

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-1993

Reclaiming the Public Domain by Repeal of the Mining Law of 1872

Shelby D. Green

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Oil, Gas, and Mineral Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Shelby D. Green, Reclaiming the Public Domain by Repeal of the Mining Law of 1872, 6 Hofstra Prop. L.J. 85 (1993), <http://digitalcommons.pace.edu/lawfaculty/437/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

RECLAIMING THE PUBLIC DOMAIN BY REPEAL OF THE MINING LAW OF 1872

*Shelby D. Green**

"Property is nothing but a basis of expectation"¹

Jeremy Bentham

I. INTRODUCTION

The "sale" of public lands has continued for more than a century.² Any citizen holding a mining claim on a parcel of public land can purchase absolute title to the land³ for as little as \$2.50 an acre.⁴ This price has not been changed since 1872. The price and policy were originally determined at a time when this country, and in particular the West, held pristine and seemingly boundless wilderness areas, such that encouraging the settlement of the West and the discovery and development of mineral resources seemed to be sound policy.⁵ For most of the last 100 years, land titles obtained through

* Associate Professor, Pace University School of Law; J.D., Georgetown University Law Center; B.S., Towson State University.

1. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 68-69 (Richard Hildreth ed. & Etienne Dumont trans., Oceana Publications 1975) (1864).

2. In the last century, the United States has sold over 3.2 million acres of land under the patent provisions of the 1872 General Mining Law, an area the size of the State of Connecticut. 137 CONG. REC. S2015 (daily ed. Feb. 20, 1991) (statement of Sen. Bumpers). Between 1980 and 1990, the Bureau of Land Management issued 657 patents, for a total of 4,752 claims, covering approximately 179,915 acres. *Id.* (statement of Sen. Bumpers). The United States government still owns 725 billion acres of land, over 50% of which is located in Alaska, and more than 90% of the remaining lands located in 11 western states. PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* 22 (1970).

3. General Mining Law of 1872, 30 U.S.C. §§ 21-54 (1988). "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase" *Id.* § 22.

4. *Id.* § 37.

5. See John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989). The author states that:

[T]he main policy thrust into the early 20th Century was to transfer land from federal ownership to private individuals, developers and selected industries such as

this policy came without any burdens to the new owners as preservation or reclamation efforts were not required, but also without much benefit to the previous owner, except for the satisfaction of furthering a national policy.⁶ The new owners became vested with most of the traditional incidents of absolute ownership of property, including the right of possessing, excluding others, and enjoying the fruits and profits derived from the extraction and exploitation of valuable mineral deposits.⁷ There was no thought of preserving the then viewed limitless natural environment⁸ or of increasing the then known limited treasury.⁹

railroads [The goals for the land transfers were] largely left to the new owners and developers, and the workings of the free marketplace

. . . .
 . . . Congress clearly believed the vast public domain would be more valuable to the growing nation if it were transferred to the hands of those who could develop it. There was no detailed plan for development prepared by economists, scientists, or anyone else The main guidelines appear to have been that the lands should be settled rapidly, at little or no cost to settlers, and that the new ownership should be predominantly private and widely distributed.

Id. at 340 (quoting COUNCIL ON ENVTL. QUALITY, THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY 33, 35, 38 (1985)).

6. *See infra* note 21 and accompanying text.

7. *See infra* note 24 and accompanying text.

8. *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987).

9. In 1880, the first Public Land Commission reported to President Hayes that it cost the government four times more to transfer title to the land than was received from the miner as a patenting fee. *See* Michael McCloskey, *The Mining Law of 1872*, in THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS 1 (1989).

In 1974, the General Accounting Office ("GAO") reported that the government received about \$12,000 for 41 mineral patents for land having a fair market value of more than \$1 million. *See* 137 CONG. REC. S2015 (daily ed. Feb. 20, 1991) (statement of Sen. Bumpers). Government appraisers and local real estate brokers estimated the value of land sold between 1980 and 1990 to be from \$200 to \$200,000 an acre. U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: THE MINING LAW OF 1872 NEEDS REVISION (1989). Of 20 patented lands studied, the GAO found that the government received less than \$4,500 for lands valued between \$14 million and \$48 million. *Id.* A recent scandal as reported in the Congressional Record gives some additional reasons for concern:

[The Oregon Dunes National Recreation Area] is located on the beautiful southwestern coast of Oregon and is a popular tourist destination. In 1989, BLM [(the Bureau of Land Management)] announced its intention of issuing a patent for an uncommon variety of sand on claims covering over 700 acres in the heart of the National Recreation Area. Although the Material Disposal Act of 1947 and the Common Varieties Act of 1955 had effectively precluded the location and patent of claims for sand and gravel, the claimants relied on an exception in the law for uncommon varieties. Six of the State's seven Congressmen wrote to the Secretary of the Interior requesting that the patent not be issued. The Secretary issued the patent. After much public consternation regarding the possibility of a major sand quarrying enterprise in one of Oregon's most popular scenic areas, the claimants let it be known that they would be open to trading their claims for suitable land else-

The "inexhaustible" quantity of rich and easily accessible deposits of ore led to the creation of huge multi-national entities seeking to yield low-grade and diffuse deposits.¹⁰ These entities almost entirely eclipsed the lone, relentless frontiersman picking and panning in the golden western sunset.¹¹ Only after nearly fifty years of sometimes thoughtless, often ruthless, mining did it occur to the federal government that the public domain, like the resources hunted, could be irreversibly depleted and exhausted, and that streams could be degraded, wildlife habitats destroyed, and aquifers polluted.¹² It is now feared that billions of public dollars will be needed to reclaim these public lands.¹³

Congress has revealed its second thoughts about the terms of the General Mining Law of 1872 and has considered its repeal on several occasions.¹⁴ In 1993, various bills were voted out of commit-

where—if the price were [sic] right. The Forest Service and BLM undertook to find lands of equal value for exchange outside the boundaries of the recreation area. The patented land is valued at \$350,000 to \$750,000, but the owners believe the site's potential mineral value is about \$12 million. Since the claimants obtained the patented land for the 1872 mining law price of \$5 an acre—about \$1,950 total—it is no wonder that this incident has become known as sandscam.

137 CONG. REC. S2015-16 (daily ed. Feb. 20, 1991).

Currently, miners pay no royalties to the United States government for any minerals extracted from public lands. In 1989, the total value of non-fuel mineral production in the United States was \$32.3 billion. *Id.* S2016. It is estimated that between \$3.9 billion and \$6.1 billion of the total is derived from public lands. *Id.*

10. See McCloskey, *supra* note 9, at 4-5.

11. The United States Geological Survey studies show that small miners represent only one percent of the total. See generally MANAGEMENT OF FUEL AND NON-FUEL MINERALS IN FEDERAL LAND (Office of Technology Assessment ed., 1979); McCloskey, *supra* note 9, at 13 (testimony of Mr. McCloskey before the House Interior Subcommittee on Mining and Natural Resources, June 23, 1987).

12. The first act to halt the depletion of certain resources was the Mineral Leasing Act of 1920. 30 U.S.C. § 181 (1988). While the Forest Service Organic Act of 1897 gave the Forest Service the authority to regulate mining activities to prevent "undue degradation" or damage to surface resources, it was not until 1974 that the Forest Service promulgated any regulations. 16 U.S.C. §§ 475, 551 (1988).

13. The General Accounting Office has found that more than 420,000 acres in eleven western states are yet unreclaimed because of mining activity including the pile-up of mining wastes and the contamination of rivers, lakes and soil by cadmium, nickel, lead, mercury, and arsenic. 137 CONG. REC. S2017 (citing U.S. General Accounting Office, *An Assessment of Hardrock Mining Damage*, April 1988). Of this amount, more than 280,000 unreclaimed acres relate to abandoned, suspended, or unauthorized mining operations. *Id.* "Over [one hundred] sites on the Superfund national priority list are mining related and the cost for cleaning up these sites could reach billions of dollars." *Id.* (quoting Bureau of Mines, *The Mineral Position of the United States* 37 (1989)).

14. One of the first attempts at reform was the recommendation of the Public Land Commission in 1880 that the Mining Law be completely rewritten. JOHN D. LESHY, *THE MINING LAW. A STUDY IN PERPETUAL MOTION* 2 (1987). In 1920, most fuel and fertilizer miner-

tee in both houses of Congress.¹⁵ All of these bills would preserve the idea of a mining claim as a property right, but, in return, would significantly qualify and redefine the rights inhering in the mining claim. Certain provisions would condition the existence of the right on the production of commercial ore and assess a fee for the right's acquisition and retention; withdraw the right to obtain a patent to any lands in the public domain, even based on existing mining claims; and impose substantial economic burdens and environmental protection and reclamation requirements upon existing mining claims.¹⁶ The proposed changes most significantly raise the question of an unconstitutional taking of property and the extent to which Congress can qualify or redefine these property interests without the concomitant obligation of making just compensation to the owners.

Part II of this paper offers an analysis of the new allocation of burdens and benefits in the use of public lands as contemplated by the proposed legislation. In Part III, I discuss the acquisition of property rights under the General Mining Law of 1872. In Part IV, the theory of property in general is explained along with the types and nature of property interests inhering in, and arising from, a mining claim. I explain the recent efforts in Congress to reform the mining law in Part V and the concept of a taking of property in general in Part VI. I discuss the idea of a taking by redefinition in Part VII and in Part VIII, I deal with the question of whether the proposed legislation effects an unconstitutional taking of property. Conclusions are offered in Part IX.

als like oil, gas, and oil shale were no longer covered by the Mining Law, but instead, came within the purview of the Mineral Leasing Act. *Id.* In 1922, a reform proposal was made by the federal Bureau of Mines and the Mining Metallurgical Society of America. *Id.* at 3. The major miners requested better security of title, more protection against nuisance locators and less red-tape. *Id.* The prospectors perceived this proposal as a means of denying them access to federal lands. *Id.* In the end, the prospectors won and the reform bill never emerged from committee. *Id.* A number of reform measures were introduced in Congress every year between 1970 and 1978, but all such efforts proved unsuccessful. *Id.* at 67. The recent revival of interest in mining law reform, however, can be explained in part by the need for a framework for hardrock mineral development more consistent with contemporary environmental values and imperatives. See generally John D. Leshy, *Reforming the Mining Law: Problems and Prospects*, 9 PUB. LAND L. REV. 1 (1988).

15. The most substantial of these bills was H.R. 322, 103rd Cong., 1st Sess. (1993) (also known as "The Mineral Exploration and Development Act of 1993").

16. See *infra* notes 158-68 and accompanying text.

II. ACQUIRING PROPERTY RIGHTS UNDER THE GENERAL MINING LAW OF 1872

Under the General Mining Law of 1872,¹⁷ any citizen is free to explore the public lands in the hope of discovering valuable minerals (gold, silver, lead, copper and zinc) and to obtain title to the parcel of land in which such minerals are found.¹⁸ The original purpose of this overture was to encourage risk-takers to explore, discover, and develop both known and unknown mineral deposits for the general good and to settle the western United States.¹⁹ It was thought that, where agricultural land was connected with mining lands, the miner would make improvements, cultivate the land, and raise crops, as well as mine.²⁰ The desired result would be a more settled community that would protect the western frontier and facilitate the production of food and resources for the national good.²¹

17. 30 U.S.C. §§ 21-54 (1988).

18. *Id.* See generally George E. Reeves, *The Origin and Development of the Rules of Discovery*, 8 LAND & WATER L. REV. 1 (1973). The law makes a distinction between "lode" mining claims, in which the valuable minerals occur in a vein held in place by the surrounding rock, and "placer" claims in which valuable minerals are loosely held in the general earth. 30 U.S.C. §§ 23, 35. The distinction is important in that the technical location requirements vary depending on the type of claim. 30 U.S.C. § 23. The statute also places a twenty-acre limit on any mining claims, although no limit is placed on the number of claims an individual may hold. 30 U.S.C. § 35. However, placer claims located by associations of individuals may be as large as 160 acres. 30 U.S.C. § 36. See generally Terry Noble Fiske, *Rush to the Rockies: Some Aspects of Mineral Development of Non-Fee Land*, 17 KAN. L. REV. 225 (1969); Rodney D. Knutson & Hal G. Morris, *Coping with the General Mining Law of 1872 in the 1980's*, 16 LAND & WATER L. REV. 411 (1981); Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 ENVTL. L. REP. 10261 (1988).

19. See *supra* note 5 and accompanying text.

20. Frank J. Barry, *Discovery Under the Mining Laws*, 8 ARIZ. L. REV. 84, 89 (1966) (citing CONG. GLOBE, 42d Cong., 2d Sess. 532 (1872) (statement of Rep. Sargent)).

21. *Id.*; see also John C. Lacy, *Historical Overview of the Mining Law: The Miner's Law Becomes Law*, in THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS 13, 28, 34-35 (1989). Early prospectors simply took occupancy of public lands and adopted their own rules for locating, holding and working their claims. Gradually, local customs and rules of organized mining districts developed, and a few court decisions clarified the nature of a mining claim. See 1 CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 41 (2d ed. 1903). The first treatment of mineral rights by the Continental Congress appeared in provisions for the sale of land by the government in the Northwest Territory in the Land Ordinance of May 20, 1787, which provided that "there shall be reserved . . . one-third part of all gold, silver, lead, and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct." The provision was, however, not adopted by the Constitutional Convention. Lacy, *supra* at 16.

