State Mineral Leases on Arizona's School Lands

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During the period of settling and dividing the great expanse of land west of the Louisiana Purchase into states, the federal government began relinquishing certain sections of land in each township to local governments. These grants, although made for various purposes,[1] became known as "school lands," and were to be administered by the states to raise revenue and reduce taxation. In Arizona, four of the 36 sections in each township are school lands.[2] They vested in the state upon statehood, if federal surveys had previously been returned and approved by the Secretary of the Interior. Otherwise, the sections vested upon the return of survey.[3] Since there are still small portions of Arizona which have not been surveyed, the process of vesting is a continuing one.[4] At present, Arizona has been granted more than eight million acres.[5]

The disposition of resources from school lands is controlled by a state statutory scheme[6] which must function within the restrictions imposed by Congress in the grants.[7] By 1972, over 59,000 acres of

1. The major grant in Arizona was for the support of the common schools. Arizona Enabling Act, ch. 310, § 24, 36 Stat. 572 (1910). Lands were also granted for universities, penal institutions and public buildings. *Id.* § 25.

The Arizona Enabling Act as amended is set forth in full in Volume 1 of the *Arizona Revised Statutes Annotated* at page 79. The various amendments to the Act are listed in note 13 *infra*.

2. Sections 16 and 36 were granted to the Territory of Arizona, Act of Sept. 9, 1850, ch. 44, § 15, 9 Stat. 457, and sections 2 and 32 were granted to Arizona upon statehood. Arizona Enabling Act, ch. 310, § 24, 36 Stat. 572 (1910).

3. United States v. Wyoming, 331 U.S. 440 (1947); United States v. Morrison, 240 U.S. 192 (1916).

4. *See* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 246 (1970).

5. Arizona State Land Commissioner's Annual Report, ARIZONA LAND MARKS 5-7 (1971-72).

6. ARIZ. REV. STAT. ANN. §§ 27-231 to -238 (1956), *as amended*, (Supp. 1972-73); *id.* § 37-481 (1956).

7. Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910):

> Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. . . .

vested school lands in Arizona were under mineral and mineral materials lease and another 115,000 acres were subject to state prospecting permits,[8] resulting in approximately 2,700,000 dollars in royalties to the state during the 1971-72 fiscal year.[9] The validity of many of these leases is now in doubt, however. The Arizona Court of Appeals recently held in *State Land Department v. Tucson Rock & Sand Co.*[10] that since state leasing of a mineral right without a prior appraisal violated the trust[11] established in the federal grants, the lease must be invalidated. Although the supreme court avoided invalidating Arizona's mineral leasing system by vacating the court of appeals opinion,[12] the decision of the supreme court raises equally disturbing questions concerning other aspects of the Arizona statutes.

The controversy in *Tucson Rock & Sand* arose from ostensibly conflicting mandates found in the Arizona Enabling Act.[13] Originally, the 1910 Enabling Act required that all lands given to the state be appraised at their true value prior to sale or lease.[14] Those lands described as mineral at the time title was to vest under the Act, however, were not included in the original grant.[15] It was not until the 1927 amendment to the Act that title to those included mineral lands was passed to Arizona.[16] Although the state was authorized to sell most of its rights in these newly acquired lands, it was required to reserve ownership of the mineral rights, which could only be leased.[17] There was no mention of appraisal in this legislation, but the mineral lands were apparently subject to the appraisal stipulation of the 1910 Enabling Act. In order to further define the 1927 provisions, the Act was again amended in 1936 to provide for the lease of mineral

8. Arizona State Land Commissioner's Annual Report, *supra* note 5, at 5-14.

9. *Id.* at 5-6.

10. 12 Ariz. App. 193, 469 P.2d 85 (1970), *vacated*, 107 Ariz. 74, 481 P.2d 867 (1971).

11. Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910): [a]ll lands hereby granted . . . shall be by the said [s]tate held in trust . . . and money proceeds of any of said lands shall be subject to the same trusts . . . ."

12. State Land Dep't v. Tuscon Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

13. Act of June 20, 1910, ch. 310, §§ 19-35, 36 Stat. 568-79, *as amended*, Act of June 5, 1936, ch. 517, 49 Stat. 1477, *as amended*, Act of June 2, 1951, ch. 120, 65 Stat. 51, *as amended*, Act of Aug. 28, 1957, Pub. Law. 85-180, 71 Stat. 457 [hereinafter referred to as the 1910 Enabling Act, the 1936 amendment, the 1951 amendment and the 1957 amendment, respectively].

