September 1945

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Recommended Citation
Wm. E. Colby, Mining Law in Recent Years, 33 CALIF. L. REV. 368 (1945).

Link to publisher version (DO1)
https://doi.org/10.15779/Z382B60

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Mining Law in Recent Years†

Wm. E. Colby*

It is now over twenty years since the third and last edition of Lindley on Mines was published. In this interim many important decisions involving mining law have been handed down, and equally important legislation has been enacted by Congress. The Supreme Court of the United States, the court of last resort on this particular subject, has during these years spoken many times in deciding critical cases involving various aspects of the law. Judge Curtis H. Lindley, the author of Lindley on Mines, was a lawyer of exceptional ability and during his lifetime was recognized as the leading authority on mining law in America. In the preparation and editing of his outstanding work on the law of mines he demonstrated that he was equally able as an author. Judge Lindley became interested in mining law in its formative period. Prior to the appearance of the first edition of Lindley on Mines in 1897 the few published books dealing with mining law were little more than copies of the

†This series of articles, of which the following is the first, is intended to supplement the 3rd edition of "Lindley on Mines" (1914), and bring the mining law as it has since developed, down to date. It is obviously impossible in the allotted space to present the subject in detail in all of its aspects. To treat it exhaustively would require a large volume. Only the more important legislation and decisions will be considered and, because the Supreme Court of the United States is the final arbiter in all cases involving federal public lands, the decisions of that court will receive special consideration. Land laws related to the mining laws will also receive some consideration, as was done in Lindley on Mines. The order in which the sub-titles to be discussed are here presented will, in the main, follow the same order in which they appear in Lindley on Mines.

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‡While some commendable books on mining law have appeared in the meantime, none of them purports to give more than a bare outline of what the cases have decided and there is very little attempt at analysis of, or comment on, underlying principles. The 16th edition of Morrison's Mining Rights was published in 1936 and a revised 4th edition of American Mining Law by Ricketts was printed in 1943 and is sold by the Division of Mines of the State of California. This latter volume is especially creditable and furnishes a ready reference for decided cases, bringing them up to the date of its publication.

Judge Lindley gave a course of lectures on mining law at the University of California and received the degree of LL.D. from that institution in 1917. See Curtis Holbrook Lindley (1850-1920) an account of his life and accomplishments by the writer in (1921) 9 Calif. L. Rev. 87-99.
MINING LAW IN RECENT YEARS

3 The law had not developed sufficiently to warrant a systematic and philosophical treatment of the subject. It is fortunate for the profession that a man of such outstanding ability undertook this work when he did. Mining law was rapidly developing and its principles crystallizing. Many of our law textbooks are written by men who have had little experience in active practice. Few busy lawyers can or will give the time and labor involved in writing texts. Judge Lindley was the rare exception. The demand for a second edition was met in 1903; and in 1914 the third appeared. The latter was truly a magnum opus, and takes rank with the best law treatises that we have. Judge Lindley reached the greatest height in his professional work at the very time that mining law was at its zenith. Since then, mining litigation has decreased in importance and number of cases. All one has to do is to note the number of mining cases appearing in the reports to realize that mining law is on the wane. This is only to be expected, for no new mining fields of outstanding importance have been discovered in recent years, the older camps have in many instances been entirely worked out, and the large corporations which have taken over the more important mining operations have profited by past experience and, with foresight, forestalled prospective litigation by avoiding in advance possible sources of legal trouble.

4 This has one great disadvantage to a mining lawyer nowadays, for, while in Judge Lindley’s day there were many judges familiar with the problems of this specialty, they having previously been active in the field of mining law, it is rare today for a judge to try a mining case who has had any previous familiarity with the subject.

Introduction. To understand mining law as it exists today in the United States, one must know something of the historical background which is responsible for the different types of mining law in

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3 Mining Claims and Water Rights (1869) by Yale was the leading pioneer work. Copp’s U.S. Mineral Lands appeared in several editions as did also Morrison’s Mining Rights and Weeks on Mineral Lands. Sickels’ Mining Laws and Decisions was published in 1881.

4 All one has to do is to note the number of mining cases appearing in the reports to realize that mining law is on the wane. This is only to be expected, for no new mining fields of outstanding importance have been discovered in recent years, the older camps have in many instances been entirely worked out, and the large corporations which have taken over the more important mining operations have profited by past experience and, with foresight, forestalled prospective litigation by avoiding in advance possible sources of legal trouble.

5 We had Justices Field, Brewer, McKenna, Sutherland and Van Devanter, of the United States Supreme Court, Chief Justice Beatty and Justices Temple and McFarland, of the State Supreme Court, and Judges Morrow, Gilbert and Ross, of the Ninth United States Circuit Court of Appeals, to mention some of the leading jurists who were familiar with mining law, besides many trial judges, who knew without any telling its underlying principles.

