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# Administration of the Mining Laws in Areas of Conflict

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[SYMPOSIUM]

# ADMINISTRATION OF THE MINING LAWS IN AREAS OF CONFLICT

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Conflict is a characteristic of development. That the mining laws involve areas of conflict in our expanding economy and increasingly complex society is to be expected. The use of the word in a discussion of the mining laws, therefore, should not be considered invidious.

Conflict can create progress. However, this can be true only if proper response is made to conflict. It is easy to respond to conflict emotionally. But emotional reactions tend to be all-inclusive; they tend to include the baby with the bathwater. Thus, many would treat mining law conflicts by throwing out the miner. The time for such emotional response to the problems of the mining laws expired long ago. It is necessary for the interested public and Government officials to approach the revision of the mining laws with an objective and open mind. It is equally necessary that the mining industry respond to suggestions by more than mere opposition to any change in the mining laws. Intransigence may result in something difficult to accommodate for everyone. For everyone, the time for calm deliberation and analysis is here.

Fortunately, conditions are favorable. The forum for analysis and suggested remedies can be the Public Land Law Review Commission. The creation of the Commission gives all interested parties the opportunity to present the issues and to propose solutions to be a receptive audience, an audience which in turn will speak authoritatively to the lawmakers of this Nation.

This Article will attempt to do little more than urge the analytical consideration of the future of the mining laws. It will do so by looking at the present areas of conflict in terms of four points of view: (1) conflicts resulting from the legitimate use of the mining law, (2) conflicts resulting from the abuse of the mining laws, (3) conflicts resulting from *vagueness* in the mining laws, and (4) conflicts resulting from *administration* or *application* of the mining laws.

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It will leave to future analysis a determination of the adequacy of the proposed responses to the known problems.

## I
## SOURCES OF CONFLICT

### *A. Use of the Mining Laws*

The mining laws were passed to encourage exploration of the public lands for their mineral deposits and the mining of those deposits. Miners will pursue these goals with intensity and skill. People must recognize that, to a greater or lesser extent inevitably, these activities of the miners will create conflicts with nonmineral endeavors and with the realization of nonmineral values.

In part, the conflicts are inescapable. Mining often involves destruction of other resources to some extent. In many cases, timber must be removed, wildlife habitat must be disturbed, natural waterways must be changed, overburden must be set aside, wastes must be disposed of, roads must be pushed through undisturbed areas, water must be diverted and may become contaminated, and holes must be drilled. These and other activities are essential to obtain minerals needed by the economy. Sacrifice of some resources to realize others is not limited to mining. It is characteristic of any intensive use. However, the mining laws notably fail to have internal controls for weighing the value of these "sacrifices." They contain no general requirement for recognition of the "more valuable" concept which is embodied in other public land laws. Under these conditions, the miner cannot be expected to take upon himself the burden of determining what is of more value to society in relation to his activities where there is no assurance that his determination will be recognized by others. For example, he cannot be expected automatically to feel obligated to respect the purity of a natural streamside recreational area when he does not know that others will also do so. The result has been a continuing battle among miners, prospectors, other user groups, administrators, legislators, and the general public. Attempts are made to resolve these incompatible conflicts often simply by barring mineral or nonmineral activity from specific areas. There are also, as a result, a host of special laws, or laws for special situations, governing mining in different types of federal areas—some national parks, national recreational areas, power site reserves, wilderness areas, and others.[1]

1. *E.g.*, 43 C.F.R. § 3530 (Supp. 1966), an example of the application of special-area mineral laws.

Under the existing mining law, administrators can, and should to a greater extent, rely upon economic analysis for such "yes and no" decisions. It should also be relied upon more for the development and application of special legislation. Without some revision of the law, economic analysis cannot be used for maximizing benefits by choosing the best of all available combinations, for the mining law is basically a "yes or no" law.