As the new nation expanded westward, the policy of public land management was to convey lands to private ownership as quickly as possible without much thought of retaining lands for any specific purpose. The first major departure from this practice occurred in 1807 after the discovery of lead deposits in Missouri, Indiana Territory,

A mining claim arises upon the discovery of "valuable mineral deposits."²² An explorer perfects his mining claim by staking it and complying with the applicable statutory and regulatory requirements, such as recording notice of the claim.²³ The claim then gives the discoverer "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations"²⁴ as against all third parties except the United States.²⁵ Though the United

and Southern Illinois. At that time, through a series of enactments between 1807 and 1832, lead mines and salt springs in public lands were reserved from sale . . . and a leasing system established. It wasn't long, however, before the experiment proved to be a failure as the cost of administering the system far outstripped revenues. The system was abandoned by a series of acts authorizing sales of lead mines and lands containing copper in 1846 and 1847.

Id. at 16-17 (footnotes omitted).

The gold rush of 1848 prompted the consideration of legislation by Congress in 1849 and 1850, although Congress failed to take any action to take control of the western mineral resources. *Id.* at 29. Meanwhile, local custom and state rules prevailed, though conflicts continued. *Id.* at 30. The first mining law was enacted in 1866. The Placer Act of 1870 corrected a flaw of the 1866 Act by adding placer deposits into the category of minerals capable of being patented. *Id.* at 40. As previously stated, the General Mining Law was then enacted in 1872. *Id.* at 34, 40. Although history has demonstrated that mining has flourished best when the property and minerals were distinguished from the ownership of the soil, the recommendation of the Commissioner of Mineral Statistics was that the best policy for the United States would be to sell the surface along with the mines to avoid conflicts. *Id.* at 38-40; *see also* LESHY *supra* note 14, at 1-2.

Subsequent to the passage of the 1872 Act, state statutes continued to be important in a variety of aspects. Some of these aspects included determining how claim boundaries were monumented; what, if any, "discovery work" was required at the time of location; how notices or certificates of location were posted and recorded; and how annual assessment labor was documented. *See* ROBERT G. PRUITT, JR., *DIGEST OF MINING CLAIM LAWS* 5-13, ROCKY MOUNTAIN MINING LAW FOUNDATION (1990).

22. 30 U.S.C. § 26. Under the "prudent man" test, a valuable mineral deposit is an occurrence of mineralization of such quantity and quality as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral. The mineral deposit that has been found must have a present value for mining purposes. The prudent man test is refined and complemented by the marketability test, which requires a showing that the mineral can be extracted, removed, and marketed at a profit. The marketability test reveals a claimant's intention to secure the land for the purpose of mining a valuable deposit, and it identifies more objectively the factors relevant to a determination that a deposit is valuable. *See generally* *Skaw v. United States*, 2 Cl. Ct. 795, 801 (1983), *cert. denied*, 488 U.S. 854 (1988); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 661 n.4 (1980); *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Chrisman v. Miller*, 197 U.S. 313, 322-23 (1905); *Converse v. Udall*, 399 F.2d 616, 621 (9th Cir. 1968); *see also* Reeves, *supra* note 18, at 1; Carl J. Mayer, Comment, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624 (1986).

23. *See* 43 C.F.R. § 3861.1-2 (1979).

24. 15 U.S.C. § 26 (1988).

25. While the claim offers the discoverer exclusive rights against third parties, rights against the United States are "conditional and inchoate." *See United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1965); *Skaw v. United States*, 2 Cl. Ct. 795, 800 (1983).

States retains title to the land, the claim is otherwise segregated from the public domain.²⁶

After the discovery of the "valuable mineral deposits" and upon fulfillment of other regulatory requirements, a mining claimant becomes eligible to file an application for a patent.²⁷ Claimants may only apply for a patent where they have assumed the requisite degree of risk.²⁸ Thus, to apply for a patent, expenditures on the claim must reach \$100 annually and at least \$500 cumulatively.²⁹ This concept and the requisite levels of expenditure have withstood more than 100 years of our country's general economic development.³⁰

III. THE IDEA OF PROPERTY

At the end of the eighteenth century, the high point of classical liberal thought, the idea of property stood at the center of the conceptual scheme of lawyers and political theorists.³¹ One celebrated theorist argued that:

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which guarantees it to me. It is law alone which permits me to forget my natural weak-

Rights against the United States are governed by the doctrine of *pedis possessio* and the Mining Law of 1872. 30 U.S.C. §§ 21-54. *Pedis possessio* doctrine protects the locator's rights as against all others during occupation and exploration. See Knutson & Morris, *supra* note 18, at 425-26; James A. Finberg, Comment, *The General Mining Law and the Doctrine of Pedis Possessio: The Case for Congressional Action*, 49 U. CHI. L. REV. 1026, 1027-28 (1982). The General Mining Law of 1872 restricts these protections by requiring that occupation be for the good faith purpose of prospecting, mining, or processing operations. 22 U.S.C. § 612 (1988); see also *United States v. Coleman*, 390 U.S. 599, 602 (1968); *United States v. Bagwell*, 961 F.2d 290, 292 (9th Cir. 1992).

26. See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 655 (1898); *Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981).

27. 30 U.S.C. § 29; 43 C.F.R. §§ 3861.1-3864.1 (1988).

28. 30 U.S.C. §§ 28-29; 43 C.F.R. §§ 3851.1, 3861.2-2 to 3861.2-5 (1988).

29. 30 U.S.C. §§ 28-29; see also *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 55 (1970) (indicating that token assessment work does not substantially satisfy the requirements of section 28 of the General Mining Law of 1872).

30. See *Hearings on H.R. 3866 Before the Subcomm. on Mining and Natural Resources*, 137 CONG. REC. S2014, 2016 (Sept. 6, 1990) (statement of Cy Jamison, Director of the Bureau of Land Management).

31. Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* (J. Roland Pennock & John Chapman eds., 1980).

ness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure, though, distant hope of harvest.

A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation, founded on the laws, of enjoying such and such a portion of good. The legislator owes that greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.³²

Bentham's notion that property is a basis of expectation, more than the physical thing, but involving a group of rights inhering in the person's relation to others with respect to the physical thing, is largely reflected in the concept of private property in the United States.³³ This "liberal conception of property" holds that inhering in all property are six traditional rights: (1) right to possess; (2) right to exclude others, (3) right to use, (4) right to dispose of, (5) right to enjoy the fruits and profits, and (6) right to destroy or injure.³⁴

Not every economic, social, or other interest or advantage is, however, property. Property includes only those expectations or economic advantages which have a basis in law.³⁵ An owner of property expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specification of his rights.³⁶ For example, Bentham suggests that a person who has killed a deer may develop an expectation that, although he

32. See BENTHAM, *supra* note 1, at 68-69. William Blackstone defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (15th ed. 1809). That property consists of "the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 *Id.* at *138.

33. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (Papers & Proc. 1967).

34. See Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

35. See *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979); *United States v. Wilow River Co.*, 324 U.S. 499 (1945).

36. Demsetz, *supra* note 33, at 347.

may lose possession at the hand of a stronger rival, he should by law be entitled to its recovery.³⁷

While first possession at the early point in our history served as the original premise for property, others have since come to be accepted with equal force. For example, a person who has created an intellectual or aesthetic work may develop certain expectations in relation to that work.³⁸ Similarly, a person may develop an expectation if she contracts for certain advantages,³⁹ or if she utilizes a variety of government largess such as licenses, public land grazing rights, welfare benefits, and public land mining rights.⁴⁰

A. *The Nature of a Mining Claim*

Several types of property interests may be said to arise out of a mining claim: a right of possession for unpatented mining claims (which is defeasible upon failure to comply with applicable federal and state laws);⁴¹ an equitable fee simple title arising in land, claims on which a patent application has been filed and completed;⁴² a legal fee simple title to the land within which the claim is founded after issuance of a patent; and an opportunity to obtain a patent.⁴³

1. Unpatented Mining Claim

An unpatented mining claim is regarded as a "unique form of

37. BENTHAM, *supra* note 1 at 69.

38. *See* International News Serv. v. Associated Press, 248 U.S. 215, 246 (1918); *see also* Copyright Act of 1976, 17 U.S.C. § 101 (1976). John Locke's Labor theory is implicit in this rule and seems to underlie our patent and copyright laws. *See supra* note 194.

39. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) ("prior to the ratification of the Fourteenth Amendment [the contract clause] was the primary constitutional check on state legislative power").

40. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 745 (1964). In this important work, Reich states that government largess has given rise to a distinctive property law system. This system can be viewed from at least three perspectives: the rights of holders of largess, the powers of government over largess, and the procedure by which holders' rights and governmental power are adjusted. *Id.*

41. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428, 430 (1892). Prior to the enactment of any formal legislation, the status of a miner on public land was little better than that of a mere trespasser since, by local rules and customs, a miner could acquire some nature of estate or interest in his claim. *Duggan v. Davey*, 26 N.W. 887 (Dakota 1886). The interest was nonetheless regarded as real property. *See, e.g., Hughes v. Devlin*, 23 Cal. 501 (1863); *Merrit v. Judd*, 14 Cal. 59 (1859). *See generally* CURTIS H. LINDLEY, LINDLEY ON MINES (3d ed. 1914); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 699-763 (1968).

42. *Benson*, 145 U.S. at 430.

43. *Id.* at 431.

property," essentially, a "possessory right."⁴⁴ The unpatented claim is

property in the fullest sense of that term The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.⁴⁵

As defined, an unpatented mining claim seems to be no more than one of the incidents which inheres in title under the liberal conception of property. In operation, though, the unpatented mining claim is more in the nature of other limited property rights, such as a servitude—a "profit a prendre"—which gives its owner some interest in lands owned by another.⁴⁶ The owner of this "profit a prendre" holds the right to use, but not possess, another's land by removing a portion of the land or its products (such as gravel, minerals, and timber).⁴⁷ A "profit a prendre" can be exclusive, giving the owner the right to exclude everyone else from using the profit.⁴⁸

At the same time, the unpatented mining claim, at its inception, seemed like a fee simple title because it included the right of possession, against even the United States and the general public. It was held to be "exclusive;" locators of valid mining claims, or valid locations, obtained the exclusive right of possession and enjoyment of all the surface included within the lines of the claim's location.⁴⁹ A party who was in actual possession of a valid location could maintain that possession and exclude everyone from trespassing thereon, and no one was at liberty to forcibly disturb his possession or enter the

44. *Cameron v. United States*, 252 U.S. 450 (1920); *see also Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930).

45. *Wilbur*, 280 U.S. at 316-17; *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963); *Black v. Elkhorn Mining Co.*, 163 U.S. 445, 449 (1896); *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1965); *Duguid v. Best*, 291 F.2d 235, 240 (9th Cir. 1961).

46. *See Black*, 163 U.S. at 451-52.

47. In the United States, profits are generally governed by the same rules as easements. *See generally* RESTATEMENT OF PROPERTY § 450, Special Note (1944).

48. *Id.*

49. *Delmonte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 83 (1898). The use of the word "exclusive" denotes congressional intent that locators should have the right to exclude the general public. *Id.* at 69. "Exclusive" is defined as "[e]xcluding or having the power to exclude, or prevent entrance, debar from possession, participation or use; . . . limiting or limited to possession, control or use by a single individual, organization, etc." *Id.* at 74 (citations omitted).

premises.⁵⁰ The unpatented mining claim is completely alienable and may be sold, transferred, mortgaged, and inherited without infringing upon any right or title in the United States.⁵¹ The right of the owner is taxable by the state and is "real property," subject to the lien of a judgment recovered against the owner in a state or territorial court.⁵²

However, unlike a fee simple title, an owner of an unpatented mining claim is limited in the purposes or uses to which she may put her claim—the claim is limited to mining purposes only.⁵³ A claimant may not use public lands for grazing, harvesting, or residential purposes.⁵⁴ Instead, the mining claim gives the locator only the right to explore for and extract minerals, and to purchase the land if there has been compliance with the provisions of the statute.⁵⁵ "To hold otherwise would permit the owners of a valid mining claim, with no intention of purchasing the fee, to strip the surface of the land of all of the valuable property and materials thereon to his own profit, and

50. *Id.*; *Wilbur*, 280 U.S. at 315-16. The right of mining claimants to exclude has since been qualified. See *infra* notes 311-29 and accompanying text.

51. *Wilbur*, 280 U.S. at 316.

52. *Id.*

53. In *United States v. Langley*, 587 F. Supp. 1258 (E.D. Cal. 1984), the United States brought an action for ejectment of persons occupying an unpatented mining claim located on public land in the Shasta-Trinity National Forest. *Id.* at 1259. The government alleged that the land at issue was part of the national forest and that the defendants, without right and in trespass, had moved onto, lived on, and occupied the lands and had situated a cabin or other structure on the land. *Id.* at 1259-60. The defendant argued that it had a valid mining claim and, thus, the exclusive right of possession and enjoyment of the surface within the lines of location, and that the structures and buildings on the mining claims on the land were used in connection with prospecting, mining or processing operations and uses reasonably incident thereto. *Id.* at 1264. The court found that the defendant had engaged in mining operations that would cause a significant disturbance on national forest land and that the maintenance of a residence would require an approved plan of operations pursuant to the applicable regulations. *Id.* However, the court denied the motion for a permanent injunction. *Id.* at 1267. It granted only an injunction against the maintaining of a residence and engaging in mining activity without an approved plan of operations. *Id.*

54. In *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1965), the United States brought an action against the defendants to recover damages for alleged trespass on certain lands of the public domain and to enjoin further trespass. *Id.* at 194. Defendants leased the land from the owner of placer mining claims for grazing purposes and grazed cattle and sheep on the land. *Id.* One question before the court was whether the owner of a valid mining claim has the right to lease or to use the surface of the claim for the grazing of livestock not incident to the mining operations. *Id.* The court answered in the negative. *Id.* at 195-96; see also *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650 (1898); *Belk v. Meagher*, 104 U.S. 279 (1881).