6 The writer must confess, however, that many of these comparatively inexperienced judges in mining cases have exhibited great ability in grasping technical mining problems once they have been presented and explained. Still, it is not the “easy sailing” that it used to be when little time had to be expended in explaining basic principles of mining law to the courts, because already thoroughly understood by them.
force in various parts of the United States. The thirteen original col-
onies achieved their independence as sovereign powers and, conse-
quently, when they formed a confederation and later on, the Union, 
they each had complete sovereign powers over the public lands within 
their respective borders, and legislated regarding such lands, includ-
ing mineral lands, as each saw fit. (The same is true of Texas.) When 
these states ceded to the United States the public lands lying west, 
and between them and the Mississippi River, the United States could 
have adopted a uniform code of mining laws applicable to these lands. 
However, comparatively few mineral deposits were known and mined 
in this territory and, with the exception of legislation providing for 
the leasing of deposits of lead in a limited area, Congress did not act. 
It later abandoned this lead-mine leasing policy as impractical, and 
disposed of these and other mineral lands on the same basis as agri-
cultural lands.8

With the acquisition of the vast areas of public domain embraced 
in the Louisiana purchase in 1803, the Florida cession in 1821, Cali-
forinand adjacent territory conquered from Mexico (treaty of 
1848), the area in the southwest included in the Gadsden purchase 
of 1853, and the area in the northwest confirmed by the treaty with 
Great Britain, the United States came into possession of a veritable 
empire containing a hidden and then unknown mineral wealth un-
rivaled the world around.

The discovery of gold in California in 1848 started a new trend 
in thought on the subject. In the stirring days of '49, men from all 
parts of the world, but principally from the eastern states, rushed to 
this new El Dorado to make their fortunes mining gold. Gold was 
found with few exceptions on public domain owned by the United 
States. Congress had not legislated, so that it was impossible to legal-
ly acquire title to these lands. The Mexican mining laws were held 
to be inoperative. The miners were technically trespassers, and the 
gold they mined belonged to the United States. To avoid bloodshed

72 Stats. at Large, 488. It is interesting to note that Congress provided for the 
leasing of lead mines, instead of the outright sale of the lands containing them, in its 
first mining legislation. This was because of the great importance of lead as ammunition 
for use in war. This policy of leasing mineral lands was later abandoned by Congress 
and only revived as to strategic minerals, oil, gas, coal, phosphate, potash, etc., in recent 
years. The Continental Congress had in 1785 enacted a law reserving one-third part of 
all gold, silver, lead and copper mines in the "western territory" but after the Constitu-
tion was adopted, the new Congress did not reenact it.

8 See Lindley on Mines, §§33-35. Wherever Lindley on Mines is cited in this 
series of articles the references are to the 3rd edition.
and unseemly contests over possession and working the gold-bearing lands, the miners took matters into their own hands, formed mining districts, held district meetings and adopted their own rules and regulations, which became the "customs of the diggings," and which specified the amount of ground that each miner was entitled to work and the manner of working, etc. This general policy, fixed and regulated by these rules and customs, was approved by the silent acquiescence of the federal government, and was expressly sanctioned by the Supreme Court of the United States. It received formal confirmation at the hands of Congress by the Act of 1866. This extraordinary situation, of the United States, by sufferance, and in the absence of Congressional legislation, permitting the miners to have their own way and possess and work the mining ground in accordance with rules of their own making, which rules were for all practical purposes "the law of the land," recognized as such by the courts, is without parallel in the history of the world. The enormous federal debt, over a billion dollars, resulting from the civil war, caused officials, who were solicitous for the credit of the country, to suggest that these mining lands in the West should either be leased on a royalty basis or sold to the highest bidder so that the nation might derive some revenue from its own property from which millions upon millions of dollars in gold value were being taken annually without a cent being contributed to it, the lawful owner.

Act of 1866. The pressure on Congress to do something became so strong that the western members realized that it was up to them to take some positive action to meet the situation and in some meas-

9 A complete description of this exciting period will be found in Lindley, op. cit. supra note 8, §§40-49. Also see Colby, The Extralateral Right: Shall It Be Abolished? (1916) 4 Calif. L. Rev., 437-452.


12 Who at that time would have believed that, only seventy years later, this country would be spending billions of dollars each month without fatal strain on its treasury?

ure protect their mining constituents. Led by Senators Stewart of Nevada and Conness of California, a bill was hastily drafted, patterned in large part on the rules and regulations the miners had adopted in their mass-meetings. The Act of 1866 (14 Stats. at Large, 251) resulted and, though the first draft provided for the payment of royalty on all ore extracted, this provision was eliminated from the Act as passed. It gave legal sanction to the presence of the miners and the staking out and mining of locations on the public domain, and exacted no payment of any sort for the grant of this privilege for, and the confirmation of, what had previously taken place under sufferance. Only when patent for the land was applied for was any payment required, and the price even then was nominal.

