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UNDERGROUND NATURAL RESOURCES

The Development of National Policy[1] and Strip Mining of Coal: Unsettled Legal Problems in Montana

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THE DEVELOPMENT OF NATIONAL POLICY

The law concerning underground space and its resources has always been intimately related to the law affecting the surface---real property law. To discuss the development of policies for underground space, land laws must be considered.

American common law has its roots in old England, where from feudal times private real property law governed both the surface and subsurface, and typically the surface owner also owned the subsurface and could do with it as he pleased; it belonged to him. There were a few exceptions--the Crown had the exclusive right to mine gold and silver, and in Derbyshire the miners had the right to prospect and locate mines on private property.

In the United States, the original thirteen states succeeded to the Crown's interest in lands, but never effectively asserted the Crown's right to subsurface gold and silver. After the Revolutionary War, but before the formation of the United States or its Constitution, the Continental Congress, by a 1785 ordinance, adopted a policy that has endured to today--the reservation to the sovereign of the subsurface minerals whenever there was a grant of public lands under the public land laws.

That 1785 ordinance established another enduring policy--the reservation from private sale of section 16 of each township for the maintenance of public schools. In 1848 section 36 was added to that reserve if it was not classified as mineral land.[3] (If it was so classified, another section was

granted in lieu of the mineral land.) In 1927 legislation, Congress granted to the states all minerals under school lands, but with the stipulation that upon any subsequent state grant, the state must reserve to itself the mineral rights.[4]

Following the Revolutionary Way, the United States attempted to raise money to pay debts and finance government by selling its vast landholdings. The land was treated as a capital asset to be exploited by merchandizing it. That policy neither settled the land nor raised revenue, so emphasis turned to land settlement rather than revenue raising. Thus the General Pre-emption Act of 1841 permitted anyone to settle 160 acres at $1.25 an acre,[5] and the more liberal Homestead Act of 1862 authorized the outright transfer of land to settlers who complied with conditions of residence, cultivation and use.[6] But these laws applied only to lands not classified as mineral lands. Mineral lands were reserved to the United States.

Between 1850 and 1871, the railroad land grants were established--up to 10 alternate sections a mile on each side of the right-of-way (the right-of-way plus 20 sections a mile). Except for coal and iron, mineral lands again were excluded, so where there were known minerals prior to patent, the railroad received other lands and the United States retained the mineral lands.[7]

Thus, except for a few particular grants such as those for copper and iron in the states formed from the Northwest Territory, the federal government followed a consistent, long-term policy of not granting mineral lands.

For a long time, the United States did nothing with its mineral land holdings. There was no federal law affecting the regulating mining on the public domain,[8] and for the first half-century of the country's history there was little activity that would have required such legal developments.

That changed with the Treaty of Guadalupe Hidalgo of Feb. 2, 1848.

By that treaty, the United States acquired the Southwest United States and California, where one week earlier (Jan. 24, 1848) John Marshall had discovered gold in the millrace of Sutter's lumber mill at Coloma, Calif. When the news leaked, the fantastic California Gold Rush was on. In a few years California's population expanded a hundredfold, from around 2-3,000 to around 200-300,000, according to one estimate.

The miners flocked to the federal public domain in California's Mother Lode country in the foothills of the Sierras to obtain their gold. Since there was no articulated law or developed law enforcement, the miners organized their own "mining districts," "laws" and rules. These governed how to establish a claim and take title to the minerals and real property. The State of California soon recognized and confirmed these miners' customs in the Possessory Acts of 1850 and 1852.[9]

The miners had no right to settle and take gold on the federal public domain, and California had no authority to confirm their titles. In the 1858 federal district court case of U.S. v. Parrott[10] and the 1862 U.S. Supreme Court decision in U.S. v. Castillero,[11] the burden was placed on the occupant to prove his private title; the Attorney General was authorized to enjoin mining on the public domain, and legally the miners were trespassers and converters of federal property---the minerals. In 1863 President Lincoln ordered the U.S. Marshall for the Northern District of California to enter a particular mining property, "remove therefrom any and every person or persons who shall be found in the same" and take possession for the United States.[12]

(Upon reflection, the California Gold Rush was the original and grandest "sit-in" on federal property of all time, prompted not by an intangible cause but by economic advantage.)

But the United States did not oust the miners. In practical effect the United States acquiesced to the illegal occupancy and seizure that had developed.