55. *Etcheverry*, 230 F.2d at 195.

then to abandon the claim."⁵⁶ This limitation also means that if a once profitable claim ceases to produce a "valuable mineral deposit" according to the prevailing test,⁵⁷ it may be said to have terminated.⁵⁸ In light of the limited nature of this property interest, it seems that the right of destroying or injuring was never afforded a claimant. This conclusion seems to be required in light of a 1955 amendment to the mining law which provided that mining claims are subject to regulations on use as may be adopted by the Secretary of the Interior.⁵⁹

Under the General Mining Law, the owner of an unpatented mining claim is free to extract for her own profit and enjoyment all valuable minerals discovered. There are no charges, fees or royalties assessed on any amount of ore extracted.

2. Patented Claim

When a patent is issued, the mining claim is merged into the fee estate in the soil; the patentholder acquires title to the entire land, soil, and all minerals.⁶⁰ "It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits, which is the subject of the application for patent, and where a patent of the United States issues, it is for the 'land,' at so much per acre."⁶¹ Nothing in the mining law limits or excepts from a patent those six rights inhering in a fee title to land under the liberal conception of property.⁶² Indeed, from the language of the statute, i.e., "[a]ny mining claim . . . shall not be used, *prior* to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto,"⁶³ it follows that whereas a mining claimant is restricted to using the claim for mining purposes, once the claimant

56. *Id.*

57. *See supra* note 22 and accompanying text.

58. *Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964) (public land should not be allowed to become "perpetually encumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out"); *see also* *United States v. Zweifel*, 508 F.2d 1150, 1156 n.5 (10th Cir. 1975) (even a continued holding of the land for several years with little or no exploitation can raise a presumption that the original claim has been destroyed); *Bales v. Ruch*, 522 F. Supp. 150, 153 (E.D. Cal. 1981); *Multiple Use, Inc. v. Morton*, 353 F.Supp. 184, 190 (D. Ariz. 1972).

59. 30 U.S.C. § 21a (1988).

60. *Deffeback v. Hawke*, 115 U.S. 392 (1885); *Forbes v. Gracey*, 94 U.S. 762 (1876).

61. *Duggan v. Davey*, 26 N.W. 887, 890 (Dakota 1886).

62. *See supra* note 33 and accompanying text.

63. 30 U.S.C. § 612 (1988) (emphasis added).

obtains a patent, she is free to use her property for any purpose, including residential, recreational, farming, harvesting and grazing.⁶⁴ It also follows that a patentholder may cease mining activities and engage in any act otherwise harmful to the land, which might have been prohibited in connection with a mining claim, except to the extent that such activities produce results which expose the patentholder to liability rules applicable to all landowners. Courts have affirmed the patentholder's right to use the land for non-mining purposes.⁶⁵

The justification for this advantage lies more in history than in logic, for the value of the right to engage in non-mining uses may be greater than the fair return to the miner whose pre-patent mining activities have conferred a benefit on society. As the historical accounts indicate, the original thought was that title to the land would encourage settlement of the western frontier and agricultural pursuits.⁶⁶ This is strong support for granting the patentholder a traditional fee title. If the patent conferred upon the holder a title with use limitations, which were in addition to those imposed on all landowners, then the patent would have little value. It would be the same as a mining claim. One advantage usually inhering in title that immediately comes to mind is security against other claimants. But this is no advantage over owning a mere claim, since staking and recording a claim upon discovery of minerals gives this security. The claimant has the right of exclusive possession at least as to other miners (although no property interest is secure against adverse possessors). But the patentholder also has the right to exclude the government and the public from all manner of interference save those pertaining to all landowners. It appears that it was to encourage the settlement of the western frontier that these advantages were originally granted to patentholders.

3. The Opportunity to Patent

Is the "opportunity" to obtain a patent to land that contains the mining claim a property interest? Bentham offered that "property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in conse-

64. *Silbrico Corp. v. Ortiz*, 878 F.2d 333 (10th Cir. 1989); *Bales v Ruch*, 522 F. Supp. 150, 156 (E.D. Cal. 1981).

65. *Silbrico Corp.*, 878 F.2d 333.

66. *See supra* notes 17-21 and accompanying text.

quence of the relation in which we stand towards it.”⁶⁷ Consistent with this conception, the Supreme Court has eschewed any “wooden distinction between ‘rights’ and ‘privileges,’ ” in favor of a definition of a “property interest” that “extend[s] well beyond actual ownership of real estate, chattels, or money.”⁶⁸ The Court has recognized a “purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”⁶⁹ This means that there may be a property interest in a government benefit to which one has come to expect and upon which one has relied, although a person must have more than a unilateral expectation of it.

The Supreme Court first articulated this principle in the context of an employment relationship. In *Perry v. Sindermann*,⁷⁰ an action brought against a state governmental unit, the Court recognized that the concept of a “‘property’ interest in re-employment,”⁷¹ “a legitimate claim of entitlement to job tenure”⁷² (at least for procedural due process purposes) stems from “rules and understandings, promulgated and fostered by [the employer].”⁷³ The Court explained that

[a] written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher’s claim of entitlement to continued employment unless sufficient “cause” is shown. Yet, absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a “property” interest in reemployment.⁷⁴

Instead, “[e]xplicit contractual provisions may be supplemented by other agreements implied from ‘the promisor’s words and conduct in the light of the surrounding circumstances.’ ”⁷⁵

67. See *supra* note 32 and accompanying text.

68. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972).

69. *Id.* at 577.

70. 408 U.S. 593 (1972).

71. *Id.* at 601.

72. *Id.* at 602.

73. *Id.*

74. *Id.* at 601.

75. *Id.* at 602. The basis for the understanding was found in the employer’s official Faculty Guide, which included this provision:

[The] College has no tenure system. The Administration . . . wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

Id. at 600.

With respect to mining claims, the Supreme Court has held that the right to purchase the land upon which a mineral location has been made by the possessor is not an equitable fee-simple estate in the premises,⁷⁶ which arises only upon completion of the application for patent and payment of applicable fees. However, under the liberal conception of property⁷⁷ and *Perry*, the "opportunity to patent" may nonetheless be a *legal* property interest. The prospect of obtaining a patent upon discovery of minerals and before an application for patent is filed is not unlike an interest in continued employment because it, too, is not a mere unilateral expectation. Instead, as in *Perry*, it is a "legitimate claim of entitlement" stemming from rules and understandings—the mining law and custom. The mining law invites miners to explore for minerals, offering to those who accept the venture and commit the required energies and capital not only the exclusive possession of the value of any minerals discovered, but also title to the land in which any minerals are found.⁷⁸

It seems though, as discussed above, that in order for the offer of a patent to have any meaning, the patent must be seen as conferring advantages much larger and different in nature than the right to continue mining under a mining claim. No reason can be found in the legislative history to explain this reward which is in addition to the value of all minerals extracted and exclusive rights to extract them, except as an inducement to undertake the mining effort and as a furtherance of the national policy to populate and develop the west. Considering these dual national objectives, the opportunity to patent can be seen as a separate and distinct property interest, and as one which is as much a vested interest as the mining claim itself.

The opportunity to patent, like the mining claim, is an advan-

In addition, guidelines promulgated by the Coordinating Board of the Texas College and University system provided that a teacher who had been employed as a teacher in the state college and university system for seven years or more had some form of job tenure. *Id.*

However, "[p]roof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate [the employer] to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." *Id.* at 603; see also *Bishop v. Wood*, 426 U.S. 341 (1976) (recognizing an enforceable expectation of continued public employment in the state where the employer, by statute or contract, has granted some form of guarantee); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (recognizing a "statutory expectancy" in continued employment in a civil service position).

76. *Black v. Elkhorn Mining Co.*, 49 F. 549, 552-53 (C.C.D. Mont. 1892), *aff'd*, 163 U.S. 445 (1896) (citing *Wirth v. Branson*, 98 U.S. 118 (1878)); see also *Hutchinings v. Low*, 82 U.S. (15 Wall.) 77 (1872); *Frisbie v. Whitney*, 76 U.S. (9 Wall.) 187 (1869).

77. See *supra* note 34 and accompanying text.

78. See *supra* note 18 and accompanying text.

tage and benefit of government largess, like grazing rights, licenses, and welfare benefits, whose availability, by definition, is subject to Congress' will, though not its whim. It is unquestionably within Congress' power to withdraw, at least prospectively, all public lands from mineral exploration. In an important work, Charles A. Reich considered the general question of an individual's vested interest in the continued enjoyment of government largess.⁷⁹ He explained that "[a] controversy over government largess may arise from such diverse situations as denial of the right to apply, denial of an application, attaching of conditions to a grant, modification of a grant already made, [or] suspension or revocation of a grant"⁸⁰ According to Reich, courts have generally afforded "the greatest measure of protection in revocation or suspension cases" on the theory that some sort of rights have "vested."⁸¹ Courts have given the least amount of protection in denial of application cases where applicants have less at stake, and varying amounts of protection, to cases lying between these two extremes.⁸² On the whole, Reich points out that "individual interests in [government] largess have developed along the lines of procedural protection and restraint upon arbitrary official action, [but] substantive rights to possess and use largess have remained very limited."⁸³ This tenuous and conditional grant of protection may be explained by the idea that "largess does not 'vest' in a recipient,"⁸⁴ the benefits remaining revocable without compensation and subject to limitations on use as the public interest demands.⁸⁵ Reich

79. Reich, *supra* note 40, at 741.

80. *Id.* at 744.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 744-45; see, e.g., *Flemming v. Nestor*, 363 U.S. 603 (1960). The appellee in *Nestor* was an alien who had become eligible for old age benefits under the social security program in 1955 after having worked in the United States since 1936. *Id.* at 628-29 (Douglas, J., dissenting). He was deported in 1956 under the Immigration and Nationality Act for having been a member of the Communist party from 1933 to 1939. *Id.* at 605. Since this was one of the grounds specified in § 202(n) of the Social Security Act, the appellee's old-age benefits were terminated. *Id.*

The question presented to the Court was whether a person eligible for social security benefit payments had an "accrued property interest" in those payments, the taking of which would violate the Due Process Clause of the Fifth Amendment. *Id.* The Court held that eligibility for social security benefit payments was not such an "accrued" property right, the "de-featance" of which could be considered a violation of Due Process. *Id.* at 611. In so holding, the Court looked to the statutory scheme underlying the Social Security system and the purposes sought to be achieved by the Social Security Act. *Id.* at 608-11. The Supreme Court reasoned that if Social Security benefit payments were to be considered "accrued property

states:

Reduced to simplest terms, "the public interest" has usually meant this: government largess may be denied or taken away if this will serve some legitimate public policy. The policy may be one directly related to the largess itself, or it may be some collateral objective of government. A contract may be denied if this will promote fair labor standards. A television license may be refused if this will promote the policies of the antitrust laws. Veterans benefits may be taken away to promote loyalty to the United States. A liquor license may be revoked to promote civil rights. A franchise for a barber's college may not be given out if it will hurt the local economy, nor a taxi franchise if it will seriously injure the earning capacity of other taxis.⁸⁶

While most of these public interest objectives are laudable, Reich points out that they ignore the existence of competing and often conflicting policies and that the regulation of government largess to achieve a specific policy may undermine the independence of the individual.⁸⁷ Reich argues for a "zone of privacy for each individual beyond which neither government nor private power can push."⁸⁸ This means that:

The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands

rights," the Social Security system would be deprived "of the flexibility and boldness in adjustment to everchanging conditions." *Id.* at 610. In fact, the Act contains a clause expressly reserving to Congress the right to alter, amend or repeal any provision. *Id.* at 610-11. The Congress, however, is not free from all constitutional restraint. An arbitrary governmental action can be held to be violative of Due Process. *Id.* at 611. Here, in refusing to find a violation of the appellee's Due Process rights, the Court reasoned that one of the underlying purposes of the Social Security system was to increase the national purchasing power by providing benefit payments to the disabled and the elderly. *See id.* at 612. This purpose of the system would be undermined if the payments were made to a person living abroad, as appellee was after deportation. *Id.*

Justice Black, in his dissenting opinion, quoted a statement by Georgia Senator Walter F. George, Chairman of the Finance Committee, regarding the benefit payments as "an earned right based upon the contributions and earnings of the individual." *Id.* at 623 (quoting 102 CONG. REC. 15110 (1956)). The clause in the Act that gives Congress the "'right to alter, amend, or repeal any provision' of the Act," *id.* at 611, according to Justice Black, meant that the Act could "stop covering new people and even stop increasing obligations to its old contributors." *Id.* at 624. But, it could not disappoint the "just expectations of the contributors to the fund." *Id.* at 624-25.

86. *Reich, supra* note 40, at 774.

