Mineral Prospecting in Urban Areas: A Study of Surface and Mineral Rights Conflicts Under the Stock-Raising Homestead Act

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To the dismay of many people living in the Western United States, mineral prospecting on their land without their permission may be legal when the owner of the subsurface mineral estate is the federal government. The source of this problem may be traced in many instances to the Stock-Raising Homestead Act of 1916 [SRHA],[1] which permits federally-owned land to be conveyed into private ownership while reserving subsurface mineral rights to the United States. The Act allows prospectors to enter onto stock-raising homestead property in search of valuable mineral deposits even after the property has been conveyed into private ownership.[2] This exploration activity was compatible with the agricultural uses for which the lands were originally sold by the government. With the eventual urbanization of many Western areas, however, these lands were often acquired for or turned into residential and commercial developments. Where this has occurred, severe surface-mineral rights conflicts may develop when mineral exploration is later undertaken.

This Note first will present a brief historical review of the growth of our nation's public land and mineral development policies in order to arrive at some understanding of the existing system of law. Consideration then will be given to the adverse effects the present mineral development scheme has had upon intensive surface uses in some areas of the country. Finally, possible solutions to conflicts between surface and mineral interests will be explored.

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1. 43 U.S.C. §§ 291-301 (1970).
2. *Id.* § 299.

THE DIMENSIONS OF THE SURFACE-MINERAL RIGHTS CONFLICT

During the early part of this century, a conflict between factions desiring unrestricted development of the public domain and those seeking conservation of the nation's resources resulted in a protracted struggle over federal land and mineral development policies.[3] This conflict prompted, in 1909, the federal policy of conveying surface estates in land to permit agricultural and other surface development while at the same time reserving part or all of the mineral rights for future exploitation.[4] Severance of the two estates provided a political compromise between those favoring ready disposition of public lands and those seeking to conserve the nation's resources.[5] This compromise also had the advantage of permitting multiple use of natural resources.[6]

The SRHA was one of the most important pieces of early legislation[7] implementing the multiple use concept. Enacted to encourage agricultural development in the Western states, the Act authorized grants of 640-acre homesteads with reservation of coal and other mineral rights in the federal government.[8] Despite the fact that raising livestock on desert land usually proved commercially infeasible,[9] many people continued to apply for homesteads; the applications averaged from 5,000 to 7,000 annually until 1934.[10] In all, over 70 million acres of surface lands were patented under the SRHA.[11] Because they contain mineral reservations, these 70 million acres present settings for potential conflicts between surface and mineral estates.

Acquisition of Minerals on Homestead Property

In an attempt to limit damage to and interference with the surface estate, the SRHA places some minimal restraints on the prospecting

3. P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 738-40 (1968).

4. 1 ROCKY MOUNTAIN MINERAL L. FOUNDATION, AMERICAN LAW OF MINING § 3.23, at 531-32 (1973) [hereinafter cited as AM. L. MINING].

5. P. GATES & R. SWENSON, *supra* note 3, at 729.

6. Maximum utilization of public resources is achieved by permitting multiple concurrent uses of federal land. *See generally* Davis, *Multiple Uses of Public Lands*, 1 ROCKY MT. M.L. INST. 495 (1955).

7. In addition to the Stock-Raising Homestead Act [SRHA], the other principal surface entry law of this period was the Act of July 17, 1914, ch. 142, 38 Stat. 509 (codified at 30 U.S.C. §§ 121-24 (1970)). Less significant legislation similar in design to these acts also was passed. *E.g.*, Act of Mar. 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81 (1970)); Act of June 22, 1910, ch. 318, 36 Stat. 583 (codified at 30 U.S.C. § 83 (1970)); Act of Aug. 24, 1912, ch. 367, §§ 1-3, 37 Stat. 496 (repealed 1930). This discussion will deal only with the provisions of the SRHA.

8. 43 U.S.C. §§ 291, 299 (1970). *See generally* P. GATES & R. SWENSON, *supra* note 3, at 512-17.

9. *See* P. GATES & R. SWENSON, *supra* note 3, at 519-22.

10. *Id.* at 519. The adoption of the Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (1934), *as amended*, 43 U.S.C. §§ 315 to -315o-1 (1970), effectively replaced the SRHA.

11. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS table 29, at 58 (1972).

and mining of reserved minerals.[12] During the initial exploration period, a prospector is expressly liable for damage to crops on the land.[13] The prospector also is prohibited from damaging the permanent improvements of the surface owner.[14] If minerals are discovered and located, the prospector acquires the additional right to reenter the land and occupy so much of the surface as is reasonably necessary to remove the minerals.[15] Entry for the purpose of continuous mining, however, may not be undertaken until the prospector has either obtained written permission from the surface owner, agreed to pay for the damages done to crops or tangible improvements, or, if unable to reach agreement with the surface owner, posted bond with the Secretary of the Interior to guarantee compensation for such damages.[16] In addition, when strip or open pit mining methods are employed, the mineral developer is also liable for damages which diminish the value of the land for grazing purposes.[17] Whether the surface owner may recover for other damage caused to the land and whether the SRHA precludes recovery for damage to nonagricultural improvements is unclear.[18]

12. 43 U.S.C. § 299 (1970).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *See* Act of June 21, 1949, ch. 232, § 5, 63 Stat. 215 (codified at 30 U.S.C. § 54 (1970)). *See generally* Note, *Surface Damages from Strip Mining Under the Stock Raising Homestead Act*, 50 DENVER L.J. 369 (1973).
18. The courts have been inclined to construe the damages provisions of the federal land acts quite narrowly. There have been only three decisions, however, dealing at length with the problem of liability once the mineral claimant has obtained the right to reenter and remove the reserved minerals. In Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928), the United States Supreme Court stated that recovery for damage to improvements under the Act of July 17, 1914, ch. 142, 38 Stat. 509 (codified at 30 U.S.C. §§ 121-24 (1970)), should be confined to agricultural improvements. The Court's reasoning was founded on the theory that recovery should be limited to the uses contemplated for the surface estate. The *Kieffer* rationale was adopted in Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955), a case involving tracts of land patented under both the Act of July 17, 1914 and the SRHA. In that decision, the Supreme Court of Wyoming determined that the surface owner could not recover for damages to the land itself but only for damages to crops and agricultural improvements. Under this rationale, damages under section 299 of the SRHA would be limited to the purposes contemplated by section 291. Those purposes do not contemplate residential and commercial development.

The narrow construction of the damage provisions found in *Kieffer* was avoided, however, in Bordieu v. Seaboard Oil Corp., 48 Cal. App. 2d 429, 119 P.2d 973 (Ct. App. 1941), another case involving both stock-raising homestead and Act of July 17, 1914, lands. The *Bourdieu* court held that statutory authority allowed surface occupation only to the extent reasonably necessary to facilitate mining operations. *Id.* at 436-37, 119 P.2d at 977. Thus, the court permitted recovery in trespass for the use of facilities and structures on the surface owner's land to handle oil and gas produced on other lands. *Id.* at 433-34, 119 P.2d at 977-78. The holding of this case, therefore, provides some assurance to surface owners that where exploration and mining is not confined to activity reasonably incident to the mineral rights being developed, on the land in question damages may be recovered for injurious activities which are not at least implicitly privileged by the SRHA. For more extensive discussion of *Kieffer*, *Holbrook*, and *Bourdieu*, see 1 AM. L. MINING, *supra* note 4, § 3.49; Note, *Protection for Surface Owners of Federally Reserved Mineral Lands*, 2 U.C.L.A.—ALAS. L. REV. 171, 175-85 (1973).

To ensure development of reserved minerals, the SRHA permits their acquisition in accordance with the mineral laws in force at the time of their disposition by the government.[19] The mineral laws currently governing the disposal of minerals reserved under the SRHA are Mineral Location Act of 1872 [Location Act][20] and the Mineral Leasing Act of 1920 [Leasing Act].[21]

The Location Act, which governs the development of metalliferous minerals, evolved prior to the SRHA during a time when little concern was shown for conserving this country's mineral wealth.[22] Consequently, the Location Act embodies a laissez-faire philosophy sanctioning virtually unrestricted and unsupervised mineral development. The Location Act provides that valuable mineral deposits belonging to the United States shall be "free and open" to exploration and development.[23] The governmental regulation authorized under the Act, which is partly delegated to state control,[24] is limited primarily to functions such as establishing location procedures,[25] validating patent applications,[26] and adjudicating questionable claims.[27] Because the Location Act was passed prior to the development of the concept of multiple use, it contains no provisions permitting regulation of mining activities which may be detrimental to surface users.[28] Thus, the only real

19. 43 U.S.C. § 299 (1970).
20. 30 U.S.C. §§ 21-54 (1970).
21. *Id.* §§ 181-287.
22. Despite vast acquisitions of mineral-rich public land during the 19th century, there existed no federal legislation to govern the orderly disposition of mineral resources until 1866. Colby, *Mining Law in Recent Years*, 33 CALIF. L. REV. 368, 369-71 (1945). Undoubtedly, the absence of such legislation was not the result of congressional oversight, but rather evidenced a lack of need for a uniform system of laws. During the first half of the 19th century, there was no significant mining on public lands. *Id.* The discovery of gold on the public domain in California in 1848 brought strong pressures to bear on Congress to enact legislation which would regulate disposition of the newly discovered mineral wealth. *Id.* at 370-72.

Beginning in 1866, a series of laws was passed to regulate the acquisition and purchase of federal mineral lands. *Id.* at 371-74. These acts were finally amended and republished as a single statute known as the Mineral Location Act of 1872, ch. 152, 17 Stat. 91 (1872), *as amended*, 30 U.S.C. §§ 21-54 (1970). *See also* Colby, *supra*, at 374. This Act, which deals with location and patent of both lode and placer claims, remains today, with some modification, the basic law governing private acquisition of federal lands containing metalliferous minerals.