14. 1910 Enabling Act § 28, *supra* note 13.

15. United States v. Sweet, 245 U.S. 563 (1918). *See also* Wyoming v. United States, 255 U.S. 489 (1921); Campbell v. Flying V Cattle Co., 25 Ariz. 577, 220 P. 417 (1923).

16. Act of Jan. 25, 1927, ch. 57, § 1, 44 Stat. 1026, *codified*, 43 U.S.C. § 870 (1970). This Act is a general amendment applicable to the land grant states which were subject to an initial mineral reservation.

17. *Id.* § 870(b). Although federal law permits the sale of mineral lands subject to a mineral reservation, under state law if the lands are known to contain minerals in paying quantities they cannot be sold. ARIZ. REV. STAT. ANN. § 37-231(D) (Supp. 1972-73). All other sales are subject to a reservation of a one-sixteenth undivided interest in all minerals. *Id.* § 37-231(C).

lands for a maximum of 20 years in any manner the state deemed appropriate.[18] The appraisal requirement, however, remained in the Enabling Act.[19] Thus, Arizona appeared to have complete discretion to manage mineral lands on the one hand, but was obligated to appraise them on the other.

This dichotomy is further complicated by the existence of two categories of mineral lands: (1) those classified mineral in nature at the time of the return of survey or statehood, whichever was later, but which were not granted until the 1927 amendment, and (2) lands not classified as mineral upon statehood or return of survey, but upon which minerals were subsequently discovered. Title to the latter group passed under the 1910 Enabling Act.

In order to examine the problems behind *Tucson Rock & Sand*, the state statutory scheme for leasing of mineral lands will be discussed. Then, after describing the case and the result reached by the supreme court, the ability of the state to define mineral lands will be explored. Finally, the issue decided by the court of appeals but avoided by the supreme court will be analyzed: whether mineral leases on school lands must be issued for not less than an appraised value.

Arizona's mineral leasing statutes are grounded in the Arizona Constitution,[20] which repeats the language of the Enabling Act. Every mineral lease of state land is subject to a royalty of 5 percent of the net value of the minerals produced.[21] "Other products" upon state land, however, are to be sold or otherwise administered in accordance with the Enabling Act and the state constitution.[22] Apparently these nonmineral resources cannot be sold or leased without prior appraisal or at less than their true appraised value.[23] This legislative differentiation is evidently mandated by the mineral land provisions of the Enabling Act, as amended in 1927 and 1936.[24] If the percentage royalty[25] for minerals is not considered to be equivalent to an appraised valuation,[26] then the Arizona legislature has exempted mineral rights from the appraisal obligations while rights in "other products" remain subject to them.

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18. 1936 amendment, *supra* note 13.
19. 1910 Enabling Act § 28, *supra* note 13.
20. ARIZ. CONST. art. 10, § 8.
21. ARIZ. REV. STAT. ANN. § 27-234(B) (Supp. 1972-73).
22. *Id.* § 37-481 (1956).
23. Appraisal appears required because "other products" did not receive the exemption minerals may have been afforded. See 1936 amendment, *supra* note 13 and text accompanying note 73 *infra*.
24. 1936 amendment, *supra* note 13.
25. ARIZ. REV. STAT. ANN. § 27-234(B) (Supp. 1972-73).
26. *See* note 55 *infra*.

Dual treatment had been accorded sand, rock and gravel, however. Although a maximum royalty of 5 cents per cubic yard for sand, rock and gravel was established[27] under the mineral leasing provisions, the same resources are provided for in the section controlling the disposition of "other products" of state lands[28] and thus can be construed to require appraisal. As a result, the two statutes were potentially in conflict, permitting the leasing of sand, rock and gravel rights as mineral products under the former, or permitting both sale or lease as an "other product" pursuant to the latter.