An interesting case14 arose in this county (Alameda), involving the Central Pacific Railroad right of way granted by Acts of Congress in 1862 and 1864.15 This right of way conflicted with a public highway in Niles Canyon, maintained ever since 1859. The Supreme Court of the United States held that the right of the county to the public highway was confirmed by the provisions of the Mining Act of 1866 (14 Stats. 251, §8), which act even though subsequent to the railroad granting acts, not only granted rights upon the public domain subsequently initiated, but also recognized, and confirmed, preexisting rights. This interpretation of the act in its bearing on rights to mineral lands of the public domain which had attached prior to the act, is of sufficient importance to justify the following quotation from the court's opinion:

"By the Act of July 26, 1866, c. 262, 14 Stat. 251-253, Congress dealt with the acquisition of a variety of rights upon the public domain. By §§1-7, mineral lands, whether surveyed or unsurveyed, are open to exploration and occupation, subject to regulations prescribed by law, and to the local customs and rules of miners in the several districts." (468)

The court cites the case of Broder v. Water Co., 101 U.S. 274, involving a right of way to a canal constructed across the public domain in 1853, which right of way it upheld as against a tract of subsequently patented railroad land issued under the railroad land grants of 1862 and 1864, and quotes from that case to the effect that the section of the Act of 1866 granting these rights of way—

14 Central Pacific Railway v. Alameda County (1932) 284 U.S. 463.
15 12 Stats. at Large 489 and 13 ibid. 356.
was rather a voluntary recognition of a pre-existing right of possession,\textsuperscript{16} constituting a valid claim to its continued use, than the establishment of a new one." (469-470)

The opinion in the \textit{Central Pacific Railway} case goes on to say:

"Likewise, this court has recognized that the appropriation of mineral lands upon the public domain in accordance with the local customs of miners, prior to Congressional legislation, was assented to by the silent acquiescence of the government, and was entitled to protection. . . ." (Citing cases, 471)

and also quotes from \textit{Jennison v. Kirk}, 98 U.S. 453, that the Act of 1866:

". . . merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." (98 U.S. 459)

The \textit{Central Pacific Railway} case concludes that these rights granted by the Act of 1866

". . . were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. . . ." (473)

It was not long after this decision before another case arose in California\textsuperscript{17} involving mining claims located in the early 1860's. There, extralateral mining rights conflicted with land patented under a railroad grant. (\textit{14 Stats. at L. 239}, enacted July 25, 1866.) The point was made by the parties claiming under the railroad grant that the mining Act of 1866 was passed on July 26, or one day later than the railroad grant act and that, therefore, the latter act, being prior in time, took precedence over the mining act grant. The Supreme Court of California, however, followed the United States court rulings just noted and held:

"It is clear that Congress intended by the Mining Act of July 26, 1866, to recognize and give legal validity to all existing mining claims in accordance with local rules and regulations, including extralateral

\textsuperscript{16} Underscoring is the court's.

\textsuperscript{17} \textit{Ames v. Empire Star Mines Co., Ltd.} (1941) 17 Cal. (2d) 213, 110 Pac. (2d) 13; \textit{cert. den.} (1941) 314 U.S. 651.
rights in those lands to which such rules and regulations applied....

(218) [T]he Railroad Grant Act of July 25, 1866, upon which plaintiffs rely for their original title, specifically excepted from its operation all mineral lands. The terms of the act make it clear that Congress did not intend to vest in the railroad title to any mineral lands of the United States. . . .” (219)

This case will be discussed at greater length hereinafter under sub-titles “Railroad Grants” and “Extralateral Rights.”

The Act of 1870. The Act of 1866 had confirmed the rights of miners to lode, or ledge, or vein, claims, and had said nothing about placer or gravel claims, though it was generally conceded that the introductory provision of the Act of 1866 throwing the “mineral lands of the public domain . . . open to exploration and occupation” was broad enough to include placers. The so-called Placer Act of 1870 (16 Stats. at Large, 217) expressly provided for the location of placer mining claims, without requiring any payment to be made to the government, excepting a very nominal price per acre in the event the locator desired to obtain a patent, and whether he applied for one or not was, as in the case of lode locations, left to his option.

The Act of 1872. The experience gained from the practical operation of the Acts of 1866 and 1872 brought about a demand for certain changes. Senator Stewart of Nevada, who was still in the Senate, again sponsored the legislation which was enacted and is generally referred to as the Act of 1872. (17 Stats. at Large, 91, but later codified with other related legislation as §§ 2318-2346 U.S. Rev. Stat.) This Act deals with the location and patenting of both lode and placer mining claims and is today, and has been for nearly three-quarters of a century, the basic law governing the acquisition and maintenance of title to mining claims on the public domain. It has been amended from time to time in certain minor respects; and lands containing certain non-metallic minerals have been removed from its operation. These changes will be noted hereinafter, but, as far as metalliferous lands are concerned, this act continues unchanged the principle of free mining on the public domain. Because it is the basic mining law, decisions of the courts interpreting it are numerous and the late cases will be considered hereinafter under appropriate headings.

Leasing Act of 1920 and Related Acts. These mining statutes,


19 Ibid., §§68-74.
reviving the early policy of leasing of lead mines, were enacted sub-
sequent to the publication of the last edition of *Lindley on Mines*,
and hence could not be noted there. However, Judge Lindley was
deeply interested in the conservation movement which resulted in
the withdrawal by the President (without express sanction of Con-
gress) from entry of public lands containing certain strategic min-
erals essential to the safety and well-being of the inhabitants of the
country at large, and, noting what Congress and the chief officials of
the government were doing in anticipation of this complete reversal
in mineral land policy from the previous policy of free mining and
granting unrestricted title, he made some illuminating comments on
this subject. It has also been elsewhere treated by the writer of this
article.  