87. *Id.*

88. *Id.* at 785.

of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.⁸⁹

These concerns for individual autonomy identified by Reich are perhaps not as compelling in the case of the mining claimant's opportunity to patent. Yet, while the statute requires a financial investment of a minimum of \$500 to obtain a patent, the discovery of valuable minerals may, in fact, require a substantially greater investment of energy and capital with the ever attendant risk that minerals may never be found, such that a prospector never becomes entitled to a patent. Though it is a calculated risk, the loss to the claimant is real. And, in accordance with Reich's views on conflicting policies, while the protection of the environment may well be the overriding public policy that requires the mining claimant to yield, the withdrawal of the opportunity to patent would not further that end because a mining claim must be worked in order to remain a cognizable property interest,⁹⁰ but a patented claim need not.⁹¹ Hence, while a mining claimant does not need a patent to continue mining, ironically, a claimant needs a patent in order to *discontinue* mining.

4. Existing Uses and Valid Existing Rights

The opportunity to patent may be viewed as a "valid existing right." Valid existing rights are often found in savings clauses of subsequently enacted legislation providing that the new legislation does not otherwise alter or eliminate rights already existing.⁹² Congress has consistently failed to state the precise purpose of any valid existing right or savings clause; instead, it leaves the burden of inter-

89. *Id.*

90. See *supra* notes 22-30 and accompanying text.

91. See *Multiple Use, Inc. v. Morton*, 353 F. Supp. 184, 193 (D. Ariz. 1972) (citing *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963)).

92. See, e.g., Mineral Leasing Act of 1988, 16 U.S.C. § 182 (1988); Alaska National Interest Conservation Act, 16 U.S.C. § 410hh-5 (1988); Multiple Use Mining Act of 1955, 30 U.S.C. § 612(b) (1988); Central Idaho Wilderness Act of 1980, 16 U.S.C. § 1132(c) (1988); Wilderness Act of 1964, 16 U.S.C. § 1311(b) (1988); Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701(b) (1988); Mining in the Parks Act, 16 U.S.C. § 1901 (1988). Section 1910 of the Mining in the Parks Act provides:

The holder of any patented or unpatented mining claim subject to this chapter who believes he has suffered a loss by operation of this chapter, or by orders or regulations issued pursuant thereto, may bring an action in a United States district court to recover just compensation, which shall be awarded if the court finds that such loss constitutes a taking of property compensable under the Constitution.

pretation to regulators and the courts.⁹³ The Courts have held that a determination of the existence and extent of valid existing rights requires a consideration of not only the language of the statute and legislative history where the statute is silent, but also interpretations, definitions and understandings prevailing at the time the rights were acquired.⁹⁴ Using this analysis, some courts have interpreted valid existing rights clauses to cover only uses then actually existing and not those merely potentially existing at the time the rights were acquired.⁹⁵

The recent decision in *Seldovia Native Ass'n v. Lujan*⁹⁶ is instructive on the interpretation of valid existing rights. The Alaska

93. See generally James N. Barkeley & Lawrence V. Albert, *A Survey of Case Law Interpreting "Valid Existing Rights"—Implications for Unpatented Mining Claims*, 34 ROCKY MTN. MIN. L. INST. 9-1 (1988).

94. For example in *Andrus v. Shell Oil Co.*, 446 U.S. 657, 661 (1980), the Court decided the existence and scope of valid existing rights under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1988), which withdrew oil shale and several other minerals from the General Mining Law of 1872 and provided that, thereafter, these minerals would be subject to disposition only through leases. A savings clause, however, preserved "valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which [the Act was] initiated, which claims may be perfected under such laws, including discovery." *Andrus*, 446 U.S. at 659. It was argued that no claim was established under the marketability test adopted after the Mineral Leasing Act. *Id.* at 660-61. The Court held that the "present marketability" standard would not be used to determine whether a cognizable property interest arose. *Id.* at 672-73. Rather, the Department of Interior instructions, which were issued just after the enactment of the Mineral Leasing Act of 1920, were the test to be followed. *Id.* at 673.

95. In *Utah v. Andrus*, 486 F. Supp. 995, 999 (D. Utah 1979), "the United States 'filed suit . . . seeking a temporary restraining order to prevent Cotter Corporation . . . from engaging in any construction, road building, leveling land, or destroying primitive, scenic and wildlife characteristics on certain federal land.'"

Cotter Corporation [was] a uranium mining and exploration company wholly owned by Commonwealth Edison, a public utility serving Northern Illinois Cotter acquired . . . federal claims . . . located pursuant to the Mining Law of 1872

. . . . Cotter conducted drilling operations on federal land to the north and to the south of the lands at issue These operations indicated a "trend" of uranium ore between the two drilling points Cotter constructed access roads . . . but did not notify BLM [(the Bureau of Land Management)] of the construction activity [About six months later] Cotter began to construct a road across the land in question . . . in order to further its exploratory drilling.

In the meantime, BLM proceeded with the inventory and wilderness area examination required by FLPMA [(Federal Land Policy and Management Act)] BLM identified a portion of roadless unit UT-05-236 [(part of Cotter's federal claim)] as being appropriate for designation as a Wilderness Study area.

Id. at 1000-01.

96. 904 F.2d 1335 (9th Cir. 1990).

Statehood Act⁹⁷ authorized the State of Alaska to select acreage from public lands that were "vacant, unappropriated, and unreserved at the time of their selection" and thereafter "to execute conditional leases and to make conditional sales of such selected lands."⁹⁸ Pursuant to this authorization, the State created the "open-to-entry" ("OTE") program, under which individuals could lease up to five acres of state land classified as OTE.⁹⁹ The lessees were then granted an option to purchase the land, which could be exercised after a survey of the land was conducted and the purchaser paid to the State the fair market value of the lands as of the date of entry.¹⁰⁰ The State issued OTE leases with conditional purchase options to the defendants in this case between 1968 and 1972,¹⁰¹ and "the Department of the Interior issued 'tentative approval' to the State only after 'determining that there [was] no bar to passing legal title'"¹⁰²

Thereafter, the Seldovia Native Association ("SNA") submitted selections for lands, which came to include the OTE lands.¹⁰³ The Bureau of Land Management ("BLM") then "vacated its tentative approval of OTE lands and approved their conveyance to SNA, subject to valid existing rights."¹⁰⁴ The decision "was appealed by SNA, the State, and several individual lessees to the Alaska Native Claims Appeals Board" (the "Board").¹⁰⁵ The Board ruled that although the OTE leases were protected by the Alaska Native Claims Settlement Act¹⁰⁶ ("ANCSA"), the purchase options

97. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (codified as amended at 48 U.S.C. Ch. 2 (1988)).

98. *Seldovia*, 904 F.2d at 1337-38 (quoting the Alaska Statehood Act, 48 U.S.C. Ch. 2, §§ 6(b), 6(g) (1988)).

99. *Id.* at 1338 (citing ALASKA STAT. § 38.05.077 (3), (7) (1968)).

100. *Id.* (citing ALASKA STAT. § 38.05.077(4) (1968)).

101. *Id.*

102. *Id.*

103. *Id.* The initial selections by the SNA did not include the OTE lands, but "the BLM notified SNA that SNA was required to select the OTE lands to ensure the 'compactness' of SNA's selection." *Id.*

104. *Id.*

105. *Id.*

106. 43 U.S.C. §§ 1601-1629e (1988). ANCSA was enacted in 1971 to settle Alaskan natives' aboriginal claims to the land and resources of Alaska. *See id.* § 1601. It provided that all prior conveyances of land under federal law or under the Statehood Act operated to extinguish aboriginal title at the time of the conveyance and all remaining claims by Native Alaskans based on aboriginal right, title, use or occupancy of the land as of the effective date. *Id.* § 1603. In consideration for the relinquishment of claims based on aboriginal title, Congress granted to Native Alaskans nearly \$1 billion and 40 million acres of land. *See id.* §§ 1605, 1611. ANCSA established a process whereby land would be withdrawn from selection by the

did not survive conveyance to Native Alaskans.¹⁰⁷ The Board's order, however, conflicted with an earlier decision of the Interior Board of Land Appeals.¹⁰⁸ To resolve this conflict, the Secretary of the Interior issued an order concluding that conditional purchase options were valid existing rights under ANCSA.¹⁰⁹ This meant that a lessee's right to exercise a purchase option was enforceable against a Native Village corporation such as SNA.¹¹⁰ The Secretary later ruled that this should be applied retroactively to the OTE lands previously conveyed to SNA.¹¹¹ In the ensuing action, the District Court accepted the Secretary's interpretation of valid existing rights under ANCSA and granted summary judgment for the federal defendants and the individual defendants.¹¹²

On appeal, SNA filed an action for declaratory relief seeking to invalidate the construction of ANCSA as adopted by the Secretary of the Interior¹¹³ because "[t]he Secretary's construction of ANCSA validated the State of Alaska's grant of leases with purchase options on land subsequently claimed by SNA pursuant to ANCSA."¹¹⁴ Furthermore, SNA sought an injunction against further enforcement pursuant to the invalid interpretation.¹¹⁵ SNA argued that the purchase options were not "valid existing rights" and, therefore, could be extinguished under ANCSA.¹¹⁶

The Ninth Circuit first noted that Congress had not defined "valid existing rights" in the text of ANCSA.¹¹⁷ The court then

State, made available for selection by Native Alaskans to fulfill their allotment, under ANCSA, and then conveyed to Native Alaskans. *See id.* § 1603.

Section 1610 of ANCSA provides: "The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing law, and from selection under the Alaska Statehood Act, as amended" *Id.* § 1610. The effect of this provision was that the state could not grant OTE leases under the Statehood Act after passage of ANCSA. However, rights previously granted were protected as "valid existing rights." *Seldovia*, 904 F.2d. at 1340.

107. *Seldovia*, 904 F.2d at 1340.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.* A year and a half later, the Secretary had reconsidered his first order and concluded that purchase options are valid existing rights under ANCSA § 11(a)(2), 43 U.S.C. § 1610(a)(2). *Id.*; *see also* Secretarial Order No. 3029 (S.O. 3029), 43 Fed. Reg. 55287 (1978).

112. *Seldovia*, 904 F.2d at 1337.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1341.

looked to the legislative history and found support for the conclusion that conditional purchase options were "valid existing rights."¹¹⁸ The court noted that the Conference Report of the House and Senate Committees on Interior and Insular Affairs stated that "[a]ll valid existing rights, including inchoate rights of entrymen and mineral locators, are protected."¹¹⁹ In the court's view, a conditional purchase option was an inchoate right.¹²⁰ However, because conditional purchase options were not expressly referred to in either the statute or legislative history, the court turned to an examination of the Secretary's construction of "valid existing rights" in general.¹²¹

The court found that the Secretary's construction was consistent with other judicial interpretations of the statute.¹²² For example, in *Aleknagik Natives, Ltd. v. United States*,¹²³ the Ninth Circuit reviewed the Secretary's construction of "valid existing rights" under the same section of ANCSA. The Secretary had determined that townsite land in Alaska, which had been segregated but not yet subdivided and distributed, was not available for Native Alaskan selection under the Act.¹²⁴ The court agreed, asserting that the municipalities had an entitlement to the lands under the townsite laws from the time the lands were segregated from the public domain.¹²⁵ The court explained:

The term "valid existing rights" does not necessarily mean present possessory rights, or even a future interest in the property law sense of existing ownership that becomes possessory upon the expiration of earlier estates. Legitimate expectations may be recognized as valid existing rights, especially where the expectancy is created by the government in the first instance.¹²⁶

Similarly, in *Seldovia*, the holders of conditional purchase options had legitimate expectations arising out of the Alaska Statehood Act and, according to the court, the leases issued pursuant to that Act should be protected as "valid existing rights."¹²⁷

118. *Id.*

119. *Id.* at 1341-42 (alteration in original) (quoting H.R. CONF. REP. NO. 746, 92d Cong., 1st Sess. 4 (1971), reprinted in 1971 U.S.C.C.A.N. 2192, 2250).

120. *Id.* at 1342.

121. *Id.*

122. *Id.*

123. 806 F.2d 924 (9th Cir. 1986).

124. *Id.* at 926.

125. *Id.*

126. *Id.* at 926-27.

127. *Seldovia*, 904 F.2d at 1343.

The Ninth Circuit found further support for its conclusion in the Supreme Court's interpretation of a similar phrase in the context of the federal homestead laws.¹²⁸ In *Stockley v. United States*,¹²⁹ a presidential order withdrew certain lands from appropriation under the homestead laws, "subject to existing valid claims."¹³⁰ The Court found that a homesteader's lawful entry upon land was excepted from this withdrawal order.¹³¹ The *Stockley* Court stated:

Obviously, this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title.¹³²

Thus, "[b]ecause the preliminary entry gave the entryman an exclusive right of possession, his inchoate right to proceed to patent was protected."¹³³ Thus, the Ninth Circuit, in *Seldovia*, stated that "[j]ust like a homesteader's preliminary entry, the grant of a conditional purchase option ripens into title upon compliance with the [State's] land laws."¹³⁴

A clear sense of the Supreme Court's attitude about the rights inherent in mining claims may be found in a case decided a few years after *Stockley*. In *Wilbur v. United States ex rel. Krushnic*,¹³⁵ a claimant sought a writ of mandamus to compel the issuance of a patent.¹³⁶ In 1919, the respondent and seven associates located a tract of land in Colorado under the name of Spad No. 3 placer claim.¹³⁷ "The land contained valuable deposits of oil shale, and was open to appropriation under the mining laws."¹³⁸ Spad No. 3 formed one of a group of six oil placer claims, all of which were located and owned by the same persons and were adjacent to one another.¹³⁹ In 1920, Congress passed the Mineral Leasing Act, which withdrew

128. *Id.*

129. 260 U.S. 532 (1923).