Federal Policy Encourages Exploitation

The conflict between law and fact in California's Mother Lode country, the conflict between the miners and the settlers under the 1862 Homestead Act and the discovery of the fabulous Comstock Lode at Virginia City, Nev., in 1859 made it evident that some articulated federal policy concerning minerals in the public lands was necessary. The genesis was the Lode Mining Act of 1866,[13] characterized as the "Miners' Magna Charta."[14] It said:

> ...the mineral lands of the public domain both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States...

This was not a mining code, but it established several enduring policies:

1. The rules and regulations developed by the miners themselves were recognized and confirmed.
2. Lode locators were enabled to obtain title in fee simple to mineralized public lands of the United States.
3. A fee of only $5 an acre was required, but the United States made no charge for the mineral taken, not even a royalty on the minerals extracted, and reserved no interest in them.
4. The nation's mineral resources were opened to free exploration and exploitation.

This 1866 act was supplemented by the Placer Act of 1870[15] which permitted placer claimants to patent up to 160 acres a person upon payment of $2.50 an acre and fulfillment of minimum conditions of possession and work.

Both laws were consolidated and expanded upon in the general mining law, the Mineral Location Law of 1872,[16] which is our basic mining law today. It:

1. Added some specifics--those concerning dimensions of surface claims and the annual work required to hold a claim prior to patent;
2. Limited placer claims to 20 acres, except that associations of individuals could obtain up to 160 acres;
3. Reaffirmed the policy of reserving all mineral lands from sale under the general land statutes;
4. Continued and newly established policy of declaring mineral lands open to exploration and sale under the mining statutes, and
5. Continued the policy of reserving no interest in and making no charge for the minerals removed.

In 1873, coal land was specifically made locatable and patentable.[17] Legislation in 1892, 1897 and 1901 included building stone, oil and gas and salt deposits among the minerals subject to entry and patent under placer claims.[18] The opening of oil and gas lands in 1897 was particularly important.

This open-handed giveaway of the nation's mineral resources was modified by the 1910 Pickett Act,[19] which authorized the President to stop mineral leasing for non-metalliferous minerals on the public domain. It was aimed principally at protecting the nation's oil and gas reserves, but it resulted in the withdrawal of non-metalliferous locations from nearly all of the public domain until the enactment of the Mineral Leasing Act of 1920.[20] The latter act opened non-metalliferous minerals to mineral leases,

not land patents. (Metalliferous minerals were left where they are today--open under the Mining Location Law of 1872.)

This change in mining law affecting non-metalliferous minerals was a part of the beginning of the Conservation Movement which commenced at the end of the 19th Century and continued into the early years of the 20th Century, and after a semi-dormant period, became active on a permanent basis in the 1930s. Gifford Pinchot and Theodore Roosevelt encouraged a change in land policy to limit the indiscriminate encouragement of settling on public lands and withdraw lands from entry. Forest lands were withdrawn and the Forest Service was established in 1905. Under Franklin Roosevelt, the Taylor Grazing Act of 1934 withdrew for classification vast areas of potential crop and grazing land. These surface land acts generally had little effect on mining because they were principally concerned with surface land use rather than the long-established policies opening mineral lands to exploitation and sale.

One change in land policy during this period altered a long-standing minerals policy. It was the Act of March 3, 1909.[21] Instead of reserving mineral lands from agricultural settlement, it opened those lands to settlement and patent, but reserved the coal in and under those lands to the United States. Subsequent acts have extended the 1909 pattern, reserving other minerals to the United States while permitting entry and patent of the surface for farms and ranches.[22] That change in policy was a great boon to homesteaders, for it offered them much more land. But some of the effects of that policy are only arising today. (They will be discussed later.) This new policy created a divided land ownership--ownership of the surface by homesteaders, and ownership of subsurface rights by the federal government or its mineral patentees or lessees.

More recent federal activity affecting underground natural resources can be summarized briefly and incompletely.[23] In 1935 and 1937 bituminous coal legislation gave continued federal support to the production, mining and pricing of coal. The mineral stockpiling program commenced in 1938, partly to stockpile minerals and partly to assure and maintain a healthy national mineral industry.

Under the Defense Production Act of 1950 the Department of Interior has responsibility for the adequacy of supplies and private facilities for the production of strategic metals, minerals, solid fuels and oil and gas, which it ensures partly by financial assistance and direct aid, enabling the mineral industry to obtain favorable tax amortization, loans, guarantees and government procurement contracts. The Bureau of Mines and the U.S. Geological Survey support industry through research and services.