Reflecting the political philosophy of the era, the Location Act and other contemporaneous laws were designed to encourage the rapid development of the West. *Id.* at 380. The mineral resources affected by this legislation were open to free exploration and acquisition, 30 U.S.C. § 22 (1970), and the lands containing these minerals were offered for sale on liberal terms. *Id.* §§ 29, 37. The country's natural resources were regarded as inexhaustible, P. GATES & R. SWENSON, *supra* note 3, at 725, and as a result, were often developed in a careless manner. 1 AM. L. MINING, *supra* note 4, § 1.24, at 71.

23. 30 U.S.C. § 22 (1970).
24. *See id.* §§ 22, 26, 28.
25. *Id.* § 28.
26. *Id.* §§ 29, 35-37.
27. *Id.* §§ 30-32.
28. *See* HERMAN D. RUTH & ASSOCIATES, PUBLIC LAND LAW REVIEW COMMISSION STUDY REPORT NO. 10: REGIONAL AND LOCAL LAND USE PLANNING IV-105 (1970).

restraints placed on exploration activities for reserved, locatable minerals on stock-raising homestead land are those enumerated in the SRHA. As a result, serious conflicts may develop when prospectors seek minerals governed by the Location Act on homestead property developed or being developed for residential or commercial uses.

The Leasing Act, which applies only to designated nonmetalliferous minerals, was enacted subsequent to the SRHA during a time when the nation's leadership was particularly concerned with preserving federally-owned resources.[29] Reflecting this concern, the Act permits considerable regulation of mining and drilling activities. The Leasing Act gives the Secretary of the Interior control over access to and development of land containing leasable minerals.[30] An application for a lease may be denied altogether if the Secretary determines that mineral development would be detrimental to the public interest.[31] Additionally, mineral lands located within incorporated cities and towns may not be leased.[32] Approved prospecting permits and leases may contain specific provisions for the protection of the surface, natural resources, and improvements.[33] Thus, while the Location Act permits

29. The waste of natural resources which accompanied the era of rapid development prior to the turn of the century, *see* discussion note 22 *supra*, soon caught the attention of the nation. At the turn of the century, under the leadership of Theodore Roosevelt's administration, a conservationist movement gained national support. P. GATES & R. SWENSON, *supra* note 3, at 725. Motivated by sentiment that legislation permitting unrestricted exploitation of natural resources had outlived its usefulness, 1 AM. L. MINING, *supra* note 4, § 1.26, at 75 n.5, the Roosevelt administration initiated broad ranging reforms. The advocates of reform proposed adoption of a lease system for mineral fuels. P. GATES & R. SWENSON, *supra* note 3, at 728. The proposed system met with strong opposition from Western mining and oil interests which were reluctant to abandon the laissez-faire development policy of the Location Act. *Id.* at 738-40. The resistance to change offered by the development-oriented interests was met by an equally uncompromising attitude on the part of reformers. *Id.* Consequently, Congress became embroiled in a protracted controversy regarding mineral development policy. *Id.* Finally, in 1920, the Leasing Act was passed, establishing a lease system for designated nonmetalliferous minerals. *Id.* at 740-45.

30. *See* 30 U.S.C. §§ 181-287 (1970). *See also* HERMAN D. RUTH & ASSOCIATES, *supra* note 28, at IV-105.

31. Pease v. Udall, 332 F.2d 62, 63-64 (9th Cir. 1964). *See also* Udall v. Tallman, 380 U.S. 1 (1965); United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414 (1931); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). In determining what is in the public interest, however, it appears that the Secretary may have to rely upon some congressional or executive expression of that interest rather than his own discretion. *See* Udall v. Tallman, *supra*; Pease v. Udall, *supra*. *But see* Duesing v. Udall, *supra*.

32. 30 U.S.C. § 181 (1970). This provision suggests a congressional intent to resolve surface-mineral conflicts with respect to leasable minerals in favor of the surface interests when exploitation of the mineral interest would impair urban development. It thus may be argued that the Secretary acts in the public interest in denying leases of federally-owned mineral lands which are not situated within an incorporated city but which would impair intensive surface development if exploited. *See also* text & note 33 *infra*.

33. 30 U.S.C. §§ 183, 188 (1970). By the terms of the agreements made under the Leasing Act, the permittee or lessee may be required to take steps to prevent soil erosion, pollution of the environment, damage to surface improvements, and the destruction of historic sites. In addition, the mineral developer agrees to fill excavations, remove or cover debris, and otherwise restore the surface land to its former condition. *See* TWITTY, SIEVWRIGHT & MILLS, PUBLIC LAND LAW REVIEW COMMISSION STUDY REPORT

little control, surface damage resulting from mineral exploration and development may be regulated and thereby minimized under the Leasing Act.

Available controls under the Leasing Act suggest that this type of development scheme could serve as a model for legislation regulating metalliferous mineral development. The viability of this alternative as a solution to surface-mineral conflicts will be considered subsequently. In view of the control of mineral exploration and development available under the Leasing Act, the following discussion of surface-mineral conflicts will be limited to problems arising from exploration and development under the Location Act.

The objective of exploration activities for locatable minerals is to make a mineral discovery, since discovery of a valuable mineral deposit is essential to obtaining exclusive possession of minerals owned by the United States.[34] During this initial exploration period, a prospector diligently searching for minerals has a possessory right to occupy surface property under the judicially-developed doctrine of pedis possessio.[35] Although this right precludes clandestine or forcible intrusions by others upon a prospector's claim,[36] it is not a vested right in any way diminishing the title held by the United States.[37] After discovery, a prospector obtains possessory title to the claim which becomes a vested property right enforceable against the United States so long as he continues to fulfill certain obligations under the Location Act.[38] Should the locator desire, he may eventually obtain a patent to the reserved

No. 30: NONFUEL MINERAL RESOURCES OF THE PUBLIC LANDS app. 6, at VI-4 (Prospecting Application and Permit, § 12); *Id.* at VI-10 (Potassium Lease, § 5); *Id.* at VI-14 (Sodium Lease, § 5) (1970). While the Leasing Act does not expressly provide recovery of damages for injuries to surface interests, there is apparently no legislative or constitutional bar to a lease provision requiring payment for damages incurred by the surface owner during mineral development. *Cf.* Forbes v. United States, 125 F.2d 404 (9th Cir. 1942) (decision upholding as consistent with the Leasing Act a regulation permitting the government to recover cost incurred in plugging a well drilled on permitted lands when lessee fails to plug well properly).

34. 30 U.S.C. §§ 22, 26, 29 (1970). United States v. Coleman, 390 U.S. 599 (1968); Cole v. Ralph, 252 U.S. 286 (1920); United States v. Frazier, 491 F.2d 243 (6th Cir.), *cert. denied*, 417 U.S. 971 (1974). *See also* 30 U.S.C. § 23 (1970); 1 AM. L. MINING, *supra* note 4, at § 2.4; Note, *Marketability and the Mining Law: The Effect of United States v. Coleman*, 10 ARIZ. L. REV. 391 (1968).

35. Davis v. Nelson, 329 F.2d 840, 845-46 (9th Cir. 1964). *See* Cole v. Ralph, 252 U.S. 286, 294 (1920). Pedis possessio, a prediscovery right of entry and possession, may be conveyed to third persons. Consolidated Mut. Oil Co. v. United States, 245 F. 521, 525 (9th Cir. 1917); Rooney v. Barnette, 200 F. 700, 710 (9th Cir. 1912).

36. Cole v. Ralph, 252 U.S. 286, 294-95 (1920); Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964).

37. Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964); Crossman v. Pendery, 8 F. 693, 694 (D. Colo. 1881).

38. 30 U.S.C. §§ 26, 28, 28b-e (1970); Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964); United States v. Deasy, 24 F.2d 108, 111 (N.D. Idaho 1928). During this period, paramount title remains in the United States, Belk v. Meagher, 104 U.S. 279, 284 (1881), with little consequence, however, to the rights of the claimant. Union Oil Co. v. Smith, 249 U.S. 337, 348-49 (1919).

minerals.[39] When the patent is issued, the locator is freed from all obligations under the Location Act,[40] although the obligations imposed by the SRHA remain.[41] Thereafter, the surface interest held by the miner is analogous to a profit à prendre.[42]

Consequences of Uncontrolled Exploration in Urban Areas

The location system may be an acceptable development scheme on stock-raising homestead property if the surface is used for agricultural purposes. Where formerly rural stock-raising homestead lands are acquired for intensive urban uses, however, plans of surface owners are likely to conflict sharply with prospectors' desires to enter and explore for minerals. Under the SRHA the interests of the prospectors prevail.[43]

This type of conflict occurred on stock-raising homestead property surrounding Tucson, Arizona.[44] As Tucson expanded into what were formerly rural areas, stock-raising homestead property was sold for residential purposes.[45] Subsequent purchasers often took title in ignorance or disregard of the mineral reservations indicated in the deeds.[46] In the early 1960's, prospectors entered these residential areas and began to explore for locatable minerals as authorized under the SRHA.

Initial activities of the Tucson prospectors involved only exploratory procedures designed to discover valuable mineral deposits. The nature of these operations, as viewed from the perspective of surface owners, was described as follows:

> Lands were invaded. Staking crews proceeded with the destruction of valuable trees and flora in cutting "brush" lines to facilitate running of surveys—this without notice to or permission from the landowner. Backhoe tractors followed to excavate location pits. Next, roads were "dozed" with further destruction of trees and flora

39. The patent would be issued in accordance with procedures specified in the Location Act. 30 U.S.C. § 29 (1970). The SRHA technically modified the Location Act in that the latter law originally contemplated the sale of mineral land rather than the sale of mineral rights. *Compare* 30 U.S.C. § 29 (1970), *with* 43 U.S.C. § 299 (1970), *[and]* 43 C.F.R. § 3814.2(b) (1973) (regulation pertaining to application for disposal of reserved minerals under the SRHA).

40. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892). *See* 1 C. LINDLEY, LINDLEY ON MINES § 22 (3d ed. 1914).

41. *See* 43 U.S.C. § 299 (1970). *See also* text accompanying notes 12-18 *supra.*

42. A profit à prendre is a right to make some use of the soil of another, including the right to use as much of the surface as is necessary and convenient for the exercise of a right. Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113, 120-21 (Ct. App. 1967). *See also* BLACK'S LAW DICTIONARY 1376-77 (4th ed. 1951).

43. *See* 43 U.S.C. § 299 (1970).

44. *See generally Hearings on the Disposition of Reserved Minerals Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs,* 87th Cong., 2d Sess. (1962) [hereinafter cited as *Hearings on Reserved Minerals*].

45. *Id.* at 63.

46. *Id.* at 119.

> . . . . Only the facilities of the locators were considered. Only after entry had been made, trees cut, damage done, and after we had contacted the locator, were we notified of their intent.[47]

These procedures undoubtedly caused extreme noise and disturbance in areas surrounding the exploration sites.[48] Although the damage inevitably had a significant impact on both the individual property owners and the Tucson community in general, the exploration activity was fully permissible under the provisions of the SRHA.[49] The prospectors' casual attitude toward surface damage was perhaps encouraged by language in the Act permitting surface owners only limited recovery during the prospecting period.[50]

While most of the activity undertaken by prospectors was in good faith, a few took unfair advantage of the law.[51] A common practice of these individuals was first to enter upon homestead property to locate a mining claim. Once the claim was secured, the locator would offer to sell it to the surface owner. If the owner failed to accept the high sales price, he would be threatened with destruction of his surface property, as the locator allegedly developed the claim in accordance with the law. The damages provision of the SRHA provided little protection to the homeowner.[52]

Potential interference with the surface uses eventually hindered the development of Tucson's residential community. Lending institutions refused to finance home mortgages if the land to be encumbered had mineral rights reserved to the federal government.[53] Title companies refused to insure homestead land in many cases.[54]

Under normal circumstances, the nuisance aspects of these activities, as well as the health and safety hazards they caused, would have been prime targets for local government zoning and performance standard regulations.[55] In this instance, however, it was believed that local governments were barred from action by a state statute prohibiting zoning which restricted or otherwise regulated mining activities.[56] In ad-

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47. *Id.* at 112.
48. *Cf.* NEWSWEEK, Oct. 15, 1973, at 96.
49. 43 U.S.C. § 299 (1970).
50. *Id. See* text & notes 12-18 *supra.*
51. *See Hearings on Reserved Minerals, supra* note 44, at 101-03, 119.
52. 43 U.S.C. § 299 (1970). *See* text & notes 12-18 *supra.*
53. *Hearings on Reserved Minerals, supra* note 44, at 72.
54. *Id.* at 126-28.
55. See text & note 80 *infra.*
56. *See Hearings on Reserved Minerals, supra* note 44, at 43-45. The belief, however, may have been erroneous. The present and substantially unchanged version of the relevant statute, ARIZ. REV. STAT. ANN. § 11-830 (Supp. 1974-75), states: "A. Nothing contained in any zoning ordinance authorized by *this chapter* shall:

. . .

2. Prevent, restrict or otherwise regulate the use or occupation of land or improvements for . . . mining . . . purposes, if the tract concerned is five or more contiguous

dition, attempts at city or state regulation might have been preempted by controlling federal law.[57] Inasmuch as the basic problems were fostered by federal rights, relief was eventually sought from the federal government.

In response to this problem, Congress, in 1962, withdrew from future exploration and purchase a sizable portion of federally-owned mineral rights held beneath Tucson's stock-raising homestead property.[58] This special legislation was in large part modeled after suggestions presented by the mining industry.[59] Mining and exploration companies favored special legislation over enactment of a general law which would have given the Secretary of the Interior broad administrative authority to deal with similar situations as they developed elsewhere.[60]

Limited congressional withdrawals of mineral rights provide no satisfactory long-range solution, as is evidenced by the fact that similar surface-mineral rights conflicts have developed again in Tucson on surface land not affected by the 1962 withdrawal.[61] Indeed, the potential for the continued recurrence of this problem is substantial. In Arizona alone there are approximately 3 million acres of land that have been patented under the SRHA.[62] There is also increasing concern that substantial surface-mineral rights conflicts will continue to occur in other states, notably California, Nevada, and Colorado.[63] If projected increases in the national population are accurate, there will be greater demand upon surface lands for living space.[64] The inevitable consequence is that more stock-raising homestead property will be converted from rural to urban use. In conflict with this trend is the increasing

commercial acres." (Emphasis added.) This chapter, chapter 6, of the *Arizona Revised Statutes Annotated*, deals exclusively with *county* zoning and planning. Arguably, the City of Tucson therefore could have regulated mining activities under the municipal enabling statute, which contains no restrictions with respect to mining activities. *See id.* §§ 9-461.05(C)(1), -461.08(B)(2), -462.01(A)(1) & (2). It also should be noted that the restriction on the county's zoning power applies only when the tract in question is larger than 5 commercial acres. *Id.* § 11-830(A)(2). If the acreage restriction is construed to apply to the surface land involved in mining activity, then even the county would be empowered to impose restrictions on mining for the benefit of many homeowners.

57. See text & notes 66-70 *infra*.

58. Tucson Withdrawal Act of Oct. 5, 1962, Pub. L. No. 87-747, 76 Stat. 743 (1962).

59. *Compare id., with Hearings on Reserved Minerals, supra* note 44, at 21-36.

60. *Hearings on Reserved Minerals, supra* note 44, at 13, 24-25.

61. *See* NEWSWEEK, Oct. 15, 1973, at 96.

62. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS table 29, at 58 (1972).

63. *Hearings on Reserved Minerals, supra* note 44, at 149-50. *See generally* Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 DENVER L.J. 1 (1974).

64. *Hearings on the Establishment of a Nat'l Mining and Minerals Policy Before the Subcomm. on Minerals, Materials and Fuels of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 7 (1969).

pressure to develop new sources of minerals as national and world requirements grow.[65] The laissez-faire philosophy of present legislation dealing with locatable minerals under patented surface lands affords federal administrators virtually no power to regulate development of either surface or subsurface resources.

REMEDIES FOR SURFACE-MINERAL RIGHTS CONFLICTS

Two approaches may be employed to achieve more satisfactory protection for surface interests. On the federal level, legislation providing additional compensation for surface owners or allowing regulation or elimination of potential conflicts could be enacted. Congress recently has considered, but failed to enact, legislation which would have given additional protection to certain classes of surface owners. As will later be suggested, however, the legislation would have been inadequate in many respects. Thus, it is necessary to consider other sources of governmental power which may be employed to resolve surface-mineral rights conflicts. Second, there exists an intriguing question whether and to what extent state and local governments may exercise their police power to resolve conflicts which develop under the federal mineral location system.

State Resolution of Conflicts

1. *Limits on State Authority Before Patent.* In all probability, the Location Act substantially curtails state authority to regulate mining activity during the period before the mineral prospector obtains a patent to the mineral rights. Zoning or other regulations altogether precluding mineral exploration normally would provide an excellent means of preventing surface damage in urban areas.[66] Where zoning ordinances apply to federal mineral reservations, however, their validity would be judged in light of federal interests expressed in the Location Act. The basic objectives of this Act are to encourage the discovery and development of mineral resources in the United States.[67] If these objectives are to be realized, the right of exploration necessarily includes access to federal mineral deposits.[68] In addition, the law

65. U.S. DEP'T OF THE INTERIOR, UNITED STATES MINERAL RESOURCES 1-8 (1973).

66. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931); Village of Spillertown v. Prewitt, 21 Ill. 2d 228, 171 N.E.2d 582 (1961); Davidson County v. Rogers, 184 Tenn. 327, 198 S.W.2d 812 (1947). *See generally* Carpenter, *supra* note 63, at 16-20; Comment, *Constitutional Law—Governmental Regulation of Surface Mining Activities*, 46 N.C.L. REV. 103, 109-22 (1967).

67. 30 U.S.C. § 21a (1970). *See* McKinley v. Wheeler, 130 U.S. 630, 632-33 (1889).

68. *See generally* Rights of Mining Claimants to Access over Public Lands to Their Claims, 66 Interior Dec. 361 (Solicitor Gen. Op. 1959).

requires the locator to perform $100 of assessment work annually to preserve his claim.[69] Thus, any zoning regulation which precluded exploration or assessment work would be in direct conflict with federal law. Under these circumstances, the zoning regulation undoubtedly would be precluded by federal law.[70]

Although apparently without authority to preclude exploration and assessment work prior to patent, states may have authority to minimize the adverse impacts of these activities. While as a matter of constitutional allocation of authority the states are without power in their own right to regulate private acquisition of federal property,[71] the states do have considerable authority, in the absence of preemptive federal legislation, to regulate activity on federal lands over which the federal government does not have exclusive jurisdiction.[72] Thus, for many purposes, the police power of the states extends over the public domain.[73] In addition, Congress may delegate authority to the states to partially regulate acquisition of federal property interests,[74] as in fact is the case under the Location Act.[75] Both the state police power and the delegated authority under the Location Act deserve consideration as a basis for regulations which could aid surface owners.

A careful examination of the authority delegated under the Loca-

69. 30 U.S.C. § 28 (1970). The purpose of the requirement is to ensure good faith and diligence in development of mineral claims. Chambers v. Harrington, 111 U.S. 350, 353 (1884). *See also* Note, *Annual Assessment Work as Notice to Prospectors*, 6 UTAH L. REV. 391 (1959).

Mining claims which are not maintained as required by law are subject to relocation by other prospectors. 30 U.S.C. § 28 (1970). Physical evidence of the assessment work may serve as notice that the claim is being properly maintained. *See generally* Note, *supra*, at 392-95. Where the annual work requirement is fulfilled by means of geological, geochemical, or geophysical surveys which leave no physical evidence on the location site, notice is provided by filing a detailed report with the county office in which the claim is located. 30 U.S.C. § 28-1 (1970). *See also* ARIZ. REV. STAT. ANN. § 27-208 (Supp. Pamphlet 1973).

