leasing Act?

5. If said deposits, or any of them, are otherwise subject to leasing under the sodium provisions of the Mineral Leasing Act, is the oil shale cognizable under such leases as a related product?

6. Were valuable deposits of sodium discovered?

(a) What is the nature and extent of the sodium deposits that were found within the limits of each permit?

(b) Is their extraction economically feasible, considering such relevent factors as quality, quantity, and mining, production and marketing costs and markets?

7. Are the lands chiefly valuable for sodium?

8. Do any of the applicants exceed the sodium acreage limitations? 30 U.S.C. § 184(b) and (e) (1964).

"Section 24 of the Act, supra, requires that, in order to qualify for the sodium preference right lease, the applicants must show 'to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area

covered by his permit and that such land is chiefly valuable therefor . . . .' Therefore, if a hearing is held, the applicants shall have the initial burden of going forward with evidence, as well as the ultimate burden of proof, to support their claim to sodium preference right leases."

11. Phosphate.

It has always been recognized that lands chiefly valuable for phosphate deposits are mineral lands and that, prior to 1920, they were subject to location. 1/

Section 9 of the Mineral Leasing Act of 1920 authorized the Secretary to lease phosphates. 2/ Section 2 of the Act of June 3, 1948 added the words "including associated and related minerals" 3/ on the basis of executive communications from the Department of the Interior pointing out that most western phosphate rocks contain vanadium which would be wasted unless authorization was provided for its production. 4/

Section 37 of the Mineral Leasing Act of 1920 provides

1/ Gary v. Todd, 18 L.D. 58 (1894); Florida Central & Peninsular R., 26 L.D. 600 (1898); Richter v. State of Utah, 27 L.D. 95 (1898) (guano). See Opinion of the Solicitor, 60 I.D. 45 (1947) (bat guano on Indian reservation held subject to location under 25 U.S.C. § 463). See also Act of Jan. 11, 1915, ch. 9, 38 Stat. 782.

2/ 30 U.S.C. § 211 (1964).

3/ Id. Probably of no significance is the fact that § 211(b) provides that a prospecting permit shall give the exclusive right to prospect for phosphate deposits, "including associated minerals," the reference to related minerals being omitted.

4/ S.Rep.No. 646, 80th Cong., 1st Sess. (1947); H.R.Rep. No. 1541, 80th Cong., 2d Sess. (1948).

that phosphates shall be disposed of only under the mineral leasing laws, except as to valid claims existing on February 25, 1920, and thereafter maintained in compliance with the laws under which they were located. 1/

12. Sulphur.

The Act of April 17, 1926 authorized the Secretary to issue prospecting permits and leases for sulphur in public lands of the United States in Louisiana. 2/ The Act of July 16, 1932 extended the Secretary's authority in this regard to New Mexico. 3/ All deposits of sulphur on the public domain outside of Louisiana and New Mexico are subject to location. 4/

The Mineral Leasing Act for Acquired Lands (1947) applies to all deposits of sulphur, wherever situated. 5/

D. Common varieties.

Section 3 of the Multiple Surface Use Act of 1955 6/ provides:

"No deposit of common varieties of sand, stone,

1/ 30 U.S.C. § 193 (1964). See Arthur L. Rankin, 73 I.D. 305 (1966).

2/ 30 U.S.C. § 271 (1964).

3/ Id.

4/ Id. § 22.

5/ Id. § 352.

6/ 30 U.S.C. § 611 (1964). This particular section is sometimes referred to as the Common Varieties Act.

gravel, pumice, pumicite, or cinders . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining location hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occuring in or in association with such a deposit. 'Common varieties' . . . does not include deposits of such materials which are valuable because the deposit has some special property giving it distinct and special value, and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

This section of the Act was designed to prohibit the location and removal, under the mining laws, of substances which are really building materials and not minerals such as were contemplated to be handled under the mining laws. 1/ Even prior to the enactment of the Multiple Surface Use Act, with the exception of common building stone, no deposit without "some special property giving it distinct and special value" was locatable under the mining laws, 2/ although it must be admitted that some decisions were more than liberal in finding a "special property". 3/ The Multiple Surface Use Act effected at least a partial repeal of the Building Stone Law of 1892, 4/ and possibly a total repeal, but otherwise

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1/ 101 Cong. Rec. 8743 (1955) (remarks of Mr. Engle).