The Exploration Assistance Act of 1958 authorized the Secretary of the Interior to enter into contracts with private parties to aid in the exploration for and discovery of minerals, by paying up to 75 percent of the cost of exploration, with a ceiling of $250,000 per contract. There is no obligation to produce and no production means no repayment. If there is production, the United States receives a royalty of five percent of the "gross proceeds" or "value" of the production, generally for 10 years, or until the government is repaid its contribution with interest, whichever occurs first. Small operators of lead and zinc mines have received price support since 1961.

Federal policy has rather consistently favored and encouraged the exploitation of underground natural resources. Federal assistance programs show a paternalism and policy of encouragement of the private exploitation of underground resources regardless whether federal minerals or lands are

involved.

Coal Mining Problems in the West

In northeastern Wyoming, eastern Montana and the western Dakotas, vast areas of land were patented by settlers under stockraising homesteads and other land laws, subject to the reservation by the United States of the underlying coal.[24]

This land is underlain by the Fort Union coal formation--one of the world's largest coal resources. Moreover, the coal is low in sulphur content, and therefore has a lower pollution potential than most of the Midwestern, Eastern and Southern coal. With the nation facing both an environmental crisis and an energy crisis, the large coal and energy companies have turned vigorously to this western plainsland.

The federal government owns the coal beneath most of the ranches and lands in eastern Montana. Most of the surface land overlying the federal coal is now in private ownership. It has been homesteaded by Montanans in accordance with those federal policies reserving the coal to the United States, beginning in 1909. The federal government, or a large coal company acting as a licensee of the United States, can mine the coal. Eastern Montanans are perplexed about what coal mining methods are permitted and whether shafts and tunnels must be dug to preserve the use of most of the surface for overlying ranches, or whether eastern Montana can be strip mined, turning it into a neo-Appalachia.

STRIP MINING OF COAL: UNSETTLED LEGAL PROBLEMS IN MONTANA

The Montana law of eminent domain as it applies to strip mining is one area of problems that involves principally Montana law. Eminent domain is the power of the state to take property for what it considers to be a public use, subject to the payment of compensation to the person whose property is

taken. The state, through legislation, may delegate this power to private corporations and may, by similar legislation, designate what activities are to be considered public uses.

In Montana, the principal legislation defining the public uses for which eminent domain is authorized was first enacted in 1877, and has been amended and added to periodically since.[25] In 1961, mining was added to that statute as a fifteenth subsection, describing the additional public use in these words:

> 15. To mine and extract ores, metals or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others.[26]

In other words, the owner of the minerals can condemn the surface property owner in order to mine them.

When the power of eminent domain is exercised to take another's property, no more property may be taken than is needed to accomplish the public purpose.[27] Applying this to the eastern Montana coal underlying many large ranches, the foregoing statute would authorize taking through eminent domain only so much of a ranch as is needed to gain access to the coal and mine it. The statute does not authorize the use of eminent domain to condemn entire ranches where that is not necessary to the mining operation. In many instances only a temporary easement would be justified. This is a very important qualification, though for any ranch the vital fact will be the location of the coal---whether it underlies a meadow or winter hay land or only marginal sagebrush land.

If a coal company can take only so much of the land as is needed to mine and extract the coal, can it exercise the power of eminent domain to

enable it to strip mine, or should that power be limited to taking only so much land as is needed to mine the coal by shafts and tunnels? This is the most important legal question the courts have not answered about coal strip mining.

The legislature has provided an answer. The 1973 legislative assembly added the following language to that subsection 15 of the eminent domain law:

> ...provided, however, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use and eminent domain may not be exercised for this purpose.[28]

This enactment may be challenged on federal constitutional grounds. Coal is only one of several minerals that may be taken by strip or open pit mining. Thus the challenge could be based on the law's selection and isolation of coal owners, prohibiting them from strip mining while allowing other mineral owners to continue under the right of eminent domain. In short, the coal owners may claim unfair discrimination and denial of equal protection of the law in violation of the federal Constitution.

The threat of such a challenge was recognized by the legislature, which sought to justify this special restriction against coal through extensive findings.[29] Excerpts from some of these are:

> (1) Because of the large reserves of ... coal in eastern Montana, coal development is potentially more destructive to land and watercourses and underground aquifers and potentially more extensive geographically than the for-

seeable development of other...minerals, and affecting large areas of land and large numbers of people;

(2) ...to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner...;

(3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain;

(4) ...it is the public policy of the State to encourage and foster diversity in land ownership....