70. *See* Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 526-38; Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 215-16, 221-22 (1959). *See also* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

71. Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917).

72. *Id.* The term exclusive jurisdiction is applied to situations wherein the federal government possesses all authority to regulate activity upon the property in question, to the exclusion of all state regulation. UNITED STATES INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES pt. II, at 10 (1957). These lands are exclusively controlled by Congress under the authority of article I, section 8 of the United States Constitution. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). In contrast, the public domain of the United States is controlled under the authority of article IV, section 3 of the United States Constitution. Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917). Congressional authority under this article is not exclusive regarding the regulation of activity on public land, thus permitting the operation of state laws which are consistent with the federal government's power to protect its interests and to control the use of its property. Utah Power & Light Co. v. United States, *supra*.

73. Omaecheverria v. Idaho, 246 U.S. 343 (1917); Bacon v. Walker, 204 U.S. 311 (1907).

74. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01-.16 (1958).

75. *See* 30 U.S.C. §§ 22, 26, 28 (1970).

tion Act suggests that the powers granted to the states are not sufficiently broad to reach many of the mineral exploration and development activities that are detrimental to surface interests. The delegated power is limited in substance to laws governing location procedures.[76] Thus, while the revision of state location laws may modify location procedures in order to offer greater protection to surface interests,[77] this delegated power cannot reasonably be construed to permit regulation of exploration activity that occurs prior to location.

Despite the fact that the state has no delegated authority which would permit significant regulation of mineral exploration, it is arguable that the Location Act does not entirely preclude the exercise of state police power with respect to prepatent mineral activity. The Act is essentially a regulatory scheme for the disposition of federal mineral interests.[78] Arguably, this scheme may be sufficiently narrow in scope to permit exercise of state police power to protect legitimate state interests.[79] Thus, states might be permitted to promulgate performance standards for the regulation of excessive noise, dust, and other offensive byproducts of exploration.[80] Standards of this nature, which would not significantly interfere with federal interests in the development of mineral rights, would serve only to promote local community interests in health and safety and thus would not be invalid on the basis of federal preemption.[81] Care must be exercised in drafting local or state regulations, however, for a mere difference in purpose between state and federal law does not necessarily preclude a finding of preemption.[82] The regulations may not be so stringent in their operation as to make exploration either commercially or technologically infeasible, lest such regulations be found to conflict with the "free and open" exploration policy of the Location Act and the federal government's paramount interest in controlling disposition of the public domain.[83]

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76. *Id.* § 28.
77. *See* Western Standard Uranium Co. v. Thurston, 355 P.2d 377 (Wyo. 1960).
78. *See* 30 U.S.C. §§ 21-54 (1970).
79. *See id.* §§ 21, 22, 28 (1970). Note particularly 30 U.S.C. § 26 (1970), which requires locators to comply with state and local regulations "not in conflict with the laws of the United States *governing their possessory title* . . . ." (Emphasis added.) *Cf. id.* § 43; Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (C.C. Cal. 1884).
80. *Cf.* Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (C.C. Cal. 1884). The performance standard system would not attempt to preclude mining activity but would attempt to regulate those undesirable byproducts of the activity. Protection would be provided by specifying a maximum level of byproducts to which the activity must conform. *See* McDougal, *Performance Standards: A Viable Alternative to Euclidian Zoning?*, 47 TUL. L. REV. 255 (1973); York, *Controlling Urban Noise Through Zoning Performance Standards*, 4 URBAN LAW. 689 (1972).
81. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).
82. *See* Perez v. Campbell, 402 U.S. 637 (1971). *See also* Hirsch, *supra* note 70, at 526-38.
83. *See* 30 U.S.C. § 26 (1970). *See also* Black v. Elkhorn Mining Co., 52 F. 859 (9th Cir. 1892), *aff'd*, 163 U.S. 445 (1896).

The protection offered by performance standards would minimize the adverse impact of mining activity on the surface community. These provisions, however, would not substantially alleviate the surface community's basic problem. Mining activity would still cause severe damage to surface property and urban displacement. At most, a state may only require that this be done with as little disruption as possible.

2. *Limits on State Authority After Patent.* Although state and local exercises of the police power are significantly impaired prior to patent by the federal preemption doctrine, the situation may be altered when a patent to mineral rights is obtained. Thereafter, the mineral interests become private property and as such are subject to local and state law.[84] Under these altered circumstances, it may be argued that the preemption problem does not exist since the federal government no longer has an interest in the property. If this is the case, then consideration may be given to imposition of zoning or other regulations restricting mineral development in order to protect surface interests.[85]

The simplicity of this argument, however, may be deceptive. Since the intent of the Location Act is to encourage development of the nation's natural resources,[86] it is open to question whether this paramount federal interest is defeated by the mere act of patent. Support for the argument that the federal interest survives patent may be found in the SRHA, which recognizes the right to reenter homestead property for the purpose of mining and removing minerals and specifies restraints under which reentry, mining, and renewal may occur.[87] While the SRHA may be read as merely providing a starting point for resolving potential controversies between surface and mineral interests, the argument also may be made that this Act should be construed as protecting the federal interest in mineral development by indicating, through negative implication, the maximum extent to which mining activity may be restrained.[88] Any alteration of the scheme of rights established by the SRHA through state regulation therefore may be invalid. According to this argument, the SRHA would prevent the state from restricting mining activity even though title to mineral interests no longer remains in the federal government.[89]

84. Irvine v. Marshall, 61 U.S. (20 How.) 558, 564 (1857); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839); C. LINDLEY, *supra* note 40, § 22.

85. *See generally* Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NAT. RESOURCES J. 137, 156-60 (1969); Comment, *supra* note 66, at 109-22.

86. *See* 30 U.S.C. §§ 21a, 22 (1970). *See also* United States v. Coleman, 390 U.S. 599, 602 (1968).

87. 43 U.S.C. § 299 (1970). *See also* text accompanying notes 15-16 *supra*.

88. *Cf.* Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504 (1928).

89. *Cf.* Ruddy v. Rossi, 248 U.S. 104 (1918) (homestead act held to provide that federal property conveyed into private ownership shall not become liable for the satisfaction of debts contracted prior to issuance of patent upheld).

Imposition of stringent state regulations also may be tempered by the nature of the property interest owned by the mineral patentee.[90] A regulation which prohibits the use and enjoyment of this special property interest may diminish the value of the mineral estate so severely as to constitute a taking without just compensation. If this is the case, a restrictive regulation may be held unconstitutional under the due process clause of the fourteenth amendment.[91] In *Pennsylvania Coal Co. v. Mahone*,[92] the United States Supreme Court held invalid a Pennsylvania statute prohibiting underground mining operations which might cause surface subsidence. Petitioner coal company had conveyed the surface property but had expressly reserved the right to remove all coal which might lie underneath. Emphasizing that the state law virtually destroyed the value of the subsurface property interest, the Court declared the statute unconstitutional because it constituted a taking of private property without just compensation.[93]

The theory that the taking issue primarily turns on the degree of economic harm inflicted on private property has appeal because of its simplicity. A review of constitutional doctrine in this area reveals, however, that the Supreme Court has yet to adopt a conclusive rationale when dealing with relative rights of property owners vis-à-vis the state's police power.[94] It has been observed that the Court is selective in applying the "magnitude of harm" analysis used in *Pennsylvania Coal*.[95] The theory is applied only in cases where there is neither a physical takeover—clearly a taking—nor a restriction on activity which has been properly deemed a nuisance.[96] Where the activity constitutes a nuisance, the Court has had little difficulty denying compensation claims and upholding prohibitive regulations even though the value of the regulated property has been severely depreciated.[97]

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90. See text & note 42 *supra*.

91. *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42, at 1-104 to -147 (rev. 3d ed. 1974); *cf.* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.01, 2.06, 2.19-.23 (1968, Supp. 1974-75).

92. 260 U.S. 393 (1922).

93. *Id.* at 414-15.

94. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

95. Michelman, *supra* note 94, at 1190-91.

96. *Id.* at 1191.

97. Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); Hadacheck v. Sebastian, 239 U.S. 394 (1915). *Cf.* 1 R. ANDERSON, *supra* note 91, §§ 6.62-.64, 6.71.

The nuisance or noxious use theory is based on the proposition that action may be taken against an activity which impairs the ordinary use and occupation of surrounding property. Baltimore & Potomac R.R. v. Fifth Baptist Church, 108 U.S. 317, 329 (1883). While there is considerable appeal for a concept which requires the one who causes or creates the harm to bear the costs attendant with its abatement, the theory encounters difficulty when it is subjected to thoughtful analysis. It has been observed that in many cases the problem is not one of moral blameworthiness, but rather a prob-

Because mineral development activity may do considerable harm to neighboring urban property interests and thereby constitute a nuisance, the *Pennsylvania Coal* doctrine is probably no major bar to state regulation for the purpose of abating nuisances. Indeed, regardless of whether particular forms of mining activity constitute a nuisance, the rationale of *Pennsylvania Coal* has been called into question. It has been suggested that the doctrine has lost vitality in light of subsequent Supreme Court decisions recognizing the validity of comprehensive zoning and its necessarily prohibitive effect on commercial activities.[98] More recent decisions of the Court have refused to follow the *Pennsylvania Coal* precedent even though the economic losses to the affected party were considerable.[99] Thus, although *Pennsylvania Coal* may not be ignored, it does not stand as an absolute obstacle to restrictions on the development of patented mineral rights.