1. Economic Constraints

Special laws result not only from unavoidable incompatibilities, but also from the fact that the mining laws put no restraints on natural economic forces. Absent special rules (federal, state, or local), the miner must react by reason of the private enterprise nature of his activity in accordance with least-cost principles. The economic facts of life tend to make him want to get to his site the easiest way; to take out his minerals with the least effort; and to go on to other ventures when costs creep ahead of returns. He thus may travel over the countryside with little thought to resulting erosion or watershed damage, he may bulldoze, in a short moment, timber that took years to grow and soil that took eons to create and stabilize. He may pollute the water and the area and leave a gashed, littered, and denuded countryside. Miners have not devastated our little world; however, damages, though localized, are significant, and continue to become more serious every day. The mining law of 1872,[2] however, gives little attention to this source of conflict—avoidable damages to other resources, but avoidable only at a cost. This is not to say that many mining companies fail to do a good job in preventing pollution or correcting damages. Many have recognized that these are legitimate costs of doing business in our society.

2. Instability

Another source of conflict in the legitimate use of the mining laws is the instability of programming for both the miner and the Government. In some cases, third parties are also involved. That is where the miner locates minerals in lands patented with a reservation of locatable minerals to the United States. In either situation, the miner's program of prospecting may be abruptly terminated by the landowner. For example, the Government may reserve the property for its own uses or, for other reasons, bar the continued operation of the mining laws. Or the private landowner may take steps to prevent peaceful entry on the lands. The opposite can happen too. The Government's plans for a tract of land can be

2. Rev. Stat. § 2319 (1875), as amended, 30 U.S.C. § 22 (1964).

suddenly snarled up by the filing of a mining location. There are reasons to believe that the mining law will become a steadily increasing problem for those who have taken lands with all minerals reserved to the United States. The mining laws contain no mechanism for comprehensive stability of tenure.

3. Resources for the Future

There is a source of conflict which can raise arguments directed toward whether "uses" or "abuses" of the mining laws are involved. This is the location of the mining claims to assure reserves for the future—either as reserves presently commercial or reserves pending technological or economic changes which might make them commercial. The mining laws give no guides or special means for the provision of reserves, whether commercial or marginal, or for continuity of operations. Where locations for "reasonable but adequate reserves" end and locations "for elimination of competition or 'playing it safe' to the ultimate degree" begin would be hard to determine in many situations. The mining laws themselves remain silent in this respect.

*B. Abuse of the Mining Laws*

Conflicts from legitimate uses are serious and will be receiving increasing public attention as population and technology press upon resources. Abuses of the mining laws, however, jeopardize chances for satisfactory adjustments to those conflicts because they anger the general public and infuriate the administrators. Ironically, abuses are generally not perpetrated by legitimate miners. They are often engaged in by very "respectable" people, and abetted by "specialists in mining law," many of whom enjoy no law degree.

Locators of outright spurious claims may have any of a number of objectives in mind—hunting cabins, vacation sites, extortion by threat of delaying or compromising public programs, such as land exchanges, highways, and camp developments; compensation for discontinuing "mining" activities on private lands; or just spite.

To the "con" man, it makes little difference whether the claim is entirely spurious or based on some prospect of value for minerals. His interest is in peddling the claims in whole or in part, by quitclaim deed or stock. The mining laws make his operations a bit easier since the paper evidence of a claim has no relationship to its validity. A "paper" claim is easily and cheaply created because the requirements of the mining laws and the "customs of miners" are modest. No need exists to ask permission; posting and marking are simple, particularly for placer claims; the recording fee is not great;

and the "right" is sacred until the creaky machinery of government runs its full course. And then, as likely as not, nothing prevents starting over again. An example of the ease of initiating claims is the recent activity of one man. He has located, along with other locations, 450 association placers of 160 acres each in one county in Arizona, over 600 in southwestern Wyoming, hundreds of others in Colorado, Utah, and New Mexico, more than 6,500 in all.[3]

Many people have gone into the business of locating claims for a fee. They create essentially paper locations, with very little or no real interest in mineral development. Even though they have no real substance, such claims constitute a cloud on the title of the land, are an impediment to the use of the public land, and a deterrent to legitimate mineral development. Often the only way these claims can be cleared from the record is by expensive and time consuming contest procedures.

