THE NEW PUBLIC LAND POLICY WITH SPECIAL REFERENCE TO OIL LANDS

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(REPRINTED FROM THE CALIFORNIA LAW REVIEW FOR MAY, 1915.)

California Law Review

Volume III. MAY, 1915 Number 4

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THE sentiment of the people of the United States, as reflected by the attitude of the President, of Congress and of the Supreme Court of the United States with regard to the disposal of certain of the lands of the public domain has in the past few years undergone a vital and radical change. This recent change is the outcome of a marked conflict of opinion as to the appropriate manner of disposing of the remainder of the public domain.[1]

The public lands acquired by the federal government during the past century by cession, purchase and conquest have amounted to over one and a half billion acres. This immense empire was, when acquired, an almost totally undeveloped wilderness and in order to encourage and foster its settlement and development, the government held out great inducements, not only to its own citizens, but to the citizens of other countries who were willing to transfer their allegiance and become pioneers. Agricultural lands were given away to those who became actual settlers and lands valuable for other purposes were sold at nominal prices. Mineral lands were "declared to be free and open to exploration and purchase."[2] This lavish policy, coupled

[1] This new policy does not materially affect the disposition of lands which are purely agricultural in character and which will continue to be disposed of in accordance with the provisions of the various existing acts of congress providing for such disposal. As George Otis Smith said before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, "in the case of agricultural lands there is the home on the land idea, which puts them in a class by themselves". Neither is there any pronounced attempt at present to materially change the policy of disposing of metalliferous lands.

[2] § 2319 U. S. Rev. Stats.

with the wonderful discoveries in these lands of wealth of mine, forest, water and water power available to all comers, has resulted in the disposition by the federal government and the passing into private ownership of by far the more fertile and valuable half of this vast acreage.

Awakened by this rapid shrinkage of the public domain and the realization that if prompt action were not taken all of the valuable public lands would pass into private ownership, certain leaders in the creation of public opinion started a new trend of thought, having for its basis certain fundamental ideas.[3] These were, briefly, the belief that the liberal policy of the government in holding out inducements to prospectors and pioneers had, in the main, accomplished its purpose, and in many instances the disposal of natural resources had far over-reached the point where the greatest public good would be subserved by a continuation of that policy; that there were certain of these resources so intimately associated with the future welfare of the nation that it was for the best interests of the public at large that these resources, viz: timber, coal, petroleum, water power, phosphates, potash, etc. should be retained in public ownership since their use could thus be best conserved and

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[3] Apropos of this subject, Secretary of the Interior, Franklin K. Lane has the following to say:

"....there exists a feeling in the West that its affairs and needs have not been given that consideration at the hands of the National Government which they merit.....they are unable to understand why ways have not been found by which the great bodies of coal and oil lands, of phosphate and potash lands, may be developed, and waters of the mountains made available for the generation of power and the redemption of the desert. There is one very simple explanation for the existence of this feeling. We have adventured upon a new policy of administering our affairs and have not developed adequate machinery. We have called a halt on methods of spoliation which existed, to the great benefit of many, but we have failed to substitute methods, sane, healthful, and progressive, by which the normal enterprise of an ambitious people can make full use of their own resources. We abruptly closed opportunities to the monopolist, but did not open them to the developer.....we had put into force a new land policy, which caused dismay and discontent.....Congress has always been most generous as to the disposition of the national lands.....out of the abuse of the Nation's generosity there came a reaction against a policy that was so liberal as to be dangerous.....So there has slowly evolved in the public mind the conception of a new policy—that land should be used for that purpose to which it is best fitted, and it should be disposed of by the Government with respect to that use. To this policy I believe the West is now reconciled....." Annual Report of the Secretary of Interior (1913), pp. 1-3.

controlled; and that there was also imminent danger that they might be monopolized to the detriment of the public.[4] The idea of a public revenue to be derived from the leasing and sale of these resources has also come into prominence. This is the modern idea of conservation of natural resources.[5]

One of the first of these resources to be conserved, as having a most vital effect upon the future welfare of the nation, were the forests. The assurance of a conserved supply of lumber and the regulation of stream flow and its natural benefit to the navigability of such streams were the controlling inducements which have resulted in the withdrawal from disposal and permanent reservation of millions of acres of timbered lands now embraced within the "national forests" in the western states.[6]

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[4] "The objects to be sought by amendment of the public land laws are, first, purposeful and economical development of resources for which there is present demand, with retention of such control as may insure against unnecessary waste or excessive charges to the consumer, and, second, the reservation of title in the people of all resources the utilization of which is conjectural or the need of which is not immediate." Geo. Otis Smith, Annual Report of the Director of the U. S. Geological Survey, (1911), p. 9. These annual reports, 1908 to date, contain much interesting information and forecast the change in public land policy.

[5] Of course, conservation in its broadest sense embraces a far greater field and is applicable to the use of private as well as of public resources. Conservation in this modern sense has been defined to be "the utilization of lands for their greatest value". The Classification of the Public Lands, by George Otis Smith, et al., Bulletin 537 U. S. Geological Survey, p. 1. Another definition, credited to Dr. C. W. Hayes, chief geologist of the U. S. Geological Survey, is "the utilization of natural resources with a maximum efficiency and a minimum of waste". Professor Van Hise has defined conservation of natural resources to mean "that they should remain as nearly undiminished as possible in order that this heritage of natural wealth may pass in full measure to succeeding generations". The Conservation of Natural Resources in the United States, by Chas. R. Van Hise (1910).

A more comprehensive definition, with special reference to public lands, is the following: "National conservation. . . . . is a policy of primarily placing the remnant of the public domain, other than that portion of it which is essentially agricultural in character, in a state of reservation and subsequently dealing with it or its natural resources in such a manner as will economically yield the best results to all the people. Its principal aim is to obtain a maximum economic production at a minimum of waste; to prevent individuals or aggregations of individuals from securing monopolies; and to exact some equivalent for the privileges granted". Lindley on Mines, 3d ed., § 200. Anyone interested in the subject will find an excellent presentation of "Conservation Measures and their Effect on the Mining Industry" in §§ 200-200c of this work.

[6] Acts of March 3, 1891, 26 Stats. at L. 1103; June 4, 1897, 30 Stats. at L. 1103; Feb. 1, 1905, 33 Stats. at L. 628; Mar. 4, 1907, 34 Stats. at L. 1256; etc.

Public sentiment rapidly crystallized so that coal lands were next deemed of such far reaching value to the public that their conservation by retention of federal control was urged upon congress[7] and in rapid succession followed similar proposals as to lands valuable for water power control[8], asphalt, petroleum oil and gas, nitrates, phosphates and potash.[9] Congress has either already enacted legislation providing for the federal control of lands of this character or is expected to act shortly on these subjects. The federal reclamation and irrigation of arid lands in the West is also a part of this modern conservation movement.[10]

This comparatively sudden reversal of policy on the part of the federal government and the termination of the opportunity for private interests to acquire these valuable lands very naturally met with determined opposition. The constitutionality of these conservation measures adopted by congress and the action of the President in anticipating such legislative action by withdrawing from private entry the lands in question pending the enactment of the desired statutes, has been seriously questioned on every conceivable ground.

Of greatest immediate interest to California, as far as the operation of the new public land policy is concerned, has been the withdrawal of oil lands situated on the public domain within the state. The California deposits of mineral oil are among the most extensive and important deposits in the world and the manner in which the federal government will administer these withdrawn lands and provide for the extraction and disposition

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[7] Until July, 1906, the government had followed the policy of disposing of coal lands at the minimum prices prescribed in the statutes, U. S. Rev. Stats. § 2347. Thereafter it classified these lands, and has disposed of them at appraised values, in many cases far in excess of the statutory minimum. The Public Lands Committee of the senate eliminated all reference to coal from the general leasing bill passed by the house at the last session of congress, for the reason that the need for new legislation for the mining of coal on the public lands is not so great as that for the other minerals specified. Senate Report, No. 947, 63rd congress, 3rd session.

[8] The executive withdrawal of lands valuable for water-power sites, irrigation, etc. was authorized by congress, June 25, 1910, 36 Stats. at L. § 847.

[9] These latter substances are considered of great general economic value because of their use in the manufacture of fertilizers to renew the productivity of worn-out agricultural lands.

[10] Act of June 17, 1902, 32 Stats. at L. 388, amended June 25, 1910, 36 Stats. at L. 836.

of this oil is of vital interest to the future of this state. Because of the arid character of the surface lands, vast areas of the territory overlying the oil strata had remained a part of the public domain. The discovery of the existence of this oil in commercial quantities and the creation of a market for the crude output resulted in a rush of locators to the oil fields commensurate with and in many respects similar to the congestion and conditions resulting from new "strikes" or discoveries of the gold fields.

The general placer law was the only operative mining law permitting of the acquisition of these deposits.[11] Immediately following the disclosure of the value of these public oil lands there were the usual attempts to acquire them by indirection and by distorting other land laws in the attempt to defeat the mineral claimant. "Scrippers", i. e. those who attempted to make selections of these oil lands in lieu of other lands under an exchange system provided for by law, homesteaders, desert entrymen, etc., all proceeding under laws providing for the acquisition of agricultural lands, which laws expressly exclude mineral lands from their operation, hastened to make filings, in most instances lacking in good faith. Locators under the mining laws even, claiming discoveries of gypsum cropping on the surface, were also subject to the valid criticism of attempting to gain by subterfuge the valuable oil deposits which they could not acquire directly without the expenditure of time and money. These attempts were rendered possible by the physical fact that the valuable oil-bearing sands lay at considerable depths below the surface and could be reached only after drilling to the depth of hundreds or even thousands of feet and at great cost. In some instances it has taken wells of 4000 or 5000 feet in depth and the expenditure of over $250,000.00 to reach the oil. The courts early held that only actual discoveries of oil by drilling would satisfy the statutory requirement of discovery essential to validate a mining claim and that mere oil seepages or stains or other surface indications were not sufficient.[12]

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[11] §§ 2329-2333 U. S. Rev. Stats., a codification of the Federal Placer Act of 1870. The act of Feb. 11, 1897, 29 Stats. at L. 526, provided that lands containing petroleum or other mineral oils could be acquired under the laws relating to placer mineral claims.

[12] Nevada Sierra Home Oil Co. v. Home Oil Co. (1899), 98 Fed. 673, at p. 675; Miller v. Chrisman (1903), 140 Cal. 440, 75 Pac. 1083, 74

While this holding gave the fictitious agricultural claimants a certain technical advantage over the bona fide mineral claimants, yet the courts made short work of these subterfuges and finally eliminated most of these pseudo filings from further serious consideration.[13] The land department also came to the rescue of the oil miners and withdrew from agricultural entry large areas of land adjacent to the proven territory pending classification by government geologists.[14] This peculiar situation forced on government officials an early realization of the fact that the placer mining laws with their rigid discovery requirement were a misfit when applied to the location of oil lands.[15] The courts of California and Wyoming aided the diligent oil locator in a measure, by a liberal interpretation of the inchoate right acquired by him in making his location prior to actual discovery and held that such a locator, who in good faith was prosecuting the drilling of his discovery well with reasonable diligence, would be protected to the full extent of his boundaries from clandestine or forcible invasion by others attempting to locate subsequently.[16] Thus many of the serious problems which confronted the oil locator in the early days of the field have since been removed, so that the amount of litigation arising from these original sources is becoming relatively unimportant.

Pac. 444, 98 Am. St. Rep. 63; s. c. (1905), 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. Rep. 468.

[13] Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900), 104 Fed. 20, 112 Fed. 4, (1903), 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692; Kern Oil Co. v. Clarke (1897), 30 L. D. 550, on review, 31 L. D. 288; State of California (1913), 41 L. D. 592; Hirshfeld v. Chrisman (1911), 40 L. D. 112; see also Diamond Coal Co. v. United States (1914), 233 U. S. 236, 58 L. Ed. 936, 34 Sup. Ct. Rep. 507; Washington Securities Co. v. United States (1914), 234 U. S. 76, 58 L. Ed. 1220, 34 Sup. Ct. Rep. 72; Leonard v. Lennox (1910), 181 Fed. 760.

[14] United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 315. Similar withdrawals from non-mineral acquisition have been made as a measure of protection to surface locators under the mining laws, of lands overlying deep seated deposits of copper ore in Arizona. Report of Director of U. S. Geological Survey (1913), p. 154.

[15] Classification of the Public Lands, Bulletin 537 U. S. Geological Survey, p. 38; Report of Secretary of the Interior Lane (1913), p. 13.

[16] Weed v. Snook (1904), 144 Cal. 439, 77 Pac. 1023; Merced Oil Co. v. Patterson (1908), 153 Cal. 624, 96 Pac. 90; Miller v. Chrisman (1903), 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Borgwardt v. McKittrick Oil Co. (1913), 164 Cal. 650; Little Sespe Cons. Oil Co. v. Bacigalupi (1914), 167 Cal. 381, 139 Pac. 802; Smith v. Union Oil Co. (1913), 166 Cal. 217, 135 Pac. 966; Whiting v. Straup (1908), 17 Wyo. 1, 95 Pac. 849.