The complexity of the issues surrounding state regulation suggests that no sound conclusion as to the validity of post-patent regulations may be reached in the absence of concrete factual circumstances. Even if zoning regulations will generally be sustained, it should be recognized that considerable irreparable damage may be inflicted by mining activity that occurs prior to patent. If zoning regulations are constitutional only after patent, the restrictions may come too late to protect the surface interests adequately. Furthermore, the mineral claimant is under no obligation to obtain a patent prior to the removal of mineral deposits.[100] Thus, regulations which validly may be applied only after patent may be avoided altogether simply by mining minerals without a patent.

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lem of incompatibility between two or more innocent and independently desirable uses. *See* Sax, *supra* note 94, at 48-50. Nevertheless, the theory enjoys widespread acceptance in the courts. *See, e.g.*, Hilliard v. Shuff, 260 La. 384, 256 So. 2d 127 (1971) (crude oil storage tanks adjoining residential property constituted a nuisance); Proulx v. Basbanes, 354 Mass. 559, 238 N.E.2d 531 (1968) (laundry business constituted a nuisance when it produced vibrations and fumes which caused damages and disturbed adjoining landowners); Dworkin v. Town of Lakeview, 327 S.W.2d 351 (Tex. Civ. App. 1959) (operation of business which reconditioned pipe and structural steel created odors, noise, and dust which constituted a nuisance). The theory also has received scholarly support. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 75, 80. Despite the weakness of the noxious use doctrine, the decisions relying upon this rationale may often be supported by reliance on a different analysis of the taking problem. When the government functions as mediator to settle conflicts between private claimants, the loss incurred as a consequence of governmental action may be viewed as a noncompensable exercise of the police power. *See* Sax, *supra* note 94, at 61-76. *See also* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

98. *See* Comment, *supra* note 66, at 117.

99. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 384 (1926); *cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). *See generally* Sax, *supra* note 94, at 40-46.

100. *See* 30 U.S.C. §§ 26, 28, 28b-28e, 29 (1970); Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964).

Federal Remedies for Surface-Mineral Rights Conflicts

The lack of wholly effective state means to regulate mining activity relating to federal mineral rights makes it clear that adequate relief for surface owners can be provided only at the federal level. Under the United States Constitution, Congress is granted authority to "make all needful rules and regulations" respecting property interests owned by the United States.[101] Pursuant to this authority Congress may resolve surface-mineral rights conflicts by appropriate legislation, provided the mineral rights remain in the public domain. Although the United States Constitution specifically vests Congress with power to regulate federal land use and disposition, the Supreme Court has recognized that the power to withdraw federal land from development and sale also may be exercised by the President independent of express legislative consent.[102] The Court has viewed continued congressional acquiescence in executive withdrawals as a delegation of Congress' power to the President.[103]

Exercise of the presidential power to withdraw mineral rights from development might serve as a solution for surface-mineral rights conflicts under stock-raising homestead property. The nature of the conflict seems to meet the very situation in which this power may properly be exercised. For as the Supreme Court noted in *United States v. Midwest Oil Co.*:[104] "[The] rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the [President] should, in the public interest, withhold the land from sale . . . ."[105] Since the laws governing disposal of mineral interests do not adequately resolve surface-mineral rights conflicts in urban areas, there is a sound basis for executive action in this matter. Realistically, however, action by the executive department is not likely to be obtained. Executive withdrawals adversely affecting mineral interests historically have been the subject of great controversy.[106] The executive branch also may hesi-

101. U.S. CONST. art. IV, § 3.

102. *See, e.g.*, Sioux Tribe v. United States, 316 U.S. 317, 324-36 (1942); United States v. Midwest Oil Co., 236 U.S. 459 (1915); Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 381 (1867). *See also* 1 AM. L. MINING, *supra* note 4, at § 1.27; Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 ROCKY MT. M.L. INST. 55, 55-64 (1958).

103. Sioux Tribe v. United States, 316 U.S. 317, 326 (1942); United States v. Midwest Oil Co., 236 U.S. 459 (1915).

104. 236 U.S. 459 (1915).

105. *Id.* at 474.

106. *See generally* P. GATES & R. SWENSON, *supra* note 3, at 732-38. As a comparison of the majority and dissenting opinions in the *Midwest Oil* decision illustrates, the controversy is based in large measure on differing views as to the proper role of the President in matters dealing with management of federal property. The majority in *Midwest Oil* espoused the view that the President could act in the public interest without express congressional authorization when emergency administrative action is necessary,

tate to resolve the controversy while Congress is giving active consideration to remedial legislation.

Two legislative proposals recently before the 93d Congress sought to resolve surface-mineral rights conflicts. A bill was introduced in the United States Senate which would have authorized conveyance, free of charge, of federally-reserved mineral rights to owners of developed surface property.[107] The bill also provided some relief where reserved minerals already had been patented to other than surface owners. A different proposal originating in the House was revised in Conference Committee and then approved by the entire Congress. The bill of which the proposal was a part, however, was vetoed by the President.[108] This plan, which constituted a separate title under the proposed Surface Mining Control and Reclamation Act of 1974,[109] would have authorized the Secretary of the Interior to designate as unsuitable for mining certain surface lands subject to federal mineral reservations. Land so designated would either not have been subject to mining activity or subject to such activity only under regulation by the Secretary of the Interior. Since the problem of surface-mineral conflicts will again be dealt with by the 94th Congress,[110] a critical evaluation of both proposals is warranted.

Within 12 months after enactment of the Senate bill, all SRHA and other surface patentees whose land supported a residential dwelling or commercial structure would have been eligible to notify the Secretary of the Interior that the government's mineral reservation should be terminated.[111] If locatable mineral rights had not been claimed as of the date of this notification, these rights were to be conveyed to the surface owner on condition that he agree to pay a royalty to the federal

236 U.S. 459, 466-83 (1915), while the dissenting justices took the more conservative view that the Constitution authorized Congress, rather than the President, to regulate federal property interests. *Id.* at 484-512. Overzealous exercise of presidential power continues to be an issue about which the judiciary expresses concern. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

107. S. 2590, 93d Cong., 1st Sess. (1973).

108. Los Angeles Times, Dec. 31, 1974, § 1, at 4, col. 2. President Ford vetoed the Surface Mining Control and Reclamation Act of 1974, S. 450, 93d Cong., 2d Sess. (1974), over concern that the measure's environmental curbs would have led to an unacceptable reduction in coal production during a time of energy shortages. The President also was concerned with the inflationary effects of federal expenditures mandated by the bill. *Id.*

109. The proposal first appeared in H.R. 11500, 93d Cong., 1st Sess. (1973). Subsequently, the bill moved to conference committee where the relevant provision was revised and adopted as part of S. 425, 93d Cong., 2d Sess. (1974). *See* H.R. REP. NO. 93-1522, 93d Cong., 2d Sess. (1974). This Note will deal with the proposal as it was adopted by the Conference Committee and, for convenience, will refer to the proposal as Conference Committee bill.

110. The Conference Committee bill was reintroduced and passed by the 94th Congress. H.R. 25, 94th Cong., 1st Sess. (1975). The bill was again vetoed by the President, N.Y. Times, May 21, 1975, at 40, col. 1, on the same grounds as the earlier bill. *See* discussion note 108 *supra.*

111. S. 2590, 93d Cong., 1st Sess. §§ 1-2 (1973).

government if mineral rights were subsequently developed.[112] If a mineral claim already existed on the property, the Secretary would have been authorized to acquire the claim by appropriate means so that the entire locatable mineral estate might have been deemed terminated and of no effect.[113] To have effectuated this acquisition, notice of requests for termination would have been given by publication or other appropriate means to affected mineral claimants.[114] Any person having an affected mineral claim would in turn have been required to notify the Secretary,[115] and failure to provide such notification would have been deemed an abandonment of the claim.[116]

In addition to eliminating unclaimed mineral rights, the Senate bill would have provided protection for owners of surface lands, even if mineral rights were not terminated pursuant to the provisions of the legislation. The bill would have imposed liability for damages equal to one and one-half times the damage to all surface improvements and surface values resulting from prospecting for, mining, developing, or removing locatable minerals on lands subject to United States mineral reservations.[117] In addition, prior to any mining activity, a bond posted with the Secretary of the Interior would have been required to secure the payment of such damage.[118]

In contrast to the Senate proposal, the Conference Committee bill would have established an administrative system which permitted the Secretary of the Interior to withdraw from mining activities federal lands designated as unsuitable for such operations.[119] Valid existing mineral rights, however, would not have been affected by the bill.[120] Federal lands could have been designated unsuitable for mining operations in areas predominantly urban or suburban in character or where mining operations would have had an adverse impact on land used primarily for residential or related purposes.[121] Upon request by a

112. *Id.* §§ 2, 4.
113. *Id.* § 3(a).
114. *Id.* § 3(b).
115. *Id.*
116. *Id.* § 3(c).
117. *Id.* § 5(a).
118. *Id.* § 5(c). Under the SRHA, no bond need be posted during exploration activities. *See* text & notes 12-17 *supra.*
119. S. 425, 93d Cong., 2d Sess. § 601 (1974).
120. *Id.* § 601(d).
121. *Id.* § 601(b). The term "federal lands" in the Conference Committee proposal was not well chosen, though its intended meaning seems clear. The proposal spoke of "Federal land of a predominantly urban or suburban character." *Id.* At another point the bill defined "federal lands" as any land, including mineral interests. *Id.* § 701(8). A literal interpretation of the term without regard to its definition suggests that a designation might have taken place in areas where mineral interests were predominantly urban or suburban in character. The authors, however, apparently intended to permit designation of either any land where the surface estate was urban or suburban in character and the mineral interests remained in the public domain or any mineral

state governor[122] or upon petition by a person "having an interest which may be adversely affected" by mining activity,[123] the Secretary of the Interior would have been required to review the federal lands in question to determine their suitability for mining operations.[124] If a governor rather than a private party had requested review, the Secretary could have withdrawn the land from mineral entry or lease for up to 2 years pending such review.[125]

Prior to any decision, the Secretary would have been required to prepare a statement detailing the impact a designation of unsuitability would have had upon mineral resource availability.[126] In addition, the Secretary's statement would have had to consider the environmental impact resulting from his decision on the suitability of an area for mining.[127] Upon a finding that the benefits resulting from designation would have been greater than the benefits to the regional or national economy resulting from mineral development, the Secretary could have withdrawn lands designated unsuitable from mineral entry and leasing or conditioned such entry or leasing.[128] A designation of unsuitability would not necessarily have prohibited mineral exploration. Exploration activities could have continued if the written consent of the surface owner had been obtained.[129] Finally, the Secretary was authorized to promulgate regulations to minimize the adverse effects of such exploration.[130] Any party having a valid legal interest who had appeared in the Secretary's proceedings and who had been aggrieved by his decision could have appealed for review to the federal district court for the district in which the subject land was located.[131]

Having set forth the pertinent provisions of the Conference Committee and Senate bills, it is necessary to assess the effectiveness of these proposals. Consideration also will be given to additional procedures and restrictions which may serve as solutions to present surface-mineral rights conflicts.