Other claims lack a valid discovery and are made in the hope that some day they will prove to be valuable. In due time, the locator may really prospect the claim or he may peddle it to someone who will. As against the Government, many claims survive the locators.

In a sense the mining laws cannot be blamed for their abuse. Also, it is unlikely that a law can be framed that cannot be subverted to some extent with considerable impunity. However, a law that is so subject to abuse that it threatens its own existence needs careful consideration. Prohibition led to its own repeal. In the minds of many the mining laws are headed for the same fate.

### *C. Interpretation of the Mining Laws*

Much of the difficulty between rival claimants, or between surface-owner and claimant, or between industry and administration, stems from a lack of a common understanding as to just what the language of the law means in terms of respective rights and privileges. It is a common charge that the administrators have, more or less deliberately, been misinterpreting the mining laws or changing their meaning through interpretations. Most administrators maintain that they are merely trying to do their best to interpret the law as the Congress meant it to operate. The fact is that the law is written in deceptively simple language. It must operate in a frankly complex economy. Ambiguity strikes against the essential utility of law. If questions of interpretation cannot be resolved

3. By November 1966, reports indicated that this individual and his associates had located claims covering more than 1,000,000 acres in Colorado, Wyoming, and Utah, and was continuing with further locations.

readily in a manner that is broadly acceptable to all, then the law cannot serve either the best interests of the industry or the public at large.

In the mining laws, indefiniteness is characteristic. What constitutes a "discovery"? What is a "valuable deposit"? The test of discovery, as developed by administrators and the courts, is based solely on a hypothetical analysis of the behavior of an imaginary "prudent man."[4] The latter phrase may well be a redundancy. In our daily work, we have to assume that this imaginary gentleman's behavior pattern can be deduced on the basis of a "normal" concern for his economic well-being. But who really knows how he would react to a specific assay report. What would he consider "promising"? What would he discard as submarginal? Lacking "civilized" means of answering questions such as those, we must indulge in trial by combat—a hard-fought contest, a resort to the courts, expenditure of much money, and generation of considerable ill will. When it is all over we are still not sure what we have proven. We still don't know for sure what point in the process of detecting the presence of minerals may justify a conclusion that a discovery has been made, as compared with a showing which merely justifies further exploration. In either case, our prudent man might be well justified in the further expenditure of his labor and means, but if the object is further exploration, he has not yet validated his claim. This question of interpreting the law of discovery is a principal bone of contention with the legitimate mining industry and one of our hardest problems in connection with the abuses of the mining laws by non-miners. It seems obvious that the mining laws do not fit many of the industry practices in reconnaissance, prospecting, exploration, development, and mining.

Another serious source of problems with respect to interpretation of the law is the matter of defining "common varieties." The Act of July 23, 1955,[5] excluded deposits of "common varieties" of certain materials from location under the 1872 law.[6] Ever since the enactment of this law, attempts to crystallize a definition that would enable both industry and administration to determine with reasonable certainty whether a given deposit was or was not a "common variety" mineral material have yielded little more than a series of hard-fought contests. In fact, some are beginning to believe that

4. Best v. Humboldt Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905).

5. 69 Stat. 368 (1955), 30 U.S.C. § 611 (1964).

6. Rev. Stat. § 2319 (1875), as amended, 30 U.S.C. § 22 (1964).

there is nothing so uncommon as an uncommon variety. Others fear that if some current thinking prevails, there will be no such thing as a common variety.

A problem of growing concern is the question whether certain minerals are leasable or locatable. Many minerals which have been claimed by location under the general mining laws have elements of minerals which are specifically leasable under the 1920 act.[7] This brings the mining laws and mineral leasing acts into direct conflict. Which law shall govern the disposition of minerals mentioned in the mineral leasing laws? The laws themselves throw little light on their own intent. The Solicitor now has before him this question with specific reference to zeolites of sodium and potassium in bedded tuff deposits. Whatever the answer to this question may be, calcium zeolites presumably will still be locatable. The question has also been posed whether a recently discovered deposit of bedded tuff containing large amounts of potash feldspar is locatable or leasable. Potash is specifically listed in the Mineral Leasing Act of 1920.[8] There are still no answers to these questions. And the worst part is that the scope of the problem has not yet been defined.

