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PUBLIC LAND AND MINING LAW

LOREN L. MALL

Seattle: Butterworth Legal Publishers, Inc., (3d Ed.) 1981. Pp. xxiv, 439.
\$65.00.

Loren L. Mall's *Public Land and Mining Law*, first issued in 1979, now appears in its third edition in almost as many years. From its initial publication the casebook has tried to yoke cases and notes dealing with the ownership of public land to cases and notes dealing with the application of the Mining Act of 1872 (the "Hard Rock mining act") to the public domain.

Even in the author's own mind, the two subjects do not fit easily together. In separate prefaces to each edition, all set out in this 1981 volume, Mall describes his essentially unchanged text, at first as gathering materials on two different subjects (federal land law and federal mining law), then as presenting material on two "inter-related subjects" (the same two), and, finally, as a casebook directed only to "the fundamental principles of mining law." The protean descriptions suggest uncertainty about what vision holds this casebook together. The text itself demonstrates that public land law and hard-rock mining law do not necessarily belong in the same book.

Public Land and Mining Law treats completely neither federal land law nor federal mining law. Roughly half of the text deals with the legal history of federal acquisition, disposition, and continued control of the public lands in general. These chapters hardly mention the esoteric but current historical issues concerned with the nature of aboriginal claims to the public domain. They say nothing about analogous claims based on the laws of the United States' antecedent sovereigns, Spain and Mexico. The other half of this text deals with metalliferous mining on the federal lands. These chapters do not deal at all with the Mineral Leasing Act of 1920 and the fundamentally different treatment of non-metalliferous mineral resources on the public domain. Students of this book will be exposed to uranium but will learn nothing of either oil and gas or coal. Considered separately, neither half of this book will stand alone.

Considered together, the subjects that author Mall has selected for this casebook share one important, if ironic, element: both public land law and hard-rock mining law are anachronisms in the galaxy of heated issues today surrounding federal management of the public lands. Devotion of more than half this book to hard-rock mining focuses on a dying subject. Of the 27 cases presented in Mall's sixth chapter on "Disposition of Minerals from Federal Lands by Location," the average case was decided in 1950, 32 years ago. The number of mineral patents issued under the

Mining Act of 1872 has declined steadily since 1892, when it reached its peak, to a negligible current level. Why devote pages, as *Public Land and Mining Law* does, to mineral patent application procedures when the valuable public domain mineral resources involve the 1920 Leasing Act?

Similarly, the text's focus on how the United States gained title to its public domain involves a moribund issue at best. With the exception of the few serious legal issues floating around the edges of the largely political "Sagebrush Rebellion," most of the current debate about federal lands turns on how to manage their resources, not who owns them. The history of the assembly and partial disposal of the public domain may interest students. It won't help their understanding of current management problems.

Indeed, Mall's organization obscures those current problems. For example, Mall sets out, in the lands section of the book under the heading "Early Development of Public Land Policies," the critical and relatively recent decision in *Kleppe v. New Mexico*. The Supreme Court opinion gives an important, expansive reading to Article 4's property clause. But the issue in the case involves not federal ownership of land but the federal powers incident to that ownership. The expansive view adopted by *Kleppe* will not affect hard rock mining law nearly as much as it will affect federal land use and management practices. But in this casebook there's no range of resource issues—wildlife, recreation, and land use control, to name a few—against which to test *Kleppe*'s radical implications.

The same problem plagues the rest of the text. *Public Land and Mining Law* includes the great, currently important cases dealing with federal land and resources law. *Charlestone Products*, *Coleman*, *Leo Sheep*, *Oil Shale Corporation*, *Southern Pacific Railroad* and *Kleppe* all appear here. But the narrow structure imposed by this text's limited concerns frustrates a full consideration of all, and indeed the most important, implications of these important decisions. *Charlestone Products* teaches that water is not a 'locatable' mineral under the Mining Act of 1872. But *Public Land and Mining Law* offers little else on the critical subject of water rights—for hard rock mining or for any other resource enterprise on the public domain.

This casebook does have real redeeming virtues. The visual layout is handsome, even if my review copy came stitched into its elegant cover upside down and backwards. The author's copious notes raise provocative issues. Full illustrations provide the law student with a badly needed primer in geology and mining practices. For once an author has taken the trouble to explain the system of government surveys on the public domain.

But a casebook like *Public Land and Mining Law* is produced for law school, not the general public, and for teaching, not casual perusal. The

text's fundamental asymmetry affects more than its aesthetic design. The forced fit between public land law and public hard-rock mining law damages the book's usefulness as a pedagogical tool. Law teachers always cavil at the choice of books available to them. But Coggins and Wilkinson's *Federal Public Land and Resources Law* offers a more comprehensive look at the range of resources involved in modern public land management than does *Public Land and Mining Law* while, at the same time, offering almost as complete a portion on the antiquated Mining Act of 1872.

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