These legislative findings will make the task of those challenging the restrictive legislation a formidable one.

Surface and Subsurface Ownership Rights

Ownership of the land surface and of the underlying coal become divided by two principal methods. One is for the owner of both the surface and subsurface to sell only his mineral rights, thus dividing the ownership. The other is for such an owner to sell the land while reserving or withholding the mineral rights from the sale. This latter pattern was used by the Northern Pacific Railway Co., whose reserved or withheld ownership of coal is now owned by the Burlington Northern railroad.

Northern Pacific acquired a vast amount of land in eastern Montana, including the underlying coal, from the federal government under the railroad land grant acts. Subsequently the railroad sold large amounts of land to private ranchers, but reserved for itself the underlying coal, which now belongs to the Burlington Northern. A 1908 Northern Pacific deed contains this reservation:

> Excepting and reserving unto the party of the first part, its successors and assigns, forever, all coal and iron upon or in all of said lands hereinbefore described and also the use of such surface grounds as may be necessary for exploring for and mining or otherwise extracting and carrying away the same....

It is unclear whether this reservation not only entitles the railroad to the coal and the right to use so much of the surface as is needed for mining or extracting the coal by deep tunnel and shaft mining, but also the right to such surface as is needed for strip mining the coal. The answer has not yet been determined in Montana, but the question has resulted in litigation and answers in the coal mining states of the eastern United States. Those eastern decisions will be considered by, and will influence, the Montana Supreme Court. For that reason the case law in Pennsylvania since 1950 has been selected to illustrate the decision-making process and reveal considerations that may guide Montana courts in deciding whether strip mining is permissible.

In chronological sequence, the first case is Commonwealth v. Fisher,[30] 1950, in which an 1855 deed conveyed the land, reserving to the seller...

> ...the full entire complete and exclusive ownership... as though the present conveyance had not been made, to all metals ores minerals coal mine-banks and desposits or ores minerals metals or coal...(and the right to excavate...any part of said premises.

Some time later the Commonwealth purchased the land surface for recreational purposes, and after that the owner of the coal sought to strip mine the land. The Commonwealth sought an injunction against strip mining and was successful

in the trial court. But the decision was reversed on appeal--strip mining was permitted. The appeals court noted that the 1855 deed relinquished common law rights to surface support (i.e., the miner is not responsible for subsidence or collapse of the surface by reason of the mining activity. That could have enabled the court to infer that only deep mining was contemplated, but instead the court found that damage to the surface without liability or responsibility was implied) and that the deed contained no restrictions on mining methods. The appeals court also considered the facts that the land was remote, mountainous and had been logged over. One judge dissented, arguing that the broad, inclusive language reserving ownership of the coal should not be used to confer broad and inclusive means of mining the coal--so the language in the 1855 deed (quoted above: "...as though the present conveyance had not been made...") refers to the quality of ownership reserved and not to mining methods. He also found that strip mining was inconsistent with the surface owner's use of his land and contrary to the conveyance of that land.

The next case also permitted strip mining. In Mount Carmel Railway Co. v. Hanna Co.,[31] 1952, the railway tried to restrain Hanna from strip mining coal under the railroad right-of-way because (as the court found) such mining would make railroad operation impossible until the land had been back-filled after mining was completed. The document in question was an 1891 grant to the railroad of an easement for its right-of-way. The grant reserved for Hanna the minerals "under the surface" and the right to take them "by any method of mining." It also reserved the rights to use "drifts, tunnels, gangways, airways, breasts, slopes and other ways through and under the said tracts." The railroad assumed the risk of "the said surface of the ground hereby granted breaking or falling in" by any method of mining. In upholding

strip mining, the court emphasized the language "by any method of mining" and found that the other language, appropriate only to deep mining, followed the word "also" and hence described additional rights rather than a limitation on the generality and breadth of the earlier language.

In Rochez Bros. v. Duricks,[32] 1953, Rochez had been prevented access for strip mining and sought to prohibit such interference. The document in question was a 1919 deed that reserved the coal.

> Together with the right to mine...rights....to such mining and removal, draining and ventilating the same, and without being required to provide for support of the overlying strata, and without liability for injury to the said surface.. (and the) right to enter in, upon and under the lands.