In addition to this conviction that the placer laws were a misfit, the land department was also influenced most forcibly by the conservation movement which has already been commented on and which is resulting in the establishment of the new public land policy. The appreciation of the importance of oil as a mineral fuel and source of heat and power, next to that of coal, was accentuated by the magnitude of the discoveries in the oil fields of California and Wyoming. Here was an asset of vital concern to the future welfare of the nation found in almost fabulous quantities on land which was in part still public domain. The rapidity with which these lands were being located and thus passing into private ownership, convinced the public officials and leaders in conservation ideas that if prompt action were not taken, most of the available territory would be privately absorbed and as far as petroleum was concerned, the new policy of government ownership and control would be impossible of accomplishment.[17]

The importance of conserving a supply of this new fuel for the requirements of the navy was also in the minds of the interested officials though it had not at that time assumed the importance which has since arisen through the more definite determination to use fuel oil in the navy.[18] Acting on the suggestion of his advisors in the land department,[19] President Taft caused an executive order or proclamation to be issued on September 27, 1909, withdrawing from all forms of disposal and "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain", over three million acres of land in California and Wyoming which included most of the territory known or thought by the Geological Survey to be valuable for oil.[20] This sudden and sweeping

[17] See United States v. Midwest Oil Co. (1915), 35 Sup. Ct. Rep. 309, at p. 310; The Classification of Public Lands, Bulletin 537 U. S. Geological Survey, p. 38.

[18] At the request of the navy department, two naval petroleum reserves were created in the California oil fields on Sept. 2, 1912, and Dec. 13, 1912, estimated to contain 250,000,000 barrels of oil. Report of Director of U. S. Geological Survey (1913), pp. 151-152.

[19] The history of the origin and development of this proposal is outlined by its chief sponsor, George Otis Smith, before the Public Lands Committee of the senate at a hearing on the Oil Lands Leasing Bill, 63rd congress, 3rd session, pp. 208-210.

[20] Of course, much of the land withdrawn included private titles which had already vested and which were consequently not affected by the withdrawal. The net area of the public lands thus withdrawn could

action on the part of the executive in withdrawing practically all of the remaining public lands possessing probable oil values caused great consternation among the oil operators. It injected a tremendous element of uncertainty into the operations of many and resulted in a decided curtailment of expenditures looking toward the making of discoveries. Many bona fide operators were placed in the position of not knowing whether their expenditures already made would be forfeited or not, and yet they hesitated in the dubious experiment of continuing to "throw good money after bad". President Taft himself was not convinced of the unqualified legality of his act[21], and in order to place his power of withdrawal beyond question he urged congress to give him positive statutory authority, which resulted in the passage of the Act of June 25, 1910.[22] Immediately after its passage and acting under its authorization, he again caused these same lands and additional lands which had been withdrawn from time to time subsequent to the first withdrawal, to be withdrawn. The validity of this later withdrawal in pursuance of congressional sanction has not been seriously questioned. The Withdrawal Statute expressly provided:

> "That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act."

Thus all question as to the validity of the original Taft withdrawal of September 27, 1909, was left open for the determination of the courts.[23] The practically universal consensus of

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only be estimated in a very general way, for the included location titles were in all conditions varying from mere "paper locations" not accompanied by actual possession, nor followed by any attempt at discovery work, to locations where all the legal requirements had been strictly complied with and discovery actually made. Until "court has been held" and all of the underlying and essential facts disclosed, it will be impossible to determine whether many of these private claims are valid or not. The Government has instituted suits to test the validity of many of these private claims.

[21] This doubt was expressed by the President in his message to congress of January 14, 1910, and also in public speeches.

[22] 36 Stats. at L. 847. This act only provided for the withdrawal of mineral lands containing coal, oil, gas and phosphates, but was amended August 24, 1912, (37 Stats. at L. 497), in order to provide for the withdrawal of lands valuable for potash, and in anticipation of the fact that other minerals might later be found desirable to be included in such reservations, the act was made operative as to all non-metallic minerals.

[23] In the recent Midwest decision by the Supreme Court of the United States and hereinafter noted, the majority opinion states that

opinion among the oil operators and the lawyers of the West who examined into the question, was that the first or executive withdrawal was invalid. Acting on opinions of their legal advisors to this effect, many operators located withdrawn lands, or commenced diligent prosecution of work on lands already located.[24] As a consequence, cases involving lands affected by the first order of withdrawal began to arise, necessitating a determination of the validity of this executive action. The land department first passed on the question, deciding that the order of September 27, 1909, was valid.[25] Then Judge Riner, federal District Judge for Wyoming, in the now famous Midwest case, sustained a demurrer to the bill of complaint filed by the United States, holding that the withdrawal order was void.[26] This case was taken to the Supreme Court of the United States and became the test case on this question. Meanwhile on June 1, 1914, Judge Dooling, one of the federal District Judges in California, decided[27] that the promulgation of the order in question was "an encroachment upon the domain of Congress" and was therefore unlawful.

The Midwest case just referred to involved a tract of public land in Wyoming which was taken possession of by private individuals six months after its withdrawal under the order of September 27, 1909. A well was drilled, discovery of oil made and quantities of oil extracted. The federal government brought suit to recover the land and for an accounting. The government took an appeal from the District Court's ruling sustaining the demurrer and dismissing the bill. The Circuit Court of Appeals certified certain questions to the Supreme Court of the United States which latter court ordered the entire record sent up for consideration. The Supreme Court recently decided the case in favor of the government, reversing the ruling of the Wyoming federal District Court.[28]

"The Act left the rights of parties . . . . to be determined by the state of the law when the proclamation was issued".

[24] The withdrawal act of June 25, 1910, expressly protected bona fide claimants of oil lands who were, at the date of any order of withdrawal theretofore or thereafter made, diligently prosecuting work leading to a discovery.

[25] In re Lowell (1911), 40 L. D. 303.

[26] No written opinion was filed in this case.

[27] United States v. Midway Northern Oil Co. (May 29, 1914), 216 Fed. 802.

[28] United States v. The Midwest Oil Company (Feb. 23, 1915), 35 Sup. Ct. Rep. 309. Five justices joined in the prevailing opinion,

The case was twice argued orally and several briefs were filed by parties interested in other lands similarly affected. The importance of this decision to the oil industry, as well as the interesting character of some of the problems involved, will justify a brief analysis of the case.

The single and controlling question was the validity of the withdrawal order and the power of the President to make such an order in the absence of positive congressional authorization. Justice Lamar wrote the prevailing opinion and held that it was unnecessary to determine as an original question whether the President had this power because "of the legal consequences flowing from a long continued practice to make orders like the one here involved". He calls attention to the fact that such a practice dates from an early period in the history of our government and that during the past eighty years a multitude of executive orders have been made without express statutory authority, operating to withdraw every kind of land—mineral and non-mineral—that would otherwise have been open to private acquisition under existing acts of congress. Instances of at least 252 executive orders withdrawing public lands for military, Indian, and bird reservations were cited where there were no express statutes empowering the President to withdraw any of the lands affected. He said that it was natural that the government should retain for these purposes what it already owned, especially since no private right was, at the date of the withdrawal, in existence to be injured, for prior to the initiation of some right under public statute, no citizen had an enforceable interest; that the President was in a position to know when the public interest required such withdrawals and his action was subject to disaffirmance by congress which had repeatedly acquiesced in the practice; and that this was also the interpretation placed upon the existence of the power by the law officers of the government at various times.

In answer to the argument that while there might be this usage yet these instances of the exercise of this power did not establish its validity, Justice Lamar said:

> "But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally

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Justice McReynolds not participating. Three justices dissented. A petition for rehearing was filed April 16, and denied April 19, 1915.

adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be as often repeated as to crystallize into a regular practice".

Therefore, usage itself shall be given weight in determining the existence of a power.[29] Not that "the Executive can by his course of action create a power" but "the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands." The United States, acting through congress, is the proprietor and owner of the public domain, and conditions may arise requiring that, in the public interest, the land be withheld from sale and this power may be granted by implication to the executive just as might be the case between a private owner and his agent. The attempted distinction between reservations and withdrawals was held unavailing. If permanent reservations made by the executive and already noted are valid, then the lesser exercise of similar power, involved in making a temporary withdrawal in aid of future

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[29] The best considered criticism of this doctrine is to be found in Cooley's Constitutional Limitations 7th ed., Chapter IV, pp. 102-107, from which the following extracts are taken:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. . . . . .

"Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.

"Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction . . . . can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the

legislation, is lawful and examples were cited where this power of withdrawal had also been exercised, and attention called to the fact that in 1902 the senate specifically requested information of the secretary of the interior as to the extent that public lands had been withdrawn and the authority for such action. Congress after receiving this information did not repudiate the practice and its silence was acquiescence, or equivalent to consent, until revoked by subsequent congressional action.

An unusually vigorous dissenting opinion was written by Justice Day and concurred in by Justices McKenna and Van Devanter.[30]

Justice Day quotes article four, section three, of the Constitution of the United States, which empowers congress

> ". . . to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . "

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true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of Stuart v. Laird, above referred to, the practical construction was regarded as conclusive. . . . .

"It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

It will be noted that the case of Stuart v. Laird (1803), 1 Cranch 299, 2 L. Ed. 115, adversely commented on by Cooley, is one of the leading authorities on which the prevailing opinion in the Midwest case is based. The authorities discussed in the note on p. 107 of Cooley are also of considerable interest in this connection as indicating that, after all, the question is fundamentally a matter of opinion as to whether it is best to "bend the Constitution to suit the law of the hour" and yield "to considerations of expediency in expounding it" or whether "the success of free institutions depends upon a rigid adherence to the fundamental law", whereas "by yielding to such influences constitutions are gradually undermined and finally overthrown."

[30] It is interesting to note that these latter two are western appointees and together with the two federal District Judges below

and cites a previous decision of the Supreme Court which holds that

> "this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise".[31]

He states that there is nothing in the Constitution suggesting or authorizing any augmentation of executive authority said to arise by implication from the tacit consent of congress in its long acquiescence in such executive action of making the specified withdrawals. Withdrawals have been made by the President in the past and have the sanction of judicial approval but only in cases (a) where congress has already declared its policy as being an appropriate one for the use of public lands such as military and Indian reservations, or (b) where grants of land by congress are so conflicting that the withdrawal of the lands affected is sustained until congress has had an opportunity to clear up the ambiguity.[32]

Taking up the Taft withdrawal, Justice Day calls attention to the fact that congress had by specific statute[33] authorized the location of lands valuable for oil under the placer mining laws. The sole purpose for making the withdrawal was in anticipation that congress might provide a better system for the disposition of such lands and to preserve some oil lands in California as a basis of naval supply in the future. It is not claimed that the President had express authority from congress. Such withdrawals must be limited to purposes which congress has itself recognized by direct legislation or long continued acquiescence as public purposes. It is conceded that the President might reserve tracts for definitely fixed public purposes declared by congress, such as military or Indian reservations, but the action here taken in withdrawing a large part of the public domain from the operations of the public land laws is neither sanctioned by the Constitution, nor conferred by congressional legislation, nor by that

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who declared this order invalid, presumably reflect the western thought and attitude toward this question.

[31] Wisconsin etc. R. R. Co. v. Price County (1890), 133 U. S. 496, 504, 10 Sup. Ct. Rep. 341.

[32] Justice Day entered into a rather elaborate review of the specific withdrawals claimed to constitute the basis for the executive custom of withdrawal held in the prevailing opinion to have ripened into implied authority and classifies these withdrawals under either the one heading or the other.

[33] February 11, 1897, 29 Stats. at L. 526.

long acquiescence as to be the equivalent of a grant. The President's powers are defined by the Constitution which does not confer upon him any power to enact, suspend or repeal laws of congress, and the Supreme Court has refused to sustain withdrawals made by the executive in contravention of a policy for the disposition of lands expressly declared in acts of congress.[34] In order to be valid, an executive withdrawal must either be authorized by express congressional authority or clear implication of such authority. Justice Day calls attention to the limited powers of the United States government vested definitely by the Constitution in the three co-ordinate branches of the government and quotes from the famous case of Kilbourn v. Thompson, to the effect that it is essential to the successful working of this system that the respective functions of these branches shall be broadly and clearly defined and that they shall not be permitted to encroach upon the powers confided in the other branches, but each "be limited to the exercise of the powers appropriate to its own department and no other",[35] and concludes the dissenting opinion with the following language:

> "These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.
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> In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress, did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a

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[34] Cases are cited involving withdrawals in aid of railroad grants held to have been invalid for the foregoing reason.

[35] Kilbourn v. Thompson (1880), 103 U. S. 168, at p. 190.

different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive."