2/ Dunluc Placer Mine, 6 L.D. 761 (1888); Conlin v. Kelly, 12 L.D. 1 (1891); Holman v. State of Utah, 41 L.D. 314 (1912).

3/ See Stephen E. Day, Jr., 50 L.D. 489 (1924) (trap rock used for railroad ballast); Layman v. Ellis, 52 L.D. 714 (1929) (sand and gravel).

4/ United States v. Coleman, 390 U.S. 599 (1968); McClarty v. Secretary of the Interior, No. 21,227 (9th Cir. Feb. 20, 1969).

it is little more than a codification of the pre-existing decisional law. 1/

By regulation, the Secretary has provided that deposits valuable for use in trade, manufacture, the sciences, or in the mechanical arts, which do not possess a distinct special economic value for such use over and above the normal uses of the general run of such deposits, are "common varieties". 2/ Thus, building stone, 3/ sand and gravel, 4/ and cinders 5/ used for road building purposes are common varieties.

After some doubts had arisen concerning the locatability of some mineral deposits having distinct and special properties, 6/ the regulations were supplemented to provide that minerals which occur commonly are not "common varieties" if the particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. 7/ The Secretary gives, as an example of a deposit of this character, a deposit of gravel having magnetic properties which could be utilized for some purpose other than those to which ordinary gravel could

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1/ See Mary A. Mattey, 67 I.D. 63 (1960); United States v. Chornous, A-28577 (July 14, 1961).

2/ 43 C.F.R. § 3511.1(b) (1968).

3/ United States v. Roberts, A-30941 (Oct. 15, 1968).

4/ United States v. Hensler, A-29973 (May 14, 1964).

5/ United States v. Chapman, A-30581 (July 16, 1968).

6/ See Bureau of Land Management Press Release, P.N. 15415-62, September 24, 1962. The doubts were engendered by an opinion that limestone suitable for use in the manufacture of cement was a common variety. Opinion of Associate Solicitor, Division of Public Lands, M-36619 (May 12, 1961); id., M-36619 (Supp.) (Oct 5, 1961).

7/ 43 C.F.R. § 3511.1(b) (1968).

be put. 1/ In determining whether a deposit has such a commercial value, the Secretary will consider (1) quality and quantity of the deposit, (2) geographical location, (3) proximity to market or point of utilization, (4) accessibility to transportation, (5) requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and (6) feasible methods for mining and removal of the materials. 2/

The mere fact that minerals are uncommon varieties does not make them locatable, for they must also be capable of being extracted, removed, and marketed at a profit. 3/ Conversely, even though a mineral may be extracted, removed, and marketed at a profit, it cannot be located if it is a common variety. 4/

Section 1 of the Multiple Surface Use Act amended the Materials Disposal Act of 1947 to provide:

> "The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) . . . on public lands of the United States . . . if the disposal of such mineral . . . materials . . . is not otherwise expressly authorized by law, including, but not limited to . . . the United States mining laws . . . ." 5/

1/ See United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968).

2/ 43 C.F.R. § 3511.1(b) (1968).

3/ United States v. DeZan, A-30515 (July 1, 1968) (limestone and wollastonite held uncommon varieties).

4/ United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968).

5/ 30 U.S.C. § 601 (1964).

1. Building stone.

Common building stone, whose only "special properties" are its bulk, density, and strength, is a "common variety". 1/ It would seem that ornamental building stone has "some special property giving it distinct and special value", the special property being its ornamental characteristics, e.g., pleasing color and ability to take a polish. However, the Secretary has uniformly held that ornamental building stone is a common variety of building stone.

