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THE HISTORY OF GOVERNMENT PROPERTY IN MINERALS IN THE UNITED STATES

I.

The familiar maxim that one who owns land owns it "*ad inferno usque ad caelum*" was subject at early common law to the qualification that if a person owned lands which contained royal mines (gold and silver) the ownership of the mines rested in the King. The right of the King was first recognized in an early case between the Queen and the Earl of Northumberland.¹ The three reasons as expressed by the Queen's solicitor for such rights were: first, the analogy between the excellency of gold and silver and the excellency of the King; second, the necessity of having those precious metals in order to provide for the public welfare of the kingdom; third, the coinage of money to promote commerce. Upon the last reason Blackstone upheld the King's prerogative right.²

By a later decision, not only was the King's prerogative right established in mines which contained gold and silver, but it was also declared that if a copper mine or mine of any other metal contained gold and silver then such mine was also to be in the Crown, for the King could not hold jointly with another, nor could he share his rights with another.³ But statutes were soon enacted to overcome the effect of this decision.⁴

It was only natural that the idea of sovereign rights should have found its way into the Crown Charters granted to the early American settlers, and in practically all of them a provision is made for reserving to the King a certain portion of the precious metals found. A typical example of such reservation is found in a charter granted by Queen Elizabeth to Sir Walter Raleigh, which states: "Reserving always to us our heirs and successors for all services, duties, and demands the fifth part of all the ore of gold and silver that from time to time and at all times after such discovery, subduing, and possessing shall be there gotten and obtained."⁵

But not all charters contained the same provision. In Virginia one-fifteenth of all the copper was reserved.⁶ In the grant to Lord Baltimore, in addition to the gold and silver, the King reserved one-fifth of all the gems and precious stones found.⁷ The charter of Carolina reserved a royalty of one-fourth of

¹ Queen v. Earl of Northumberland (1568) 1 Plowden 310, 75 Eng. Repr. 472.

² 1 Bla. Comm. 249.

³ The Case of Mines (1568) 1 Plowden 336, 75 Eng. Repr. 511.

⁴ 1 Wm. & Mary, c. 30 sec. 4; 5 & 6 Wm. & Mary, c. 6 sec. 3.

⁵ 1 THORPE, AM. CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (1909) 53.

⁶ 7 *ibid.* 3790.

⁷ 3 *ibid.* 1677.

the royal metals plus an annual payment of twenty marks.⁸ The grant to the Duke of York was different from the others in that it gave the Duke the metals in the land in return for an annual payment of forty beaver skins.⁹ By reason of this New York has even up to the present day continued to assert such right, so that all of the gold and silver mines still vest in the state.¹⁰

It almost inevitably followed that the United States should reserve for itself all the minerals contained in the lands owned by it. This idea was expressed by the Continental Congress in a law passed in 1785 providing for the disposition of western lands. A survey was to be made of the land which was to be apportioned, with a notation being made of any known mines or salines, and in case any of these lands were granted a provision was to be placed in the deed, "excepting therefrom and reserving one-third part of all gold, silver, lead and copper mines within the same."¹¹

In 1803 by the Louisiana Purchase the government added to its domain about a million square miles. In 1807, Congress passed an act authorizing the President to lease any lead mines which might thereafter be discovered in the Indiana territory or in lands contiguous to such territory for a term not exceeding five years.¹² This plan was followed by the government for but a short while, for the leasing of mines proved a failure. The collection of payments cost more than the amounts collected. Therefore, upon recommendation by the President, Congress authorized the sale of the reserved lead mines in Missouri, Illinois, Arkansas, and the territories of Wisconsin and Iowa,¹³ and by a later statute the lands containing copper, lead, or other valuable ores in Michigan and Wisconsin were also ordered sold.¹⁴

By the Treaty of Guadalupe Hidalgo, July 4, 1848, the United States acquired another vast tract of land, which now embraces Utah, Arizona, New Mexico west of the Rio Grande and north of

⁸ 5 *ibid.* 2743.

⁹ 3 *ibid.* 1637.