The foregoing analysis of the two opinions will indicate that they are based respectively upon fundamentally different conceptions of governmental policy as embodied in the federal constitution.

The prevailing opinion rests upon the conception that "government is a practical affair intended for practical men" and that the federal Constitution should be construed accordingly. Instances where the executive branch of the government has withdrawn lands in aid of governmental functions, either expressly or impliedly sanctioned by congressional action, are held to constitute a precedent and to create a power by implication which the President admittedly did not possess originally under the terms of the Constitution, and which gives him the authority to withdraw immense tracts of public domain, in aid of contemplated legislation, from the operation of existing acts of congress specifically providing for the private acquisition of such lands. To reach so liberal a conclusion as to the existence of this executive power, the majority of the court were unquestionably influenced by the modern conservation policy and the pressing necessity for immediate action in the effort to retain under public control as large an area of valuable oil lands as possible. The fact that no private interest existing at the date of the withdrawal was affected, was also a potent consideration. Those who attempted to secure private rights thereafter did so with full knowledge of the executive withdrawal and acted at their peril.

On the other hand, the dissenting opinion is based on a strict conception of the distinct spheres of action of the three branches of the government and the danger of a centralization of power in the executive resulting from its invasion of the legitimate and exclusive functions exercised by the other branches. Irrespective of the beneficial results to be attained by the consummation of federal conservation policies, the minority members of the court were influenced by the bald proposition that the executive in withdrawing all of the lands of the public domain

known or thought to be valuable for oil[36] was virtually nullifying and suspending the operation of the last expressed will of congress contained in its positive declaration that all lands valuable for petroleum shall be free and open to exploration and purchase by citizens under the placer mining laws.

The fact that the executive assumed this power as a result of a conviction that new laws should be enacted is interesting to note. If the executive can suspend the operation of existing statutes on the theory that they are detrimental to the public interests and can substitute his views for those last expressed by congress, even if only temporarily, there may arise occasions where this power might be exercised in hostility to what may prove to be the public interest. It was to avoid just such contingencies that the strict division of power as between the various branches of the government was originally conceived by the framers of the Constitution. It would also be interesting to know how long the executive could lawfully suspend the operation of statutes and continue such suspension in force in the event that congress did not see fit to make the contemplated changes in the existing law. Of course, the answer can be made that congress has the power to nullify such executive action, since it retains the fundamental and exclusive power to legislate on such subjects, but it may be said with equal force that congress is in session during a large portion of each year and can act in the original instance on such contemplated proposals and, if deemed expedient, authorize the executive to make necessary withdrawals in the interim in order to preserve the *status quo*. This is really the fundamental difficulty. Logically, congress is the body contemplated by the Constitution to consider and originate legislation and make radical changes in existing legislation affecting the public lands, but as a matter of practical operation, congress has become to a greater and greater degree an unwieldy body, slow to consider and slower to act. From the very nature of its organization, representing as it does such radically different viewpoints on most of the problems presented for its consideration, it is prone to debate rather than to legislate. This has

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[36] The withdrawal of September 27, 1909, "included not only all known California oil lands . . . . but also the Wyoming lands." George Otis Smith, in Senate Public Lands Committee hearings on Oil Lands Leasing Bill, p. 209.

resulted in the executive stepping in and usurping, to a degree, certain of the functions unquestionably vested exclusively in congress by the federal Constitution if interpreted in the spirit which actuated its framers. This has become notably conspicuous in the case of the last few administrations where the executive branch of the government has formulated to a large degree the legislative program, prepared to the letter the actual bills proposed for passage, and employed all available political pressure to insure their passage in their original form.

We are, therefore, confronted with an actual condition which has by force of circumstances compelled a material deviation from the policy outlined by the framers of the federal Constitution and the decision in the Midwest case is but a recognition of this change and of the exercise of increased powers by the executive in the attempt to secure a greater flexibility of action and more expeditious results than it is at present possible to obtain from the ponderous and slow-acting legislative branch of the government.

The decision in the Midwest case is, therefore, of far reaching importance, since it sanctions a material enlargement of federal executive power and places a positive stamp of approval on the new public land policy. Of course, congress still has control over the ultimate disposition of these oil lands and may not accept the proposed executive policy as to future legislation, but the trend of recent events practically insures adoption of the new policy either in whole or in large part.

The upholding of the validity of the Taft oil withdrawal adds materially to the importance of the policy which will control the future disposition of public oil lands. As already pointed out, the conservation policy now generally accepted involves the idea of a permanent reservation of title in the federal government and the disposal of the oil under a leasing system on a royalty basis.[37] A bill having this object and fostered by the administration was before the last congress but in the press of other legislation failed of passage.[38] A similar bill is likely to be en-

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[37] Legislation of this character has been urged for a number of years by the department of the interior. See the Annual Reports of the Secretary of the Interior, and of the Director of the U. S. Geological Survey for the past few years.

[38] The fact that these oil lands have been withdrawn for over five years and that congress has not acted yet as to their ultimate disposi-

acted during the sixty-fourth session of congress.[39] In his report to the Public Lands Committees of congress[40] Secretary Lane states that this bill does not propose any change in the laws governing the disposition of agricultural lands in general; that, instead of conducting a "gigantic land lottery under government auspices" as heretofore, in which a few individuals and corporations have acquired the best oil and coal lands for little or nothing and have then sold the product back to the public at arbitrary prices, the proposed leasing system is open to all comers who wish to prospect and develop these mineral resources on fair terms so as to afford a fair return to the lessee and eliminate to a degree the element of speculation.[41] He points out the fact that the oil lands in private ownership are now largely operated under the leasing system and that though the federal government early abandoned a system of leasing lead mines, the adverse conditions there encountered do not exist today in the case of oil and coal lands.[42]

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tion is evidence of the difficulty of securing prompt action from this body on most subjects.

> "The West no longer urges a return to the hazards of the 'land is land' policy. **But it does ask action.** It is reconciled to the Government making all proper safeguards against monopoly and against the subversion of the spirit of all our land laws, which is in essence that all suitable lands shall go into homes, and all other lands shall be developed for that purpose which shall make them of greatest service. But it asks that the machinery be promptly established in the law by which the lands may be used. And this demand is reasonable." Annual Report of Secretary of the Interior Lane for 1913, p. 3.

[39] H. R. 16136. An act providing for the leasing of coal lands in Alaska became a law Oct. 20, 1914. U. S. Stats. Ann., Jan. 1915 supp. p. 6. By private resolution, 37 Stats. at L. 1346, the secretary of the interior was authorized to continue the operations of the Owl Creek Coal Co. in Wyoming, which he did by formal lease. See Report of the Secretary of Interior (1912), pp. 10-11.

[40] 63rd congress, 3rd session.

[41] In a letter dated May 1, 1914, addressed to the chairman of the Public Lands Committee of the house, Secretary Lane writes: "The measure deals with the principal fuel and fertilizer minerals found in the public lands, classes of deposits in which the people generally are particularly interested, and which should be so handled as to insure general use at reasonable rates. It would be unwise to permit these resources to be monopolized or gathered into private ownership of a few for speculative purposes".

[42] "The leasing method of disposition is about as fair a disposition as we can expect to make of the publicly owned lands, not simply from the standpoint of economics, but especially from the standpoint of the public interests in the control of some of these minerals that must be considered as absolutely necessary to the industrial life of today."

The proposed law passed the House and as finally amended in the senate Committee on Public Lands, provided for a prospector's permit giving an exclusive right for a maximum period of two years to prospect for oil and gas upon a maximum of 640 acres of public land situated not less than two nor more than ten miles from any producing well, or a maximum of 2560 acres when situated over ten miles from such a well. Drilling operations were to be commenced within six months, 500 feet to be drilled in one year and 2000 feet in two years. The applicant must comply with certain formalities of marking the ground and posting notices, and the drilling operations must be carried on as prescribed. Upon establishing a discovery of valuable deposits of oil or gas the permittee becomes entitled to a patent for one-fourth of the area embraced within the permit.

All other deposits of oil and gas on the public domain are subject to lease by the secretary of the interior through competitive bidding, each tract not to exceed 640 acres and such leases to be conditioned upon the payment of a royalty of not more than one-eighth, payable in oil or gas, and a rental of not less than one dollar per acre per annum payable in advance to be credited against the royalties as they accrue for that year. The term of such leases is to be twenty years with preferential right of renewal for successive periods of ten years. The maximum leasehold or leaseholds that can be held by a single lessee in any area of fifty miles square is 640 acres.[43]

In order to protect those oil miners who were affected by the executive withdrawals, it is provided that claimants of land in which oil was discovered, or drilling operations were in actual progress, January 1, 1914, and the claim to which land was initiated prior to July 3, 1910, may, within six months after the passage of the act or within sixty days after the final determination of the right to a patent, relinquish the land to the government and receive a lease therefor upon substantially the same conditions as other lessees, except that no annual rental is prescribed aside from the royalties, and it is further provided that where claimants in good faith located lands prior to withdrawal thereof and continued to occupy the same, and since July 3, 1910, have

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Hearings on Oil Land Leasing Bill, Public Lands Committee of senate, 63rd congress, 3rd session, pp. 216-217. See also Classification of Public Lands, Bulletin 537 U. S. Geological Survey, pp. 47-50.

[43] There were many regulative provisions of lesser importance.

diligently prosecuted work looking toward a discovery and have discovered oil prior to the passage of the act, that such claim may pass to patent under the mining laws.[44]

The secretary is authorized to dispose of the surface of these lands insofar as the surface is not necessary for the use of the lessee.[45] One of the most important provisions of all, requires the payment to the respective states wherein the leased premises are situated of fifty per cent of all moneys received from royalties and

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[44] On March 2, 1911, congress passed an act to cure a questionable situation arising in numerous cases where an individual acquired more than 20 acres of located land prior to discovery of oil, (36 Stats. at L. 1015). This act was amended August 25, 1914, 38 Stats. at L. 708, to authorize the secretary of the interior to enter into agreements with claimants of producing oil land so as to provide for the disposition of the oil pending final determination of the title of the land where this was questioned by the government.

A curative act applicable to phosphate lands located prior to withdrawal was approved January 11, 1915, and provides for their patenting under the placer laws. Where a lode claim conflicts, no placer patent is to be issued until the adverse lode claim is abandoned, presumably to get rid of any possible claim of an extralateral right.

[45] This policy of severing the surface from the subsurface mineral deposits and disposing of each separately has already been provided for by congress. The importance of this step was recognized by the director of the U. S. Geological Survey, who in his annual report for 1911, p. 10, said: "The first step, both in principle and practice, in any amendment of the land laws, appears to be that of making possible by legislation the separation of surface and mineral rights whenever the two estates have values which can be separately utilized". See also Bulletin 537, U. S. Geological Survey, Classification of Public Lands, pp. 46-47. The Act of July 17, 1914, 38 Stats. at L. 509, provides for the issuance of patents under the non-mineral laws of the United States for the surface of withdrawn lands containing phosphate, nitrate, potash, oil, gas, or asphaltic deposits, with a reservation to the United States of such deposits, together with the right to prospect for, mine and remove the same under appropriate federal laws. The right to occupy the necessary surface for mining operations is also reserved and payment for any damages to crops and improvements incident to such operations provided for. Agricultural entries of surface lands overlying coal deposits are permitted in the Acts of March 3, 1909, 35 Stats. at L. 844, and June 22, 1910, 36 Stats. at L. 583, amended April 30, 1912, 37 Stats. at L. 105, and April 14 1914, 38 Stats. at L. 335. The Act of August 24, 1912, 37 Stats. at L. 497, provides for the agricultural entry of the surface of oil and gas lands in Utah. The Act of February 27, 1913, 37 Stats. at L. 687, provides for the selection by the state of Idaho of the surface of oil and phosphate lands. This policy of severing the surface from the mineral rights and treating each as distinct properties is unquestionably the ideal system of land and mining law, for the surface and the underlying minerals can in most cases be disassociated and the surface used for agricultural or other non-mineral pursuits with of course the reservation of the right to use enough of the surface as may be essential to mining operations and provision made for the payment of damage suffered by the surface

rentals,[46] the other half going into the reclamation fund. This provision is inserted in order to appease the strong western sentiment antagonistic to the permanent retention by the federal government of the proprietary control of these immense areas of land wealth.[47] That this sentiment has a valid basis is apparent from the mere statement of the fact that millions of acres of land containing fabulous values of timber, coal, oil, water-power etc. are to be administered by the federal government to the exclusion of the states within which these resources exist, whereas all of the eastern states and most of the states of the middle west do possess and exercise this exclusive sovereign control over all of the lands and resources within their respective borders, and enjoy the salutary results flowing from such complete exercise of sovereignty. These western states are facing a serious curtailment of sovereign power which places them on a distinct plane of inequality. Here again, if this federal policy is to become a permanent one, as there is every reason to believe, our primary conceptions of the status of the western states which were to be admitted to the Union upon terms of exact equality with all the other states and were to enjoy equal privileges must suffer a profound adjustment to harmonize with these new conceptions.