It could be that in enacting mineral legislation Congress assumed that mineral deposits are simple subjects and easily classified. The 1872 law[9] was essentially the result of experience with the true vein deposits and true placer deposits, such as those in the gold areas of northern California. Also, Public Law 167 of the Eighty-fourth Congress apparently assumes that it is possible to distinguish readily between common and uncommon varieties of certain minerals.[10] Mineral deposits are not that simple nor are they so easily classified. There is tremendous variety, almost a continuum, of types of minerals and of deposits. As new types of deposits are found or minerals with little previous market value become valuable, the problems of properly classifying a mineral or a deposit as locatable, leasable, or saleable become increasingly difficult. These problems are not solely those of Government. Industry faces the same uncertainty and the problems seem likely to become increasingly common in the future.

Under the mining law, lands can be claimed for lode or placer deposits or as millsites. Distinctions between lodes and placers can become extremely nebulous. The consequences of a locator choosing

7. 41 Stat. 437 (1920), 30 U.S.C. § 181 (1964).
8. *Ibid.*
9. Act of May 10, 1872, ch. 152, 17 Stat. 91.
10. 69 Stat. 368 (1955), 30 U.S.C. § 611 (1964).

the wrong proviso of the law on which to base his claim can be disastrous. The locator is frequently faced with the same kind of dilemma that lawyers used to face under the old common law system of pleading when they had to choose the proper form of action or find themselves out of court on a summary dismissal. Administrators may have to hold that the type of claim is inappropriate for the type of deposit. This can be a serious problem between rival claimants to the same ground.

The above stresses the problems with the mining law resulting from ambiguity. However, it has been possible to adapt the mining laws to specific situations—such as the uranium boom. Elsewhere large developments have been based upon mining claims. A little research may well suggest that this has often been possible only as a result of considerable bending or stretching of the mining law to fit the situation. One could raise, and some have raised, very logical questions as to whether lode locations are the correct type for uranium, massive copper, or iron deposits or whether oil shale deposits were properly located prior to 1920 as placers. However, they have been so located and patents have been granted. One could almost predict that this may be a fertile field in the future for people who seem to thrive on ambiguities.

Discovery or prospect? Common or uncommon? Lode or placer? Leasable or locatable? These are not merely administrative problems. A burden is on every prospector to resolve these questions before he locates the claim. If he chooses incorrectly, he or his successors in interest are the ones who stand to lose.

An even larger question might be why is it necessary to even ask these questions? There is no inherent reason in the nature of mineral deposits or in the exploration or development of deposits which makes it necessary to be concerned with these questions. Surely everyone's energies would be better and more efficiently used in more useful endeavors.

### *D. Administration and Application of the Mining Laws*

Laws are generally not self-enforcing. Rules must be established for their operation and machinery must be set up for their enforcement. Enforcement means assurance that rights granted are realized and obligations required are shouldered. The machinery for administration of the mining laws is highly conducive to conflict and irritation.

State laws establish the particular actions that create the indicia of claim. Some laws for example, require the digging of discovery

pits, whether or not necessary, whether or not dangerous, and whether or not destructive. During the uranium boom, bulldozers in promising places (and some not too promising) ripped up the countryside in a wholesale manner to prove the existence of claims. Nature had the minerals hidden elsewhere in most cases. In practice, these laws seem to be concerned with form rather than substance. Instead of encouraging work which would aid in the discovery of minerals, they often lead to useless damage to valuable resources.

Another neat device for insuring difficulties is the requirement for recordation of notice of locations in local governmental offices but not in the land offices.[11] Thus, the facts of mining locations are not readily available in the land offices where other public land information can be obtained. Also, state laws do not uniformly require efficient record systems from which needed information can be readily obtained. Lack of any notice to the Government, either before or after discovery, can and does contribute to irresponsibility and recklessness in actual operation of the law. It is difficult to imagine any other landowner who would allow or could manage his land efficiently when the possibility of alienation is permitted without even notice, let alone permission.