In the United States v. Ligier, 2/ building stone found in an extensive range of pleasing colors, having a high compressive strength and light weight was held to be a common variety because "it can be used only for the same purposes as other deposits of similar stone". In United States v. Shannon, 3/ a very beautiful Jasparized agate which looked like marble when polished, and which could be used for facings on buildings and decorative stone around fire places was held to be a common variety because "nothing more than a limited use as a building stone . . . is not indicative of an uncommon variety of stone". In United States v. Melluzzo, 4/ pink quartz was held to be a common variety because it was "sold for the ordinary uses to which any colored building stone is put". In the latter case, it was contended that the fact that the pink quartz sold for $25 to $35 per ton while common stone sold for $10 per ton or less made the pink quartz an uncommon variety of stone. This contention was rejected on the ground that "there is nothing in the statute to show that price is the pertinent criterion for determining whether a mineral is

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1/ United States v. Roberts, A-30941 (Oct. 15, 1968). See also United States v. Jungert, A-28199 (Apr. 14, 1959).

2/ A-29011 (Oct. 8, 1962).

3/ 70 I.D. 136 (1963).

4/ 70 I.D. 184 (1963).

a common variety." In United States v. McClarty, 1/ it was held that regularly shaped stone, which required less cutting and shaping than irregularly shaped stone, existing on a claim in commercial quantities and giving the claim an economic advantage over other deposits, was not an uncommon variety where it was used only for the same purposes for which other deposits in the vicinity were also suitable.

In United States v. Coleman, 2/ the Supreme Court read the Multiple Surface Use Act of 1955 as—

> ". . . removing from the coverage of the mining laws 'common varieties' of building stone, but leaving 30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under § 611)."

Although there is no compelling reason why Congress could not have placed both common and uncommon varieties of stone under the Building Stone Law, the Secretary and, prior to Coleman, the courts interpreted the Building Stone Law as applying only to common building stone, while stone having 'some property giving it distinct and special value' was held locatable under the general mining laws rather than

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1/ 71 I.D. 331 (1964). On appeal to the district court, summary judgment was entered dismissing the action. The Court of Appeals for the Ninth Circuit reversed the district court and remanded the case to the Secretary of the Interior "with the suggestion that he vacate the decision of the former Secretary . . . and that the Department of the Interior have further proceedings not inconsistent with this opinion." McClarty, v. Secretary of the Interior, No. 21,227 (9th Cir. Feb. 20, 1969).

2/ 390 U.S. 599 (1968).

under the Building Stone Law. 1/

The first decision of the Secretary relating to building stone rendered after the Coleman decision was United States v. U.S. Minerals Development Corp. 2/ This decision merits quotation at length, as it contains a comprehensive statement of the Secretary's current interpretation of the Common Varieties Act.

> "Appellant contends that the decision by the Office of Appeals and Hearings constitutes a ruling that no building stone claim can be upheld as containing uncommon varieties and that building stone deposits are not locatable as a matter of law under the mining laws. It charges, in effect, that the Department has interpreted the act of July 23, 1955, as repealing section 1 of the act of August 4, 1892, 27 Stat. 348, 30 U.S.C. sec. 161 (1964), which authorized the location of placer mining claims for lands 'that are chiefly valuable for building stone.' The basis of the charge is that the Department's decisions have emphasized the use of the material as the criterion for determining whether it is common or uncommon and have held that where material is used for the same purposes as common varieties of the material it is considered a common variety despite its having distinctive and special qualities. Since, appellant asserts, ordinary stone can be and is used for building purposes, no stone used for building purposes can, under the Department's rulings, be an uncommon variety; hence, the Department has in effect held that the 1892 act has been repealed by the 1955 act.

1/ McGlenn v. Wienbroeer, 15 L.D. 370 (1892); Pacific Coast Marble Co. v. Northern Pac. R., 25 L.D. 233 (1897); Stephen E. Day, Jr., 50 L.D. 489 (1924); see Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 F.2d 351 (8th Cir. 1926); Bowen v. Sil-Flo Corp., No. 1 CA-CIV 744 (Ariz.App. Mar. 10, 1969).