Judge Lindley, as were the great majority of lawyers in the min-
ing states of the west, was very definitely of the opinion that these
presidential withdrawals of potential oil land were invalid. President Taft had expressed grave doubt as to his authority to make
these extensive withdrawals of lands of the public domain from entry
in the absence of congressional approval, especially when the mining
laws then in force gave express sanction to the location of such lands.
Though Congress gave the President this authority to withdraw lands
by the Act of June 25, 1910, there were many locations of oil lands
made between the original presidential withdrawals of 1908 and
1909, and his confirmatory withdrawal of the same and additional
lands immediately following the passage of this Act. The validity of
these pre-Act locations was in violent dispute. The year following the
appearance of the third edition of *Lindley on Mines* (1914), the
Supreme Court of the United States set the matter at rest in *United
States v. Midwest Oil Co.* (1915), 236 U.S. 459, though by a divided
court, three Justices dissenting. The authority of the President was

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20 *Ibid.*, §§200 and 200a, b and c.
22 *Lindley, op. cit. supra* note 18, §200b. See also Colby, *The New Public Policy with Special Reference to Oil Lands* (1915) 3 Calif. L. Rev. 269: In Mason v. United States (1923) 260 U.S. 545, the court said, "It is common knowledge that the validity of the withdrawal order . . . was in grave doubt until the decision of this court in United States v. Midwest Oil Co." (556), 3 Calif. L. Rev. 269-291.
23 36 Stats. at L. 847. This Act also gave the President authority to withdraw lands for water power sites and other purposes.
24 The dissenting justices included McKenna and Van Devanter, who were from the west and were unusually familiar with land law involving the public domain so that they wrote most of the court's opinions in such cases.
upheld, based on the long continued practice of the President in making withdrawals of land for various purposes, all of which had been acquiesced in by Congress, either silently or by making appropriations of money for the benefit of lands thus withdrawn.\textsuperscript{25}

The Leasing Act of 1920 (41 Stat., 437) inaugurated a new policy, and abolished the former practice of location of mining claims which contained the minerals specified in the Act, viz.: coal, oil, oil-shale, gas, phosphate and sodium.\textsuperscript{26} Such lands are no longer open to location and acquisition of title, but only to lease.\textsuperscript{27} Potash had been originally included in this group, but the urgent need for making potash available for war purposes resulted in Congress passing an act in 1917 providing for the leasing of lands containing potash. (40 Stats., 297.) This act was later repealed and superseded by another potash act in 1927 and noted hereinafter.

In 1914 Congress had passed an Act in furtherance of the conservation policy (38 Stat., 509), which was part of the contemplated legislation to follow the earlier withdrawal of lands containing oil and other minerals embraced in that policy. This Act provided for the separate disposal of the surface of land to agricultural claimants, and the severance of the underlying specified minerals which were reserved for later disposition. The Act did not become operative for practical purposes, as far as the leasing and removal of minerals is concerned, until the passage of the Leasing Act of 1920, which provided the legal machinery whereby government leases on such patented lands might be obtained. Persons who have qualified by filing a bond for payment of damages to crops and improvements of the agricultural occupant of the surface, may prospect and mine the reserved minerals. The Act of 1920 provides for the disposal of such reserved mineral deposits through leases from the government entitling the lessee to remove them and make the necessary use of the surface and pay royalties, and in some instances further compensation, to the United States. A servitude is laid on the surface estate

\textsuperscript{25} See 3 CALIF. L. REV. 269, for a full discussion of this case. This withdrawal power of the President has been reaffirmed in a comparatively recent case where public lands had been withdrawn for occupancy as an Indian reservation. Sioux Tribe v. United States (1942) 316 U.S. 317, 325.


for the benefit of the mineral estate, to the end that the United States may realize a proper return from the extraction and removal of the reserved minerals. The only compensation which the surface owner may rightfully demand is for damages caused by mining operations. Damage to crops and agricultural improvements are intended, and not damage to improvements placed on the land after mining operations are under way, and which are obviously incompatible with those operations. In the leading case on the subject, the surface owner was subdividing the land, and selling town lots. The government's lessee was successful in preventing such development, so foreign to agricultural use of the land.\textsuperscript{28}

To effectuate the conservation policy of President Hoover, Secretary of the Interior Wilbur in 1929 issued a general order, and refused to entertain applications made under the Act of 1920 for permits to prospect for oil and gas. He also cancelled all pending applications. This action was taken because of an enormous increase and troublesome surplus of petroleum. The over-supply was glutting the market, and "cutthroat" tactics of producers and dealers were aggravating a serious situation.\textsuperscript{29} In a suit to test the Secretary's power to take this drastic step, the Supreme Court of the United States upheld his authority, stating that the general powers of the Secretary over the public lands as guardian of the people, and the right of the President to withdraw public lands from private appropriation, supported the Secretary in his general order.\textsuperscript{30}

The Leasing Act expressly excepted from its operation prior "valid claims" to the land sought to be leased. However, this exception was not intended to include "nebulous and insubstantial" claims such as the mere privilege of contesting possible presumptive titles. The Act is not operative where substantial rights had already been acquired to lands containing these leasable minerals. It was enacted in order to permit the exploitation of lands subject to lease by lessee applicants, and was conditioned on the payment of royalties to the government.\textsuperscript{31}

An interesting question which arose in the administration of the Leasing Act was whether unpatented mining locations that were

\textsuperscript{28} Kinney etc. Oil Co. v. Kieffer (1928) 277 U.S. 488, 490-1, 494-5, 504-5.