The fact that lode claims are not located by legal subdivisions complicates any proposal for recordation in the land records. Nor is there any requirement in the law that the locator disclose what minerals he has discovered or to maintain open for all to see the minerals exposed in place. This is sure to make the enforcement of the mining laws, as "enforcement" is used herein, difficult.

Living law can benefit from adaptable mechanisms, for then procedures can change to permit basic objectives to continue to be met. But the mining laws have built-in rigidities that prevent adaptation to changing conditions. One example is the standard price of two dollars and fifty cents (or five dollars) an acre for title to the land in which the mineral deposits are located.[12] In 1872 these prices, under then prevailing policies and economic conditions, were quite often a fair price. Under today's conditions, those prices do not operate as real economic determinants. In the old days, a fair price for the land offered little inducement to the miner to be concerned with nonmineral values. Today, it is an inducement often to get title to land for other resources or for speculation. Another provision, undoubtedly meant to encourage mining and discourage trifling with the public land laws, was the requirement for one

11. Rev. Stat. § 2324 (1875), as amended, 30 U.S.C. § 28 (1964).
12. Rev. Stat. § 2333 (1875), 30 U.S.C. § 37 (1964).

hundred dollars of annual assessment work and 500 dollars investment before a patent could issue.[13]

In 1872 wages and standard of living were very low compared to today. Assessment work of one hundred dollars amounted to a significant input—possibly as much as a summer's work when wages were less than twenty cents an hour. Under today's standards, it may involve less than a day's activity. Even so, many file affidavits of labor where either no work has been done or the amount actually completed has been greatly exaggerated. As with discovery work, even where assessment is actually done, it often is worse than useless—it has little relation to exploring or developing a mineral deposit and it needlessly destroys other resources. An annual assessment requirement, at best, no longer serves as a means for the claimant to demonstrate the good faith of his development efforts.

The lack of a relatively uncomplicated means of termination of abandoned or inactive claims is another significant weakness in the law. It means that all of approximately 6 million claims in existence —all but a minor fraction of which have been abandoned—continue to constitute a cloud on the management and use of the public lands.

These and other features of the mining laws have led to the development of administrative responses. One such response that not all will agree to is, at certain times and in certain places, a general despair among Government personnel and a laxness in their enforcement of the mining laws. This is not universally true nor does it fail to yield at times to spirited over-reactions in the other direction.

Another response has been the creation of that expensive, cumbersome, time-consuming, and indecisive set of proceedings known as the mining contest. Often the point at issue is a technicality of the law which has little bearing on good land management or mineral development. Some feel that this is a highly valuable device because it has encouraged the Government policy of *not* challenging the validity of claims except where unavoidable. It is pointless to undertake all the work if the lands remain open to relocation. Ordinarily, an action to determine the validity of a mining claim is started only when the presence of the claim (1) conflicts with some management program, (2) is an impediment to the conveyance of title or some lesser estate, (3) supports an unauthorized occupancy, or (4) does not support an application for mineral patent.

13. Rev. Stat. § 2324 (1875), as amended, 30 U.S.C. § 28 (1964).

As an administrative tool, the contest procedure leaves much to be desired. The claim must be examined by qualified mineral examiners, often more than once. Numerous samples must be assayed by independent commercial assay firms. Often the claimants must be served by publication in a newspaper. There is a substantial clerical effort involved, considerable cost for travel of the hearing examiner, attorneys, and witnesses for both sides and for making a record and transcribing it. The expenditures of money in many contest cases exceed the value of the land, but the cost in terms of manpower should be measured also in terms of other necessary administrative work left undone. Another factor which tends to make the administrative contest an awkward and unsatisfactory tool is the appellate process which is its essential adjunct. It is quite common for final adjudication to require three years, and ten years may not prove long enough in some cases. This factor is important for it often prevents timely action.