130. *Id.* at 536.

131. *Id.* at 544.

132. *Id.*

133. *Seldovia*, 904 F.2d at 1343 (citing *Stockley*, 260 U.S. at 544).

134. *Id.*

135. 280 U.S. 306 (1930).

136. *Id.* at 316.

137. *Id.* at 315.

138. *Id.*

139. *Id.*

public lands containing deposits of coal, phosphate, sodium, oil shale and gas from mining exploration, and permitted only leases.¹⁴⁰ However, the statute contained a savings clause protecting "valid claims existent [at the date of the passage of the Act] and thereafter maintained in compliance with the laws under which initiated" and declaring that the claims "may be perfected under such laws, including discovery."¹⁴¹

Before 1921, the co-locators had already performed annual labor on three of the six claims amounting in value to more than \$600, with the intention that the labor should apply to all six claims.¹⁴² The claimant subsequently acquired the interest of his co-locators in Spad No. 3 and performed the required assessment work until the aggregate value exceeded \$500.¹⁴³ On September 25, 1922, the claimant applied for a patent, complied with the statutory requirements pertaining to the application process, and paid the purchase price.¹⁴⁴ Thereafter, a proceeding against the entry was instituted by the Land Office, which then declared the claim null and void on the ground of insufficient assessment labor for the year 1920.¹⁴⁵ This holding was affirmed by the Secretary of the Interior.¹⁴⁶ The claimant then applied for a writ of mandamus, which was denied by the District Court, which decision was reversed by the Court of Appeals.¹⁴⁷

The specific question before the Supreme Court was whether the Mineral Leasing Act of 1920 had the effect of extinguishing the locator's right to save his claim under the original location by resuming work after his failure to perform annual assessment labor.¹⁴⁸ The Court explained that "[w]hile [a claimant] is required to perform labor of the value of \$100 annually, a failure to do so does not ipso

140. 30 U.S.C. § 193 (1988) provides:

The deposits of coal, phosphate, sodium, potassium, oil, shale, and gas herein referred to, in lands for such minerals . . . shall be subject to disposition only in the form and manner provided in this chapter, except as provided in sections 1716 and 1719 of Title 43, and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

141. *Id.*

142. *Wilbur*, 280 U.S. at 315.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 316.

148. *Id.*

facto forfeit the claim, but only renders it subject to loss by relocation.”¹⁴⁹ The Court further pointed out that “the law is clear that no relocation can be made if work be resumed after default and before such relocation.”¹⁵⁰

This concession that “Spad No. 3 ‘as a valid claim existent on February 25, 1920,’ [left] only [the] question [of] whether, within the terms of the excepting clause, the claim was ‘thereafter maintained in compliance with the laws under which initiated.’ ”¹⁵¹ The Court believed the owner’s resumption of work, after his failure to do assessment work, meant a retention of the owner’s claim except in cases where the United States intervened to challenge the claim.¹⁵² The Court stated:

“[The locator’s] rights after resumption were precisely what they would have been if no default . . . in . . . doing [the] assessment [work had] occurred.” Resumption of work by the owner, unlike a relocation by him, is an act not in derogation, but in affirmance, of the original location; and thereby the claim is “maintained” no less than it is by performance of the annual assessment labor. Such resumption does not restore a *lost* estate . . . it *preserves* an *existing* estate.¹⁵³

This case is important not only for its instructive points on the annual assessment requirements, but also for its consideration of the import of the savings clause. The Court found that the savings clause of the Act preserved existing mining claims and that a mining claim gave not only the right to continue mining and extracting valuable mineral deposits (including the fossil fuels otherwise withdrawn by the Act), but also the right to obtain a patent to the land based on these existing claims.¹⁵⁴ This means that the “valid existing rights” clause saved the mining claim as well as the right to apply for a patent based on these claims.

149. *Id.* at 317.

150. *Id.*

151. *Id.*

152. *Id.* at 317-18.

153. *Id.* at 318 (citing *Belk v. Meagher*, 104 U.S. 279, 283 (1881); *Knutson v. Fredlund*, 106 P. 200, 202 (Wash. 1910)) (emphasis added).

154. *See Wilbur*, 280 U.S. at 317.

IV. REDEFINITION OF MINING CLAIM UNDER THE PROPOSED MINERAL EXPLORATION AND DEVELOPMENT ACT OF 1993

In 1872, the tone of the General Mining Law,¹⁵⁵ as well as the government's attitude toward mining was one of laissez-faire; the government left it largely up to claimants and patentholders to determine how mining operations would be conducted.¹⁵⁶ Nearly fifty years passed before Congress amended the General Mining Law or enacted new laws to increase the role of the government in controlling the ways in which public lands were claimed and mined.¹⁵⁷

The most recent effort by Congress to control mining activities is the proposed "Mineral Exploration and Development Act of 1993."¹⁵⁸ The proposed Act restates the offer to any citizen to seek minerals in public lands and preserves the explorer's exclusive right of possession upon the location of valuable minerals.¹⁵⁹ The claim, however, is deemed abandoned unless the claim holder continues to maintain the sufficiency of the claim in accordance with the Act.¹⁶⁰ Under the proposed Act, the taking on of the risk of exploitation is no longer sufficient compensation to the United States for the use of its land. Instead, the proposed Act requires that the claim holder make certain payments to the Secretary. For example, under section 103(d)(3), a locator must pay a location fee of twenty-five dollars for each unpatented mining claim located after the date of enactment of

155. 30 U.S.C. §§ 21-54 (1988).

156. Humbach, *supra* note 5, at 340.

157. *Id.*

158. H.R. 322, 103rd Cong., 1st Sess. (1993). H.R. 322 was passed in the House by a 316 to 108 vote. Also, currently under consideration is S. 775, a more industry-friendly bill. See S. 775, 103rd Cong., 1st Sess. (1993).

159. H.R. 322, 103rd Cong., 1st Sess. (1993). Section 101(a) provides "that mining claims may be located under this Act on lands and interests owned by the United States" pursuant to the terms of the Act. Section 103(a) sets forth the rules for locating a mining claim. Specifically, section 103(a) states "[a] person may locate a mining claim covering lands open to the location of mining claims by posting a notice of location, containing the person's name and address, the time of location . . . and a legal description of the claim." Accordingly, section 103(d)(1) provides that "[w]ithin 30 days after the location of a mining claim pursuant to this section, a copy of the notice of location referred to in subsection (a) shall be filed with the Secretary in an office designated by the Secretary."

160. Section 107(b)(1) of the proposed Act provides that "at any time, upon request of the Secretary, the claim holder shall demonstrate that the continued retention of a mining claim located or converted under this Act is exclusively related to mineral activities at the site." Section 107(b)(2) places the burden of proving the sufficiency of the claim on the claim holder. Accordingly, section 107(b)(3) states that "[a]ny mining claim for which the claim holder fails to demonstrate continued sufficiency, in the determination of the Secretary, pursuant to subsection (b) of this section, shall thereupon be deemed forfeited and be declared null and void."

the Act.¹⁶¹ Additionally, pursuant to sections 105(a)(1) and (2), an explorer must pay annual claim maintenance fees of \$100 for converted claims, and of \$200 for claims located pursuant to the Act.¹⁶² Section 306 of the proposed Act also requires that the claim holder pay a royalty fee of eight percent of the "net smelter return" to the United States as the Secretary prescribes.¹⁶³ Claims existing prior to the effective date of this Act will be converted to be covered by the proposed legislation (for all purposes except the right to patent).¹⁶⁴ The proposed Act imposes substantial obligations upon existing and future claimants to minimize adverse environmental impact on the land,¹⁶⁵ and to reclaim mined land to a condition capable of support-

161. Section 103(d)(3) also provides that such "location fee" must be paid to the Bureau of Land Management at the time of the recording of the claim. Furthermore, the Secretary of Interior would be authorized to set and collect "user fees as may be necessary to reimburse the United States for expenses incurred in administering" any and all requirements of the Act. H.R. 322, 103rd Cong., 1st Sess. § 402 (1993).

162. Section 105(b) requires that the payment of claim maintenance fees be payable on or before August 31 of each year. Furthermore, section 105(e) allows for such fees to be waived for the "claim holder who certifies in writing to the Secretary that on the date the payment was due, the claim holder and all related parties held not more than 10 mining claims on lands open to location."

Section 402 further states that "[t]he Secretary and the Secretary of Agriculture are each authorized to establish and collect from persons . . . [any] fees as may be necessary to reimburse the United States for the expense incurred in administering such requirements."

163. Section 306(a) states that "any mining claim located or converted under this Act . . . shall be subject to a royalty of 8 percent of the net smelter return from such production." It should be noted that section 105(h) allows for "[t]he amount of the annual claim maintenance fee required to be paid under this section . . . [to] be credited against the amount of royalty required . . . under section 306"

164. Section 104(a) states:

Notwithstanding any other provision of law, on the effective date of this Act any unpatented mining claim for a locatable mineral located under the General Mining Laws prior to the date of enactment of this Act shall become subject to this Act's provisions and shall be deemed a converted mining claim under this Act. Nothing in this Act shall be construed to affect extralateral rights in any valid lode mining claim existing on the date of enactment of this Act. After the effective date of this Act, there shall be no distinction made as to whether such claim was originally located as a lode or placer claim.

Sections 417(a) and (b) address the limitations placed on the issuance of patents for all types of claims located or converted under this proposed Act.

165. Section 201 of the proposed Act deals with surface management standards. Section 201 states:

Notwithstanding the last sentence of section 302(b) of the Federal Land Policy and Management Act of 1976, and in accordance with this title and other applicable law, the Secretary, and for National Forest System lands the Secretary of Agriculture, shall require that mineral activities on Federal lands conducted by any person minimize adverse impacts to the environment.

Section 202(a) requires that "[n]o person may engage in mineral activities on Federal lands that may cause a disturbance of surface resources, including but not limited to, land, air,

ing uses which such lands were capable of supporting before the surface disturbances occurred.¹⁶⁶ The proposed Act also requires the posting of financial guarantees for the estimated cost of reclamation prior to commencement of mining activities¹⁶⁷ and sets forth detailed reclamation standards.¹⁶⁸

V. TAKING PROPERTY AS THE LIMITS OF REDEFINITION

Most Supreme Court cases that interpret the Takings Clause of the Fifth Amendment¹⁶⁹ fall within two classes.¹⁷⁰ "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."¹⁷¹ The government effects such a *per se* taking, for example, when it floods a landowner's property,¹⁷² requires a landowner to suffer from the physical occupation of his premises by the installation of cable for television on his building,¹⁷³ or destroys the use of land as a chicken farm by noise from low-flying military aircraft.¹⁷⁴ However, a law that results in a transfer of wealth from a landowner to others or that deprives a landowner of some right of disposition (e.g., choosing tenants) does not establish a *per se* taking.¹⁷⁵

[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation and the extent to which it deprives the owner of the economic use of the property suggest that the regulation has

water (both ground and surface) fish, wildlife, and biota unless . . . (2) a permit was issued to such person under this title authorizing such activities."

Section 203 deals with the obtaining of exploration permits.

166. Section 207 contains the provisions on reclamation. The general rule on reclamation as set forth in 207(a) states: "[e]xcept as provided under paragraphs (5) and (7) of subsection (b), the operator [of a claim] shall restore lands subject to mineral activities carried out under a permit issued under this title to a condition" of natural topography and vegetation as existed prior to the disturbance of the surface.

167. Section 206 requires a claimant to provide financial guarantees prior to the commencement of any mineral activity causing more than minimal disturbance to the environment, to ensure the complete and timely reclamation of the mining area.

168. The various reclamation standards for each type of mining activity are found in section 207(b)(1) through (10). Additionally, section 207(b) allows for the Secretary to promulgate any necessary and further standards depending upon the type of mining performed.

169. U.S. CONST. amend. V.

170. *Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992).

171. *Id.*; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Both of these cases will be discussed *infra*.

172. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 180 (1871).

173. *Loretto*, 458 U.S. at 438.

174. *United States v. Causby*, 328 U.S. 256, 262, 267 (1946).

175. *Yee*, 112 S. Ct. at 1529.

unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.”¹⁷⁶

Unlike the *per se* takings cases, which require courts to apply a clear rule, the regulatory takings cases “necessarily entail complex factual assessments of the purposes and economic effects of government actions.”¹⁷⁷ A government action that denies a property owner “some beneficial use of his property or that may restrict the owner’s full exploitation of the property” will be upheld “if such public action is justified as promoting the general welfare.”¹⁷⁸ The Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”¹⁷⁹ Instead, the Court “‘has examined the “taking” question by engaging in essentially *ad hoc*, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action’”¹⁸⁰

It was not until 1922, in *Pennsylvania Coal Co. v. Mahon*,¹⁸¹ that the Supreme Court recognized that, if the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.¹⁸² Thus, a government regulation which limits a landowner in the use of her property or requires her to perform particular acts in the use of her property will not be upheld where it fails to “substantially advance a legitimate [government] interest,” or has the effect of depriving the owner’s property of an “economi-

176. *Id.* at 1526; see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978).