In prohibiting strip mining, the court noted that the land was agricultural rather than logged-over, remote mountain land and it emphasized that the clauses in the 1919 deed were appropriate to deep mining and not to strip mining. The relinquishment of surface support and rights to damages for injury to the surface was found inapplicable to strip mining---a method of mining that will necessarily destroy the surface. The "right to enter in, upon and under the lands" was also found to be language of deep mining. Finally, the court found that the right to destroy the surface must be specifically reserved because it is so inconsistent with the use of the surface and contrary to the grant of surface ownership. As a general rule for construing such a deed, the court said that if the grantor used language that led to ambiguities or uncertainties about his reservations of the coal and mining rights, the doubt should be resolved against him and in favor of the grantee of the land.

In Commonwealth v. Fitzmartin,[33] 1954, the deeds were executed from 1921

to 1923 and reserved....

...all the coal...and other minerals in and under the surface...

without any liability whatsoever for damages to said lands...

In allowing strip mining, the court emphasized the breadth and generality of the quoted language and ignored other language that was in the context of deep mining, such as references to "shafts" or "ventilation." It declined to follow the 1953 Rochez Bros. case because that case involved rich, useful agricultural land, whereas in this case, as in the 1950 case of Commonwealth v. Fisher the state land was cut over, mountainous and unimproved. Three judges dissented on the basis that the contexts of the deeds lent themselves only to deep mining, that the present utility of the land was irrelevant and that (following the rule stated in the Rochez Bros. case) any ambiguities or uncertainties should be resolved against the grantor.

In Wilkes-Barre Township School District v. Corgan,[34] 1961, school land had been strip mined and the school district was suing for damages, alleging that the land had been stripped without right. The document in question was an 1893 deed of the surface, reserving the coal and the right to drive tunnels and passageways under the land without liability or responsibility for injury to the surface, as by subsidence or collapse. In interpreting this deed, the appeals court stated (as in the 1953 Rochez Bros. case) that uncertainties and ambiguities should be resolved against the grantor of the land who reserved to himself only the minerals. The court found that nothing specific permitted the grantor such a broad, destructive power as strip mining and that strip mining would not have been contemplated in 1893 when the deed was executed. It also found that the land was valuable for its surface uses. And so it found that the school

district had a good case for suing for damages. Two judges filed a brief dissent saying that the 1954 case of Commonwealth v. Fitzmartin (above) should be controlling.

In Heidt v. Aughenbaugh Coal Co.,[35] 1962, the court found that a 1915 mineral lease permitted strip mining because it provided:

> The right to mine to include all practical methods now in use, or which may hereafter be used...and the right to strip the surface or excavate, dig, bore, shaft, quarry and otherwise explore for and mine said minerals.

In Merrill v. Manufacturers Light and Heat Co.,[36] 1962, Merrill wanted to strip mine and brought an action to prevent interference. The document in question was a 1930 deed which granted the power company an easement for its gas transmission line but relieved Merrill from responsibility for damages caused "by the removal of surface support thereunder in the mining of coal." The court found that the quoted language referred to weakening of the surface strata by removal of lower supporting strata and had no reference to strip mining: "Patently, surface support is not synonymous with surface destruction..." (Court's emphasis.) The court said that since strip mining was known in 1930, the parties would have expressly provided for it had it been intended. Other circumstances were considered, such as the fact that in 1930 Merrill (1) did not own all of the mineral and surface rights that he owned by the time of the trial and (2) did not have the right to strip mine all of the land when he granted the easement to the power company. Once again, the fact that it was agricultural land affected the court's judgment. It said that the burden is on "him who seeks to assert the right to destroy" and that the conveyance should be interpreted... in the light of the apparent object or purpose of the parties and of the

conditions existing when the words were employed. The strip mining was prohibited.

In New Charter Coal Co. v. McKee,[37] 1963, the coal in question was granted to New Charter under a 1903 deed, with McKee reserving to himself a seam of coal which lay between the grantee's coal and the surface. New Charter wanted to strip mine its deeper seam, but the court denied it that right, principally because McKee's seam would be torn up by New Charter's stripping.

The most recent case was Steward v. Chernicky,[38] 1970, in which Chernicky had strip mined and Steward sought damages, alleging that his land had been stripped without right. The document in question was a 1902 deed that granted to Chernicky the coal and the right of...

> ...mining...also the right to drain and ventilate said mines by shaft or otherwise...with a full release of and without liability for damages for injury to the surface...