¹⁰ Not only does the state lay claim to all gold and silver mines, but also to all mines of other metals discovered on lands of persons not citizens of the United States; to all mines of other metals discovered upon lands owned by citizens of the United States, the ore of which on an average shall contain less than two equal third parts in value of copper, tin, iron, and lead or any of these metals; and to all mines and all minerals and fossils discovered or hereafter to be discovered upon lands belonging to the state. Consol. Laws N. Y. (Cahill 1923) c. 47 sec. 80.

¹¹ LINDLEY, MINES (3d ed. 1914) 61.

¹² 2 Stat. 449 (1807).

¹³ 4 Stat. 364 (1807); 9 Stat. 37 (1846).

¹⁴ 9 Stat. 146 (1847).

the Gadsden Purchase, Colorado west of the Rocky Mountains, and the southwestern part of Wyoming. The discovery of gold in this territory made the shores of the Pacific a magnet for all fortune seekers. It was imperative that some kind of law be established for these throngs of varied people. But the Federal Government took no steps to promulgate rules to govern them, and as a result the miners looked to themselves for the drafting of codes of laws which would best serve them. The rules drawn up were a product of the common-law regulations as found in respect to the tin mines of Devon and Cornwall in England, the Mexican ordinances, and the civil law of Spain.¹⁵ These improvised codes were later recognized by both State and Federal authority.¹⁶

There was not a code that did not provide for some method of filing claims to the land desired. But since no authority was given by the government to take the land, the question arises as to what kind of title these miners obtained. Strictly speaking they were all trespassers on the property of the United States. In all general laws granting the right of pre-emption to settlers upon public lands, mineral lands were excepted¹⁷ and upon the entrance of a state into the Union such reservation was again expressly made. "By the act of Congress passed March 3, 1853, it was provided that all public lands in the State of California, whether surveyed or unsurveyed *excepting mineral lands* should be subject to the provisions of the Act of 1841; and it was further provided that no person should obtain the benefits of the act by a settlement or location on *mineral lands*."¹⁸ Again the superior right of the United States in mineral lands claimed was recognized in an act providing for a district and circuit court in the district of Nevada, which stated that no possessory actions between individuals for the recovery of mining titles or for damages to any such titles should be affected by the fact that *the paramount title to the land on which such mines lie is in the United States*, but each case shall be judged by the *law of possession*.¹⁹

About five years after the discovery of gold in California the question arose as to who had the property right in the metals in the mines on privately owned lands—*i. e.*, whether the prerogative right of the state existed in this country as it did in England. This question was first answered in the affirmative, in

¹⁵ YALE MINING LAW AND MINING RIGHTS, 73.

¹⁶ Sparrow v. Strong (1865) 13 Wall. 97; Chambers v. Harrington (1884) 111 U. S. 350; Broder v. Natoma Water Co. (1879) 101 U. S. 274.

¹⁷ 5 Stat. 453 (1841).

¹⁸ LINDLEY, *op. cit.* 85.

¹⁹ 13 Stat. 440 (1865), 28 U. S. C. sec. 690.

the case of *Hicks v. Bell*²⁰ where it was held that the state because of its sovereignty was entitled to the *jura regalia* which pertained to the King at common law, and therefore had title to all the minerals in the state. But this holding was expressly overruled in the later case of *Moore v. Smaw*²¹ where the court ruled that although the state held certain rights of sovereignty yet such rights were only those necessary for its existence; and it was held that the ownership of mines and minerals is not such a power necessary for its existence. Such decision negatives all idea of the government's superior right to the minerals in privately owned land.

In 1866 Congress introduced a new policy in the disposition of mineral lands, abandoning the idea of abstracting royalties.²² the Act in substance embodied three main principles. First, that all mineral lands of the public domain should be open to free exploration and purchase. Second, that rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed.²³ Third, that titles at least to certain classes of mineral deposits or lands containing them might be obtained by patent.

What the Act of 1866 did in regard to obtaining title to mines, the Act of 1870 did in regard to the owners of placer and other forms of deposit.²⁴ By a subsequent act, May 10, 1872,²⁵ these two previous statutes were practically united in one. By the present mining act, passed in 1920, although no changes were made in regard to the manner of disposing of lands containing metallic minerals, as to non-metallic minerals a new policy was adopted, namely that of leasing.²⁶ The operation of this Act is discussed below.

II.