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claimant. This separation of these rights is in line with true conservation, since it permits of "the utilization of lands for their greatest value". Many of the continental systems of mining law provide for this severance and it is unfortunate that the United States should not have earlier recognized its ultimate importance.

[46] As to this proposal, Secretary Lane says: "Inasmuch as the title to these oil or other lands would remain in the Government and be excluded from State taxation, it would seem to be fair that a certain percentage of the royalties received should go to the States within which the revenues are raised". Report to Public Lands Committee of Congress.

The Senate Committee on Public Lands reports: "This is deemed a just recognition of the rights of the States in and about the public domain situated within their borders and the right of a State to receive therefrom some revenue and benefit to go toward maintenance of State Government". Report on H. R. 16136, p. 7.

[47] This western attitude is strongly voiced by Justice Henshaw who wrote the opinion in Deseret Water, Oil, etc. Co. v. State of California (1914), 167 Cal. 147, a case decided in bank and where the following language appears:

> "But here we desire to point out that while the state of California was admitted as a sovereign state of the Union upon equal terms with all the other states, and while it has been judicially declared that an essential part of that equality is the disposition of the public lands within the state, to the end that the revenues by taxation therefrom and the control over them may be vested in the state, we have in California a withdrawal by the United States from sale and a placing in reserves of one-third of the area of the

This is a question of the interpretation to be placed on the provisions of the federal Constitution which bear on the creation of new states, their status and relation to the other states. If we take the decision in the Midwest case as evidence of the recent trend of opinion entertained by a majority of the federal Supreme Court, we can almost certainly conclude that when this basic question of State v. Federal Rights is presented to that court for decision, it will not consider itself bound by strict letter, but will interpret the Constitution broadly and in the light of the recent public attitude toward conservation problems in general, and will again recognize the doctrine that "government is a practical affair intended for practical men".[48] The question is, after all, an eminently practical one, involving as it does profound economic and social problems, and not only a readjustment of the relations of the individual toward the resources of the public lands, but also a readjustment of the respective spheres within which the state and the federal governments shall operate.[49]

This new public land policy certainly marks a decided step in the direction of centralization of power in the federal govern-

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whole state—an area greater than the combined territory of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland. Not this alone, but we have in these withdrawals a refusal upon the part of the United States to yield to the state of California control over its natural sources of wealth. Its forests, its mines, its oil-bearing lands, its power sites and possibilities, have been withheld by the United States, which proposes to exercise over them, and is exercising over them, the "municipal sovereignty" which the supreme court of the United States in Pollard's Lessee v. Hagan declared not to exist. If at the time of the proposed cession of its lands by Virginia, Congress had declared its intent to be that which it has actually executed in the state of California, little doubt can be entertained as to the answer which Virginia would have made. It is indeed a departure from the accepted construction of these constitutional provisions to have it said that the United States may, as here, withdraw from state use one-third of the area of a sovereign state, forever deny to the state the sovereign power of taxation and control over these lands, and develop and exploit them under its own rules and regulations for the enrichment of its own treasury."

[48] In fact the Supreme Court of the United States in the case of Light v. United States (1911), 220 U. S. 523, 31 Sup. Ct. Rep. 485, 55 L. Ed. 570, has already intimated that congress may, in the fullness of its power of disposal over the public lands, and acting for the nation as proprietor and owner, withhold from sale and settlement and place in a state of permanent reservation such lands as it may, in the exercise of its discretion, deem necessary for national and public purposes.

[49] The fact that these problems are largely social and economic and are tendencies represented on the one hand by advocates of "collectivism" or "advanced socialism" as opposed to the more conservative

ment which was not within the contemplation of its framers, but which policy its proponents contend, with considerable reason, can be more satisfactorily and efficiently administered through national rather than state control.[50]

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"individualists", was presented in a clear analysis of these opposing views by Judge Curtis H. Lindley in April, 1910, at a meeting of the San Francisco Bar Association in an address entitled "Conservation of Natural Resources and its possible Effect on Mining, Irrigation and Hydro-Electric Industries". He said:

> "It is manifest that we are on the eve of a new dispensation, a new order of things, and that it is time we should examine into the prospective operation of these 'policies' when crystallized into statutory enactments at the hands of the national legislative body. . . . . The subject is a monumental one; presenting, in my judgment, some of the greatest problems which are to be solved by the present generation of lawyers, judges and constructive statesmen."

[50] Hon. Walter L. Fisher, when secretary of the interior, had the following to say on this general subject:

> " . . . the ordinary citizen of these [western] states—are not at all concerned over Federal usurpation or unjust treatment. They recognize that the Federal Government has full legal power to dispose of the public domain as wise policy may direct.
>
> "They do not fear Federal usurpation, but seek Federal co-operation in supplementing State and local powers, so that the natural resources shall be utilized for the public benefit primarily of the locality in which these resources are situated, and thus ultimately for the benefit of the Nation as a whole. They suspect that the real purpose of those who urge the turning over of the Federal domain to the States is that they may escape the longer and the stronger arm of the Federal Government and may take advantage of the more limited resources and governmental facilities of the individual States. While some States have undoubtedly wisely conserved certain of the lands and natural resources turned over to them by the Nation, the story has too often been the acquisition of these lands and resources by special interests or individuals without adequate recognition of the public interest. There is no policy which it would be wise for any State to adopt with respect to these matters in the adoption and enforcement of which it can not be supplemented and assisted rather than retarded by the retention in Federal hands of the powers and the property now held by the Nation. It is precisely this policy of practical co-operation which should be put into effect.
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> "There is no real conflict between the Nation and the States upon this subject. In fact, there can be no real solution of these aspects of the problem until the interests and the functions of the Nation and the States are co-ordinated and they are working together for the same essential ends." Report of the Secretary of the Interior (1912), pp. 20-21.

A similar policy has been suggested in Great Britain with reference to some of these same resources particularly coal. This has been entitled the "Nationalization of Minerals" and means

> "the acquisition by the State of the whole of the minerals of the country whether worked at the present time or not, and the holding of them for the benefit of the community." Even the "Nationalization of Land" has been proposed.

Lacking the public domain of this country the movement then is seriously handicapped since it means exclusively condemnation and purchase of private rights or confiscation. Final Reports of the Royal Commission on Mining Royalties. pp. 46-47, 1893.

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MINING HAS HAD A PROFOUND INFLUENCE on the laws and social usages of the communities throughout the world where mining has flourished. The available record of the mining laws of different countries throughout the ages establishes the fact that there is a remarkable uniformity of underlying principle in these usages and customs. In very ancient times mining was carried on as a sovereign venture or concession and as a consequence laws governing mining in those days were practically non-existent. It was only with the advent of the autocratic democracy created by the Athenians that individual mining assumed any considerable importance. The silver mines of Laurium were divided into small tracts and leased to individuals or groups of citizen adventurers.[1]

Under Roman rule there was a partial emergence of the right of the individual to mine on his own account. The Romans were not as a rule skilled in the art of mining. They therefore found it more expedient to allow the peoples whom they had conquered to continue mining operations in accordance with local customs and to exact a tribute or royalty from them. Certain Roman emperors, in order to increase this flow of wealth into Roman coffers, distinctly encouraged the leasing of mining claims by individual adventurers.

In the title "De Metallariis" of the Code of Justinian was found the constitution of Valentinian, by which any one was permitted, and invited, to become an *aurilegulus,* and to work for his own profit, on the condition of rendering a certain metallic canon, and of selling the produce to the *fisc* in preference to others.[2]

GERMANY: Out of the darkness and welter of the Middle Ages, important institutions, social and governmental, were born and many of their essential principles can be traced down to the present day. During these medieval times mining became of increasing importance, particularly in the Germanic states. The German miners were exception-

ally proficient in the art of mining and their services were in demand in many parts of the civilized world. The first edition of Agricola's comprehensive treatise, *De Re Metallica,* was published in Germany in 1555 and is a veritable encyclopedia of the then existing phases of the mining industry.[3]

In this same medieval period the miner acquired a considerable measure of freedom (*Bergbaufreiheit,* to use the German expression). This is all the more remarkable when we remember the bondage which the feudal system at that time imposed upon the farmer and ordinary laborer, who were serfs in every sense of the word. Writers differ as to just how this mining freedom came about. Some contend that the miners themselves threw off the shackles of serfdom,[4] but the more conservative view is that the miners constituted a skilled class with special knowledge of an art, the practice of which brought large royalties to the overlords and feudal rulers. In order to attract and encourage miners to work in a particular area that they might thus receive the royalties paid on the metals mined, these overlords vied with one another in issuing liberal charters under which the miners operated.

> The princes of Germany imitated the policy of the Roman emperors, and invited adventure by indefinite liberty of search on terms which gave to the adventurers a strong interest in their success. This liberty (the *Freierklärung* of the German mines) is indicated obscurely in the Iglavian mine laws of the thirteenth century; more distinctly in those of Wenceslaus the Second; and the system received its full development in the fifteenth and sixteenth centuries. By the general practice of that country, every one is entitled to a provisional right of search within certain limits.[5]

Medieval mining was largely carried on in uncultivated and mountainous districts, on lands claimed by the overlords.

While the miners' right to enter upon this waste land and stake out and work mining claims was, in the Middle Ages, largely controlled by charters issued by the local rulers, it is also true that the provisions of these charters were based upon and chiefly reflected the customs and usages of the miners themselves.[6] This is true also of mining in other parts of the world. The miner, having developed a special art, the successful exercise of which he alone could carry on, was able to impose

customs and usages of his own making upon his superiors in power, who accepted this measure of dictation because of the financial benefits accruing to them through payment of royalties.

One of the conspicuous rights asserted by these early miners in the Middle Ages was freedom to go upon "common" or "wastrel" lands and to stake out claims, the right to work which was recognized both by charter and by custom as the miners' individual property.[7] The free miners in Germany, France, and Great Britain not only had a right to mine on these lands, but also were entitled to the use of rights of way, timber, fuel, and water, space for buildings, and refineries. They were exempted from various tolls, taxes, and duties, from military service, from obligations of a servile tenure or condition, and from disability and forfeiture by reason of alienage. They were also provided with local officers and courts for the administration of justice. There was special protection of person and property.[8] As long as the miner complied with the usages and customs of the district, he had the right to mine his own claim to the exclusion of all other persons and the right to the product of his industry subject only to payment of the royalty.

> Upon the discovery of a vein or other mineral deposit, he is entitled, as of right, to a grant of a certain measured space of ground for the purpose of pursuing his discovery; and the ceremony of bounding this area is announced by three consecutive proclamations. The demand made upon the Bergmeister, or other local officer of the sovereign, cannot be refused unless there be conflicting claims, in which case the first finder, and not the first claimant, is entitled to preference. The interest of the concessionary is permanent, assignable, and transmissible; but is subject to the obligation of continual working, of payment of the tenth or other proportion, and of a small fixed quarterly rent.[9]

Ordinarily, it is true, he exercised this right under the general terms of a charter or other proclamation issued by the ruler in control of the land in question, and the important point to bear in mind is that the overlord, by granting this free right to go upon waste lands and stake out claims, had yielded up the ordinary privilege of an owner of real property to select and designate the particular person who might acquire such rights; in other words, the right of personal selection of the individual grantee was waived. The overlord no longer dictated and determined who the particular individual should be who might mine

a specific parcel of his land. This right of free mining subsequently spread into other parts of the world and eventually was exercised on our own federal public domain in the mining regions of the West following the discovery of gold.[10]

As soon as the door was thrown open so that qualified miners could freely locate individual claims on waste lands, it became essential to determine their respective rights as among themselves in order to prevent inevitable conflict. Virtually all systems of mining law in which the individual or claim system of location prevails, early recognized as a cardinal principle the superior right of the first locator or appropriator in time. This is variously referred to as the "Doctrine of Priority" or "Law of the First Finder."[11] *Qui prior est in tempore, potior est in jure,* was the Roman wording of this equitable doctrine.

The same principle of "prior appropriation" was quite naturally applied by the Germanic miners in their customs governing the acquisition of water for use in the mines. Most mining operations require a considerable use of water and the greater number of mines are not so situated that the use of this water can be enjoyed through the ordinary exercise of a riparian right. The water, in order to be beneficially enjoyed, must of necessity be diverted from the stream and conducted to the nonriparian mining land where it is needed.

The early German mining law, which in the majority of its main principles resembles the original German general law, from the beginning guaranteed to the mine operator free use of the flowing water.[12]

The necessity of the use of water for mining purposes, and the fact that mining first occurred in uncultivated and undivided districts *(Marks)* and in royal and feudal forests, explain two later facts: (1) that the free use of water and pasturage was given to the mine operators as well as to the members of the Mark Association and (2) that the right to the free use of water continued in special recognition of the economic importance of mining when mining entered upon ground which had already become private property and when the general law enacted into statute no longer recognized a free use of flowing water. The older mining rules *(Bergfreiheiten)* permit no doubt. Thus we read in the *Bergfreiheit* for the silver mine at Fischbach of the year 1426 (Lori, p. 27):

All our forests and waters, wherever situate and suitable for mining purposes, shall at all times be free and open....