This conflict was resolved in *State Land Department v. Tuscon Rock & Sand Co.*,[29] where the Supreme Court of Arizona upheld the State Land Department's cancellation of a mineral lease issued to Tucson Rock & Sand Company for the removal of sand, rock and gravel from school lands. The lease was issued in 1952 pursuant to the state mineral leasing statutes[30] and provided that the plaintiff-lessee was to pay 5 cents per cubic yard for material removed. In 1967, the State Land Department appraised sand, rock and gravel at 9.5 cents per ton and demanded the increased royalty from the lessee. Upon the Company's refusal to pay the higher royalty, the Land Department cancelled the lease on the ground that it violated the trust established by the Enabling Act. Land Department officials apparently thought that the Enabling Act and state constitution required payment of a mineral royalty based on a true appraised value.[31] The superior court set aside the order of cancellation, but the court of appeals reinstated it,[32] holding that while the 1936 amendment to the Enabling Act permitted the state to set the manner and term of mineral leases on school lands, the appraisal requirement[33] was still in force with respect to such leases. The court stated that a maximum royalty of 5 cents per cubic yard

27. ARIZ. REV. STAT. ANN. § 27-234(C) (1956) provided:

> In case of sand, rock and gravel to be used in the construction of roads, buildings or other structures, the royalty shall be the amount as determined by the commissioner under reasonable rules and regulations promulgated by him, but not more than five cents per cubic yard.

This subsection was repealed by H.B. 112, 29th Ariz. Leg., 1st Reg. Sess. 57 (1969), *codified*, ARIZ. REV. STAT. ANN. § 27-234 (Supp. 1972-73). Unless otherwise indicated, reference will hereinafter be to the 1956 version.

28. ARIZ. REV. STAT. § 37-481 (1956):

> The state land department shall conserve, sell or otherwise administer the timber products, stone, gravel and other products and property upon lands belonging tot he state under rules and regulations not in conflict with the enabling act and the constitution, and conforming as nearly as possible to the rules and regulations of the forest service of the United States department of agriculture.

29. 107 Ariz. 74, 481 P.2d 867 (1971).

30. ARIZ. REV. STAT. ANN. §§ 27-231 to -238 (1956), *as amended*, (Supp. 1972-73).

31. *See* Brief for Appellant at 25, State Land Dep't v. Tuscon Rock & Sand Co., 12 Ariz. App. 193, 469 P.2d 85 (1970), *vacated*, 107 Ariz. 74, 481 P.2d 867 (1971).

32. Tuscon Rock & Sand Co. v. State Land Dep't, 12 Ariz. App. 193, 469 P.2d 85 (1970), *vacated*, 107 Ariz. 74, 481 P.2d 867 (1971).

33. 1910 Enabling Act § 28, *supra* note 13.

for sand, rock and gravel "is inconsistent with both the spirit and purpose of the Enabling Act."[34] The court relied primarily upon *Lassen v. Arizona ex rel. Arizona Highway Department*,[35] where the Supreme Court of the United States held that the Arizona Highway Department must pay into the trust fund the appraised value of school lands used for highway purposes, notwithstanding the increase in value occasioned to the surrounding school lands by the presence of the highway.[36]

Had the decision of the court of appeals been left standing, the Arizona courts would have been obliged ultimately to decide whether the percentage royalty provisions of the mineral leasing statutes constituted appraisal within the meaning of the Enabling Act. If the royalty provisions were held insufficient to meet the appraisal requirement, then it would have been necessary to interpret the Enabling Act, as amended, to determine whether an appraisal is required for a mineral lease. Until those issues were resolved, every mineral lease of state trust lands executed without an appraisal would have been of doubtful validity.

Faced with this situation, the Supreme Court of Arizona vacated the court of appeals opinion while upholding the lease cancellation.[37] The mineral appraisal issue was avoided by reducing the case to a question of statutory construction involving apparently conflicting statutes.[38] This issue had not been considered in the lower courts.

On the basis of legislative intent, the court concluded that sand, rock and gravel should be considered as "other products" rather than "minerals." Mention of these resources in the mineral leasing statute was deemed to refer only to the limited use of sand, rock and gravel for on-site improvements of a mining claim.[39] Since the materials covered by the *Tucson Rock & Sand* lease were not used for

34. State Land Dep't v. Tuscon Rock & Sand Co., 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970).

35. 385 U.S. 458 (1967), *discussed*, "Public Land Law," 10 ARIZ. L. REV. 153, 220, 223 (1968).