Conveyance of Mineral Rights to Surface Owners—The Senate Proposal

In an effort to prohibit unrestricted exploration on patented sur-

interest in the public domain whose development would have an adverse impact on land use primarily for residential or related purposes. *See id.* § 601.

122. *Id.* § 601(a).
123. *Id.* § 601(c).
124. *Id.* § 601(a).
125. *Id.* § 601(c).
126. *Id.* § 601(e).
127. *Id.*
128. *Id.* § 601(f).
129. *Id.* § 601(d).
130. *Id.*
131. *Id.* § 601(a).

face lands, the Senate bill contemplated conveyance of reserved locatable minerals to surface owners.[132] This conveyance would have effectively precluded further mineral exploration without the surface owner's permission. Conveyances made regardless of whether there was an impending conflict between surface and subsurface interests, however, would have improperly divested the federal government of its mineral wealth and unduly restricted mineral exploration at a time when the demand for minerals was increasing. Recognizing this, the Senate bill limited conveyances of locatable minerals to those surface owners who had constructed a dwelling or commercial structure on the property in question.[133] The proposal was further restricted by the requirement that construction must have been commenced prior to October 18, 1973, the introduction date of the legislation.[134] Finally, the proposal was further limited since all requests for termination of reservations had to be initiated within 1 year after its enactment.[135]

Several criticisms may be made of the reservation-conveyance provisions of the Senate proposal. While it was desirable to restrict conveyances to areas where potential conflicts existed, the limitations in the Senate bill might have often defeated its purpose. Limiting conveyances to surface owners who had constructed a dwelling on the surface property would have precluded conveyance of mineral rights in undeveloped urban land and therefore permitted mineral development. Thus, under the Senate bill, a residential community consisting of patented lands containing a significant amount of undeveloped acreage could easily have become pockmarked with undesirable mineral claims.

The limited availability of the opportunity to obtain the conveyance of mineral rights is another criticism. Because many surface owners are unaware of the significance, or even the existence, of mineral reservations in their deeds,[136] it is likely that many would not have considered acquiring subsurface mineral rights in the absence of imminent threats of invasion by prospectors. Thus, where a surface-mineral rights conflict developed after the period allowed for conveyance, the unwitting surface owner would have been unable to prevent mineral exploration.[137]

Despite the apparent weaknesses in the Senate proposal, the bill

132. S. 2590, 93d Cong., 1st Sess. § 2(b) (1973).
133. *Id.* §§ 1-2, 6.
134. *Id.* § 6.
135. *Id.*
136. See text accompanying note 46 *supra*.
137. A similar problem might have arisen because the Senate bill relied wholly on the initiative of individual surface owners. Had a significant number of landowners failed to acquire subsurface rights or later consented to the development of their mineral rights, the community would have remained vulnerable to disruption by mineral prospectors.

would have provided significant protections to the surface owner. In addition to providing for termination of mineral reservations, the Senate plan also would have allowed recovery of one and one-half the damages inflicted on surface property.[138] The SRHA, by contrast, contemplates only limited recovery for surface damage.[139] The Senate bill, by allowing more extensive recovery, would thus have provided more equitable protection.[140] It also would have remedied another inadequacy of the SRHA by establishing a bond requirement prior to entry for exploration.[141] Hence, while the Senate scheme would not have eliminated all potential surface-mineral rights conflicts, the proposal represented a significant improvement over the provisions of the SRHA.

Administrative Withdrawals—The Conference Committee Proposal

Unlike the Senate bill, the Conference Committee proposal provided neither an exploration bond nor broad damage coverage. The bill sought instead to protect surface owners by allowing withdrawal from mineral development of areas appropriately designated as unsuitable for mining operations.[142] If a designation had been made and if the benefits of withdrawal outweighed those of development, explora-

138. While this damage provision would be of obvious benefit to the surface owner, it appears on its face to penalize prospectors who explore on SRHA lands. It would have been more evenhanded to make the mineral prospector liable only for actual damage inflicted.

139. See text & notes 12-17 *supra.*

140. S. 2590, 93d Cong., 1st Sess. § 5 (1973). The Senate bill provided that nothing contained in the damages section would have impaired vested legal rights existing on the date of enactment. *Id.* Since claimants and patentees have vested rights, *see* Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964), the bond and damage provisions would have been inapplicable to claims and patents existing at the time of enactment. It was not clear, however, whether this limitation meant merely that the damage provisions would have been inapplicable to injuries inflicted before enactment, thus subjecting those with vested rights to the stiffer damage provision for subsequent damage.

Whether the damage provisions would have been applicable to those merely prospecting at the time of enactment would have depended on the meaning of "vested" in this context. It has been held in other contexts that the possessory right of prospectors, see text accompanying notes 35-38 *supra,* is not a vested interest. Davis v. Nelson, *supra* at 845-46. Moreover, even if the right would have been considered vested, it is not clear that the damage provisions would have been inapplicable to a claim or patent subsequently obtained by one engaged in prospecting prior to enactment. It has been held that: "The right to explore, that is prospect for valuable minerals on public lands, cannot be telescoped with the right to locate the mining claim and occupy and exploit it for its valuable mineral content after such minerals have been found." *Id.* at 845.

141. S. 2590, 93d Cong., 1st Sess. § 5 (1973). A preexploration bond requirement would have brought the SRHA into conformity with other homestead legislation. *See* 30 U.S.C. § 85 (1970); *Id.* § 122.

142. The Conference Committee bill provided, nevertheless, that: "Valid existing rights shall be preserved and not affected by such designation." S. 425, 93d Cong., 2d Sess. § 601(d) (1974). For discussion of this limitation's adverse impact on the effectiveness of designation in protecting surface rights, see text & notes 155-56 *infra.*

Presumably the bill's bar on mineral development through designation and withdrawal would have relieved any existing claimant subject to the bar of his obligation under the Location Act to do annual assessment work. See discussion note 69 *supra.* This result is also suggested by the above limitation, although not specifically expressed in the bill.

tion activity could not have been undertaken without the written permission of the surface owner.[143] This requirement would have prevented prospectors operating in designated areas from relying upon language in the SRHA granting an unqualified right to explore.[144]

In so protecting surface owners, the Conference Committee proposal ameliorated some of the problems inadequately treated by the Senate bill. Designating areas as unsuitable for mining activity would have offered greater efficiency in dealing with surface-mineral rights conflicts than the Senate bill since entire areas could have been protected by a single administrative act. Area designation also offered greater security to the surface community since the protection provided would not have depended upon each surface owner in a given area acquiring his respective mineral rights. Nevertheless, the Conference Committee bill contained several deficiencies.

The most obvious weakness of the Conference Committee proposal was that it left all undesignated areas vulnerable to the inadequacies of the SRHA. In addition, the bill's effectiveness was impaired by allowing the mineral prospector to obtain the surface owner's consent to explore.[145] If several surface owners in designated areas had consented to exploration, the adverse effects of mining activity would once again have been experienced by the residential community. The proposal, however, also authorized the Secretary to promulgate regulations to minimize the adverse impact of exploration and extraction, implying that the Secretary could have required a bond securing damages[146] or promulgated performance standards controlling offensive by-products such as dust and excessive noise.[147]

Another criticism of the Conference Committee proposal is that the criteria guiding withdrawal did not provide clear standards with which to anticipate the Secretary's decision.[148] While it might have been desirable from a legislative standpoint to set forth only the general framework for an administrative program, both surface owners and mineral prospectors would have desired to predict with greater precision whether an area could have been designated as unsuitable. This criticism might have been overcome with time as a body of precedent construing the criteria and demonstrating their application in given cir-

143. S. 425, 93d Cong., 2d Sess. § 601(d) (1974).
144. 43 U.S.C. § 299 (1970).
145. S. 425, 93d Cong., 2d Sess. § 601(d) (1974).
146. *Id.*
147. See discussion note 80 *supra.*
148. S. 425, 93d Cong., 2d Sess. § 601(b) (1974). It is not clear for example whether "land of a predominantly . . . suburban character, used primarily for residential . . . purposes," *id.*, would have included residential desert land of low population density, such as was involved in the recent surface-mineral rights conflicts surrounding the Tucson area. *See* NEWSWEEK, Oct. 15, 1973, at 96.

cumstances was developed. Additionally, the Secretary could have promulgated interpretative regulations clarifying the appropriate criteria.[149] For instance, the term urban area could have been given more explicit meaning by adopting one or more of the definitions used by the Bureau of the Census.[150] Similarly, the boundaries of specific urban areas could have been delineated by placing reliance on metropolitan or regional land-use plans. Since these plans are intended to guide long-range land development in specific urban areas,[151] they could have served as an indicator of future urban uses which might warrant preference over mineral development. In view of these considerations, Congress might find it desirable to incorporate more specific legislative criteria to guide the Secretary in his determination on withdrawals.