The *Bergfreiheit* for Fischbachau for the year 1446 (Lori, p. 32) granted the miners "dwelling and pasturage," for their cattle, also wood, water, roads, and pathways "if the same are of use and convenience."

In the *Bergfreiheit for Kutzbuchel, Ratenberg,* etc. 1459, Section 8, it was provided:

We allow, grant and confirm the mines and minerals wherever the same may be found and worked, in the herein mentioned dominions and assizes, together with forests, mining claims [*Hüttslegen*], pathways, roads, water and stone and all other things as are usually appurtenant to mines.

Compare Section 8 of the *Bergfreiheit* for Lam (Lori, p. 65). *Bergfreiheit of The Duchy of Braunschweig* for Gittelde, Grund, and Zellerfeld of 1532 (Calvor, p. 218):

From the beginning to all our subjects throughout our domain and duchy all our mining roads, ways, and footpaths shall be free and open, together with water for smelters and stamp mills and all other works, according to the mining law and custom from time immemorial.

Bergfreiheit of the Mark Brandenburg of the year 1539 (Wagner, p. 421):

We give and grant to them herewith the right and privilege to enjoy, have and use our forests and water. We concede and grant for ourselves, our heirs and our sovereignty to each and all of them, our lands and estate and the right to go upon the mines, mills, forests and waters, to ride or drive upon now and forever more.

Bergfreiheit of Nassau-Katzenemb of the year 1559 (Brassert, p. 9):

Those who come to dwell among us for mining purposes shall hold freely and unhindered in common, water, pasturage, streets, footpaths and roads (excepting fisheries and hunting grounds), according to the mining custom.

Bergfreiheit of Kurtrier of the year 1564 (Brassert, p. 101):

We grant to the miners in the designated district the right to use the water, pasturage, to hunt rabbits, to shoot and fish, and therefore that all roads, water, pasturage and foot paths shall be free, except that we reserve to ourselves certain hunting grounds and fishing waters.

These examples show that, as a part of the *Bergfreiheiten* (free mining privileges), the free use of flowing water was maintained for mining, or at least that in the common *Mark* (district) and in the manors the right to the free use of water, which had existed from time immemorial in favor of mining, was recognized and declared applicable.

Just as the right to mine minerals found in open land was acquired by the individual miner by priority of location, so the custom similarly arose of acquiring the use of water for mining purposes by prior appropriation. Neither the lord of the manor nor the owner of the ground had any right to dispute the acquiring of such right to the use of water by the miner. This right of the miner to appropriate water establishes the fact that the owner of land riparian to the flowing water did not have an exclusive use of such water but had to yield to the miner.

The one who received a grant of the right to use water had either to dam up the water or divert it within a period of one half-year. If this was not done, or if the water conduits were allowed to deteriorate for a half-year, then, after such fact had been established, other persons might be granted the water. These provisions were not applicable to a proprietor of a mine which produced its own water, for he did not need to obtain a grant of a water right: they applied only to such users of water as required a grant.

All those waters which were discovered by means of tunnels, shafts, prospect works, or ditches, were to be granted by the *Bergmeister* to those who had appropriated them or taken possession of them, but always with the restriction, namely, that such grant of such water should not interfere with the mine or the mine workings of the district, and that the miners might at all times use the same for the dressing of ores, if the necessity arose.[13]

Wells and springs as a general rule were not objects of grant by the Bergmeister. The right to the use of water in creeks and rivers for mining purposes, on the contrary, was acquired by appropriation and grant. If the use of the water had already been granted to a third person, and the latter had constructed special works for the use of the same, nevertheless, mining took precedence. If no appropriation and

grant of the water in streams and rivers had occurred, either according to law or to custom, nevertheless, according to the *Bergfreiheiten* and the common mining laws, mining had the preferential right to the use of such water. Water in streams and rivers, in contrast to mine waters, could only be acquired for mining purposes by appropriation and grant of the *Bergmeister*.[14]

The other mines and newly discovered claims, of whatever sort they may be, whether old workings or newly discovered, which are situated within the boundaries of our *Niederoester* lands and therein opened up, together with rivers, coal lands, and forests, are to be granted by our mining authorities, representing us, and by no one else.[15]

The flowing brooks and waters are not to be granted or given as exclusive property to anyone, but such waters are always to be used for those purposes which chiefly promote and maintain mining, such as *Heintzen* (bucket pumps) and *Künsten* (Hertwig, *Bergbuch,* p. 249, defines these as machines for raising or pumping water out of mines), regardless of stamp mills, lumber mills, hydraulic machines, etc.[16]

If a water power is still open to appropriation and we have no right ourselves to build a stamp mill upon it, and such water power does not interfere with other stamp mills, then our *Oberbergmeister* may grant such water power to the next one who makes application therefor, etc.[17] (This coincides in the main with the Schlackenwalder Tinn ordinance.)

In conformity with the tradition of his office *(Oberbergmeister)* and that which we permit him to do, the *Oberbergmeister* shall grant and confirm to those who desire to develop them, mines, tunnels, water powers, stamp mills, smelter works, forges *(Hammer),* saw mills, and the like.[18]

The provisions of the Prussian *Allgemeines Landrecht,* although somewhat obscure, reflect the foregoing provisions and customs concerning the use of water in brooks and rivers for mining purposes. The material portions of the *Landrecht*[19] entitle one to conclude that the old law was intended to be retained, as is evidenced by the following provisions (Part II, Tit. 16, Sec. 80):

Washworks (dressing works) and stamp mills, as well as ditches and water conduits on the surface, are not included in the location of a mine, but must be separately appropriated and granted. (Waters of operating

mines [mine waters], for the use of which, according to the German mining law, the mine proprietor does not require a grant, constitute an exception.)

Even Section 110: "Ponds and mills must also give way to mining, if it is necessary for the further prosecution thereof," accords with the former law, since the latter law prescribed the compensation to be paid to the one who was formerly entitled to the water. Section 109, according to which the owner of the soil is obliged to surrender to mine proprietors, "the water necessary for the operation of mine engines, stamp mills, dressing works and smelters," does not follow the old law since, under the new law, according to Section 112, there must be compensation for every surrender of a water right.

The *Austrian* Mining Law of May 23, 1854, Section 105, provides:

> Surface waters which are necessary for carrying on mining must even against the will of the owner be surrendered to the *Revierstöllner* even by other mine owners, so far as water police regulations and other public considerations do not stand in the way and the desired surrender of the water results in greater national economic advantages. . . .

In respect to mine waters, the same law in Section 128 materially follows the older law. Such waters are reserved to the mine owner for mining and smelting purposes, but may, however, under certain provisions be granted to third persons "for any purpose whatever." The mine owner is not responsible for any changes in the quantity of the mine water flowing out of the mine.

The mining law of the *Kingdom of Saxony* dated May 22, 1850, similarly prescribes, in Section 216, that rights to the use of water may be acquired for mining purposes by dispossession proceedings. A special chapter (IX) contains very explicit provisions concerning the use of mine water. If the mine owner does not use the waters discovered in the course of his mining operations, the *Bergamt* must grant the same to other mine proprietors for mining purposes. If the mine proprietor in whose workings the waters were discovered does not make use of his right of priority, the law then looks upon these mine waters as being the common property of all mine proprietors. In the event of a grant to one of the latter, the former cannot thereafter enforce his right of priority. This is a variation from the older law. In the event

of a conflict among various miners, the greatest politico-economic value decides, where conditions are equal, but the priority of the application must also be considered. For other than mining purposes only a temporary use may be permitted, with the provision that the waters must again be surrendered for mining purposes without compensation (Sec. 252).

The foregoing mining laws cited clearly reflect the older German law. The Prussian *Allgemeines Berggesetz* of June 24, 1865, has entirely broken away from this precedent for it recognizes no appropriation and grant of flowing water, nor a compulsory surrender of the use of the water for mining purposes.

FRANCE: The impress of these Germanic usages upon the mining law of France is quite apparent.

Smirke[20] comments on the fact that Charles the Sixth and Louis the Eleventh, in the fifteenth century promulgated a system for the government of the mines of France, "evidently founded on the practice in Germany." He further states that these edicts emphasize "general liberty of search for minerals in all uncultivated places" and "rights of way and water." With some modifications in later reigns, these edicts formed the groundwork of the general mining law of France. Still later Napoleon's Mining Code of 1810 was adopted, which provided that:

> Streams of water which are found within reach or which can be brought to these establishments without detriment to their use by the inhabitants etc., may be granted to those having mining concessions.[21]

ENGLAND: As already noted, the English mining law received its impress from the Germanic. At the same time it must be recognized that the mining usages and customs in certain of the mining districts of England are of great antiquity.[22] The great mass of English mining law in the Middle Ages represents usage pure and simple.[23]

The following authorities establish the fact that the law of prior appropriation which prevailed in the mining districts in Germany also prevailed in the mining districts of the British Isles.

In *Derbyshire,* the miners were "entitled to rights of way . . . from the mine to the nearest running stream, spring, or natural pond; and to use the water from such stream, spring or pond for mining pur-

poses."[24] They had the right to "running water to wash their ore withal" "and also shall have the next water to their several uses" and "all Miners within the King's Field ought to have the next Wood and Waters of the King's Land."[25]

In *Cornwall,*

Bounders (claim stakers) are entitled by custom to the free use of the water over the whole of the district within their bounds; and to the right of diverting that water into other streams. Indeed "streaming for tin," which is a process for obtaining grain tin by means of washing, is almost always a necessary part of their operations; and for this purpose, "streamers for tin" usually secure a conduit of water from the nearest stream. Bounders may, moreover, carry an adit for the passage of water through other men's bounds in waste lands without leave.[26]

. . . the right of every tinner to divert water for the use of his tin bound is affirmed in the charters of Edw. I, . . . "divertere aquas—*sicut consueverunt. . . .*"[27]

The right to the use of, and to divert and foul water and water courses for the purposes of mining is affirmed in the charters of John and Edward. . . .[28]

In the tinner's charters this right is merely confirmed as having already existed time out of mind. It appears as the right of "diverting streams."[29] *"Et divertere aquas ad operationem eorum."*[30]

These customs were later enacted into statutes:

The course of streams may be altered for mining purposes under the Incl. Act, 22 and 23 Vict. c. 43. So the Duke of Cornwall, and persons acting under his authority, may take, use, and divert water for mining purposes under the Act, 7 and 8 Vict. c. 105. So streams may be diverted and used for mining purposes under the Irish Act, 46 Geo. 3 c. 71, And streams may be employed for mining purposes under the Irish Act, 23 and 24 Vict. c. 154.[31]

British Colonies: In more recent times, in other parts of the British Empire, similar rights have been recognized. The mining laws of the *Malay Peninsula* provided as follows:

58. (i) It shall be lawful for the Warden to issue to any person who is working or is about to work any land for mining by virtue of any legal title, a license to divert, make use of and deliver such water as is therein mentioned, in such places, by such means, in such manner, in such quantities and on such conditions as he may think fit.[32]

Natal had similar provisions:

70. Water rights shall be granted to the registered holder of a prospecting or mining claim, or machine stand.[33]

The mining laws of the *Orange Free State of South Africa* similarly provided for "mining water rights" to be used by the holder of a "mynpacht" or mining claim.[34]

The mining laws of the *Transvaal Colony* contained the following provision:

115. It shall be lawful for every holder of a mynpacht or claim or parts thereof to obtain on application to the Resident Magistrate a certificate of special registration of his mynpacht or claim or parts thereof, together with any mining water rights, rights of way, rights of leading water, etc.[35]

In all the *Australian States* the holder of a "miner's right" has the privilege of entering upon any Crown lands for the purpose of prospecting and may secure in his own right certain claims and the use of water therefor.[36]

The mining laws of *Queensland,* Australia, provided that the holder of a miner's right shall be entitled:

(3) To take or divert water from any natural spring, lake, pool, or stream situate in or flowing through Crown lands, and to use such water for mining purposes and for his own domestic purposes. . . .[37]

Similarly, the laws of *Tasmania* provided that a mining lessee might take and divert water

. . . from any spring, lake, pool or stream situate or flowing upon or through, or bounded by, any Crown lands in such manner as shall be prescribed by such water right and Regulations, in order to supply water for mining and domestic purposes to such person.[38]

Under the Gold Mining Ordinance of 1867 (Part X), the Water Clauses Consolidation Act, and the Placer Mining Act of 1891 (Sec. 64) of *British Columbia,* the right to divert and use water for mining was granted to the first appropriator.[39]

SPAIN: King Charles the Third of Spain ordered a study to be made of the mining laws of the world, and Gamboa's famous *Comentarios a las Ordenanzos de Minas,* published in the year 1759, sets forth the result of this research. Gamboa states that the mining laws of Germany formed the basis of the new Spanish ordinances.