Petroleum has almost everywhere been regarded as a mineral.²⁷ Although there are decisions to the contrary, the great weight of authority holds the substance to be a mineral within the terms of a grant, lease, or reservation. Such construction received the sanction of the Land Department until Secretary Hoke Smith in 1896 ruled that petroleum lands were not mineral lands and could not be entered under the mining laws. But almost immediately Congress voiced its disapproval by enacting a

²⁰ (1853) 3 Cal. 220.

²¹ (1861) 17 Cal. 199.

²² 14 Stat. 251 (1866).

²³ *Jennison v. Kirk* (1878) 98 U. S. 453.

²⁴ 16 Stat. 217 (1870), 30 U. S. C. secs. 35, 36.

²⁵ 17 Stat. 91 (1872), 30 U. S. C. sec. 22.

²⁶ 41 Stat. 437 (1920), 30 U. S. C. sec. 181.

²⁷ MORRISON AND DESOTO, OIL AND GAS RIGHTS (1920) 8.

statute which ordered: "That any persons authorized to enter lands under the mining laws of the United States, may enter and obtain patents to lands containing petroleum, or other mineral oils, and chiefly valuable therefor under the provisions of the laws relating to placer mining claims."²⁸

The effect of this statute was to make it more difficult to obtain oil lands, since the requirements for obtaining mineral lands were not only more stringent but also more difficult than those for obtaining public lands. But such law was not adapted to the exploitation of petroleum. In the first place it gave the prospector no definite rights until discovery, *i. e.*, it was only when oil actually was discovered that he could obtain title to the land. As a result of this, fictitious claims were placed upon the land by other parties as soon as drilling operations began. If oil was discovered, there was no assurance that the discoverer would obtain title, since it was always possible for one of the fictitious claimants to receive title first. In the second place, the law required the performance of assessment work regardless of the need for oil. Quite often this led to waste, for even if oil was discovered the locators were required to perform their development work until the time when they received patents to the land. Means of escaping this provision of the statute were successfully devised, until finally Congress enacted a law which permitted the work on one claim to be sufficient for five, "lying contiguous and owned by the same person or corporation."²⁹ A third defect of the law was that it provided for dispositions of tracts too small for efficient operation, and so made it necessary for the oil operators to use dummy entry men in order to get large enough tracts. In one instance one company filed claims upon 40,000 acres of land by the use of different powers of attorney.

However, about the same time the necessity of conserving our valuable mineral lands arose; for it was seen that if wasteful exploitation of our reserves was permitted, our supply would in a short time be exhausted. As a result of such forethought, President Roosevelt appointed a commission to examine the then existing conditions of our public lands, with an effort to determine what resources were obtained therein. As a result of such survey, President Taft, who had then come into office, ordered in 1909³⁰ about 2,000,000 acres of supposedly oil-bearing lands in California, placed in a state of temporary reservation in "aid of proposed legislation affecting the use and disposition of petroleum deposits in the United States." Whether such acts of

²⁸ 29 Stat. 526 (1897).

²⁹ 32 Stat. 825 (1903), 30 U. S. C. sec. 102.

³⁰ *Temporary Petroleum Withdrawal Order No. 5* (Sep. 29, 1909).

the President were constitutional was not presented for judicial determination, for such action was later confirmed by Congress in a law which specifically conferred upon the President those powers which he had exercised.³¹ Subsequently, the President having such power, more withdrawals were ordered so that by 1916, 5,587,077 acres of public land had been withdrawn from exploitation.

As a result of this policy a conflict arose between the government, which wished to preserve the oil, and the acquisitive interests which wished to obtain it. The latter group was reinforced by those who believed that the public lands should go to the states for the purpose of advancing their economic development. Between 1910 and 1920 no session of Congress failed to have before it the question of the disposition of public oil lands, and although various bills were introduced in regard to such disposition, none of any real importance was passed until 1920, when the governmental policy in regard to the future acquisition of oil lands was announced.³²

The main features of the Act of 1920 were: The Secretary of the Interior was authorized to issue prospecting permits for oil and gas on tracts of not more than 2560 acres, for a term not exceeding two years. Title to mineral deposits could no longer be secured under patent except such deposits as were included in valid locations existing at the date of the Act. The right to produce such minerals could be secured only under permits and/or leases issued by the government, such leases or permits reserving substantial royalties to the government. The acreage which an individual or corporation could operate directly or indirectly was limited. Operations were required to be conducted under the supervision of the Department of the Interior. The state in which the minerals were to be extracted was given a share of the royalties resulting therefrom.³³ Consent was given to taxation of the property of producing agencies by the states.