36. In State *ex rel.* Arizona Highway Dep't v. Lassen, 99 Ariz. 161, 407 P.2d 747 (1965), *rev'd*, Lassen v. Arizona *ex rel.* Arizona Highway Dep't, 385 U.S. 458 (1967), the Supreme Court of Arizona held that the highway department need not pay for rights-of-way over trust lands, reasoning that it could be presumed that the state improvements would benefit the surrounding trust lands in an amount at least equal to the value of the land taken. The United States Supreme Court was not concerned with whether mineral leases were exempted from appraisal. The legislative history examined concerned only the 1910 Enabling Act. In addition, the *Lassen* Court expressly stated that the opinion did not control transactions prior to the date of decision. 385 U.S. at 469 n.22. The lease held by Tucson Rock & Sand Company was executed 15 years earlier.

37. State Land Dep't v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971).

38. *Compare* ARIZ. REV. STAT. ANN. § 27-234(C) (1956), *with id.* § 37-481 (1956).

39. The Court stated that *id.* § 27-234(C) (1956) was to be read in conjunction with *id.* § 27-235(C)(4) (1956). State Land Dep't v. Tucson Rock & Sand Co., 107 Ariz. 74, 78, 481 P.2d 867, 871 (1971).

mineral claim improvement, the court concluded that the lease was void because it was issued without the appraisal required by the Enabling Act[40] and constitution[41] for other products.[42] The court cited the federal Surface Resources Act of 1955, which classifies sand, rock and gravel as nonmineral under federal law,[43] as supporting the proposition that sand, rock and gravel are properly classified as other products under state law. Finally, the court stated that even for the limited purposes of improving a mining claim, a 5 cents per ton royalty on sand, rock and gravel was not an appraisal and was therefore invalid as a contravention of the Enabling Act.[44]

POWER OF THE STATE TO RECLASSIFY A TRUST RESOURCE

The holding that the Arizona legislature intended to classify sand, rock and gravel as "other products"[45] as opposed to "minerals" raises the question whether such a construction is consistent with the principles of the Enabling Act. Congress has drawn a definite distinction between minerals and other products owned by the state: mineral rights may only be leased, whereas rights to all other products may be leased or sold outright.[46] By requiring that title to mineral rights remain in the state, Congress sought to guarantee a continuing source of income to the trust. The decision in *Tucson Rock & Sand* makes it theoretically possible to defeat that scheme.

When the lease to Tucson Rock & Sand was issued, sand, rock and gravel were "minerals" within the terms of the 1927 and 1936 amendments to the Enabling Act. Since Congress did not define mineral in those enactments, it can be concluded that the definition was intended to be consistent with existing federal law.[47] Otherwise, the

40. Enabling Act § 28, *supra* note 13.
41. ARIZ. CONST., art. 10, § 4.
42. ARIZ. REV. STAT. ANN. § 37-481 (1956).
43. Act of July 23, 1955, ch. 375, § 3, 69 Stat. 367, *codified*, 30 U.S.C. § 611 (1971).
44. State Land Dep't v. Tucson Rock & Sand Co., 107 Ariz. 74, 78, 481 P.2d 867, 871 (1971).
45. Ariz. Code § 11-501 (1939) (controlling "other products") and Ariz. Code § 11-1604 (Supp. 1952) (governing mineral royalties) were in force in 1952 and read substantially the same as ARIZ. REV. STAT. ANN. §§ 37-481 and 27-234(C) (1956), respectively.
46. *Compare* the 1910 Enabling Act § 28, *supra* note 13, *with* the 1936 amendment, *supra* note 13.
47. Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 275 (8th Cir.) *cert. denied*, 371 U.S. 912 (1962) ("In searching for the will and intent, it is to be assumed that Congress was aware of established rules of law applicable to the subject matter of the [Clayton Act, § 4 B, 15 U.S.C. § 15(b) (1956)] and thus, upon enactment, the statute is to be read in conjunction with the entire existing body of law"); Utah v. Bradley Estates, 223 F.2d 129, 130 (10th Cir.), *cert. denied*, 350 U.S. 841 (1955) (intent of Congress in passing Utah Enabling Act "must be viewed in the light of its contents, in light of the mining laws, in the light of the school land indemnity law, and in the light of the established public policy relating to mineral lands").