177. *Yee*, 112 S. Ct. at 1526; see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). See generally Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988); John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVT. L. 1 (1992).

178. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155, 163 (1980); *Penn Central*, 438 U.S. at 125-29. The Court will uphold “laws or programs that adversely affect recognized economic values.” *Id.* at 124.

179. *Penn Central*, 438 U.S. at 124.

180. *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)) (emphasis added).

181. 260 U.S. 393 (1922).

182. *Id.* at 413-15.

cally viable use."¹⁸³

A regulatory taking may also occur by the imposition of an exaction—a “forced contribution to general governmental revenues . . . not reasonably related to the costs” of any governmental benefits or services provided.¹⁸⁴ Where there is such a nexus, an exaction is not a taking, but instead is often characterized as a “user fee.”¹⁸⁵ The Court in *United States v. Sperry Corp.* held that, to avoid a takings finding, it is sufficient that the “user fee” be intended to reimburse

183. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264 (1981).

184. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). This case considered the effect of “a Florida statute appropriating interest on funds deposited into a court registry by an interpleader complaint.” *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.8 (1989). “Florida law provided for both the deduction of a small percentage of the interpleader funds as a fee for services rendered by the clerk of the court and the deduction of interest earned on the funds.” *Id.* at 62. The court struck down the law stating that “[i]t [was] obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged . . . and described specifically . . . as a fee ‘for services’ by the clerk’s office.” *Webb's Fabulous Pharmacies*, 449 U.S. at 162. The Court “failed to discern any justification for the deduction of the interest other than the bare transfer of private property to the county.” *Sperry*, 493 U.S. at 62.

185. *Sperry*, 493 U.S. at 53, 63. In *Sperry*, the user fee was a charge for the use of an established Tribunal for the recovery of claims against Iran. *Id.* The “user fee” was exacted “as reimbursement to the United States government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before the Tribunal and the maintenance of the Security Account.” *Id.* at 60. “Prior to the 1979 seizure of the United States Embassy in Tehran, Sperry, an American parent corporation and its wholly owned subsidiary, entered into contracts with the Government of Iran.” *Id.* at 53. “After the Embassy seizure, Sperry filed suit for claims against Iran in a [district] court and obtained a prejudgment attachment of Iranian assets.” *Id.* “Subsequently, the United States and Iran entered into the Algiers Accords, which established, inter alia, the Iran-United States Claims Tribunal (the “Tribunal”) to arbitrate Americans’ claims against Iran, specified that Tribunal awards are final, binding, and enforceable in the courts of any nation, and placed \$1 billion of Iranian assets in a Security Account for the payment of awards to the Federal Reserve Bank of New York and thence to claimants.” *Id.* “After Executive Orders implementing the Accords invalidated Sperry’s attachment and prohibited it from further pursuing its claims in American courts, Sperry filed a claim with the Tribunal and ultimately entered into a settlement agreement whereby Iran promised to pay it \$2.8 million . . .” *Id.* “Congress then enacted section 502 of the Foreign Relations Authorization Act, . . . which require[d] the Federal Reserve Board to deduct a percentage of the [claimant’s] award [and pay the United States Treasury] “as reimbursement to the . . . Government for expenses incurred in connection with the arbitration of claims . . . before [the] Tribunal and the maintenance of the Security Account.” *Id.* “When the Federal Reserve Board so deducted a percentage of Sperry’s award, Sperry renewed a suit it had previously filed in the Claims Court, arguing that the deduction authorized by section 502 was unconstitutional.” *Id.* “The [lower] court rejected the claim and dismissed the suit, but the Court of Appeals reversed.” *Id.* The Supreme Court reversed the Court of Appeals and remanded the case back to the Federal Circuit. See *Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 53 (1991).

costs incurred by the government, and it is not necessary "that the amount of [the] user fee be precisely calibrated to the use that a party makes of government services,"¹⁸⁶ but only that it is a "fair approximation of the costs of benefits supplied."¹⁸⁷

The question of taking by financial exaction has also arisen in the context of land use impact fees.¹⁸⁸ An impact fee is lawful and not a taking where the fee bears a rational relationship to a legitimate public purpose.¹⁸⁹ "For example, courts have sustained requirements that [land] developers construct various on-site improvements, such as sewers, water mains, sidewalks, curbs and gutters, storm drains, and landscaping."¹⁹⁰ "Requiring off-site improvements that serve a public purpose, such as roads, schools, parks and sewage treatment plants, may also be justified where the requirement alleviates a public burden or ameliorates harmful effects caused by development."¹⁹¹

186. *Sperry*, 493 U.S. at 60.

187. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)). In *Massachusetts*, the Court:

upheld a flat registration fee assessed by the Federal Government on civil aircraft, including aircraft owned by the States, against a challenge that the fee violated the principle of intergovernmental tax immunity. In holding that the registration charge could be upheld because it was a user fee rather than a tax, the Court rejected Massachusetts' argument that the "amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways." The Court recognized that when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we declined to impose a requirement that the government "give weight to every factor affecting appropriate compensation for airport and airway use."

Id. at 60-61 (citations omitted). In *Sperry*, the court found that the fees were not "so clearly excessive as to belie their purported character as user fees." *Id.* at 62.

188. See generally Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (1987); Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 WASH. U. J. URB. & CONTEMP. L. 55 (1990).

189. *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991).

190. *Id.* at 876-77.

191. *Id.* at 877. In *Commercial Builders*, the court addressed the constitutionality of a city ordinance which:

imposes a fee in connection with the issuance of permits for non-residential development of the type that will generate jobs. The fees were to be paid into a fund to assist in the financing of low-income housing. In challenging the ordinance, Commercial Builders conceded that the city had [a legitimate interest in expanding low-income housing, but argued that the ordinance constituted] an impermissible means to advance that interest because it places the burden of paying for low-income housing on non-residential development without a sufficient showing that non-residential development contributed to the need for low-income housing in proportion to that

A. *Evolving Public Values in the Ad Hoc Analysis*

The development of an *ad hoc* analysis for regulatory takings cases indicates a change in public values that many argue have and should advise takings jurisprudence.¹⁹² Of particular importance is the idea that "land and natural resources are our common heritage, to which we all have equal claims,"¹⁹³ and which are "not properly subject to claims of ownership in perpetuity, but must be managed in such a way that all people in all generations share their benefits."¹⁹⁴

The idea of evolving public values may be the only way to explain and reconcile recent takings cases with longstanding principles.

burden. [The Court of Appeals affirmed a District Court in upholding the ordinance based on the fact that the ordinance] was enacted after a careful study revealed the amount of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new non-residential development.

Id. at 873-74. The court found that the assessment was not excessive but bore a "rational relationship to a public cost closely associated with such development." *Id.* at 874; *see also* Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991).

192. *See* T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1723 (1988).

193. *Id.* at 1723.

194. *Id.* Tideman quotes a famous passage by John Locke that addresses whether "any-one [can] properly use land if no one can properly claim to own land":

The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned [sic] to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable *Property* of the Labourer, no Man but he can have a right to what that is once joyned [sic] to, at least where there is enough, and as good left in common for others.

Id. at 1723-24 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE § 27 (1960)).

Tideman argues that "the finiteness of land makes all claims to *perpetual possession* inconsistent with Locke's proviso." *Id.* at 1724. He states:

Natural resources share with land the quality of being provided by nature, but differ from land in that they are exhaustible. Therefore the application of Lockean principles to natural resources requires separate treatment.

... Any person's claim upon exhaustible natural resources is consistent with Locke's proviso if the value of the claim does not exceed a person's dividend under such a rule. Locke's proviso thus constrains the claims that people can make upon land and natural resources, but it does not impose impossible constraints.

Id.; *see also* John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989); John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311 (1987); E. George Rudolph, *Let's Hear it for Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355 (1987); Joseph L. Sax, *Why We Will Not (Should Not) Sell the Public Lands: Changing Conception of Private Property*, 1983 UTAH L. REV. 313.

In *Pennsylvania Coal Co. v. Mahon*,¹⁹⁵ the Supreme Court declared invalid, as applied to the facts of the case, a Pennsylvania statute that required that a certain amount of coal be left in place during the underground mining of coal to protect the surface from subsidence.¹⁹⁶ At the time, "the coal companies had owned vast areas of land . . . [and] had sold much of th[e] land, reserving not only [the rights to] the coal, but 'the right to . . . remove the [coal]'" with immunity from any liability for any damage occasioned by its removal.¹⁹⁷ In other words, the coal companies reserved a specific property interest: the right of subjacent support, or the right to withhold from sale.¹⁹⁸ After passage of the Kohler Act in 1921,¹⁹⁹ a homeowner successfully sued to enjoin the mining of coal that threatened to cause subsidence resulting in the collapse of his private residence.²⁰⁰ The Pennsylvania court found that the Kohler Act, created to prohibit mining that would cause any subsidence under land improved by buildings or roads, was a proper exercise of the police power in light of the legislative finding that the enjoined activity threatened the health and safety of a large number of people.²⁰¹ The lower court ruled that the exercise of the police power precluded any claim that the Act effected an unconstitutional taking.²⁰² The clear effect of this ruling was that the coal companies could not continue mining under or adjacent to land where the surface rights were not

195. 260 U.S. 393 (1922). For an interesting and thoughtful discussion of the history, politics, and philosophy of this case, see E. F. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287 (1986).

196. *Pennsylvania Coal Co.*, 260 U.S. at 393.

197. Roberts, *supra* note 195, at 288; see also *Pennsylvania Coal Co.*, 260 U.S. at 395.

198. Hugh G. Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 TEMP. L. Q. 1 (1951); see *Noone v. Price*, 298 S.E.2d 218 (W. Va. 1982); *McCabe v. City of Parkersburg*, 79 S.E.2d 87 (W. Va. 1953). See generally RICHARD POWELL, *THE LAW OF REAL PROPERTY*, ch. 63 (Patrick J. Rohan ed., rev. ed. 1986).

199. 52 PA. CONS. STAT. ANN. §§ 661-71 (1966). The Kohler Act was a legislative response to the ruling in *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820 (Pa. 1917), that a coal company can continue mining under a schoolhouse, regardless of the danger that it may collapse, because the coal company owned both the mineral estate and the right of support, and the exploitation of both of these property interests did not amount to a public nuisance. *Id.* at 820-21.

200. *Mahon v. Pennsylvania Coal Co.*, 118 A. 491 (Pa. 1922), *rev'd*, 260 U.S. 393 (1922).

201. *Id.*

202. *Id.* at 493-94. In Roberts' view, the perceived difference in result between *Mahon* and *Keator* was that in *Mahon* there had been a legislative finding of public nuisance. See Roberts, *supra* note 195, at 289.

also owned by the coal companies.²⁰³

The Supreme Court reversed, stating that the Act "purport[ed] to abolish what [was] recognized in Pennsylvania as an estate in land," the right of support, which the coal companies withheld in the sale of the surface estate.²⁰⁴ By abolishing this property interest, the Act transferred a benefit to the community, but at no cost to the community.²⁰⁵ The Court reasoned that if this could be done, the public in similar situations would always resort to police power to take away an individual's property in lieu of the eminent domain power, and consequently, the institution of private property itself would be in jeopardy.²⁰⁶

Sixty-five years later, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,²⁰⁷ the Court ruled on essentially the same question. A Pennsylvania statute required that substantial amounts of coal be left in place when mining under public buildings, non-commercial buildings used by the public such as churches and dwellings, streams and reservoirs.²⁰⁸ The Act's preamble sets out the public purposes to be served, including "the conservation of surface land areas which may be affected in the mining of bituminous coal . . . , to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies, and generally to improve the use and enjoyment of such lands."²⁰⁹

Keystone argued that the Act was invalid "on its face" because it violated both the Takings Clause and the Contracts Clause of the Fifth Amendment.²¹⁰ Keystone relied on *Pennsylvania Coal Co.*, arguing that it was indistinguishable.²¹¹ The District Court, the Court of Appeals, and the Supreme Court all held that *Pennsylvania Coal Co.* was indeed *distinguishable* and upheld the validity of the Act.²¹²

203. Consider *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of a quarry in a residential area was not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of a brick mill in a residential area was not a taking); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (declaration that a livery stable constituted a public nuisance rather than a taking); *Mugler v. Kansas*, 123 U.S. 623 (1887) (statute which prohibited operation of brewery was not a taking).

204. *Pennsylvania Coal Co.*, 260 U.S. at 414.

205. *Id.* at 415-16.

206. *Id.* at 413.

207. 480 U.S. 470 (1987).

208. Bituminous Mine Subsidence and Land Conservation Act, 52 PA. CONS. STAT. ANN. §§ 1406.1-1406.21 (Supp. 1994).

209. *Id.* § 1406.2.

210. *Keystone*, 480 U.S. at 474.

211. *Id.* at 474, 481-84.

212. *Id.* at 474.