The "Royal Ordinances for the Miners of New Spain" promulgated by the King of Spain in 1783 provided that water might be "taken from the river, brook or pool" for washing ores (XLVII) and that owners of mines might establish their refining plants near and "freely make use" of the waters of a river or brook (LII).[40]

These ordinances of Spain became the mining law of the Spanish possessions in South and Central America, and in Mexico. We find that either these ordinances, with modifications, are still in force in the South and Central American Republics or that new codes patterned upon these have been adopted.

The *Argentine Republic* has the following:

Mines, by reason of the benefits which the public derives from their proper operation, are privileged property.... Under the same principle a number of easements are created in favor of the mines.... These easements are substantially governed by the same rules which are observed in all countries since the days of the Roman law. The owner of a mine has always, for instance, the right of way through the lands of his neighbor, or the right to use the water which he needs for his works.[41]

In the *Mining Laws of the Republic of Colombia,* Chapter XIV, entitled "Waters for Mines," these provisions are given:

Art. 205. *The discoverer of the first mine* found in any locality *has a preferential right,* over all other subsequent discoverers, to take the water necessary in the judgment of experts for an ordinary installation, and for the persons thereof; and he can enforce this right at any time whatsoever, even though he has not worked the mine and even though, to make such right effective, it may be necessary to suspend work in an establishment installed on a mine discovered subsequently (to the first mine).

Art. 206. *Other discoverers acquire a like right, subordinated to that of prior, and preferential to that of subsequent discoverers, in strict order in point of time.* (Italicized by the author.)[42]

In the *Honduras Republic* we find the following:

The mining industry shall have "the right to use the woods and waters extant in public or vacant lands."[43]

In *Mexico* the law reads:

Art. 93. Should there occur the denouncement [location or appropriation] of some current of water for power or for the washing of metals, said denouncement shall be admitted and substantiated with the same procedure employed in the denouncement of mines both in the case in which the

same water may have been previously utilized for said purpose, if it be denounced as abandoned or deserted and when it has no known owner. . . .

The ownership of a current of water or water fall shall be lost and may be adjudged to the party denouncing, whenever it shall not have been utilized during twenty-six consecutive or interrupted weeks inside of one year previous to the denouncement. The water which may have been utilized in reduction works cannot be denounced unless the works themselves are abandoned.[44]

. . . Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that in the *State of Sonora* [Mexico] the doctrine of appropriation, as now recognized, was to some extent in force by custom.[45]

In *Nicaragua* the law states:

Sec. 20. Authorization can be given to the owners either of a mine or of a reducing or smelting establishment, to take advantage . . . of the waters of some river or water course running in the neighborhood of their property.[46]

Title XIII of the *Mining Ordinances of Peru* provides for acquisition of water rights for mines.[47]

In *Uruguay,*

Art. 19 of the Code of Mining Laws authorizes "the use of the natural water running" in the vicinity of the mine.[48]

United States: The mining regions of the western United States have been no exception to the general rule that has been here developed. In the very early days of mining in California, the miners adopted as a part of their rules and customs the right of prior appropriation of water for use in operating the mines. The conditions which surrounded these pioneer adventurers were virtually the same as the conditions confronting the miners of the Middle Ages. The mining regions were unoccupied, uncultivated, waste lands constituting the "Public Domain." There were no mining laws applicable. The miners were technically trespassers. The federal government remained inactive, so that the miners were compelled to make their own laws. Their rules, usages, and customs bear a striking resemblance to those which arose centuries earlier in Germany, England, and other parts of the world. The right of the discoverer or first finder of the mineral was everywhere recognized. The same necessities resulted in giving a superior right to the

first appropriator of water from a flowing stream. *Qui prior est in tempore, potior est in jure,*[49] was made applicable to water rights as well as to mining claims. Pomeroy has made in *The Law of Riparian Rights* (1887) an excellent statement of

> . . . the origin of the peculiar doctrines concerning water rights as settled in the Pacific communities. Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land. The streams and lakes were all on the public domain. For their advantageous employment it was often necessary to divert water from its natural bed, and to carry it through artificial channels,—"ditches" or "flumes,"—sometimes of great length and constructed at an enormous cost. There were no riparian owners or occupants except the miners, and the streams could be put to no beneficial use except for purposes of mining. From all these circumstances, and from the very necessities of the situation, it universally became one of the mining customs or regulations that the right to use a definite quantity of water, and to divert it if necessary from these streams and lakes, could be acquired by prior appropriation (Sec. 15).[50]

As with the customs and usages which had developed in Europe in the Middle Ages, a failure to use the water for periods of time that varied in different mining districts resulted in a forfeiture of the appropriation right just as a failure to work the mining claim resulted in its forfeiture. The right to mine the claim rather than ownership of the fee simple was of outstanding importance in the early days, and the right to use the water in connection with such mining was what counted. The Supreme Court of California recognized these "customs of the diggings" at a very early date. The fact of priority controlled "the right to divert the streams from their natural channels" as well as "the privilege to work the mines."[51]

The Supreme Court of the United States also gave its sanction to this principle of priority, and we find set forth in Justice Fields' inimitable style a picture of the conditions which confronted the miner on the public domain in the early days.[52] He directs attention to the fact that this doctrine of prior appropriation was, after eighteen years, during which the miners occupied the public domain under sufferance, finally recognized by Act of Congress. This Act of 1866 provided that

> Whenever, by priority of possession, rights to the use of water for min-

ing . . . have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same.[53]

The doctrine of prior appropriation as applied to water rights was codified in Sections 1410–1422 of the Civil Code of California. The doctrine spread all over the West wherever mining was carried on. It obtained such a firm foothold in many of the states and was so well suited to the semi-arid conditions of those states, as well as to the necessities of the mining industry, that the riparian doctrine was repudiated, and today the doctrine of prior appropriation created by the miners controls exclusively the acquisition and tenure of water rights in those states. The history of the origin and development of this prior appropriation doctrine has received such adequate and comprehensive treatment by text writers that it would be out of place to present the subject here.[54] In other western states, notably California, Oregon, and Washington, a dual system has grown up, the law of these states recognizing both the riparian and appropriation doctrines. In California the riparian doctrine has the ascendancy in spite of the fact that it was in California that the miners originated the appropriation idea as applicable to water; in Oregon, by judicial interpretation, the riparian doctrine has been relegated to a subordinate position. In California, the conflict between these two doctrines and the supremacy given the riparian doctrine in the famous case of *Lux v. Haggin* 69 Cal. 255 furnishes one of the most picturesque and stirring incidents in the annals of California litigation.[55]

The authorities cited herein were collected in a research which was by no means exhaustive; there are doubtless many other authorities for the free right of the prior appropriator to use water for mining purposes, that might be added to this formidable list. These examples, however, at least serve to establish the main thesis of this article, namely: that the doctrine of prior appropriation of water has been almost universally in force in the important mining regions of the world, and that it even antedates the extant records.

NOTES TO COLBY ESSAY

[1] Demosthenes in some of his orations describes in great detail the laws governing these operations. *Man and Metals,* by T. A. Rickard (1932), contains an excellent and authoritative chapter on "The Athenians and Their Silver Mines."

[2] Smirke, *Stannaries of Cornwall* (1843), p. 81 Appendix. See also Hoover's translation of Agricola's *De Re Metallica,* fn., pp. 83–84, and *Man and Metals,* Chap. XI, on "The Law of the Mines and the Freedom of the Miner."

[3] A splendid English translation was published by Herbert C. Hoover in 1912. In a footnote to Agricola's Book IV dealing with the Germanic mining laws, pp. 82–86, Mr. Hoover has given a comprehensive and valuable comment on comparative mining law.

[4] Chas. H. Shinn, *Mining Camps* (1885).

[5] Smirke, *op. cit.,* 83 Appendix. Also see Arundel Rogers, *The Laws of Mines, Minerals, and Quarries* (ed. 2), p. 53.

[6] "The mining laws of the Middle Ages do not create, but rather recognize and establish, the customs of miners previously existing. . . ."—*Ibid.,* 52.

[7] See Rickard, *op. cit.* Chap. XI; Alford, *Mining Law of the British Empire.*

[8] Smirke, *op. cit.* 84, 85, 88.

[9] *Ibid.,* 83 Appendix. It was not the land so much as the necessary privilege of working the mine that was granted.—Mander's *Derbyshire Mining Glossary* (1834), p. 57.

[10] That the Germanic mining laws founded on custom were adopted by other countries, notably England, France, Spain, Russia, etc., see Smirke, *op. cit.* 85–95 and note "g" p. 94; Alford, *op. cit.* 12; Walmesley, *Guide to the Mining Laws of the World,* p. 22. The last-named concludes that the American mining law, which originated in the miners' customs of California, "is probably Germanic in origin."—p. 163.

[11] The rights of "der erste Finder" are mentioned in a decision made in the mining district of Joachimsthal, December, 1606, being the thirty-sixth decision in a digest of six hundred Germanic mining decisions, published in 1636 A.D. (*Sechs Hundert Bergt Urthel,* pp. 4, 10).

[12] Probably the most comprehensive and authoritative exposition of the Germanic law of waters used for mining purposes is to be found in an article the title to which as translated is "The Right of a Mine Owner to the Use of Flowing Water, etc.," by Dr. H. Achenbach, in the *Zeitschrift für Bergrecht* for the year 1870, p. 76. Dr. Achenbach was for many years co-editor of this Journal of Mining Law and published several treatises on mining law. He was also Privy Counselor of Mining at Berlin. Most of the material on Germanic law in this essay is derived from this source and from Hertwig's *Bergbuch* and the *Sechs Hundert Bergt Urthel* published in Germany in 1636. The writer takes this opportunity of expressing his profound appreciation of the masterly work of the late Walter J. Aschenbrenner in translating the old Germanic material which forms the basis of this portion of this essay. He would also express his great debt to his wife, Rachel Vrooman Colby, for unfailing assistance in translations and similar matters.

[13] Joachimsthaler Bergordnung, 1548, Part II, Art. 104.

[14] *Kursächsische Bergwerkeverfassung,* pp. 97, 101, LXXIII.

[15] Nieder-Oesterreichische Bergordnung, 1553, Art. 9 (*Ursprung der Bergwerke,* p. 168).

[16] Appendix to Joachimsthaler Bergordnung, 1548, to Art. 104 (*Ebend.,* p. 102).

[17] Kurkölnische Bergordnung, 1669, Part IX, Art. 4 (Brassert, p. 642).

[18] *Op. cit.*, Part II, Art. 3 (Brassert, p. 536). Compare *Bergrechtsspiegel*, Part II, Chap. IV, Sec. 4, p. 195; also Hertwig, *Bergbuch, sub voce* "Watter."

[19] See monograph of Beyers, *in* Brassert, pp. 105, 286, 300.

[20] *Op. cit.* 85.

[21] Halleck, *De Fooz on the Law of Mines*, p. 232.

[22] Rogers, *op. cit.* 457; Alford, *op. cit.* 10.

[23] Lewis, *The Stannaries*, p. 82.

[24] *MacSwinney on Mines* (ed. 3), p. 751.

[25] *Mineral Laws of Derbyshire* (1734 ed.), p. 8.

[26] MacSwinney, *op. cit.* 438; also 439.

[27] *Bainbridge on Mines and Minerals* (ed. 5), p. 144.

[28] Rogers, *op. cit.* 462.

[29] Lewis, *op. cit.* 163.

[30] *Stannary Charters of 1201* A.D. (Lewis, p. 238).

[31] MacSwinney, *op. cit.* 438–439, 408–409.

[32] Alford, *op. cit.* 77.

[33] *Ibid.* 165–166.

[34] *Ibid.* 176.

[35] *Ibid.* 195.

[36] *Ibid.* 210.

[37] *Ibid.* 236.

[38] *Ibid.* 259.

[39] Martin's *Mining Cases*, I: 10, 64, 422, 460.

[40] Rockwell's *Spanish and Mexican Law*, pp. 341, 343.

[41] *Mines and Mining Laws of Latin America* (Bureau of the American Republics, Bulletin No. 40, April, 1892), p. 10.

[42] Chas. Bullman, *Mining Laws of the Republic of Colombia* (1892), p. 78.

[43] *Ibid.* 167.

[44] Mexican Mining Code of 1884. *Mines and Mining Laws of Latin America* (1892), p. 198.

[45] Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 343.

[46] *Mines and Mining Laws of Latin America* (1892), p. 234.

[47] *Ibid.* 260.

[48] *Ibid.* 279.

[49] In a rare pamphlet entitled "Jure Aquarum Metallicarum," published in Germany in 1730, the author quotes this Latin maxim as does the Supreme Court of California (5 Cal. 159, 161) in support of the doctrine of prior appropriation.