states would have been able to determine which resources were mineral and, therefore, which lands could be sold outright and which lands were subject to the lease requirement. Not only does the overall purpose of the grant preclude the latter construction, but there is no reason for construing a word used in federal mining laws differently when used in the Enabling Act. Thus, because sand, rock and gravel would have been denominated minerals under federal law[48] when the mineral lands were granted as well as when the Tucson Rock & Sand lease was issued, they should have been considered minerals under state law.[49] The Supreme Court of Arizona held, however, that the legislature has continuously classifed these resources as "other products" since enactment of Arizona's first public land code in 1915.[50] As a result, Arizona may now transfer fee title of trust lands containing sand, rock and gravel to private hands, whereas if such materials were still classified as mineral the mineral rights could not be sold. Therefore, it is at least questionable whether a transfer of the fee title of trust lands containing locatable sand, rock and gravel could withstand a state constitutional and Enabling Act challenge.

If the state legislature may reclassify one resource, the logical inference is that it may do the same with other resources currently classified as minerals. Reclassified "other products" on trust lands would then be subject to sale by the state. While there would be an immediate benefit to the trust fund if all the trust lands were sold, passing all rights to such lands to private hands would defeat the intent of Congress in making the grant of mineral lands.[51] Thus, it must be concluded that such an extension of *Tuscon Rock & Sand* would violate the

48. A prospector has discovered a "valuable" mineral when he can show that resources from a particular claim can be marketed at a profit sufficiently in excess of his own wages to justify a prudent man in the investment of his time and money. A mineral is not defined by its intrinsic chemical characteristics, therefore, but upon wholly external economic considerations. United States v. Verrue, 75 I.D. 300 (1968); Layman v. Ellis, 52 I.D. 714 (1929); Opinion of the Acting Solicitor, 54 I.D. 294 (1933); *accord*, United States v. Schaub, 163 F. Supp. 875 (D. Alas. 1958). All recognize sand, rock and gravel as locatable minerals. *See also* United States v. Coleman, 390 U.S. 599 (1968); Cameron v. United States, 252 U.S. 450 (1920); Note, *Marketability And The Mining Law: The Effect of United States v. Coleman*, 10 ARIZ. L. REV. 391 (1968); Comment, *Present Marketability: A Proper Test of Mineral Value Under The Mining Law?*, 9 ARIZ. L. REV. 70 (1967).

49. It has been stated that minerals owned by the state are subject to state laws only, except in those instances where state legislation incorporates federal statutes by specific reference. Woolsey v. Lassen, 91 Ariz. 229, 371 P.2d 587 (1962). This remark was addressed to the manner of location, however, and not to what substances are locatable. In the case of state trust lands, the state is a trustee governed by the Enabling Act which is the paramount law. State Land Dep't v. Tucson Rock & Sand Co., 107 Ariz. 74, 78, 481 P.2d 867, 871 (1971); Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947); State v. Boyd, 60 Ariz. 388, 138 P.2d 284 (1943).

50. *See* Law of June 26, 1915, 2nd Spec. Sess., ch. 5 § 78.

51. H.R. REP. No. 1617, 69th Cong., 2nd Sess. 3 (1926): "It will readily be observed that the provision requiring the States to reserve unto themselves all minerals in lands sold or transferred fully protects the States and conserves the natural resources." See text accompanying note 45 *supra*.

Enabling Act. The possibility of such a result is slight, however, because the legislature probably would not desire to make outright sales of school lands currently classified as mineral lands under state law. Even if the legislature should attempt such reclassifications, it is doubtful that it could withstand a challenge under the Enabling Act.

The above analysis is somewhat complicated by the federal Surface Resources Act of 1955.[52] That Act reclassified sand, rock and gravel as "other products" under federal law.[53] One possible construction of the Act is that Congress was consenting to a reclassification of those materials by the state. Even if this interpretation is accepted, the Act is by its terms prospective,[54] and thus inapplicable to the 1952 Tucson Rock & Sand lease and to the state statute in effect at that time. It must be concluded that the supreme court, laboring to avoid the issue of whether appraisal is required for mineral leases, did not consider the problems inherent in holding that the legislature may reclassify a trust resource, which under federal law was a mineral, as an "other product" under state law.[55]

MINERAL LEASES ON SCHOOL LANDS WITHOUT PRIOR APPRAISALS

The 1910 Enabling Act authorized state sale or lease of timber and "other products of land" from granted lands only after appraisal, and sale or lease at less than appraised value was prohibited.[56] Fail-

52. Act of July 23, 1955, ch. 375, § 3, 69 Stat. 367, *codified*, 30 U.S.C. §§ 601-15 (1971).

53. 30 U.S.C. § 611 (1971). This aspect of the Surface Resources Act implies that Congress was of the view that sand, rock and gravel were "minerals" under federal law prior to 1955.