The court found that the deed was not specifically for or against strip mining, but placed the burden of proof upon whoever seeks authority to destroy the surface. It acknowledged the general rule enunciated in the 1953 Rochez Bros. case and the 1961 Wilkes-Barre School District case that ambiguities and uncertainties should be resolved against the grantor, but it did not find that the deed gave rise to significant ambiguities and uncertainties. Rather, since strip mining was not common in 1902 when the deed was executed and since it incorporated such language as "ventilate said mines," it found that strip mining was neither intended nor included in the grant of the mineral rights.

The above cases are almost evenly divided for and against strip mining.

Several key considerations caused courts to decide one way or the other.

The principal emphasis in each case was upon the language of the grant or reservation of the coal. Broad language, authorizing mining "by any method" or exculpating the mineral owner from liability for any damage, tends toward permitting strip mining. Language that is particularly applicable to deep mining, such as "ventilating," "tunnels," "shafts," "passageways" and concerning liability for support of "overlying strata" tends toward excluding strip mining. Factual circumstances also helped courts interpret the language, such as whether the land supported a valuable activity (agriculture), or was merely detimbered eastern mountains or hills, and whether strip mining was common in the area when the language was employed. The release of liability for surface support or damage to the surface has been used by courts to arrive at opposite conclusions, but the more reasonable decision would seem to be that reached in the Merrill case---such language applies only to deep mining because "surface support is not synonymous with surface destruction." Several of the Pennsylvania cases suggest that strip mining can only be authorized by specific language to that effect, because such a method is inconsistent with and destructive of the ownership of the surface.

With these cases as background, it is possible to project how the language of the 1907 Northern Pacific deed should be dealt with. (That language is repeated here for convenience:)

> Excepting and reserving unto the party of the first part, its successors and assigns, forever, all coal and iron upon or in all of said lands hereinbefore described and also the use of such surface grounds as may be necessary for exploring for and mining or otherwise extracting and

carrying away the same...

The reservation of all coal "upon or in" the lands conveyed seems neutral, so far as the method of taking it is concerned--it addresses itself to ownership rather than to mining methods. Then it speaks of the "use" of such surface as needed for exploration, mining, etc. In the context of a 1907 deed, it seems unlikely that such a common, general word as "use" would be construed as permitting the sort of destruction involved in strip mining. The word "mining" is as ambiguous as the word "use;" neither aids in carrying the burden of proving a right to strip mine. The words "otherwise extracting" connote a drawing out, as in deep mining.

The Pennsylvania cases show that surrounding circumstances should be examined to help determine the intent of the parties. A very important circumstance is that strip mining was uncommon in eastern Montana in 1907, but ranching and other agricultural pursuits were common and were expected to be carried on under these grants of railroad land holdings.

The Pennsylvania cases also show that uncertainties and ambiguities should be resolved against the grantor who reserved the coal and that the burden of proof is upon whoever seeks to destroy the surface. But the Northern Pacific deed is devoid of such clear language as "removing," "excavating," "uncovering," or, preferably, "strip mining."

Montana Ownership Divisions

The State of Montana was also a participant in the process of dividing land ownership between surface and sub-surface ownership, in the same manner as the Northern Pacific company. The state held both the surface and sub-surface ownership, but conveyed to homesteaders the land, reserving various minerals, including coal. When public land is conveyed by deed, the conveyance is not called a deed, but rather, a "patent." Montana patents

contain this reservation:

> ...and also excepting and reserving to the State of Montana all title in and to all coal, oil, oil shale, gas, phosphate, sodium and other mineral deposits in the above described land which have not already been reserved by the United States, except sand, gravel, building stone and brick clay, whether now known or hereafter found to exist therein, together with the right for itself and its lessees to remove such mineral deposits so reserved and to occupy and use so much of the surface of the said lands as may be required for all purposes reasonably extending to the exploring for, mining and removal of such mineral deposits therefrom, but the lessee shall make just payment to the purchaser for all damage done to the premises by reason of such entry upon the land and the use and occupancy of the surface thereof.

The operative words here begin with "develop, mine and remove." If "remove" can be taken as part of the mining operation itself, it could encompass strip mining, but the word probably was not used in that way. Rather the whole phrase suggests a process: develop the operation, mine the mineral and remove (transport) it from the premises. The word "mine," then, seems equivalent to the word "mining" in the Northern Pacific deed. Then the state reserves the right to "occupy and use" the necessary surface. Again, the neutral wording is similar to that of the Northern Pacific deed. The clause "required for all purposes reasonably extending to the exploring for, mining and removal" does not offer much help either, because again nothing indicates that any particular method of mining was contemplated. The clause requiring "payment to the purchaser for all damage done to the premises by

reason of such entry upon the land and the use and occupancy of the surface thereof" is not an enabling or authorizing clause, but rather one that protects the landowner and restricts the state or the person to whom the state has granted its rights to mine the coal. Of course, that clause does imply that damage may result from entry, use and occupancy, but that would be the case whether the land was deep mined or strip mined. So again, no words truly describe strip mining or imply any intention of using such a destructive method.