2/ 75 I.D. 127 (1968).

"Appellant states that the 'special and distinct value' prescribed in the 1955 act must mean an 'economic value,' and that the emphasis by the Department on the use of the material rather than on its economic value or intrinsic characteristics has destroyed all standards. It contends that the decision below and other Departmental rulings are unreasonable, out of harmony with the statute, and hence, are invalid.

"It must be conceded that the language used in some of the Department's decisions on common varieties could lead to the conclusion that the Department would hold to be a common variety any mineral deposit that was used for the same purposes as deposits of admittedly common varieties of the same mineral. . . . However, the statements in all these cases must be evaluated in light of the fact that in none of the cases was there any evidence that the unique characteristics claimed for the minerals involved gave them a distinct and special value. For example, as in the McClarty case, the sand and gravel in the Basich, Hensler, and Henderson cases, which were used for the same purposes as ordinary sand and gravel, were not shown to command a higher price for the unique characteristics claimed to make them more suitable for such purposes.

"In short, the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties

are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

"The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

"This may appear to be inconsistent with the statement in the Meluzzo case, supra, that 'price is not the pertinent criterion for determining whether a mineral is a common variety. It is only a factor that may be of relevance.' 70 I.D. at 187. This statement must be read in the context of the mining claimants' argument in that case that a common variety of stone consists of sand, rock, and other material generally sold for 25 cents a yard or ton to $4, $5 or $10 per ton whereas the pink quartz involved in that case sold for $25 to $35 per ton. The Department considered that the price difference meant nothing unless the same classes of material were being compared. For example, the claimants lumped together as common varieties rock selling at $4 per ton or $10 per ton, despite the fact that the $10 price as 2 1/2 times the $4 price. Yet they claimed that the $25 price for their stone made it an uncommon variety although that price

was only 2 1/2 times the price for a common variety of rock. The Department pointed out that there was a far greater price spread between the 50 cents per pound at which some pink quartz was sold for lapidary purposes and the .0175 cent per pound at which most of the pink quartz was sold than there was between the price of $10 per ton and $25 per ton which the claimants said would separate a common from an uncommon variety of stone. The Department's statement that price is not the pertinent criterion must be read in this context.

"When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold. 1/

"With these principles in mind we turn to a consideration of the facts in this case. The special properties claimed for the Rosado stone are its reddish color and luster and its easy clevability. The stone is a quartzite, i.e., a metamorphosed sandstone (Tr. 57). The evidence indicates that the nearest similar deposit of quartzite is 14 or 15 miles away (Tr. 20,23), although one of appellants' officers testified that it was not of the same quality (Tr. 88). As noted earlier, the stone has been sold and used in a variety of building construction, as veneer in walls, in fireplaces and hearths, and in

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1/ In McClarty v. Secretary of the Interior, No. 21,227 (9th Cir. Feb. 20, 1969) it was held that the guideline set forth by the Secretary in this paragraph "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit."

patio floors. Two stonemasons testified for the appellant that people like the color of the Rosado stone and that it was good to work with (Tr. 119, 133). However, it was not used for any purpose that other decorative building stone is not used for (Tr. 141).

"Since no unique use is claimed for the stone and it is used only for the same purposes as any decorative building stone, the question is whether the special properties of the stone, color, and cleavability, give it a special and distinct value for such uses. That is, does it command a higher price than other decorative building stone in the area?"

This decision was followed in United States v. DeZan 1/ and United States v. Brubaker. 2/ In the latter case, it was held that if the deposit is to be used for the same purposes as minerals of common occurrence, it must be shown that the market price is "significantly greater than that for the common varieties of minerals used for the same purpose."3/ A recent Ninth Circuit decision, however, points out that—

". . . It is quite possible that the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone." 4/

1/ A-30515 (July 1, 1968).