54. 30 U.S.C. § 615 (1971):

> Nothing in sections 601, 603 and 611 to 615 of this title shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim *heretofore located* . . . . (emphasis added).

55. The court held that ARIZ. REV. STAT. ANN. § 37-481 (1956) was applicable to the lease, but did not consider what constitutes appraised value. The court in effect found that the statutory amount of 5 cents per cubic yard was not the appraised value of sand, rock and gravel. Likewise, the court could hold that 5 percent of net worth, the royalty prescribed for minerals in *id.* § 27-234(B) (Supp. 1972-73), does not satisfy the Enabling Act's appraisal obligations. On the other hand, it could be concluded that since the present system does respond to market fluctuation it thereby satisfies the spirit of the Enabling Act. The Act demands a "true" value, however. 1910 Enabling Act § 28, *supra* note 13. The mere response of the percentage royalty system to market fluctuations would probably not satisfy this "true" value requirement.

56. Enabling Act § 28, *supra* note 13. While the first school land grant was to Ohio in 1802, Act of April 30, 1802, ch. 40, §§ 1 *et seq.*, 2 Stat. 173, the appraisal obligation was included only in later grants. This limitation upon the states was a response to early large scale frauds which defeated the purpose of the granted lands. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 247 (1970). Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) provides a striking illustration. The background of the case can be found in Hale, *The Supreme Court and the Contract Clause: II*, 57 HARV. L. REV. 621, 629 (1944).

ure to follow the appraisal requirement voids the transaction.[57] Since mineral lands were reserved in this Act to the federal government,[58] it is apparent that Congress did not contemplate their inclusion in the phrase "other products of land."[59] It would not prove helpful to engage in comparative analysis of the Enabling Act school grants to the other "public land states" as each grant is unique.[60] Suffice it to say that varying statutory royalty systems are in effect in those states and that the respective legislatures did not impose an appraisal requirement on the mineral leasing of state school lands.[61] Attention will thus be directed to interpretation of Arizona's Enabling Act along with an examination of the illuminating experience of New Mexico with the appraisal problem. New Mexico's experience is relevant since its initial grant came through the same federal legislation[62] and, for present purposes, was identical with that of Arizona.

Arizona's early experience with the granted lands was marked by title difficulties. Controversies developed from the emergence of two types of mineral lands under the 1910 Enabling Act—those of a known mineral character at the time the initial grant vested in the states, and those not known to be mineral in nature at the time of vesting, but upon which minerals were subsequently discovered. The distinction was a response to title challenges based on the claim that although the survey classified the lands as nonmineral, the subsequent discovery of minerals would defeat a state's title. This contention was rejected and only lands known to contain minerals *at the time of the vesting of the grant* were held to have been reserved to the United States.[63] That

57. *Id.*; *see* text of note 7 *supra.*
58. United States v. Sweet, 245 U.S. 563 (1918).
59. The mineral-non mineral classification of resources was established by the "Mineral Location Law of 1872" (30 U.S.C. §§ 21 *et seq.* (1971)) which still governs location on the public domain and requires the discovery of a *valuable* mineral. This distinction remains the determinative factor in whether lands may be acquired by location. The same requirement is found in Arizona. ARIZ. REV. STAT. ANN. § 27-231 (1956). *See also* note 48 *supra.*
60. For a list of comparative legislation, see S. REP. No. 194, 82nd Cong., 1st Sess. 5-8 (1951).
61. *E.g.*, CAL. PUB. RES. CODE § 6895 (1956) (royalty specified by the commission); N.D. CENT. CODE § 38-11-02 (1972) (minimum royalty of 5 percent); *id.* § 38-11-08 (demanding the establishment of royalty schedule bearing a resonable relationship to the value of the mineral produced); UTAH CODE ANN. § 65-1-18 (1968) (maximum royalty of 12-1/2 percent); WASH. REV. CODE ANN. § 79.01.636 (Supp. 1972) (minimum royalty during development of $2.50 per acre per year); *id.* § 79.01.644 (royalty rates established by agreement between the department of natural resources and the applicant).
62. Act of June 20, 1910, 36 Stat. 557, ch. 310, §§ 1-18.
63. In Shaw v. Kellogg, 170 U.S. 312, 332 (1898), the Court stated:
> We say lands then known to contain mineral, for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. . . . It would be an insult to the good faith of Congress to suppose that it did not intend that title when it passed should pass absolutely, and not contingently upon subsequent discovereies.