One basis for differentiating this state patent from the Northern Pacific deed stems from a doctrine that was developed to protect the public whenever there is a conveyance of public property. That doctrine is that "nothing passes by implication and a public grant will be interpreted in favor of the grantor."[39] In effect this would strictly limit the rights of the homestead patentee to those specifically granted by the state land patent. It would call for shifting the burden of proof from the grantor, as in the Northern Pacific deed, to the purchaser of the land. And it could be used to resolve ambiguities and uncertainties against the purchaser and in favor of the state, once again the reverse of the Northern Pacific situation. But even so, it does not authorize rewriting of a public grant or avoid the necessity of searching the language of the grant in light of the circumstances of the parties at the time of the grant, to ascertain what was contemplated and intended.

Certainly it was intended that the state should have the right to remove "coal, oil, oil shale, gas, phosphate, sodium and other mineral deposits." The lack of any differentiation between coal and oil, etc., suggests an absence of any contemplation of strip mining. And certainly it was contemplated that the purchaser would conduct farming and ranching operations

on his homestead. Nothing suggests that the state and the homesteader conceived that the homestead might be largely destroyed by strip mining one of the state's reserved minerals.

Strip Mining on Homesteaded Land

The federal government owns most of the coal beneath the ranches in eastern Montana, and the division of ownership of the surface and the minerals parallels the Montana land patents. The land has been homesteaded under the following federal statutes:

> All entries made and patents issued under (stock-raising homesteads) 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...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...for the purpose of prospecting...and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first upon securing the written consent or waiver of the homestead entryman or patentee; second upon payment of the damages to crops or other tangible

improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entry-man or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction...[40] (1916)

Upon satisfactory proof of full compliance with the (several homestead, desert land entry, and stock-raising homestead laws) the entryman shall be entitled to a patent...which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same...(The language continues, reading nearly identically to the 1916 statute quoted above, authorizing licensees of the United States to enter to prospect and to mine, and to occupy so much of the surface as may be required, subject to payment of damages or the giving of a bond to secure damages ascertained by a court.)[41] (1910)

This law simply determines what the damages will be if federal coal is strip mined under homesteaded land. As written, the law does not and could not confer the right upon the United States or its licensees to strip mine previously homesteaded land. That is because the rights of the United States and the homesteaders were established at the time the land was

homesteaded and the United States issued a patent (deeded the land). Since this statute, enacted subsequent to nearly all of the homestead patents in eastern Montana, does not purport to be an exercise of the power of eminent domain (to take private property for a public use upon payment of just compensation), the property rights created by the homestead patents are not affected.

There still remains the problem of determining whether the United States, under the quoted laws enacted from 1910 to 1916, reserved not only the coal and the right to mine it, but also the right to strip mine it. The process of making this determination is essentially the same as the process used in connection with the Northern Pacific deeds and the Montana land patents. And once again no language authorizes or even refers to strip mining.

Some considerations and circumstances lead toward the conclusion that strip mining is permissible under these laws:

(1) It was certainly a known technology by 1910 and was practiced in states east of the Mississippi.

(2) The land patented under the homestead laws was sold to settlers for a nominal price and so the doctrine that in the case of public grants, the grant will be interpreted in favor of the grantor, may obtain the additional force of appearance of fairness.

(3) The laws contain no indication that the United States or its licensees should be precluded from using developing technology in exercising their right of access to the coal.

(4) The homesteaders took the surface land with clear notice that the United States had reserved the coal

and the right to mine it.

On the other hand, strip mining was not being practiced in the West during the period in question and it scarcely could have been contemplated by the homesteaders. It is doubtful that Congress, when it encouraged homesteaders to move west to settle the public domain, intended that at some time in the future the developed and operating homesteads would be destroyed by ravaging the grazing and farming lands to recover the coal. It is even more doubtful that the settlers came west with that understanding.