One response is preventive in nature. It is used to avoid the problems by preventing locations in the first place. This is a withdrawal of the land from locations under the mining law. All agencies having a need for public lands look to withdrawal to protect their various programs and projects. In many cases, these are merely reactions to the lack of flexibility in the law and the difficulty, time, and expense involved in determining the validity of claims. This is almost purely an administrative response since most withdrawals are based on the implied authority of the President. Since the mining laws did not provide administrative machinery, something else did. This device is obviously defective. It provides no means to determine the kind of mining that may be compatible with other uses, and the kind of mining methods and other practices that could be made compatible. The division is usually all or nothing.

## II
## RESULTS OF CONFLICT

Much attention and effort must be given by public land administrators to administrative and legislative measures to prevent or minimize the effects of incompatibilities between the mining laws and non-mineral resource conservation. Administrative action is usually in the form of total withdrawals. Legislative action is usually in the form of special provisions for mining activities in special areas or remedial legislation to solve particular problems. Results are often various degrees of rigidity rather than needed

flexibility; and usually a proliferation of the variety of rules. A growing possibility has been voluntary cooperation without any sanctions of law. This type of system suffers easily from pressures and blows of economic shifts and changes. Goodwill often must give way to economics.

The administrator's relationship to the mining "publics" is highly expensive and frustrating. He cannot speak with assurance on practically any phase of interest to the miner and others having interest in mining claims—whether a particular mineral is locatable, whether lands are or will remain open to location, whether prospecting will remain undisturbed or subject to sudden termination, whether the discovery will meet the tests of the administration, whether the principles propounded today will serve for tomorrow, or whether the promotion literature offering claims for sale is truthful. When something goes wrong, the administrator is quite often charged with having misled the "public"—he may have been misunderstood or, in fact, he may actually have been wrong in his statements. The mining fraternity's frustration with existing conditions is fully shared by the administrator.

The operations of the mining laws introduce a measure of uncertainty and thus inefficiency to management of public lands and resources. The dam-builder has a problem of title acquisition and great uncertainty of costs because of great uncertainty as to validity of claims. Transfers of lands to states, cities, and others are delayed and complicated by the need to eliminate clouds on titles. Taking the risks by ignoring old claims can be most embarrassing in the courts. Timing on public works can be seriously affected by the existence of claims. Many transactions are stopped midway to their goals by the filing of a claim.

Containment of fraudulent activities which involve a host of state and federal agencies is not aided by the present mining laws. Great are the difficulties in establishing facts upon which a prosecution or even a show-cause order can be rested. Theoretically, the administrator is not concerned with the forms that free enterprise may take. However, he knows no peace if a private citizen is cheated in a transaction somehow involving public resources. The investigatory agencies need assistance; "policy-makers" often need a "whipping boy"; and the dupe wants overt action.

One of the worst features for the administrator in the present situation—perhaps not the direct product of the mining laws but an indirect result of the "philosophy" that stems from it—is his often profound ignorance of the mineral wealth with which he must

be concerned. Closing the lands to location because of incompatibility leads to lack of knowledge of mineral potential and administrative reluctance to determine potential. The Wilderness Act seems to recognize this fact and calls for mineral surveys.[14] Reluctance on the part of administrators to encourage surveys, of course, is understandable. What one does not know may not hurt him. As for the miner, the uncertainties of his situation under the law make it highly desirable to resist premature disclosure to the Government of the facts—or the lack of facts—relating to unpatented claims. This lack of facts limits the opportunities of the administrator to estimate the approximate values of the resources about which he must be concerned and thus limits his ability to plan and recommend properly.

Abuses of the mining laws particularly compromise the ability of the administrator to enforce the public land laws, to reveal their deficiencies and values, and to demonstrate the needs for public lands and resources and the means to meet the needs. Small tract programs, state selection programs, and the like, were or are complicated and confused by mining claim activities.

All of this results in higher costs of administration—higher costs for land transfers, higher costs for public works, higher costs for public information, higher costs for investigation, and so forth. Procedures get more and more complex, devices to prevent or eliminate problems get more devious, legal reasoning and argument gets more involved as it tries to interpret, in a complex society, laws passed for simpler though wilder conditions. Costs are not only greater in terms of cash outlays for administration but also in loss of economic and social values and in delays and false starts.