[50] John Norton Pomeroy, *The Law of Riparian Rights* (1887).

[51] Irwin v. Phillips, 5 Cal. 140, 147. Yale, *Mining Claims and Water Rights*, pp. 159, 161.

[52] Atchison v. Peterson, 87 U. S. 507, 510–515.

[53] Statutes at Large, 253.

THE AMERICAN INSTITUTE OF MINING AND METALLURGICAL ENGINEERS
[SUBJECT TO REVISION]

Governmental Control of the Production and Sale of Mineral Resources

By Wm. E. Colby, San Francisco, Cal.

(San Francisco Meeting, October, 1929)

Increasing governmental control of human activities seems inevitable. Within the present generation railroad rates and the public sale of water, gas, and electricity have been subjected to rigid regulation. The field of control is slowly but surely being enlarged, and it is the object of this paper to outline in brief space this tendency toward increased governmental regulation, as far as mineral resources are concerned.

Our dual form of government complicates the problem. We must deal not only with the powers of the Federal Government, but also with those of the individual States. In order to approach this question intelligently we must have some conception of the respective powers and jurisdiction of the States and the United States, respectively, over mineral lands and mineral production.

Starting with the Federal Government we find it never owned any public domain within the States that formed a part of the thirteen original colonies and, for historical reasons, the same is true of Tennessee and Texas. The Mid-Western States were erected out of the public domain which was acquired by the United States through cession from the original States or by purchase from foreign nations. Congress early in the last century adopted a policy of leasing public lands containing lead deposits in a portion of this Mid-Western territory, but later abandoned that policy and disposed of such public lands, mineral and non-mineral, outright so that they long since have practically all passed into private ownership and become subject to the general jurisdiction of the respective State governments. In the great public domain lying west of the Mississippi river, and in portions of some of the Southern States, the Federal Government adopted a new mineral land policy following the discovery of gold in California. (Acts of Congress of 1866, 1870, and 1872.) The mineral lands within these States instead of being disposed of on the same basis as agricultural lands, as occurred in the Mid-Western States, were segregated from agricultural lands and sold under special laws intended to encourage mining, giving the miner the free right to locate and work these mineral lands without paying any royalty to the Federal Government. A miner could also obtain at slight expense a complete title, or patent, covering his mineral deposits. This condition existed until the early part of the present century. Then came the great conservation movement, which had for its object the permanent retention and control by the Federal Government of certain natural resources that still existed

on the public domain, and that were considered important enough, and so intimately bound up with the future progress and welfare of the Nation as to justify the Government in refusing any longer to grant to its citizens complete title to the land containing such resources. The dynamic force of Roosevelt added to that of other leading conservationists brought about national reservation of forests, together with deposits of coal, oil, and gas, phosphates, potash, sodium, etc. Lands valuable for development of water power were also included. Over these lands so withdrawn and permanently reserved from private sale, Congress exercises sovereign control. In so far as these mineral deposits are found on the public domain they have been nationalized. Congress has, from time to time, passed laws providing for the leasing of these deposits by private individuals, usually on a royalty basis, and usually with specific limitations designed to prevent monopolistic control. As a result of this conservation legislation we may safely assert that the nationalization of these particular mineral deposits, in so far as they still exist on the public domain, is complete, and that the Federal Government has and is exercising full and exclusive power to determine the manner in which these minerals shall be extracted and marketed.

An outstanding example of this exclusive dominion and control over the reserved lands is the comparatively recent action of the Secretary of the Interior in carrying into effect the President's policy of canceling all oil and gas prospecting permits where the development requirements had not been fully met, and in refusing to issue new permits until the present over-production has been checked.

In so far as the lands containing these designated minerals had already passed into private ownership, the Federal Government has parted with its power to control the extraction and disposition of such minerals. The Federal Government has not seen fit to include the ordinary metallic minerals and certain non-metallic minerals within its conservation program, and while it has the power to control the output and even the manner of disposal of such of these minerals as are still situated on the public domain, it has not exercised such power, and there does not seem to be any strong probability that it will do so in the near future.

Congress retains, at all times, the right "to regulate commerce with foreign nations and among the several States, etc.," so that within the limitations of this power Congress can still exercise a certain incidental control over interstate and foreign shipments of mineral products. In view of the fact that Congress cannot levy any tax or duty on articles exported from any State, this power to reg-

ulate commerce has little direct bearing on the matter except as a means of preventing the States from interfering with and prohibiting either interstate or foreign shipments.

The Eastern States, which were a part of the original Colonies, and Tennessee, which attained statehood with complete ownership of all public lands within its borders, have long since disposed of most of their public lands to private individuals. The same is true of the federal public domain in those States that were carved out of the Middle Western territory. Texas, entering the Union as an independent sovereignty, controls all the public lands within its borders, and still retains quite extensive public land holdings, and is therefore unique in that it has the complete power of determining how the mineral resources contained in these public lands may be acquired and disposed of. All of the States created out of the public domain received from the Federal Government considerable grants of public land, the proceeds from which were to be devoted to educational purposes. Although most of these grants reserved minerals, the courts ruled that this reservation referred to minerals known to exist at the time the grant became effective. Minerals subsequently discovered in these lands belong to the States and their grantees. Practically all the States have "squandered this patrimony" by selling such lands as fast as possible for ridiculously small sums. Two or three States that had the foresight to recognize the potential value of the grants and retain the fee ownership are now reaping the reward of their sagacity, and are deriving a substantial revenue from this source. The remaining States have little in the way of mineral lands to administer. Over this insignificant remnant their control is as complete as is that of the United States over its federally owned public domain. Many of the States have now passed laws providing for the leasing of these rather limited areas of State owned lands containing minerals.

Any power that the States may possess to regulate the output and disposition of minerals found within their borders must, therefore, with this slight exception of State owned lands just noted, be founded upon control other than State ownership. Such authority arises out of what is commonly known as the "police power," a power that has been reserved almost exclusively to the States. This power only in exceptional cases has been delegated to the Federal Government. The recent prohibition amendment affords one of the outstanding exceptions. The police power reserved to the States is so all-embracing in its operation, and its scope is expanding so steadily

with changing conditions, that some of the courts have refused to define it in detail, preferring to let each case where it is invoked be decided upon its own special circumstances. The Supreme Court of the United States has said:

> "* * * in a general way the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant public opinion to be greatly and immediately necessary to the public welfare."

While usually directed to matters affecting the public health, convenience, morals, safety and welfare, "in its broadest sense as sometimes defined, it includes all legislation and almost every function of civil government." (115 U. S. 516, 520.) It is founded upon the "law of necessity."

The most extensive exercise of the police power of the States with respect to mineral resources situated within their borders is legislation regulating the manner of working and operating mines in the interest of employees *(Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 540). The regulations pertain to the safety and health of underground miners and other mine and mill employees. These regulations govern almost every detail of mining, especially underground operations, and include safety requirements affecting hoisting, blasting, use of explosives and electricity, for the prevention of fire, providing secondary exits, ventilation, etc. Any reasonable regulation designed to promote the welfare of such industrial workers has been upheld. Such laws are usually administered through State Industrial Accident Commissions.

Another form of State legislation affecting mines, and growing out of the extremely broad interpretation of the States' police power, is compulsory insurance, also designed to protect the industrial worker and promote the general welfare of these citizens and the community in which they reside.

The obligations required by State laws impose a serious burden not only upon industry generally, but upon the mining industry in particular, because of the greater risk to life and limb that usually accompanies mining operations. When we also take into consideration the taxing power of the State, which is an inherent attribute of sovereignty, we cannot fail to recognize the fact that the State exercises a power and control over the mining industry so drastic and far-reaching that any unreasonable exercise of this power is certain to prove disastrous to all those mining operations in which the margin of profit is uncertain, and to create a serious embarrassment even for mines enjoying a more profitable status. State legislation of this

character, namely, industrial accident regulation, compulsory insurance, and mine taxation, reaches the entire mining industry within the borders of the State.

Comparatively little State legislation, however, designed to directly control the output and sale of minerals already reduced to possession, has been upheld as valid by the Supreme Court of the United States. This Court has, almost invariably, declared attempts by the States to regulate such matters to be an invalid exercise of legislative authority because of the restrictions of the Federal Constitution, particularly the clause prohibiting the taking of private property without due process of law. States have attempted ineffectually to regulate the selling price of coal and, more recently, to fix the price of gasoline *(Williams* v. *Standard Oil Co.,* U. S. Supreme Court Opinions, 73 L. Ed. 141, January 2, 1929). In the latter case the Court held that the "State legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'" Public interest was defined to mean something more than large and widespread dealings in the commodity, but it must, in addition, be *devoted* to a public use. It is of interest to note that Justice Holmes dissented in this case. We must not confuse such cases, however, with certain decisions upholding the power to fix prices of vital commodities such as coal and gasoline during the stress of war. Illustrating the border line of the exercise of the police power, we have a recent decision by the Supreme Court of the United States upholding a municipal ordinance compelling oil companies to bury all tanks for the storage of petroleum products within city limits. *(Standard Oil Co.* v. *Marysville,* U. S. Supreme Court Opinions, 73 L. Ed. 445, May 20, 1929). On the other hand, State statutes have been held unconstitutional that tend to prevent or curtail the transportation of natural gas out of the State *(Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255), or that give preference to the use of natural gas found within the borders of the State. (*Pennsylvania* v. *West Virginia,* 262 U. S. 553.) Both these decisions were based upon the principle that the States have no power to interfere with or prohibit interstate commerce.

There are, however, certain mineral products possessing peculiar characteristics that have justified the courts in upholding certain State legislation designed to control directly the mining of such products. The outstanding examples are oil and natural gas, which have been held to constitute a special class because of the vagrant, fluctuating, uncertain, migratory, fugitive, and transitory nature of these substances occurring, as they usually do, in underground deposits, reservoirs or pools having a more or less indefinite situs beneath the surface of land, the surface of

which may be divided into many different ownerships. A special law has been evolved to control the relationships and rights that usually exist as between the owners of the surface overlying such deposits. The common law conception that the surface owner owned everything vertically beneath his surface even to the center of the earth, and that he could do as he saw fit with anything that he might find or develop within its boundaries has given way before these new and unusual conditions. It became evident that one owner by drilling into the common pool and allowing the gas or oil to run to waste, might inflict great damage and hardship on other surface owners overlying the pool that might later desire to make a conservative and beneficial use of these community minerals. The application of the old common law rule also shocked the public conscience, and was distinctly inimical to the public interest, as soon as the public became dependent upon a normal and continuous supply of oil and gas for light, heating, and power. Not only was there a community of private interest to protect but the public interest intervened as well. These conditions have led to the passage by many of the States of legislation designed to safeguard and conserve their resources of oil and gas against unreasonable waste. It is quite evident that such legislation could only be upheld as a valid exercise of the police power. Legislation of this character received the approval of the Supreme Court of the United States in the comparatively early case of *Ohio Oil Company* v. *Indiana,* 177 U. S. 190 (April 9, 1900). A statute of Indiana made it unlawful to allow either gas or oil to escape into the open air without being confined within safe receptacles and enforced the plugging of all open or abandoned wells. It was urged by the oil companies that this was the taking of private property without adequate compensation. The Court held that all of the surface proprietors have a co-equal right to take oil and gas from a common subteranean source of supply, and that the legislative power "can be manifested for the purpose of protecting all of the collective owners, by securing a just distribution, * * *". The statute was upheld as a valid exercise of legislative power to prevent the waste of the common property of the surface owners. The reasoning of the Court is based largely upon the correlative and community rights of the overlying surface owners.

The much more recent case of *Walls* v. *Midland Carbon Co.,* 254 U. S. 300 (decided December 13, 1920), held that a statute of Wyoming prohibiting the wasteful burning of natural gas for the manufacture of carbon where the gas wells are within ten miles of any incorporated city, was a legitimate exercise of the police power. The court said that absolute dominion of the surface did not give unlimited dominion beneath of such minerals as oil and gas. The Court held that it was "for the State to determine, not only if any conserva-

tion be necessary, but the degree of it", and it was not required to "stand idly by while these resources were disproportionately used, or used in such a way that tended to their depletion, having no power of interference". (P. 324.)

Another case of similar import is *Lindsley* v. *Natural Gas Co.*, 220 U. S. 61 (March 13, 1911). Here was involved a subterranean supply of mineral water valuable for the natural carbonic acid gas it contained. One of the overlying owners started pumping extensively and extracting carbonic acid gas without making any use of the water. A New York statute made such an excessive and wasteful use of mineral water unlawful. The Court held that the State had the power reasonably to conserve the interests of all who had the right to tap the underlying common supply. The foregoing cases have encouraged the passage of additional State legislation affecting such mineral deposits, and have furnished the precedent for many similar decisions since rendered by State and Federal courts.