\textsuperscript{29} This over-production situation and the remedies resorted to by the oil producing states and the federal government in their attempt to curb the evil results of such superabundance are detailed in Colby, \textit{op. cit. supra} note 26, at 245, 266-271.

\textsuperscript{30} United States v. Wilbur (1931) 283 U.S. 414, 419.

\textsuperscript{31} Work v. Braffet (1928) 276 U.S. 560, 565-566.
“valid claims existent at date of the passage of this Act,” and thus excepted from its operation, would remain “valid claims,” and continue to be excepted from its provisions, if the owners failed to perform the assessment work, or annual labor, as it is called, required by the mining law to keep the location alive and in good standing. The Land Department had held that certain oil shale locations were null and void because of such failure to perform assessment work. The Supreme Court of the United States reversed this ruling, holding that the mere failure to do the work does not \textit{ipso facto} forfeit the claim, but only renders it subject to loss by relocation. The owner is permitted by the mining statute to resume work and “such resumption does not \textit{restore a lost estate}... it \textit{preserves an existing estate}.”

The court intimated that some sort of challenge on behalf of the United States of this failure to perform annual labor might operate to defeat the title. Acting on this suggestion the Land Department tested this intimation and challenged the failure to perform the assessment work in a subsequent case. The court held, however, that a mere challenge by the government of the validity of the location on the ground that assessment work had not been performed was not sufficient, and did not furnish a proper basis for declaring the claims null and void.

Enlarging its leasing policy, Congress, on April 17, 1926, provided for the prospecting under permit and leasing of lands for sulphur in Louisiana; and, on June 8, 1926, for the leasing of lands embraced in any land claim confirmed by the Court of Private Land Claims, where the mineral rights did not pass to the grantee, for gold, silver, or quicksilver deposits, or mines or minerals of the same; and, on February 7, 1927, for prospecting under permit and leasing lands for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium.

\footnote{U. S. Rev. Stats. §2324.}
\footnote{Wilbur v. Krushnic (1930) 280 U.S. 306, 316-318. The italics are the court's. See Oil Shale Placer opinion by the Land Department (1933) 54 L.D. 244.}
\footnote{\textit{Ibid.} at 318.}
\footnote{\textit{Ibid.} at 1057. This Act expressly repealed and superseded the \textit{Potash Leasing Act} of Oct. 2, 1917 (40 Stats. at L. 397).}
Public Lands - Public Domain. The expressions “public land” and “public domain” are equivalent, are used interchangeably, and have acquired a settled meaning in the legislation of this country. The words “public lands” are habitually used in federal legislation to describe such lands as are subject to sale or other disposal under general laws, and, conversely, lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent general laws, grants and disposals which do not specially disclose a purpose to include them, and this is the case even though the appropriation and reservation be afterwards set aside. However, the use of these words in Acts of Congress is one of intention. Though they are seldom employed as including lands selected for or allotted to Indians, they sometimes are so used where the United States has retained title. The nature and object of the particular statute must be considered in determining the question. “Public lands” do not include lands to which rights have attached and become vested through full compliance with the applicable land law. Therefore, tide lands, which belong to the states, and which, prior to statehood, are held in trust by the federal government for future states, are not “public lands.”

Under the Constitution (Art. IV, §3) Congress has plenary power to dispose of and make all needful rules and regulations respecting public lands of the United States. As we have already noted, the President may, because of a long established exercise of such authority, acquiesced in by Congress, withdraw public lands, even from future private entry under existing laws authorizing such entry, though “valid rights” which have already attached will not be af-

35 Sinclair v. United States (1929) 279 U.S. 263, 294. In this case the power of Congress to compel a witness to answer questions at a committee hearing involving public lands was upheld.
fected by such withdrawals.\textsuperscript{46} The federally owned public lands are held in trust for all the people; and in providing for their disposal, Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization.\textsuperscript{47}

The general government was charged through Congress with the duty of disposing of the vast empire in the West, not only as owner desiring to realize a return from such sale, but because the settlement and development of the country in which the lands lay was highly desirable. To these ends, Congress passed the mining laws, the pre-emption and homestead laws, and other laws having for their object the disposal of these lands. It also, by making large land grants to aid in the building of the Pacific and transcontinental railroads, had encouraged and assisted in the settlement and parcelling out of this immense landed estate.\textsuperscript{48} The policy under which the United States administers its land laws is not that of an ordinary proprietor seeking to sell real estate at the highest possible price, but it offers it on liberal terms to encourage the citizen and to develop the country. The government does not deal at arm's length with the settler or locator.\textsuperscript{49}

The public land is property of the United States, and the land laws are not of a legislative character in the highest sense of the term (Art. 4, §3), "but savor somewhat of mere rules prescribed by an owner of property for its disposal." These rules or laws for disposal are necessarily general in their nature. The power of Congress over the public domain has a dual aspect, for it not only has legislative power, but it also exercises the powers of a proprietor as well. Congress may deal with such lands precisely as a private individual may deal with his own property. It may sell or withhold them from sale. Like any other owner, it may provide when, how, and to whom its land can be sold, and can permit it to be withdrawn from sale. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. Like any other owner, it can waive its strict rights, as it did when it suffered without compensation, the valuable privilege of grazing cattle on such lands, the custom being

\textsuperscript{46} See \textit{supra} discussion of power of withdrawal of public lands from entry under the heading \textit{Leasing Act or 1920}, etc.