Many of these results are shared by the legitimate mining industry. The problems discussed increase uncertainties and costs and cause delays in often vitally needed prospecting and exploration activity.

## III

## OUTLOOK FOR THE FUTURE

If the previous remarks have a substantial degree of validity, then, from the point of view of the administrator at least, the outlook for the future is either grim in terms of increasing conflict or promising in terms of change. Also, the discussion suggests that change must be substantial, for piecemeal measures to remedy specific ills will leave the body of public land law far from sound.

14. 78 Stat. 890 (1964), 16 U.S.C. § 1131 (1964).

Discouraging elements in the picture are the limited nature of the specific suggestions being made to correct the present situation —recordation of claims, authorization for exploration claims, separation of surface and mineral estates, invocation and enforcement by legal processes of "good faith," termination of locations in wilderness areas, and the like. Encouraging elements are this Symposium, the Public Land Law Review Commission, and the forces for improvement that it will loose. The mining laws need an intelligent probing in depth, because an accommodation must be made between dependence of this Nation's welfare on an adequate available mineral supply and the Nation's needs for the rest of nature's bounty for the good of its physical strength and the contentment of its soul. Also involved is the respect for law which can stem only from unambiguous law objectively and fairly administered.

Improvement, however, need not wait for Utopia. Partial measures to permit improvement in the situation need not await the ultimate answer. Some measures not proposed, if adapted to the totality of problems herein discussed in part, would give some degree of relief to the industry as well as to the public land administrator. Adequate adaptation can best be achieved through responsible cooperation between the mining industry and the administrators.

The totality of problems discussed here, perhaps far from everything involved, suggest that proposed revisions of the mining laws should provide at least for the following:

(1) Full consideration of alternate values in determinations whether lands are to be available or not available for mining. (2) Assumption by the "consumer of minerals" of all the costs of mining, including the costs of protecting or rehabilitating other resources. (3) Reasonable security in tenure for the users of the land, including the miner. (4) Continuity of mineral operations and maintenance of a normal competitive situation. (5) Little possibility for subversion of the laws for nonmineral purposes. (6) Reasonable opportunity for administrative officers to detect and correct violations of the law. (7) Clear objectives, clearly defined or readily interpretable terms, uniform applicability, and unequivocable descriptions of rights, privileges, and obligations. (8) Machinery for administration efficient in terms of costs and time, effective in terms of furthering the objectives of the law, objective in determining the rights and obligations in individual cases, and adaptable to changing conditions.

Perhaps the most persistent suggestion to terminate the ills of the mining law system has been to substitute a leasing system. This makes much sense, at least in terms of new discoveries and their development. The hardest argument to counter for opponents of leasing is the common use of leasing systems in the Western World. Arguments against a leasing system unfortunately have not been too enlightening; too often they remind one of a plea to prevent unemployment among burros. However, an industry partially based upon the mining laws may well have roots that could be badly damaged by the change. If so, these facts should be brought forth and given an opportunity to influence the final decision.

A leasing system could also answer the pointed questions now being asked about user fees. With fees now being levied for recreation areas, one of the last holdouts, mining, is getting a unique status among the users of the public lands. Some people feel that since minerals are depletable, it is especially important that the Government receive a return. Of course, many others argue that encouragement of exploration and development is still necessary.

A change to a leasing system would leave many problems to bedevil the industry and administrators, unless careful and perhaps ingenious provisions are made for conversion of existing claims and prospects to rights under a new system.

All in all, a leasing system would seem to hold the greatest prospect of meeting most of the criteria discussed above.

A less desirable solution, but one more harmonious with tradition, involves the separation of the mineral estate from the freehold estate. This solution seems simple on its face. However, as one tries to work out details to avoid the conflicts discussed above, complexities grow. A fully workable system comes close to being a leasing system without royalties and rentals. Variations of this system can be found in the present hodgepodge of public land laws. The Stockraising Homestead Act,[15] the Small Tract Act,[16] and the Recreation and Public Purposes Act[17] all provide for reservation of all minerals to the United States. Stockraising homestead lands are open to the mining laws and troubles are becoming more frequent. Minerals under the other two acts have by administrative order been kept closed to mining locations. That has been easier than facing the host of problems that might otherwise ensue. Incidentally, a study of the mineral development of stockraising

15. 39 Stat. 862 (1916), 43 U.S.C. § 291 (1964).
16. 52 Stat. 609 (1938), as amended, 43 U.S.C. § 682(a) (1964).
17. 44 Stat. 741 (1926), as amended, 43 U.S.C. § 869 (1964).

homestead lands may merit special attention, perhaps by the Public Land Law Review Commission.