Finally, a criticism of withdrawal schemes often advanced by mining interests is that they unnecessarily place some of the nation's natural resources in "cold storage," out of reach of either the mineral prospector or the surface owner.[152] In fact, ownership and control of the mineral rights would have remained in the federal government; if mineral development later became desirable, the Secretary could have reopened the area to exploration. Redesignation of an area could have been initiated either by the Secretary's own action[153] or by the petition of one whose interest had been adversely affected by a designation.[154]

In summary, the Conference Committee proposal would have done a great deal to eliminate surface-mineral rights conflicts. The withdrawal scheme had the considerable benefit of providing security to the entire surface community through a single administrative act. The withdrawals could have been predicated on a set of administratively established guidelines which required balancing of the competing mineral and surface interests. The effectiveness of the withdrawal scheme would have been severely hampered, however, by a clause in the bill that would have protected vested rights.

Eliminating Existing Mineral Rights in Urban Areas

Generally, designation and withdrawal of an area as unsuitable for

149. Interpretative regulations which are promulgated in the absence of statutory authorization, while not controlling on the courts, are entitled to great weight in the construction of a statute. Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944). *See generally* 1 K. DAVIS, *supra* note 74, §§ 5.03-.06.

150. *See generally* U.S. DEP'T OF COMMERCE, 1970 CENSUS USER'S GUIDE pt. I, 82-83 (1970); 1 U.S. DEP'T OF COMMERCE, THE METHODS AND MATERIALS OF DEMOGRAPHY 151-68 (1971).

151. *See generally* B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 21-39 (1961).

152. *Cf. Hearings on Reserved Minerals, supra* note 44, at 49-50.

153. *See* S. 425, 93d Cong., 2d Sess. § 601(a) (1974).

154. *Id.* § 601(c).

mining operations would have had the effect of halting altogether mining activity on reserved land. These consequences would have been curtailed, however, by a qualification in the Conference Committee proposal that "[v]alid existing rights shall be preserved and not affected by such designation."[155] While the meaning of this limitation is not clear, it could have had the effect of allowing exploration commenced prior to designation to continue and of allowing mineral removal after designation where a claim or patent previously had existed.[156] Thus, protection of surface rights might have been severely impaired.

If the goal of remedial legislation is to protect urban surface interests, some means of eliminating preexisting and undesirable mineral claims is necessary. Although the Conference Committee proposal obviously failed to consider this problem, the Senate bill required the Secretary to acquire valid conflicting mineral claims by "any appropriate means,"[157] thus permitting the subsequent conveyance of mineral rights to the surface owner. No provision was made for acquiring patents.[158] The "appropriate means" would usually have been condemnation through the power of eminent domain.

To lawfully exercise the power of eminent domain, the government must take private property for a public use and with just compen-

155. *Id.* § 601(d). The Senate bill contained a similar provision. See discussion note 140 *supra*. The effects of this clause were mitigated, however, by the power of the Secretary to acquire valid claims and convey them to the surface owner. See text & accompanying notes 157-58 *infra*.

156. Earlier versions of the proposal suggest the limitation meant that designation could not have precluded mining operations being conducted at the time of enactment or operations as to which firm plans and substantial legal or financial commitments were in existence. *See* H.R. REP. No. 93-1072, 93d Cong., 2d Sess. 105, 269-70 (1974). Whether such operations would have included exploration is not clear. In any event, since diligent exploration grants the prospector a pedis possessio right, see text accompanying notes 35-37 *supra*, this activity might have been protected by the terms of the Conference Committee bill. Thus, exploration activity which was already underway when land was designated unsuitable for mining might have been allowed to continue.

Since the earlier versions suggest that "valid existing rights" were to have been constituted by ongoing activity involving substantial legal or financial commitment, perhaps the mere possession of a claim or patent would have been insufficient to allow mineral removal after designation. Thus, while designation would not have destroyed a claim or patent, it could have disallowed removal on the mere existence of a claim or patent. The fact remains, however, that valid claims and patents are vested property rights enforceable against the United States and comprising the right to mine and remove the minerals they cover. Union Oil Co. v. Smith, 249 U.S. 337, 348-49 (1919); Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964). Thus, disallowing mining and removal of minerals for any length of time might have constituted an unlawful taking without compensation. The taking doctrine, however, has lost vitality where the taking is the consequence of a land use restriction, regardless of the magnitude of the economic harm inflicted. *See* text accompanying notes 98-99 *supra*. If "valid existing rights" were to have been determined by the nature of the activity and commitment, it would follow that exploration not involving substantial commitment also would have been precluded by designation.

157. S. 2590, 93d Cong., 1st Sess. § 3 (1973).

158. *See id.* § 3(a).

sation.[159] Public use has been an evolving concept.[160] Under early definitions of public use, the power of eminent domain could not be exercised unless the property taken was ultimately used by the general public.[161] More recently, however, this definition has been broadened by equating public use with public advantage.[162] A use is public under this broad definition so long as it is conducive to community prosperity.[163] Thus, taking property from one person for the purpose of transferring it to another will be permitted so long as some public benefit or advantage accrues from the transfer.[164]

Governmental acquisitions of mineral rights in urban areas would further general community interests by removing the threat of continued mining activities, thus encouraging intensive surface development and providing greater security to economic interests desiring to invest in the locality. Furthermore, the acquisitions would preclude mining activity which otherwise might be hazardous to the health, safety, and culture of the community. So long as these general community interests are fostered by the acquisitions, takings might not be found unconstitutional despite subsequent conveyance of the mineral rights to the owner of the surface estate.[165]

To aid in the acquisition of existing claims, the Senate bill would have required mineral claimants to notify the Secretary of claims on land for which the surface owner had indicated his desire to terminate the mineral interests.[166] Had a claimant failed to inform the Secretary of his interest it would have been deemed abandoned.[167] Notice of this requirement was to be given to the mineral claimant "by publication in the Federal Register and other appropriate means (such as newspapers and periodicals)."[168]

159. U.S. CONST. amend. V. *See generally* Campbell, *Condemnation of Mining Properties—Reflections on the Substantive Power of Eminent Domain*, 14 ROCKY MT. M.L. INST. 231 (1968); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Lange, *The Mineral Estate in Condemnation*, 10 HOUSTON L. REV. 266 (1973); "Judicial Review in Eminent Domain Proceedings," 15 ARIZ. L. REV. 593, 796 (1973).

160. 2A P. NICHOLS, *supra* note 91, §§ 7.1-7.212(2); Campbell, *supra* note 159, at 236-41; Sackman, *The Right to Condemn*, 29 ALBANY L. REV. 177, 180-83 (1965).

161. 2A P. NICHOLS, *supra* note 91, § 7.2(1); Sackman, *supra* note 160, at 180-83.

162. 2A P. NICHOLS, *supra* note 91, § 7.2(2); Sackman, *supra* note 160, at 180-83.

163. 2A P. NICHOLS, *supra* note 91, § 7.2(2); Sackman, *supra* note 160, at 180-83.

164. *See* Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946). *See also* Sackman, *supra* note 160, at 183.

165. One practical constraint on the exercise of eminent domain may well be the cost involved in acquiring the claims within a given area. Should it happen that the located mineral interest be extensively developed prior to patent, the cost of acquisition may well be prohibitive. It should be noted, however, that the Senate proposal failed to consider this eventuality since the acquisition of the claim was unqualifiedly mandated. S. 2590, 93d Cong., 1st Sess. § 3(a) (1973).

166. *Id.* § 3(b).

167. *Id.* §§ 3(b)-(c).

168. *Id.*

Because a mining claim is property in the constitutional sense,[169] due process would have entitled the claimant to prior notice whenever the government attempted to extinguish his interest.[170] Notice must be reasonably calculated to apprise the concerned party of the pending action.[171] It is very doubtful whether notification of mineral claimants by publication alone would have satisfied due process requirements. Where property ownership is either known or reasonably ascertainable, publication alone violates due process notice standards.[172] The Location Act requires that the name of a locator be recorded with his claim,[173] and state laws often require recording of a claim in the county recorder's office.[174] Given the availability of this information, due process standards would have required reasonable effort to give some form of personal notice to the mineral claimant.[175] Thus, notice by "other appropriate means" in the Senate proposal would have to have been construed as including personal notice, an intent not clearly expressed by the proposal.

The foregoing review of the Senate and Conference Committee bills reveals that while both offer significantly greater protections to surface interests than the SRHA, neither deals fully with resolution of surface-mineral rights conflicts. It is interesting to note that the bills are often complementary, and more equitable resolution of the competing interests could be obtained through careful incorporation of the two proposals. Generally, the administrative withdrawal scheme appears to provide the greatest assurance of protection to surface community values. Deficiencies in the Conference Committee proposal could be remedied by adopting the Senate bill's exploration bond and damage recovery provisions. To afford complete relief the designation and withdrawal scheme also should provide a means for eliminating existing mining claims.

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169. Adams v. Witmer, 271 F.2d 29, 33 (9th Cir. 1958).

170. Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See also* Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257 (1957).

171. Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

172. *See* Note, *supra* note 170.

173. 30 U.S.C. § 28 (1970).

174. *E.g.*, ARIZ. REV. STAT. ANN. § 27-203 (Supp. Pamphlet 1973); COLO. REV. STAT. ANN. §§ 92-22-6(2), 92-22-12(1) (1963); IDAHO CODE § 47-604 (Supp. 1974).

175. *See* Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950). A model for such a procedure already exists. Under the Materials Act of 1947, 30 U.S.C. §§ 601-15 (1970), which provides for private acquisition of common building materials, a procedure has been established to rid the public domain of long dormant mineral claims. This procedure requires that efforts be made to reach the claimants either by personal contact or registered mail, as well as by publication. *Id.* § 613.