The distinction rested on several grounds.²¹³ First, the “public interest” in *Pennsylvania Coal Co.* that would justify the abolition of a particular estate in land was not shown; instead the case centered on a threat to a private house.²¹⁴ Any other discussion of the validity of the Kohler Act was advisory only.²¹⁵ Second, the “public purpose” of the statute in *Keystone*, in contrast to the Kohler Act in *Pennsylvania Coal Co.*, was clearly established,²¹⁶ bringing *Keystone* within the line of cases including *Mugler v. Kansas*,²¹⁷ *Hadacheck v. Sebastian*,²¹⁸ and *Reinman v. City of Little Rock*,²¹⁹ which, according to Justice Stevens, were not overruled by *Pennsylvania Coal Co.*²²⁰ Third, in *Pennsylvania Coal Co.*, the finding was that the Kohler Act made mining of certain coal “commercially impractical,”²²¹ whereas in *Keystone*, the “petitioners [had] not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking.”²²² Since the “record indicate[d] that only about seventy-five percent of [Keystone’s] underground coal [could] be profitably mined,” petitioners failed to show that their “reasonable ‘investment-backed expectations’ ha[d] been materially affected by” the requirement of leaving in place a small percentage “to support the structures protected by” the statute.²²³ Last, the Court explained, the “support estate” allegedly taken from the petitioners should not be viewed “as a distinct segment of property for ‘takings’ purposes,” and, even if so viewed, the record contained no evidence of “what percentage of the purchased support estates . . . ha[d] been affected by the Act.”²²⁴ Accordingly, the Act met both the legitimate end and reasonable means test standards for takings

213. *Id.*

214. *Id.* at 487-88.

215. *Id.* at 484.

216. *Id.* at 485-88.

217. 123 U.S. 623 (1887).

218. 239 U.S. 394 (1915).

219. 237 U.S. 171 (1915).

220. *Keystone*, 480 U.S. at 490.

221. *Pennsylvania Coal*, 260 U.S. at 414-15.

222. *Keystone*, 480 U.S. at 493.

223. *Id.* at 499.

224. *Id.* at 501. Justice Stevens went on to reject the Contracts Clause argument, stating that the Court had consistently refused to construe it literally when the challenged legislation is “addressed to the legitimate end of protecting a basic interest of society” and “the legislature’s adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” *Id.* at 503-05.

cases.²²⁵

As Justice Scalia pointed out in the most recent regulatory takings case, *Lucas v. South Carolina Coastal Council*,²²⁶ the holdings in *Keystone* and *Pennsylvania Coal Co.*, are virtually identical on the facts, and therefore are apparently irreconcilable.²²⁷ In *Lucas*, Justice Scalia stated:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon* . . . (law restricting subsurface extraction of coal held to effect a taking) with *Keystone Bituminous Coal Ass'n v. DeBenedictis* . . . (nearly identical law held not to effect a taking); . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.²²⁸

If the last sentence of the quoted section is to be taken literally, then, it is quite evident that the result in these later cases results from the evolving standard, or at least a changing notion about the meaning of property (from the liberal conception to one requiring accommodation), and not from lawyering or the artful framing of the issues.²²⁹

225. *Id.* at 506.

226. 112 S. Ct. 2886 (1992).

227. *Id.* at 2894 n.7.

228. *Id.* (citations omitted).

229. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The idea of changing public values seemed particularly important in *Penn Central*. *Id.* There, the Court considered whether the city's landmark preservation ordinance as applied to Grand Central Terminal effected a taking. *Id.* at 107. Under the ordinance, any plan to alter the exterior of a building designated as an historic landmark had to be approved by the Landmarks Preservation Commission. *Id.* at 112. Penn Central sought to alter the exterior of the terminal by constructing a skyscraper over it, which would increase the income from the site, but would also substantially change the character of the terminal building. *Id.* at 116. The Commission denied a permit for the plans. *Id.* at 117. Penn Central sued in state court, alleging that the application of the ordinance effected an impermissible taking without compensation. *Id.* at 119. The trial court granted injunctive relief, but no damages. *Id.* The appellate court reversed, and then the New York Court of Appeals affirmed the appellate court, having found that no taking had occurred because a mere reduction in value, unaccompanied by a transfer

VI. "DERANGEMENT TO THE EXPECTATION" BY REDEFINITION

A. Context, Relativity, Accommodation, and the Community

In the context of a discussion of radical developments in water law in California,²³⁰ one scholar, Professor Eric T. Freyfogle, offered "the best glimpse of the future of property law," a chapter in a "story of context and relativity, of accommodation and community."²³¹ Freyfogle studied the recent California case of *In re Water of Hallett Creek Stream System*,²³² and the central concerns raised

to the government, is not a taking. *Id.* at 119-21.

The Supreme Court affirmed the judgment of the Court of Appeals in a six to three decision. *Id.* at 106. Justice Brennan's majority opinion included an admission that the Court has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. Justice Brennan goes on to review the Court's takings cases and to identify "several factors that have particular significance" in such cases: (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;" (2) "the character of the government action," noting that "[a] 'taking' may more readily be found when the interference . . . can be characterized as a physical invasion by government"; and (3) whether they are "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions." *Id.* at 124-28.

Justice Brennan rejected the takings claim because "the law [did] not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel," and Penn Central was able "to obtain a 'reasonable return' on its investment" in the terminal site. *Id.* at 136. Moreover, the record did not show that Penn Central would be unable to use some of the air space above the terminal, "since [it had] not sought approval for the construction of a smaller structure" than the one first proposed and its air rights were made "transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings." *Id.* at 137. The ability to transfer its air space development rights would "undoubtedly mitigate whatever financial burdens" the law ha[d] imposed on [Penn Central]," even if it did not constitute "just compensation." *Id.* The Court explicitly rejected the view that the police power can only be exercised in order to prevent "harm" to the public health, safety, or general welfare. *Id.* at 125. Instead, it is a proper exercise of this power where the governmental purpose is "substantially related to the promotion of the general welfare." *Id.* at 138.

230. *In re Water of Hallett Creek Stream Sys.*, 749 P.2d 324 (Cal. 1988), *cert. denied sub nom.* California v. United States, 488 U.S. 824 (1988). The California Supreme Court ruled that the federal government, as owner of nearly half the land in the state, held riparian water rights on the lands it set aside for particular federal purposes, but that the extent of rights were determined with reference to the interests of other water users. *Id.* at 327.

231. Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530 (1989). Freyfogle points out that the "law of surface water, at least [today] in California, bears little resemblance to our traditional conception of property"; that "[a]utonomous, secure property rights have largely given way to use entitlements that are interconnected and relative." *Id.* He predicted that "[p]rivate property in the coming decades, . . . might well exist principally in the form of specific use-rights. . . . [where] rights [are] defined in specific contexts and in terms of similar rights held by other people." *Id.* at 1530-31.

232. 749 P.2d 324.

by the case as to "how far a state can go in redefining the attributes of private property ownership," without incurring the obligation to make just compensation.²³³ Freyfogle "asks us to consider the difference[s] between *regulating* the use of a piece of property and *redefining* what it means to own that property in the first place."²³⁴ The author points out that *Hallett Creek* and its predecessors "reflect the court's power to control water use by changing the underlying definition of water rights rather than by regulating their exercise."²³⁵ Freyfogle interprets the new California water rights model "as concomitant to the rise of the community and the decline of the individual in American law and political culture, . . . [which view] replaces the classical liberal focus on individual autonomy and economic freedom."²³⁶ Thus, "[b]y recovering for the public the right to prohibit particular practices and to decide when and where new uses will occur, California ha[d] disaggregated the owner's bundle and recovered many of the entitlement sticks for public holding."²³⁷ Thus, after *Hallett Creek*, "water rights in California are no longer autonomous;" but are constrained by "the reasonableness limit, public trust doctrine, and the no-harm rule."²³⁸ Water rights require "sharing and accommodation" and contain a "temporal dynamism" (i.e., one that may be limited as circumstances change).²³⁹ Freyfogle applauds this approach, and supports William Kittredge's argument for a "new myth of property ownership" with an emphasis on context and accommodation; one that recognizes that "we never owned all the land and water . . . [and that] [o]ur rights to property will never take precedence over the needs of society."²⁴⁰

As Freyfogle notes, *Hallett Creek* illustrates a growing departure from the liberal conception of property,²⁴¹ a shift by redefinition of the essence of the property interest; a shift that is achieved in a fashion that is less specific, but more encompassing than particular regulations which prohibit particular conduct. A redefinition presents

233. Freyfogle, *supra* note 231 at 1531.

234. *Id.* at 1531 (emphasis in original).

235. *Id.* at 1538. "[T]he road to *Hallett Creek* represents California's evolving assertion of control over the process of defining water rights." *Id.* at 1546.

236. *Id.* at 1545.

237. *Id.* at 1546.

238. *Id.* at 1541.

239. *Id.* at 1541-42.

240. *Id.* at 1555-56 (citing WILLIAM KITTREDGE, *OWNING IT ALL* 62, 64 (1987)).

241. *Id.* at 1545; see also Sax, *supra* note 194 (arguing that changing public values have increased doubt about the extent to which rights of development should pass into private hands).

a new theory allowing new variables and new limits. The extent to which a property interest may be redefined without constitutional implications depends upon many factors, but of particular note is the nature of the property interest involved. In the case of *United States v. Locke*,²⁴² the Court explored the degree of permissible disturbance to rights in mining claims by redefinition as it considered the validity of the annual filing obligation under the Federal Land Policy and Management Act of 1976 ("FLPMA").²⁴³ In *Locke*, "[a]ppellees, four individuals engaged 'in the business of operating mining properties in Nevada,' purchased in 1960 and 1966 ten unpatented mining claims on public lands near Ely, Nevada."²⁴⁴ "These claims were major sources of gravel and building [material which were] valued at several million dollars, and, in the 1979-1980 assessment year alone, appellees' gross income totaled more than \$1 million."²⁴⁵ During the period in which they owned the claims, "appellees complied

242. 471 U.S. 84 (1985).

243. *Id.* at 86, 88-89 (citing 43 U.S.C. § 1744 (1976)). The Act requires recording of mining claims, and renders void those that are unrecorded. *Id.* at 89. Prior to the passage of this Act, in the absence of a federal recording system and because of the existence of many dormant mining claims,

federal land managers had to proceed slowly and cautiously in taking any action affecting federal land lest the federal property rights of claimants be unlawfully disturbed. Each time the Bureau of Land Management ("BLM") proposed a sale or other conveyance of federal land, a title search in the county recorder's office was necessary; if an outstanding mining claim was found, no matter how stale or apparently abandoned, formal administrative adjudication was required to determine the validity of the claim.

After more than a decade of studying this problem in the context of a broader inquiry into the proper management of the public lands in the modern era, Congress, in 1976, enacted the FLPMA

Id. at 87. Under the Act, as it was at the time of the *Locke* dispute, the Department of the Interior's Bureau of Land Management is responsible for managing the mineral resources on federal forest lands. See 43 U.S.C. § 1701 (1976). "Section 314, [of FLPMA, 43 U.S.C. § 1744] establishes a federal recording system that is designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions. *Locke*, 471 U.S. at 87.

"For claims located before FLPMA's enactment, the federal recording system impose[d] two general requirements." *Id.* at 87-88. "First, the claims must initially be registered with the BLM by filing, within three years of FLPMA's enactment, a copy of the official record of the notice or certificate of location." *Id.* Second, in the year of the initial recording, and "prior to December 31" of every year after that, the claimant must file with state officials and with BLM a notice of intention to hold the claim, an affidavit of assessment work performed on the claim, or a detailed reporting form. *Id.* at 89. Section 1744(c) "provides that failure to comply with either of these requirements 'shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner.'" *Id.* at 89 (citing 43 U.S.C. § 1744 (1976)).

244. *Locke*, 471 U.S. at 89.

245. *Id.*

with annual state-law filing and assessment work requirements.”²⁴⁶ Additionally, “appellees satisfied FLPMA’s initial recording requirement by properly filing with BLM a notice of location, thereby putting their claims on record for purposes of FLPMA.”²⁴⁷

At the end of 1980, however, the appellees failed to timely meet their first annual obligation to file their report with the appropriate federal authority.²⁴⁸ Allegedly receiving misleading information from a BLM employee, appellees delayed until December 31 to file the annual notice of intent to hold, or proof of assessment work performed, as required by the Act.²⁴⁹ This filing was one day late.²⁵⁰ Thereafter, the appellees were informed that their claims had been declared abandoned and void because of their late filing.²⁵¹ After losing an administrative appeal, appellees sought relief in the Supreme Court, arguing that section 314 of the FLPMA²⁵² “effected an unconstitutional taking of their property without just compensation and denied them due process of law.”²⁵³

Appellees’ claims were rejected. The Court held that a statutory provision which terminates property rights upon an owner’s failure to take the affirmative actions required by the statute does not take property.²⁵⁴ Even as to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties.²⁵⁵ “As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.”²⁵⁶ In the Court’s view, Congress’ power to qualify existing property rights is particularly broad where the “character” of the property rights at issue—mining

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 89-90.

250. *Id.* at 90.

251. *Id.*

252. 43 U.S.C. § 1744(c) (1976).

253. *Locke*, 471 U.S. at 91-92. After their administrative appeal, the appellees first sought relief in the United States District Court for the District of Nevada. *Id.* at 91. Appellees claim was rejected in the District Court, whereupon they petitioned the Supreme Court. *Id.*

254. *Id.* at 104 (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982)).