The existence of oil and gas in extensive underground reservoirs or pools with many diversified overlying surface ownerships has brought about not only the reckless waste resulting from lack of proper control of the wells when drilled—a waste that, as we have seen, may be prevented or minimized by appropriate State legislation —but it has also resulted in serious overproduction. The fact that producing wells deplete the total content of the pool impels adjoining owners, even against their normal desire, to drill offset wells in order that they too may secure the advantage of their surface ownership before the common pool becomes too far depleted. Such drilling frequently resolves itself into a "race of diligence" as between producers that seek to tap the common source first and secure the greatest output. This uneconomic condition is still further aggravated where the surface ownerships have become numerous through intensive subdivision. In recent years, pools of oil and gas of immense value have been found underlying surface ground that had already been subdivided into comparatively small town lots belonging to numerous private owners. Naturally, each lot owner would seek to profit by this sudden vision of wealth, and wells were drilled without regard to proper spacing on individual lots at large expense and at great economic loss. State legislation regulating the drilling of wells under such circumstances has been upheld as constitutional by lower Federal Court. *(Marrs* v. *City of Oxford,* 24 Fed. (2nd), 541 S. C. on appeal, 32 Fed. (2nd) 134; *Oxford Oil Co.* v. *Atlantic Oil Co.*, 16 Fed. (2d) 639, S. C. on appeal, 22 Fed. (2nd) 597.

The grave necessity of regulating and controlling such conditions and of preventing overproduction or waste has resulted in the appointment of a Federal Oil Committee of Nine, consisting of three representatives of the Federal Government, three representatives of the American Petroleum Industry, and three members of the Section on Mineral Law of the American Bar Association. After giving the matter exhaustive consideration this committee has rendered a report replete with suggestions that are vital to the welfare of the petroleum and natural gas industries. It starts with the wisely expressed premise that "true conservation does not mean the withholding from present use of the nation's natural resources. It does mean that those resources should be drawn upon without waste, and in orderly response to the economic needs of the country." It recognizes petroleum and natural gas as irreplaceable and indispensable natural resources justifying, from the viewpoint of the public interest, the employment of every legitimate and constructive measure that will conserve the supply. It recognizes the intensely competitive drilling of oil pools as the primary reason for overproduction. It points out the fact that the resulting dissipation and inefficient use of the gas energy originally existing in the pool means that the chief agency in producing oil has also been lost. Because of this loss of gas pressure, and decrease in mobility of the oil itself resulting from the absence of gas, only a portion of the total oil content of the pool can be recovered as compared with what might be recovered if gas and oil were extracted in the proper ratio. The extensive storage of oil above ground necessitated by this overproduction means increased and otherwise avoidable capital expenditure in the providing of tanks and reservoirs and also loss due to evaporation consequent upon storage above ground. The natural and logical method of meeting the difficulty is to develop and operate each pool as a unit. Since this is ordinarily impracticable, the alternative plan of development under a common agreement entered into by those interested in each pool or field is advised. The report is accompanied by complete drafts of proposed Federal and State legislation intended to remedy the evil. The Federal legislation is designed to insure the cooperation of the United States and to remove the anti-trust ban, which now exists on voluntary agreements between oil operators. The State legislation is intended to encourage community owners of oil and gas fields to enter into agreements providing for economic and concerted operation and regulation of output and to compel cooperative action in the absence of voluntary agreement.

In the opinion of the committee, voluntary action cannot be expected to meet the difficulty because of the natural disinclination to sacrifice personal interests. It is suggested that "the State under the police power may adjust and regulate these conflicting rights in a community property". The solving of the problem is to be found in "compulsory co-operative development and operation of oil pools". The opinion is expressed that this exercise of the police power will be upheld as valid because the fact of community interest of the private owners of the surface overlying the common property justifies reasonable regulation and the public also has an interest in the conservation of irreplaceable and indispensable natural resources. "If the police regulation is reasonable, it will survive the impairment of contract provision as well as that of due process", and suspension of drilling obligations under existing leases even can be upheld. (Note —On the point that the police power of the States is broad enough when properly exercised to justify the courts in abrogating contracts and destroying property rights to this extent without compensation, see *Sutter-Butte Canal Co.* v. *Railroad Commission of Cal.*, 49 U. S. Supreme Court Reporter 325.) This committee has rendered a monumental service to the industry and to the public by pointing the way to the only possible settlement of the question (Note—The three members of this committee, who are also members of a sub-committee of the Section on Mineral Law of the American Bar Association, recommend to that association that all "irreplaceable" minerals, as well as oil and gas, be made the subject of similar legislation).

California has taken the lead in carrying out this policy and has adopted legislation of the character recommended (Cal. Stats. 1929, Chap. 535). This Act declares unlawful the unreasonable waste of natural gas, and if it appear that gas is being produced from any well in quantities exceeding a reasonable proportion with respect to the amount of oil being produced from such well, the State Oil and Gas Supervisor is empowered to take action to compel a reasonably proportioned production, and, if necessary, to apply to the courts for an injunction to compel observance of his order. The Act authorizes this State official to approve agreements between interested parties in any oil or gas field having for their purpose co-operative development on a unit basis, and it also provides for the re-pressuring of a field through the return of natural gas into the sub-surface. The legislation was made effective by the Director of Natural Resources on September 1, 1929. This was followed by an action brought in the name of the State for an injunction to control the unreasonable waste of natural gas in the Santa Fe Springs oil-field, where nearly

half a billion cubic feet of gas is reported to go to waste every day. This action is to be followed by others affecting other fields. The total amount of natural gas wasted in one year in California alone is said to be over two hundred billion cubic feet, equivalent in heat units to over 25,000,000 barrels of fuel oil or over 10,000,000 tons of coal. Assuredly such an enormous wastage of an irreplaceable resource so vital to the welfare of the community justifies control and regulation by the State. Agreements contemplated by the Act have been tentatively entered into between some of the larger operating companies. The success of such agreements will depend upon the co-operation of independent companies and those possessing smaller interests, who naturally are disinclined to make material sacrifices which they assert will benefit the larger companies. The outcome is of profound importance and is being awaited with intense interest by the entire petroleum industry of the United States. The basic features of the Act, namely, the power of the State to prevent unreasonable wastage of natural gas, is conceded to be a lawful exertion of authority. The repeated decisions of the Supreme Court of the United States on this very question have placed this matter definitely at rest.

This California statute is a long step in the direction of bringing about unit control or, at least, cooperative action in developing gas and oil fields. It differs from previous legislation on the subject in that it goes far beyond the direct prevention of waste of gas and oil and the customary regulations providing for approved drilling of a field such as proper spacing of wells and the shutting off of water, etc. It looks to the future and imposes a duty on the owners of oil and gas wells to produce only a reasonable proportion of gas to the amount of oil issuing from the same well or wells, even though the excess production of gas is utilized and not wasted in the ordinary sense. The State Oil and Gas Supervisor is given the authority to determine, in the first instance, what is an unreasonable production or waste. An appeal from his order lies to a Board of Commissioners; and if such orders are not complied with, the Director of the Department of Natural Resources has the power to institute proceedings in court to enjoin such production as is taking place in violation of his orders. A serious question arising in connection with this particular Act is whether this plenary authority delegated to the State Oil and Gas Commissioners and Supervisor will be upheld. The fact that the aggrieved party has his day in court would seem to relieve the Act of the objection that there has been a delegation of judicial power to administrative officers. While the feature of this legislation designed to compel the interested parties to enter into cooperative

agreements may be criticised as requiring affirmative action of an intricate nature, the alternative of a complete shutdown to prevent gas wastage would seem to furnish the answer. However, anyone who ventures to prophesy what the courts will say, so often loses any claim to be a prophet, that dogmatic prediction is dangerous. This type of legislation seems to afford the only possible basis for the solving of this vital problem, which has been testing the ingenuity of our best minds, and is in line with the highest type of conservation that looks to the future.

The late Judge Curtis H. Lindley, in commenting on our mining law in general, has said in his masterly treatise:

> "This system is by no means symmetrical or perfect. It is one of the most difficult branches of the law to even logically arrange for the purpose of treatment, and the embarrassments surrounding its philosophical exposition are almost insurmountable. It has received attention in a fragmentary way at the hands of eminent writers, who are most logical and instructive when discoursing upon its imperfections and apparent absurdities." Lindley on Mines (3rd Ed. sec. 81).

Reference has been made elsewhere to American mining law as a "crazy patchwork." We started with the common law idea of vertical boundaries in the Eastern and Mid-Western States. In 1807 Congress passed a Leasing Act for lead mines that was repealed in 1850. Other than this, we had no Federal mining law of any consequence in force in these States. Then came the Mining Acts of 1866, 1870, and 1872, which confirmed and crystallized the customs and usages that, in the absence of any other law, had been put in force by the miners themselves in the mining districts of the West. With these came the dip right, or, as we now term it, the extralateral right, which is the only feature of that period of American mining law which operates to segregate minerals from the overlying surface, if we except severance accomplished through private agreement. Within the present century Congress has passed a series of Acts providing for the severance of the surface from underlying mineral deposits. The disposal of minerals such as coal, oil, gas, asphaltic, phosphate, nitrate, potash and sodium is provided for under leasing laws, whereas, in certain instances, the surface may be patented as agricultural land. Unquestionably this principle of severance of minerals from the surface is the ideal system of law. It is characteristic of most of the mining and land laws of other advanced nations, and permits of the greatest utilization of land and mineral resources. It is unfortunate that the United States should not earlier have recognized its ultimate importance. In line with this policy of severance is Presi-

dent Hoover's recent proposal that "the surface rights of the remaining unappropriated, unreserved public lands should, subject to certain details for protection of homesteaders and the small stockmen, be transferred to the State governments for public school purposes, and thus be placed under State administration". This policy, if carried out, would inaugurate, as far as this remnant of the Federal public domain is concerned, the severance feature and the carving out of the mineral deposits from the overlying surface. Unless surrounded, however, with carefully drawn reservations, such a policy is likely to work a great hardship on the miner, especially the prospector. It is even dubious whether reservations designed to safeguard the miner would protect him when it came to the practical operation of such legislation. Experience has demonstrated that it is impossible, except in a broad and general way, to classify public lands and segregate mineral from non-mineral lands. Recent discoveries of immensely valuable metallic and non-metallic mineral deposits underlying the surface of desert areas, with little or no surface indications, is proof of the fact that our present technical knowledge is insufficient to adequately meet the situation. The future hope of the mining industry, so far as the discovery of new mines is concerned, rests largely in this remnant of the public domain. If control of the surface of these lands is transferred to the respective States, will there not be a strong tendency on their part, which would not be true of the Federal government under existing conditions, to resent any invasion of these surface rights? Will not this dual control result in a rivalry greatly to the disadvantage of the mining industry? To have surface and subterranean rights administered by distinct sovereignties does not seem wise. We have already had an example of this in a small way as a result of the passage of the Stock Raising Homestead Act (39 U. S. Statutes at Large, 862, December 29, 1916).

While this Act was designed by Congress to reserve to the legitimate miner and prospector the right to any minerals found within such homesteads, and to protect him completely, nevertheless, the practical operation of the Act has been quite the reverse and it has operated to discourage the miner from prospecting or attempting to develop minerals found within such private surface holdings. Not only has the miner in many instances had to defend and maintain already vested rights by annoying and expensive litigation, but the very fact that there is a hostile and unfriendly human element involved deters most prospectors from making the attempt to explore and find mineral within such areas. The loss to the mineral industry arising from conditions such as these, while unknown and not subject to definite

calculation, is unquestionably serious. Before what remains of the prospector's proper field of operations, even though it be only the surface, is passed over to the control of the States, which would not be benefited by or sympathetic with his efforts and which are infinitely more powerful politically and otherwise than were the stockmen, the whole plan should be most carefully considered from the miner's standpoint. President Hoover himself says that his "suggestions are, of course, tentative, pending investigation of the full facts * * *"

There is, however, another phase of this problem of governmental control of mineral resources as to which we are all in hearty agreement with President Hoover. A number of years ago Judge Lindley delivered an inspiring address before the Bar Association in San Francisco on "Conservation of Resources." He pointed out the fact that as a result of recent legislation affecting the mining, irrigation and hydro-electric industries we were "at the parting of the ways * * * on the eve of a new dispensation, a new order of things," with individualism as a possible course on the one hand, and collectivism or advanced socialism on the other. There is no gainsaying the fact that governmental control is inevitable, and the necessity for governmental control of human activities is increasing daily. This is just as true of the field of mineral development as of other industries. However, there is a happy medium between drastic governmental paternalism and complete freedom of individual operation. President Hoover has pointed out to us in his "American Individualism" that this primary force of individual initiative which has brought our social system to the forefront among the nations of the world is just as important to preserve and maintain today as at any time in our national history. Under the able leadership of this extraordinary man there is little likelihood of any serious danger threatening, for the present, at least, this "most precious possession of American civilization".