\textsuperscript{47} \textit{Causey v. United States}, 240 U.S. 399, 402.


\textsuperscript{49} \textit{El Paso Brick Co. v. McKnight} (1914) 233 U.S. 250, 258.
one of one hundred years standing, and, by its silent acquiescence, assented to the general occupation of these lands for mining, private persons thereby acquiring a privilege in public land by virtue of an implied congressional consent.

The States may prescribe police regulations applicable to federally owned public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments. The State power extends to quarantine rules and measures to prevent breaches of the peace and unseemly clashes between persons privileged to go upon or use such areas. While the States have such civil and criminal jurisdiction over nationally owned lands within their respective limits, this does not extend to any matter that is inconsistent with the full power of the United States to protect its own lands, to control their use and to prescribe in what manner rights in them may be acquired. In certain instances, for example in the case of National Parks, the states have ceded to the United States some of their jurisdiction, particularly criminal, but have usually retained the power to tax privately owned property. They have also political jurisdiction, so that the residents of the area may still participate in state controlled elections.

Congress also has the power to prohibit acts upon privately owned land, such as the setting of fires, which may imperil publicly owned forested lands.

50 Just as the miners, without statutory sanction, exercised the privileges of mining on public domain from the discovery of gold in 1848 to the Act of 1866, so the stockmen and sheepmen from earliest days had exercised the right of grazing their cattle, horses and sheep on the public domain without paying for the privilege. See Omaechevarria v. Idaho (1918) 246 U.S. 343, 346-352 and notes on the subject. Since that case, Congress passed an act in 1934 regulating grazing on the public domain (48 Stats. at Large 1270).

Since the creation of the National Forests (originally called Forest Reserves or Reservations) grazing within those areas has been regulated by the National Forest Service. See Utah Power and Light Co. v. United States (1917) 243 U.S. 389 for details of this forest legislation.


52 McKelvey v. United States (1922), supra note 51; Omaechevarria v. Idaho, supra note 51, at 343, 346-7.


54 A typical statute whereby the State of California ceded partial jurisdiction over the Yosemite, Sequoia and General Grant National Parks, is Cal. Stats. 1919, c. 52, p. 74.

55 United States v. Alford (1927) 274 U.S. 264, 267. And the fact that the lands have been reserved from sale by reason of their location under the mining laws does not
Mineral Lands. Not all lands owned by the United States are subject to disposal and acquisition under the mining laws for their mineral deposits, but only those where the United States has so indicated. These mining laws never apply where the United States directs that the disposal be only under other laws.66 Alabama, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Ohio, Oklahoma and Wisconsin are “public land states,” but have been wholly or partly excepted from the operation of the mining laws.67 Arizona, Arkansas, California, Florida, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming are public land states in which the federal mining laws are operative. They also extend to Alaska.

In its legislation concerning the public lands, it has long been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal, save under laws specially including them. This practice began with the ordinance of May 20, 1785, and was observed with great persistency in the early land laws.68 While these early laws only specially and occasionally provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal. This purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown by the Oregon donation act, the homestead act (which adopted the mineral land reservation of the preemption act of 1841), the grant to the several states for the benefit of agricultural colleges, the railroad land grants and other land acts of that period.69 These and other similar acts were but expressive of the will of Congress that

66 Oklahoma v. Texas (1922) 258 U.S. 574, 600.
68 10 Journals of Congress (Folwell’s ed.) 119.
69 See also United States v. Gear (1845) 3 How. 120, 130-131. The foregoing cases involved lands containing lead mines and a like practice prevailed in respect of saline lands. Morton v. Nebraska (1874) 21 Wall. 660, 669.
70 These acts are noted at the bottom of pages 568 and 569 of 245 U.S.
every grant of public lands should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the United States Revised Statutes as expressing a general and permanent policy, the first in enlarged terms as §2318, which provides that "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law," and the other as §2346 which was more limited in scope.61

The conditions ensuing from the discovery of gold and other minerals in the western states and territories resulted in a general demand for a system of laws expressly opening the mineral lands to exploration, occupation and acquisition, and Congress, responding to this demand, adopted from 1864 to 1873 a series of acts dealing with practically every phase of the subject and covering all classes of mineral lands.62 These and related acts were codified in a chapter entitled "Mineral Lands and Mining Resources" of the U. S. Revised Statutes. Taken collectively they constitute a special code upon that subject and show that they are intended, not only to establish a particular mode of disposition of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion.63

§2318 U.S. Revised Statutes reserves from sale "lands valuable for minerals" to be disposed of only under law expressly directing such disposition. §2319 declares that