See also Southern Dev. Co. v. Endersen, 200 F. 272 (D. Nev., 1912).

holding did not alleviate the title difficulties faced by public land states, however. Even where minerals were discovered on trust lands subsequent to the vesting of title, the Department of Interior often asserted that such lands were of known mineral character at the time of vesting, thus breeding further litigation.[64]

Congress responded to the problem in 1927 by eliminating the initial reservation and granting mineral lands to the states.[65] Apparently viewing the states as responsible, independent sovereigns,[66] Congress imposed only one restriction to protect these resources: the mineral rights in the trust lands could not be sold, but only leased.[67] An appraisal requirement was not imposed by the amendent itself. After the 1927 amendment, then, New Mexico and Arizona had been granted title to both classes of mineral lands: (1) lands not known to be mineral in character at the time of the original grant or upon the return of survey, whichever was later, but on which minerals were later discovered (passing to the state under the Enabling Act in 1910 or upon return of the survey) and (2) lands known to be mineral in character in 1910 (passing to the state under the 1927 amendment).

With respect to the first category, the Supreme Court of New Mexico had held that since it was not the purpose of the Enabling Act to grant any minerals or mineral lands, they passed without the appraisal, advertising or competitive bidding restrictions imposed by the Act.[68] Consequently, New Mexico leased "nonmineral" mineral lands after 1922 without following such procedures.[69] The validity of this practice, however, had never been considered by the federal courts, and holders of New Mexico mineral leases on such "nonmineral" lands, concerned as to the status of their titles, were hesitant to make the expenditures necessary to develop the lands.

Congress responded in 1928 by consenting to an amendment to New Mexico's constitution which permitted the state legislature to au-

64. *See* S. REP. No. 603, 69th Cong., 1st Sess. 8-15 (1926); H.R. REP. No. 1761, 69th Cong., 2d Sess. 4-6 (1927). Even though a survey had been approved, a claimant could still produce evidence showing that at the time of the survey the land was of a known mineral nature. Fleetwood Lode, 12 I.D. 604 (1891); Boulder & Buffalo Mining Co., 7 I.D. 54 (1888). *See also* Pereiva v. Jackson, 15 I.D. 273 (1892).

65. Act of Jan. 25, 1927, ch. 57, § 1, 44 Stat. 1026, *codified*, 43 U.S.C. § 870 (1970).

66. H.R. REP. No. 1617, 69th Cong., 2d Sess. 15 (1926).

67. H.R. REP. No. 1761, 69th Cong., 2nd Sess. 3 (1927). The 1927 amendment provides that "[t]he coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct . . . ." 43 U.S.C. § 870(b) (1970).

68. Neel v. Barker, 27 N.M. 605, 204 P. 205 (1922). The court later reaffirmed the *Neel* decision by stating that the prohibition against the sale of minerals came from the New Mexico statutes. State *ex rel.* Otto v. Field, 31 N.M. 120, 241 P. 1027 (1925).

69. *See* S. REP. No. 90, 70th Cong., 1st Sess. 1-3 (1928).

thorize the leasing of trust lands granted under the amended Enabling Act for mineral purposes with or without appraisal, competitive bidding or advertising.[70] Thus, only one basic restriction was imposed on the disposition of both types of mineral lands in New Mexico: the mineral rights in the granted lands could not be sold by the state, but only leased. The money earned was to guarantee a continuing income to further the purposes for which the two grants were made.