Deep mining of coal by shafts and tunnels is of course permissible in these lands where the ownership of the surface and the ownership of the minerals have been divided. Future court decisions may determine that strip mining also is permissible on some or all of the lands affected by divided ownership. And if the courts deny the mineral owner the right to strip mine in accordance with his reservation of mineral rights, he still has the alternative of attempting a contractual solution: trying to purchase easements for strip mining from the landowner, or offering to purchase the surface ownership.

FOOTNOTES

1. The principal sources for this portion of the paper are 1 American Law of Mining, Title I by Robert W. Swenson; Title III by Joseph Geraud; and 4 American Law of Mining, Title XXIV by George Vranesh.

2. Prof. of Law, University of Montana. A.B. 1943, University of California. J.D. 1948, Duke University Law School. Member, California State Bar Assn.

3. 9 Stat. 323, 330, ch. 177, sec. 20 (1848), (the act creating the Oregon Territory) and see 1 Lindley on Mines, sec. 132 (3rd ed., 1914).

4. 44 Stat. 1026 (1927), 43 USC sec. 870 (1970).

5. 5 Stat. 453 (1841).

6. 12 Stat. 392 (1862).

7. See, e.g., Northern Pacific Grant, 13 Stat. 365 (1864).

8. There was, however, an old and apparently almost forgotten federal statute prohibiting settlements on public lands. 2 Stat. 445 (1807).

9. 1 Amer. Law of Mining, Sec. 1.10.

10. Fed. Cas. 15,998 (CC Cal. 1858).

11. 67 U.S. (2 Black) 17 (1862).

12. Pres. Lincoln's order was based upon the old 1807 statute, supra, note 8, and is printed in the Appendix of YALE, Mining Claims and Water Rights (1867).

13. 14 Stat. 251 (1866).

14. This characterization is by Swenson, 1 Amer. Law of Mining, sec. 1.13.

15. 16 Stat. 217 (1870).

16. 17 Stat. 91 (1872), 30 USC, ch. 2 (1970).

17. 17 Stat. 607, 30 USC secs. 71-76 (1970).

18. 27 Stat. 348 (1892) building stone. The act is superceded by the Common Varieties Act of 1955, 69 Stat. 367 (1955), 30 USC secs. 601-615 (1970); 29 Stat. 526 (1897) (oil and gas, discussed further in the text which follows); 31 Stat. 745 (1901) (Saline Placer Act).

19. 36 Stat. 847 (1910), 43 USC secs. 141-143 (1970).

20. 41 Stat. 437 (1920), 30 USC secs. 181-263 (1970).

21. 35 Stat. 844 (1909), 30 USC Sec. 81 (1970).

22. See 1 Amer. Law of Mining (Geraud) Title III, Ch. 3.

Footnotes cont.

23. What follows in the text are examples by way of selection from 4 Amer. Law of Mining, Title XXIV by Vranesh.

24. 30 USC sec. 81 (1970); 30 USC sec. 54 (1970); 30 USC sec. 85 (1970); and 43 USC sec. 299 (1970). The second of the foregoing citations provides additional liability for damages caused to the homesteader if strip or open-pit mining methods are used, but it was enacted in 1949 and therefore is not determinative of property rights vested before that date, although it might be some evidence of earlier Congressional intent.

25. R.C.M. (1947) sec. 93-9902.

26. Sec. 1, Ch. 216, Laws of 1961.

27. R.C.M. (1947) secs. 93-9905(2) and 93-9911(3); Montana Power Co. v. Boone, 153 Mont. 390, 399-400, 457 P.2d 769 (1969).

28. H. B. 238, 43rd Legisl. Assembly, 1973, Sec. 1.

29. H.B. 238, 43rd Legisl. Assembly, 1973, sec. 2.

30. 72 Atl. 2d 568 (Pa. 1950).

31. 89 Atl. 2d 508 (Pa. 1952).

32. 97 Atl. 2d 825 (Pa. 1953).

33. 102 Atl. 2d 893 (Pa. 1954).

34. 170 Atl. 2d 97 (Pa. 1961).

35. 176 Atl. 2d 400 (Pa. 1962).

36. 185 Atl. 2d 573 (Pa. 1962).

37. 191 Atl. 2d 830 (Pa. 1963).

38. 266 Atl. 2d 259 (Pa. 1970).

39. 1 Amer. Law of Mining, Sec. 3.42.

40. 43 U.S.C. sec. 299.

41. 30 U.S.C. sec. 85.

42. 30 U.S.C. sec. 54.