2/ A-30636 (July 24, 1968).

3/ Accord, United States v. Boyle, A-30922 (Mar. 26, 1969).

4/ McClarty v. Secretary of the Interior, No. 21,227 (9th Cir. Feb. 20, 1969).

2. Limestone and gypsum.

The Multiple Surface Use Act was not intended to apply to "materials such a limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." 1/ The Senate Report, in dealing with Section 3 of the Act, made it clear that the Act was not intended to apply to "limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like". 2/ This expression of intent was deliberately disregarded in an opinion of an Associate Solicitor, in which he concluded that limestone, to avoid being classified as a common variety of stone, must have "some distinct and special properties not generally found in limestone deposits". 3/ In 1962, however, the regulations were amended to state that—

> ". . . Limestone, suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum and the like are not 'common varieties.'" 4/

Limestone useful only as rubble is a common variety of stone. 5/

1/ H.R.Rep.No. 730, 84th Cong., 1st Sess. 9 (1955).

2/ S.Rep.No. 554, 84th Cong., 1st Sess. 8 (1955).

3/ Opinion of Associate Solicitor, Division of Public Lands, M-36619 (May 12, 1961). See also M-36619 (Supp.) (Oct. 5, 1961).

4/ 43 C.F.R. § 3511.1(b) (1968). Limestone and wollastonite were held to be uncommon varieties in United States v. DeZan, A-30515 (July 1, 1968).

5/ United States v. Johnson, A-30191 (Apr. 2, 1965).

3. Sand and gravel.

A deposit of sand and gravel, even if of better quality than other deposits of sand and gravel in the area, but used for the same purposes, is a deposit of a common variety of sand and gravel. 1/

If another mineral occurs in association with sand and gravel, as is commonly the case with placer gold deposits, the other mineral must be present in sufficient quantity and quality to support a discovery. 2/

4. Cinders.

A deposit of cinders, the "special property" of which is its suitability for use as a road surface, is a common variety. 3/

E. Miscellaneous substances.

Many other substances have been asserted to be minerals, but have been held not to be within the purview of the

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1/ United States v. Henderson, 68 I.D. 26 (1961); United States v. Hensler, A-29973 (May 14, 1964); United States v. Basich, A-30017 (Sept. 23, 1964); United States v. Hinde, A-39634 (July 9, 1968); see United States v. Fife, A-28386 (Sept. 19, 1960); United States v. Chornous, A-28577 (July 14, 1961); United States v. Chamberlain, A-28610 (July 17, 1961).

2/ United States v. Basich, A-30017 (Sept. 23, 1964); United States v. Mt. Pinos Development Co., 75 I.D. 320 (1968).

3/ United States v. Chapman, A-30581 (July 16, 1968).

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mining laws. These substances include sulfur springs, 1/ hot springs, 2/ mineral springs, 3/ shell rock, 4/ stalactites, stalagmites, and other "natural curiosities," 5/ fossil remains of pre-historic animals, 6/ and peat and organic soil. 7/

Petrified wood, defined as "agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter" is declared by statute not to be a valuable mineral. 8/

Geothermal steam is not a "mineral material". 9/

1/ Decision of the Commissioner, Aug. 25, 1869, Copp, U. S. Mining Decisions 22 (1874).

2/ Morrill v. Margaret Min. Co., 11 L.D. 563 (1890).

3/ Pagosa Springs, 1 L.D. 562 (1882); see 43 C.F.R. § 3632.4 (1968).

4/ Hughes v. State of Florida, 42 L.D. 401 (1913).

5/ South Dakota Min. Co. v. McDonald, 30 L.D. 357 (1900).

6/ Earl Douglass, 44 L.D. 325 (1915).

7/ United States v. Toole, 224 F.Supp. 440 (D.Mont. 1963).

8/ Act of Sept. 28, 1962, 30 U.S.C. § 611 (1964).

9/ Opinion of the Solicitor, M-36625 (Aug. 28, 1961).

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