In Arizona mineral rights in lands granted under the 1927 amendment could not be sold. Those same rights in lands passing under the original grant might have been sold following the New Mexico rationale, however, which concluded that since the 1910 Enabling Act had not intended to pass minerals, the Act's restrictions did not govern their disposition.[71] Congress, apparently desiring to prevent mineral trust lands from falling into private hands,[72] amended Arizona's Enabling Act in 1936, effectively prohibiting the outright sale of such lands.[73] The 1936 amendment authorized leases for a maximum term of twenty years and also provided: "[n]othing herein contained shall prevent said State of Arizona from leasing in a manner as the state legislature may direct, any of said lands referred to in this section . . . for mineral purposes . . . ."[74]

A problem in construction arises, however, from the retention of the appraisal requirement of the 1910 Enabling Act which provides in part that "[a]ll lands, leaseholds, timber and other products of land before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . . ."[75] These potentially conflicting mandates thus give the state legislature authority to dispose of minerals in such manner as it prescribes, but then limits that legislative prerogative by requiring appraisal of leaseholds. Construing the 1936 amendment in light of its historical background, however, suggests that Congress has not imposed the appraisal obligation for mineral leases. A contrary construction would recreate the distinction between "mineral lands" granted in 1927 and those whose title vested in the state under the original grant. If categorization were reinstated, one class of lands would be subject to appraisal while the other class would not. This type of categorization is what the previously mentioned series of

70. Act of February 6, 1928, ch. 28, 45 Stat. 58. The lease of mineral lands in New Mexico is currently governed by the N.M. STAT. ANN. §§ 7-9-6 to -34 (1953) and the N.M. CONST. art. 13.
71. *See* text and accompanying note 68 *supra.*
72. *See* S. REP. No. 1939, 74th Cong., 2nd Sess. 1-2 (1936).
73. 1936 amendment, *supra* note 13.
74. *Id.*
75. 1910 Enabling Act § 28, *supra* note 13.

legislative changes and judicial interpretations sought to eliminate. New Mexico was not required to appraise mineral leases[76] and it would be inconsistent to find that Congress intended to require such procedures of Arizona.[77]

CONCLUSION

The *Tucson Rock & Sand* court found that the state legislature has the power to classify a resource located on trust lands as an "other product" which under the most reasonable construction of the federal grants should be classified as a mineral by the state. In so doing, the court has provided a potential avenue for the transfer of the mineral rights in trust lands to private parties. Such a result defeats the Congressional purpose of providing a continuing income for the objects of the trust,[78] and would, therefore, be contrary to the Enabling Act and void.

The supreme court did not reach the question whether an appraisal is required before trust lands are leased by the state for mineral purposes. If the court is confronted with the question, it may find that the terms of the federal grants, as construed in light of their legislative history, do not require such appraisal before leasing. In transferring title to mineral lands to the state in the Enabling Act and the 1927 and 1936 amendments, Congress viewed Arizona as a responsible sovereign capable of administering these lands and their resources to provide the greatest benefit to the beneficiaries of the trusts:

> . . . minerals are expressly reserved to the States under the [a]mendment reported herewith, and certainly Congress and the Federal Government ought to deal with the States as sovereigns rather than subjects. Certainly they ought to be viewed in the light of confidence rather than mistrust. The States ought to be relied upon to dispose of their lands to the best possible advantage realizing in doing so that they are thereby reducing taxation within their borders. This we feel confident they will do.[79]

Only the legislature may decide whether the existing royalty system of mineral leasing on trust lands is consistent with the degree of confidence placed in the state.

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76. *See* text and notes 68-70 *supra.*

77. It could be argued that while the 1927 amendment did not require appraisal, this legislation was superceded by the 1936 amendment. This interpretation, however, is refuted by the relevant legislative history. The Acting Secretary of the Department of Agriculture viewed the 1936 amendment as pertaining only to those lands granted to Arizona when the state was admitted into the union. S. REP. No. 1939, 74th Cong., 2nd Sess. 2-3 (1936). In addition, the Acting Secretary of the Interior stated, "This proposed legislation appears to be in harmony with prior legislation amending the Enabling Act for certain other States . . . ." *Id.* Thus, it appears Congress did not intend to impose the appraisal restriction.

78. H.R. REP. No. 1617, 69th Cong., 2nd Sess. 4 (1926).

79. *Id.* at 14-15.