Environmental Considerations

Designation of areas as suitable or unsuitable for mining would have had significant impact on both the nation's economy and environment. Since passage of the National Environmental Policy Act [NEPA],[176] any major federal action significantly affecting the quality of the environment must be preceded by a detailed environmental impact statement setting forth, among other things, the adverse environmental effects of and alternatives to the proposed action.[177] Designation or nondesignation decisions would often have involved significant impacts on environmental quality, thus requiring preparation of impact statements.[178] Actions of the Secretary under the Senate proposal, on the other hand, would probably not have required an impact statement.[179]

Since the Conference Committee proposal explicitly predicated a withdrawal decision upon a report detailing both the environmental and economic consequences of such a decision, the question arises whether this designation report would have been supplementary to or a substitute for a NEPA impact statement. The designation report would have fulfilled the major purpose of the NEPA requirement since it built into the Department of Interior's decisionmaking process a consideration of the environmental aspects of the proposed action.[180] Nevertheless, both a designation report and a NEPA impact statement might have been required prior to a final designation decision, for the policies and goals of NEPA are explicitly supplementary to the other existing duties of federal agencies.[181] On the other hand, the more limited require-

176. 42 U.S.C. §§ 4321-47 (1970).

177. *Id.* § 4332(C). *See generally* Cohen, *The Anatomy of Environmental Impact Statements*, 10 LAND & NATURAL RESOURCES DIV. J. 269 (U.S. Dep't of Justice publication 1972); Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); Friedman, *The Operational Impact of NEPA and Related Environmental Laws, Regulations and Orders on Mineral Operations*, 19 ROCKY MT. M.L. INST. 47 (1973); Lynch, *Complying with NEPA: The Tortuous Path to an Adequate Environmental Impact Statement*, 14 ARIZ. L. REV. 717 (1972).

178. *See generally* Note, *NEPA, Environmental Impact Statements and the* Hanly *Litigation: To File or Not to File*, 48 N.Y.U.L. REV. 522 (1972).

179. Lacking significant environmental consequences, it is doubtful that issuance of a patent conveying mineral reservations to a surface owner would qualify as a major federal action requiring an impact statement. *See* 42 U.S.C § 4332(C) (1970). Moreover, the mandatory nature of the Secretary's duties under the Senate proposal would have made compliance with NEPA purposeless. *Cf.* United States v. Kosanke Sand Corp., 3 ENVIRONMENTAL L. REP. 30017 (Bd. Land Appeals, Aug. 3, 1973) (Department of the Interior need not prepare environmental impact statement prior to issuance of patent pursuant to Location Act).

180. *See* Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724 (1971).

181. 42 U.S.C. § 4335 (1970). Additionally, NEPA requires compliance with its requirements "to the fullest extent possible." *Id.* § 4332. Since compliance with the Conference Committee bill would not have precluded the possibility of compliance with the obligations of NEPA, a NEPA impact statement would arguably have been a continued requirement.

ments of a designation report might have been construed as a congressionally-authorized exemption from the impact statement obligations of NEPA.

The Conference Committee proposal authorized judicial review of a designation decision when sought by any party with a valid legal interest who had appeared in the designation proceedings and who had been aggrieved by the Secretary's decision.[182] Review would have examined a decision's compliance with the proposal itself and NEPA.[183] The courts presently are in disagreement as to whether an agency decision governed by NEPA should be subjected to substantive review beyond that usually exercised by courts.[184] A reviewing court might not view NEPA as imposing any substantive constraints upon the agency's ultimate decision[185] and thus would determine only whether NEPA's procedural requirements were met.[186] On the other hand, a court holding that NEPA imposes substantive constraints would require the decisionmaker to employ a balancing test giving full and good faith consideration to environmental values.[187] Under this scope of review, a court would reverse an agency decision which was based upon an arbitrary or capricious balancing of relevant factors or which clearly gave insufficient weight to environmental values.[188]

Under the Conference Committee proposal, the primary question for the Secretary's determination in a withdrawal decision would have been whether the benefits of withdrawal would have outweighed the economic benefits resulting from mineral development.[189] Since the Secretary would have been required in the designation report to make findings as to the environmental impact of withdrawal,[190] environmental values would have been considered as an element of the benefits of withdrawal.[191] Thus, the Secretary's decision would have in-

182. S. 425, 93d Cong., 2d Sess. § 601(g) (1974).

183. The assumption is that the Conference Committee proposal would not have excluded the application of NEPA. This would probably have been the case since the substantive requirements, if any, imposed by NEPA would have been essentially similar to and consistent with the operation of the proposal. 42 U.S.C. § 4332 (1970).

184. *Compare* Environmental Defense Fund v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971), *with* Environmental Defense Fund, Inc. v. United States Army Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). *See also* Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975).

185. National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

186. Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1404 (D.D.C. 1971); Sierra Club v. Hardin, 325 F. Supp. 99, 124-27 (D. Alas. 1971).

187. Environmental Defense Fund, Inc. v. United States Army Corps of Eng'rs, 470 F.2d 289, 297-300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

188. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

189. S. 425, 93d Cong., 2d Sess. § 601(f) (1974).

190. *Id.* § 601(e).

191. Note carefully that while environmental considerations would have entered into

volved a balancing similar to that required under NEPA by some courts. Accordingly, those courts which would have exercised limited substantive review under NEPA of the Secretary's decision would probably have exercised review similar in scope under the Conference Committee proposal itself.

This is not to say, however, that those courts which would not have exercised substantive review under NEPA also would not have exercised such review under the Conference Committee proposal. As noted, those courts refusing to exercise limited substantive review under NEPA do so on the basis that NEPA places only procedural, and not substantive, constraints on agency decisionmaking.[192] In their view, NEPA requires no balancing. The Conference Committee proposal itself, however, expressly requires balancing in reaching a decision. Additionally, as indicated, the proposal authorizes judicial review of the Secretary's decision. It might have been anticipated, therefore, that all courts would have employed the same scope of review in appraising decisions under the proposal—whether the decision was arbitrary or capricious or gave insufficient weight to the considerations to be balanced.

Leasing as an Alternative to the Location System

Federal reservation of locatable minerals on stock-raising homestead property poses a continuing problem for intensive surface development. The substantial statutory revisions presented in the Conference Committee and Senate bills might have alleviated some of the problems. Those revisions, however, would have left intact the Location Act's laissez-faire system of mineral development and would not have significantly altered the mineral development scheme which exacerbates the current surface-mineral rights conflicts.[193]

If the present location system were abandoned in favor of a general leasing system, many of the problems presented by the location and patent laws would be eliminated. To be fully effective, however, the system would have to provide some means, perhaps similar to the

a decision to designate and withdraw, they would have been neither necessary nor sufficient for designation and withdrawal. Threat to residential and related uses would have been the necessary prerequisite for such designation and withdrawal. *Id.* § 601(b). Thus, mining operations which might have scoured the face of a wilderness mountain range could not have been avoided. See text accompanying note 121 *supra.*

192. *See* National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

193. In a recent report by the Public Land Law Review Commission, procedural modifications were recommended which would provide greater control over the manner in which locatable minerals are developed. *See* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 121-31 (1970). Nevertheless, these recommendations retain the basic location-patent system of the present law. *Id.* at 131 n.* (separate views of Commissioners Clark, Goddard, Hoff, and Udall).

Senate proposal, for acquiring outstanding mineral rights.[194] Under a lease system, presently unregulated exploration activity could be brought under control through the issuance of prospecting and mining permits.[195] NEPA environmental impact statements could be required prior to authorization of mining activity to ensure that an informed judgment is made regarding the merits of exploration and development.[196] The Secretary also would have the authority to include in the lease provisions adequate protections for surface interests.[197] Under a lease system, the government would have authority to police mining activities, thereby ensuring the lessee's compliance; noncompliance with lease provisions would be grounds for termination.[198]

The leasing system could be patterned after the Leasing Act[199] which, as has been observed, differs in many important ways from the location system.[200] In substance, a general lease law would provide the Secretary of the Interior with a greater degree of control in determining when and how federal mineral resources should be developed.[201] Increased flexibility in the management of these resources would facilitate resolution of surface-mineral rights conflicts by permitting the administrator to adjust mineral development procedures to the varied competing demands found in different areas of the nation.

CONCLUSION

The states are presently powerless to effectively protect surface interests, although considerable protection is in fact essential. Only after the patent stage—long after destructive exploration and location activities have occurred—may the states perhaps apply their police power. Adequate protection of surface interests can be provided only at the federal level, for it is the federal government which owns and controls disposition of reserved mineral rights.

The surface-mineral rights conflicts created by reserved mineral rights originated in the Stock-Raising Homestead Act, which created a dominant mineral estate and a subservient surface estate without pro-

194. See text & notes 155-75 *supra.*
195. *See* 30 U.S.C. §§ 201(b), 211(b), 261 (1970).
196. *See* Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (environmental impact statement for offshore oil lease).
197. See text & accompanying note 33 *supra.*
198. *See* 30 U.S.C. §§ 183, 184(h) (1970).
199. Although the Leasing Act applies only to designated nonmetalliferous minerals, it could be adapted to metalliferous mineral development. *See* Martz, *Pick and Shovel Mining Laws in an Atomic Age: A Case for Reform*, 27 ROCKY MT. L. REV. 375, 388-89 (1955). *See also* H.R. 6253, 92d Cong., 1st Sess. (1971) (proposal to establish a metalliferous mineral leasing system).
200. See text accompanying notes 22-33 *supra.*
201. *See generally* Hagenstein, *Changing an Anachronism: Congress and the General Mining Law of 1872*, 13 NATURAL RESOURCES J. 480 (1973).

viding adequate protection for surface interests. The problems are exacerbated by an outdated federal mining law providing virtually no supervision of locatable mineral development. Two remedies have been proposed. The first would retain the scheme of the Location Act but preclude its operation in urban areas through either the conveyance of mineral rights to the surface owner or the withdrawal of these rights from exploration. The other would replace the Location Act with a general leasing system permitting stringent regulation of potentially destructive mineral development activities. The relative merits of these two remedies may well provide grounds for debate, but it is beyond dispute that it is incumbent upon Congress to provide some form of relief.