The policy of the statute as to the issuance of permits and licenses was complied with from the time of the passage of the Act in 1920 until March 12, 1929, when President Hoover issued the following statement: "There will be no leases or disposals of government oil lands no matter what category they lie in, of government holdings or government controls except those which may be mandatory by Congress. In other words there will be complete conservation of oil in this administration."³⁴ The Sec-

³¹ 36 Stat. 847 (1910), 43 U. S. C. Sec. 141.

³² ISE, *THE UNITED STATES OIL POLICY* (1926) 330.

³³ From the time of the passage of the act until June 30, 1929, states have received as royalties the amount of \$23,820,929.32. *ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR* (1929) p. 124.

³⁴ 71 CONG. REC. 2646 (1929).

retary of the Interior has issued regulations to carry out this announced policy.

But the President in announcing his new policy did not settle the problem of oil land disposition, but instead opened the whole question anew. Those who oppose the order point to the Act of 1920 as their main support and raise the following issues. The title of the statute reads: "An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain."³⁵ It will be noticed that the statute reads to promote the development, not to restrict it. However, the President's order provides for restriction, not promotion. The enacting clause reads: "That deposits of oil or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided for by this act to citizens of the United States."³⁶ The President, it is contended, is changing the word "shall" to "may." Section 35 reads: "That 37½ per cent of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the state within the boundaries of which the leased lands or deposits are or were located, said money to be used by such state or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other educational institutions as the legislature of the state may direct."³⁷ Section 32 reads: "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act: Provided that nothing in this act shall be construed or held to affect the rights of the state . . . to exercise any rights which they have."³⁸

The contention is raised that by section 35 the United States has become a trustee for the states to pay 37½ per cent of all the revenue received under the act and that the trust should not be terminated by executive order. The question as to section 32 is whether the Secretary of the Interior can by a blanket order in the guise of a regulation refuse to issue any more permits.

In criticizing the President's action, Senator Cutting of New Mexico stated: "If the leasing act has outlived its value and its usefulness it is the duty of Congress to deal with the matter and provide an alternative which shall be better."³⁹

The President and those who agree with his policy seem largely to ignore the legal aspect of the situation, and defend their action chiefly on the basis of conservation. Their attitude is

³⁵ 41 Stat. 437 (1920), 30 U. S. C. sec. 181.

³⁶ *Ibid.*, sec. 438.

³⁷ *Ibid.*, sec. 450.

³⁸ *Ibid.*, sec. 450.

³⁹ 71 CONG. REC. 2645 (1929).

best summed up in a letter by the President to Joseph H. Dixon, Assistant Secretary of the Interior. He writes: "I know that the western as well as the eastern states agree that abuse of permits for mineral development or unnecessary production or waste in our natural resources of minerals, is a matter of deepest concern and must be vigorously protected. Because of such abuse and waste I recently instituted measures to suspend further issue of oil prospecting permits on public lands and to clean up the nuisance of outstanding permits and thereby clear the way for constructive legislation. . . . On the 12th of March (1929) there were prospecting permits in force covering over 40,000,000 acres of public domain. We have determined that over 40 per cent of these holders had not complied with the requirements of the law, that the larger portion of these licenses were being used for the purpose of preventing others from engaging in honest development and some even as a basis of 'blue sky' promotions. After yielding to the dormants the widest latitude to show every genuine effort at development under the outstanding prospecting permits, the total will probably be reduced to about 10,000,000 acres, upon which genuine development is now in progress. The public domain is, therefore, being rapidly cleared of this abuse. The position is already restored to a point where measures can be discussed which will further effectually conserve the nation's resources, and at the same time take account of any necessity for local supplies."⁴⁰

The issue between the executive and those who disapprove of the President's action will doubtless be settled ultimately by the Supreme Court.

TOBIAS LEWIN, '32.

⁴⁰ 71 CONG. REC. 3572 (1929). For other expressions see 71 CONG. REC. 2641, 2646, 3169 *et seq.* (1929).