When Congress has faced the problem of conflicts arising from separation of the estates, its response has not been too different from the administrators. Sometimes it has closed the areas to mineral development entirely.[18] In other cases it has subjected the miner to regulations.[19] In the Wilderness Act[20] it combines both over a period of time.[21]

Quite a bit of work has been done in recent years on legislation to establish prediscovery rights based on geological inference or exploration claims. This is an effort to adapt the mining laws to location and development of deep-seated ore deposits. Few, if any, question the need for the protection of the investment of the legitimate miner in exploration work. But here again, the more one works on the details of the proposals, the less obvious are their general acceptability. Some suggestions seem merely to impose new complications. Provisions to prevent prediscovery rights from compounding the problems of the present mining laws bring the proposal closer to a leasing system and cast more doubts on the acceptability of the basic principles of the underlying law. This may be only an individual's experience. However, the facts are that years of effort have yet to yield a proposal having endorsement of all major interested parties.

The attempts to clarify the meaning of "common varieties" is one of the minor tragicomedies of current times. So far, the main achievement has been to agree that something must be done. A recent suggestion has been to discard entirely the notion of common varieties and to try instead to get a new mining law for all construction mineral materials.[22] A central thought of one such proposal is to appraise both the value of the mineral deposit and the total value of the land. The mining locator would have to pay the difference between the two. Other provisions would be needed to avoid

18. This was done in the establishment of most of the national parks.

19. This was done, for example, in Death Valley National Monument; Glacier Bay National Monument; Organ Pipe Cactus National Monument; Papago Indian Reservation; City of Prescott, Arizona, watershed; Olympic National Park; and with regard to mineral entry on withdrawn reclamation lands (47 Stat. 136 (1932), as amended, 43 U.S.C. § 154 (1964)) and powersite lands (69 Stat. 682 (1955), as amended, 30 U.S.C. § 621 (1964).

20. 78 Stat. 890 (1964), 16 U.S.C. § 1131 (1964).

21. 78 Stat. 893 (1964), 16 U.S.C. § 1133(d)(3) (1964).

22. *Hearings on S. 2281 and S. 3485 Before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs,* 89th Cong., 2d Sess. 23, 33 (1966).

the conflicts discussed above. Complete freedom of action for the miner does not appear likely even here.

A partial solution to some problems is legislation to require recordation of mining claims in the United States land offices. It would definitely help legitimate prospectors and help in the management of public lands and in the determination of rights, but many other problems would remain. Provisions to provide for forfeiture upon lack of recordation raise problems with respect to existing claims. They might also raise new sources of disputes, new needs for remedial legislation, and other woes for both new and old claims. Recordation legislation would be progress but not the answer. Recording of claims in the Oregon and California Railroad Company country help management but where important conflict looms withdrawal of the lands from location often becomes necessary.

## CONCLUSION

Does all this mean that we should drop all suggestions for remedial legislation until a perfect system can be worked out? Obviously not. We should carefully consider all suggestions, includ- those already mentioned. We should make a concerted, cooperative effort to establish a satisfactory system—whatever its basis. In the meantime, our consideration of partial remedial legislation should not concentrate on whether each proposal is the perfect solution for all the problems involved. We should concentrate rather on whether it will be a satisfactory temporary solution to specific problems *which will not make more difficult the establishment of the ultimate solution.* New privileges may require new obligations.

No interested party can really afford to let the present opportunity pass. We must take a hard look at all the alternatives and pick those that are practical, fair, and just. At stake is the management of the public lands in the public interest, which includes a sound, vigorous mining industry.