61 United States v. Sweet (1918) 245 U.S. 563, 567-570. It is interesting to note that the foregoing case involved a grant of school land to the State of Utah, which grant did not specially reserve mineral lands, but which the court held were nevertheless reserved by virtue of the general policy of Congress by implication to reserve mineral lands from general land grants. And yet in the case of Work v. Louisiana (1925) 269 U.S. 250, 255, decided only seven years later the Court held that in 1849 and 1850 when the school land acts there involved were passed "there was no settled policy of withholding mineral lands from disposal save under laws specially including them." While the opinion attempted to distinguish the holding from the diametrically opposite ruling in United States v. Sweet, supra, it only does so by ignoring the argument advanced in that case that the policy of tacitly reserving mineral lands from general land grants was initiated by Congress from the very beginning and continued in force thereafter without any cessation or break. The only possible ground for exception from this general rule is that Louisiana was not known to have mineral land of any particular consequence until petroleum and sulphur deposits were discovered there in more recent years and hence did not share in the general excitement which followed the discovery of gold in California in 1848. In fact, the court intimates that this situation did not apply to Louisiana because it was not known to be rich in minerals as was Utah. (258-259).

62 Ibid. These acts are cited in note 1, p. 571.

63 Ibid. at 571.
“All valuable mineral deposits in lands belonging to the United States... are... free and open to exploration and purchase, and the lands in which they are found to occupation and purchase...”

as provided by law. Many of the Acts of Congress providing for the disposition of public land expressly except “mineral lands” from their operation, so that it becomes important to determine what Congress intended by its frequent use of these words “mineral lands.” The Supreme Court of the United States (Burke v. Southern Pacific Co. (1914), 234 U.S. 669) says, referring to the mining, homestead, railroad land grant, and other public land laws: “Evidently it has the same meaning in all”, (677) and while no attempt had been made by Congress to define the words, “doubtless the ordinary or popular signification of that term was intended.”

Not all lands which contain mineral are “mineral lands” within the meaning of the mining laws. Lands which contain mineral in such small quantities and of such low grade and value as to be worthless for mining, do not measure up to the statutory requirements. The question is always one of fact. There is no certain, well-defined, obvious boundary between mineral lands and those which cannot be classed in that category. It is clear that a “paying mine” is not essential to make land mineral in character. The land must be “better adapted to mining” than for other purposes. It must contain minerals “in quantities sufficient to render it available and valuable for mining purposes, . . . to justify the expense of . . . exploitation,” and “to justify expenditure for their extraction.” It comprehends all lands “chiefly valuable for their deposits of a mineral character, which are useful in the arts of valuable for purposes of manufacture.” Mineral lands, as the phrase has been applied in the administration of public lands, embrace not only those which the lexicon defines as mineral, but, in addition, such as are valuable for other deposits, such as marble, slate, and even guano.

“Agricultural lands” are the descriptive words generally applied to lands that are “non-mineral.” The word “agricultural” is to be interpreted in the light of existing legislation and conditions. Congress has used it at times so that it is synonymous with “land subject to be taken by preemptors or homesteaders under the public land

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64 Lindley on Mines, §§94-95; Burke v. Southern Pacific Co. (1914) 234 U.S. 669, 676. See Opinion of Land Department (1933) 54 L.D. 294, which states that if the mined material can be “marketed at a profit,” the mining law is applicable.

laws” and, under such circumstances, this designation would not in-
clude non-mineral lands valuable solely for timber or other uses
which would not justify settlement under the applicable land settle-
ment laws as contemporaneously understood and administered.66
Nevertheless, it is quite common to describe lands as “agricultural”
in an all-inclusive sense to distinguish them from and contrast them
with “mineral lands.”67

Minerals. We have seen that a serious and perplexing question
oftentimes arises as to whether or not a tract of land contains suf-
fi cient indication of the presence of an admitted valuable mineral,
such as gold or silver, etc., to justify characterizing the land as min-
eral land. We have an equally difficult problem to solve in determin-
ing in certain instances whether the very substance involved and
found in the land in question may properly be called a “mineral”
within the meaning of the mining law. It is obvious that some ma-
terial restriction must be placed on the definition of mineral as so
used in legislation because, in its broadest and most generic sense,
mineral includes everything that is inorganic as opposed to the com-
paratively limited quantity of things belonging to the vegetable and
animal kingdoms. Nearly all of the earth’s land surface would, in the
broad sense, be classified as mineral. At one time some of the courts
were inclined to hold that the word “mineral,” as used in the mining
laws, was limited to metallic substances, but soon recognized their
error and held that it was intended to apply to non-metallic sub-
stances as well.68 Now it is generally recognized that any substance,
other than organic, which possesses a special economic value for use
in mercantile or commercial enterprises and in the arts and sciences,
is a mineral within the contemplation of the mining laws. And, if this
substance is found in the land in sufficient quantity and value to
warrant a prudent man in the expenditure of time and money in the
reasonable expectation of success in developing a paying mine, such

66 Ibid. at 358-364.

67 Christmann v. Yonkers (1933) 54 L.D. 228, 230; Copper Belt etc, Mining Co.
(1934) 54 L.D. 475, 480; Austin v. Mann (1937) 56 L.D. 85, 87. Lands will be consid-
ered mineral or agricultural as they are more valuable in the one class or the other,

See LINDLEY ON MINES, §97 and RICKETTS, AMERICAN MINING LAW, §11 for lists
of substances held to be minerals by the authorities.

68 LINDLEY ON MINES §96; Burke v. S. P. Co. (1914) 234 U.S. 669, 678.
land is disposable only under the mineral land law. The extremely
general nature of this test is indicative of the difficulties and uncer-
tainties of the problem. As we approach the dividing line, juries,
courts and experts will naturally differ as to whether the deposit
should be classed as mineral or not. The greatest differences of opinion have arisen over deposits of sand, gravel, gypsum, cement rock, limestone, brick clay, granite and, in fact, all superficial deposits of low value, especially where the substance in question exists in large quantities and extends over considerable areas. Unless it has some unique quality and is confined to a comparatively limited area, so as to differentiate it from the surrounding country, and unless it can be shown to have some special quality making it valuable in manufact-
uring or in some of the arts and sciences, it is generally regarded as
not meeting the test of "valuable mineral" and hence is not subject
to acquisition under the mining laws. The Land Department has de-
cided that many of the deposits above enumerated, and others of
similar character, are not to be classed as mineral. In subsequent

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69 Ibid., §98, p. 175; Cataract Gold Mining Co. (1914) 43 L.D. 248, 254. The Land
Department rendered this decision in the form of "instructions" intended to cover the
subject generally and it contains a comprehensive review of authorities bearing on the
question. Its importance is emphasized by the fact that it has been cited in many sub-
sequent departmental decisions. It reaches the conclusion that, if the lands can be shown
to be "valuable for mineral," they come within the scope of the mining laws, "notwith-
standing the fact that they may possess a possible or probable greater value for agricul-
ture or other purposes." Of course, if the lands have a greater value for other purposes,
a greater burden is correspondingly cast on the mineral claimant to prove present mineral
value and future possibilities. However, many of the cases overlook the distinction above
noted and state without reservation that the test is whether the land is more valuable
as agricultural land or as mineral land.

70 The following cases have decided adversely to the mineral character of the land
involved:

Lands containing clay, sandstone and limestone, and not valuable for either, Gray
Trust Co. (1919) 47 L.D. 18, 19-20. Lands containing common clay extending over
large areas and not valuable for its alumina content, Hare v. French (1915) 44 L.D. 217.
Ordinary brick clay, James C. Reed (1924) 50 L.D. 687, 689. Clay suitable only in
cement manufacture and widely distributed, its value being only a small element of the
cost of using it, Bettencourt v. Fitzgerald (1912) 40 L.D. 620. Shale used for a similar
purpose, Victor Portland Cement Co. v. S. P. R. R. (1914) 43 L.D. 325. Deposits of
low grade granite which exist for miles around and of no commercial value, Stanislaus
Electric Power Co. (1912) 41 L.D. 655, 660. Shell rock existing in large quantities and
used for road metal, Hughes v. Florida (1913) 42 L.D. 401, 402-3. Fossil remains of
dinosaurs and other extinct animals are not minerals, In re Douglass (1915) 44 L.D.
325, 326. A limestone bed or lode deposit which could not be successfully mined at a
profit, Big Pine Mining Corp. (1931) 53 L.D. 410, 412. Where assays showed negligible
values in gold, silver and copper and mining costs would be high and no development
in the vicinity ever resulted in the production of commercial ore. Opinion in re validity
cases it has acted more liberally as to certain of these "border-line" deposits.\textsuperscript{71}

In determining whether or not a substance is to be considered a mineral within the meaning of the mining laws "a strictly scientific test . . . is not the test contemplated by the statute." Instead, the statute "was dealing with a practical subject in a practical way . . ."\textsuperscript{72}

Since the Land Department has been charged by Congress with the disposition of public lands, it is preeminently its function, in disposing of them, to determine their character, not only as between rival and conflicting mineral and agricultural claimants, but also to classify them in the first instance with a view to such ultimate disposal. When a case involving a determination of the character of land is pending before the department, the courts usually will not interfere, but will suspend court proceedings awaiting such departmental determination. The department's decision on such questions of fact is treated by the courts as binding on them in the absence of other controlling factors, and they will seldom review its decisions on such questions.\textsuperscript{73} On questions of law, the situation is otherwise, and the courts will review the Land Department's conclusions and does not hesitate to overturn them if not well founded.\textsuperscript{74}

\textsuperscript{71} The following deposits have been held to be mineral and locatable as such:


- Burke v. Southern Pacific Co. (1914) 234 U.S. 669, 679. In this case it was urged that petroleum had an organic origin and hence could not properly be classed as a mineral which supposedly must be an inorganic substance. In deciding that petroleum was "a mineral" the court used the language just quoted in the text. See Colby, The Law of Oil and Gas (1942) 30 CALIF. L. REV. 245, 247-250.

- LINDLEY ON MINES, §§95, 161, 207, 496, 664, 717; Cameron v. United States (1920) 252 U.S. 450, 460.