255. *Id.*

256. *Id.*

claims—is a “unique form of property.”²⁵⁷ Claimants take their mineral interests with the knowledge that the government retains a substantial power to qualify and redefine such interests. The legislative history supported the conclusion that the statute would extinguish those claims for which timely filings were not made, regardless of any evidence of intent to abandon.²⁵⁸ “[T]he failure to file on time, in and of itself, causes a claim to be lost.”²⁵⁹

The Court went on to hold that filing one day late did not amount to substantial compliance with the Act. The Court stated:

The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.²⁶⁰

Locke is important because the Court affirmed the power of the legislatures, state and federal, to go beyond mere regulation and to make definitional changes in property interests. In *Locke*, the government redefined the mining claim from one which could be lost only by the failure to produce minerals, to one which could be lost by the failure to perform additional administrative acts.²⁶¹ Several

257. *Id.*

258. *See id.* at 94-96.

259. *Id.* at 100; *see also* *Western Mining Council v. Watt*, 643 F.2d 618, 628 (9th Cir. 1981).

260. *Id.* at 100-01.

261. The *Locke* Court explained that the purposes of applying FLPMA's filing provisions to claims located before the Act was passed—“to rid federal lands of stale mining claims and to provide for centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims—are clearly legitimate.” *Id.* at 105-06. Additionally, the statute

is a reasonable, if severe, means of furthering these goals; sanctioning with loss of their claims those claimants who fail to file provides a powerful motivation to comply with the filing requirement, while automatic invalidation for noncompliance enables federal land managers to know with certainty and ease whether a claim is currently valid.

Id. at 106. “[T]he restriction attached to the continued retention of a mining claim imposes the most minimal of burdens on claimants; they must simply file a paper once a year indicating that the required assessment work has been performed or that they intend to hold the claim.” *Id.* Accordingly, the possibility of the extinguishment of a vested property interest based upon rules not pertaining at the creation of the right established no constitutional

years earlier, in *Texaco, Inc. v. Short*,²⁶² the Court considered the constitutionality of a similar state statute. There, the Indiana mineral lapse statute provided that a severed mineral interest not used for a period of twenty years would automatically lapse and revert to the current surface owner of the property.²⁶³ The lapse did not apply if the mineral owner had used the mineral interest or filed a statement of claim in the local recorder's office.²⁶⁴ Several forms of "use" of a mineral interest that were sufficient to preclude extinction of a claim "include[d] the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes."²⁶⁵ Parties whose interests were extinguished under the statute maintained, among other things, that the statute effected a taking of private property for public use without just compensation.²⁶⁶ In rejecting the takings argument, the Court first noted the nature of the property interest in a severed mineral interest. The state had defined this estate as a "'vested property interest,' entitled to 'the same protection as . . . fee simple titles.'"²⁶⁷ However, the Court explained, the state had declared that this property interest was one of less than absolute duration, unlike fee simple titles, with retention being conditioned on the fulfillment of at least one of the requirements of the Act.²⁶⁸ But this redefinition was not a taking. Rather, the Court explained, "[w]e have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."²⁶⁹

The Court went on to find that the state had not exercised its legislative power in an arbitrary manner.²⁷⁰ Rather, the statute described specific actions which, if undertaken by an owner of a sev-

claims. *Id.* at 107.

262. 454 U.S. 516 (1982).

263. *Id.* at 518.

264. *Id.* at 518-19.

265. *Id.* at 519.

266. *Id.* at 522. These parties also argued that the self-executing aspect of the statute, i.e., that extinguishment would occur without prior notice of the imminence of the extinguishment, violated their procedural due process rights. *Id.*

267. *Id.* at 525-26 (citation omitted).

268. *Id.* at 526.

269. *Id.* The Court stated that "[f]rom an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time." *Id.*

270. *Id.* at 529.

ered mineral estate, would avoid lapse.²⁷¹ The specific actions added further legitimacy to the state's goals of encouraging owners of mineral interests to develop the potential of those interests; promoting the state's fiscal interest in collecting property taxes; and "facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county could collect taxes."²⁷² The Court concluded that "[t]he State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State."²⁷³

Locke and *Texaco* affirmed the power of legislatures, both state and federal, to go beyond mere regulation and to make definitional changes in property interests, depending upon the nature of the property interest. This seems to be what Freyfogle argues should be done in the case of natural resources.²⁷⁴ In Freyfogle's view, the power of the legislature to reshape water law is derived from a consideration of the special and essential nature of water.²⁷⁵ In *Locke*, Congress' power to redefine mining claims exists because of the unique nature of a mining claim, although the Supreme Court has never clearly explained in what way it is unique.²⁷⁶ Perhaps, as in *Hallett Creek*, it is unique because it involves private claims on exhaustible natural and public resources.²⁷⁷ In *Texaco*, some form of reshaping or qualification that exposes a property owner to the possible loss of a vested property right in ways different from the common law is within the power of the government if the conditions imposed for continued ownership are reasonable — i.e., either because costs are not excessive or because the statute allows a reasonable opportunity to perform the conditions in order to avoid loss of the property.²⁷⁸

While these cases do not inform as to all possible derangement to the expectation that is permitted by law, the Court did venture to draw a line in a different context in a case involving a statute which

271. *See id.*

272. *Id.*

273. *Id.* at 529-30. The claimants' due process arguments were rejected under the logic of the Takings Clause. *See id.* at 531-38.

274. *See Freyfogle, supra* note 231, at 1531.

275. *Id.* at 1530-31.

276. *United States v. Locke*, 471 U.S. 84, 104 (1985) (citation omitted).

277. *In re Water of Hallett Creek Stream Sys.*, 749 P.2d 324 (Cal. 1988) (involving petition for statutory adjudication of water rights), *cert. denied sub. nom. California v. United States*, 488 U.S. 824 (1988).

278. *Texaco, Inc. v. Short*, 454 U.S. 516, 526 (1982).

ostensibly redefined a property interest, but which had the effect of denying altogether a fundamental right otherwise inherent in that property interest.²⁷⁹ In *Hodel v. Irving*,²⁸⁰ at issue was the Indian Land Consolidation Act²⁸¹ which provided for the escheat of small undivided property interests that were unproductive during the year preceding the owner's death.²⁸² The Indian Land Consolidation Act was enacted to ameliorate the problem of fractionated ownership of

279. See *Hodel v. Irving*, 481 U.S. 704 (1987).

280. *Id.*

281. 25 U.S.C. §§ 2201-10 (1988 & Supp. IV 1993). The Court in *Hodel* described the purpose of the Act as follows:

Towards the end of the 19th century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to "speed the Indians's assimilation into American society" and in part a result of pressure to free new lands for further white settlement.

Hodel, 481 U.S. at 706 (citation omitted).

282. *Hodel*, 481 U.S. at 709. As a background to the issues here, Congress adopted legislation in 1889 which authorized the

[d]ivision of the Great Reservation of the Sioux Nation into separate reservations and the allotment of specific tracts of reservation land to individual Indians, conditional on the consent of three-fourths of the adult male Sioux [under the Act of Mar. 2, 1889, Ch. 405, 25 Stat. 888]. Under [this legislation], each male Sioux head of household took 320 acres of land and most other individuals 160 acres. In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States. Until 1910, the lands of deceased allottees passed to their heirs "according to the laws of the State or Territory" where the land was located . . . and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior [in order to protect Indian ownership].

Id. 706-07 (citations omitted).

As Justice O'Connor stated in her opinion:

The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the lands themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus, 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

Id. at 707 (citation omitted).

The administrative burdens in keeping track of ownership interests became all consuming. In response, Congress ended further allotment of Indian Lands by an act in 1934. However, "the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time[,] . . . [as] [o]wnership continued to fragment [with the] succeeding generations [which] came to hold property." *Id.* at 708.

Indian Lands.²⁸³ Section 207 of that Act provided:

No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descent [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.²⁸⁴

Congress made no provision for the payment of compensation to the owners of the interests covered by this section.²⁸⁵

Appellees were members of the Sioux Tribe who were representatives, heirs or devisees of interests covered by section 207.²⁸⁶ They maintained that section 207 resulted in a taking of property without just compensation.²⁸⁷ The District Court held that the "statute was constitutional . . . [and that] the appellees had no vested interest in the property of the decedents prior to their deaths, and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession."²⁸⁸

The Court of Appeals for the Eighth Circuit reversed. [While] it agreed that the appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death. The court held that the appellees had standing to invoke that right and that the taking of that right by [section 207] without compensation . . . violated the Fifth Amendment.²⁸⁹

In affirming this decision, the Court first concluded that Congress' "broad authority to regulate the descent and devise of Indian trust lands"²⁹⁰ is justified in order to address the problem of the fractionation of Indian lands.²⁹¹ The Court also recognized that, in general, "the Government has considerable latitude in regulating prop-

283. Indian Land Consolidation Act, Pub. L. No. 97-459, § 207, 96 Stat. 2517, 2519 (1983) (amended 1990).

284. *Id.*

285. *Id.*

286. *Hodel*, 481 U.S. at 709.

287. *Id.* at 710.

288. *Id.*

289. *Id.* (citation omitted).

290. *Id.* at 712.

291. *Id.*

erty rights in ways that may adversely affect the owners.”²⁹² The Court further noted that “[t]he framework for [determining] whether a regulation of property amounts to a taking requiring just compensation [was] firmly established and [had] been regularly and recently reaffirmed.”²⁹³ However, this framework required, among other things, a consideration of “the economic impact of the regulation.”²⁹⁴ In this case, “[t]here [was] no question that the relative economic impact of section 207 upon the owners of these property rights [had the potential to] be substantial.”²⁹⁵ Although the section provided for the escheat of small unproductive property interests, the economic impact was not lessened because of the nominal income of the property.²⁹⁶ When the total value of the property was consolidated its value was much greater, and there was “no question . . . that the right to pass on valuable property to one’s heirs is itself a valuable right.”²⁹⁷ Indeed, “[d]epending on the age of the owner, much or most of the value of the parcel may inhere in this ‘remainder’ interest.”²⁹⁸

The Court found, however, that the extent to which any of the appellees’ decedents had “investment-backed expectations” in passing on the property was dubious.²⁹⁹ None of the appellees could identify any specific expectations “beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation.”³⁰⁰ In fact, the property had been held in trust for the Indians for 100 years and was overwhelmingly acquired by gift, descent, or devise.³⁰¹ “Because of the highly fractionated ownership, the property [was] generally held for lease rather than improved and used by the owners.”³⁰² Also weighing in favor of the validity of the statute, though weakly, was the fact that consolidation of land might benefit the Tribe, since owners of escheatable interests often benefit from the escheat of the others’ fractional interests and, consolidated lands were more pro-

292. *Id.* at 713.

293. *Id.* (citation omitted).

294. *Id.* at 714 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

295. *Id.*

296. *See id.*

297. *Id.* at 715.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

ductive than fractionated lands.³⁰³

The *Hodel* Court continued by noting that if it were to end the analysis at this point, it might well find that section 207 was constitutional.³⁰⁴ However, it was necessary to consider the “extraordinary” character of the government regulation.³⁰⁵ The regulation amounted to a “virtual[] abrogation of the right to pass on a certain type of property — the small undivided interest — to one’s heirs.”³⁰⁶ As Justice O’Connor continued,

In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times. The fact that it might [have been] possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts [was] simply not an adequate substitute for the rights taken, given the nature of the property. . . . Moreover, this statute effectively abolishe[d] both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owned another undivided interest in the property.³⁰⁷

Further, these rights of alienation were “abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, did not conflict with the further descent of the property.”³⁰⁸

Given the seriousness of the problem of the fractional interests in the Indian lands, it would be unquestionably within Congress’ power to enact corrective statutory provisions, such as by redefining this property interest by making it non-divisible on pain of escheat or non-descendibility thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.³⁰⁹ However, Congress could not redefine the interest with the result of the total elimination of one of the six traditional rights inhering in property—the right to alienate through devise or descent.³¹⁰

303. *Id.*

304. *Id.* at 716.

305. *Id.*

306. *Id.*

307. *Id.* (citations omitted).

308. *Id.* at 718.

309. *Id.*

310. *See id.*; *see also supra* note 33 and accompanying text.

B. *Redefinition of Mining Rights in Earlier Legislation*

Consistent with *Locke* and *Texaco*, and in spite of *Hodel*, throughout the last century, Congress and governmental agencies have adopted laws and policies pertaining to mining activities on public land that have reshaped, redefined and curtailed the six rights traditionally inhering in property.³¹¹ The right to use property has been qualified by the Mining and Mineral Policy Act,³¹² under which the Bureau of Land Management has promulgated regulations "to encourage the development of federal mineral resources and [the] reclamation of disturbed lands, . . . [and] to assure that operations include adequate and responsible measures to prevent unnecessary or undue degradation of the Federal lands and to provide for reasonable reclamation."³¹³

The National Forest Management Act³¹⁴ ("NFMA") gives the Forest Service the responsibility of managing surface impacts from mining on federal forest lands and requires detailed land use management plans before mining activities can continue. The Act specifies the contents of land use management plans and requires extensive public participation in connection with the formulation, amendment, or revision of any plans.³¹⁵ The right of excluding others

311. See *supra* part VI.A.

312. 30 U.S.C. § 21(a) (1988).

313. 43 C.F.R. § 3809.0-6 (1992). The objectives of the regulations are to:

- (a) Provide for mineral entry, exploration, location, operations and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of non mineral resources of the Federal lands;
- (b) Provide for reclamation of disturbed areas; and
- (c) Coordinate, to the greatest extent possible with appropriate state agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations.

43 C.F.R. § 3809.0-2 (1992).

314. 16 U.S.C. §§ 1600-87 (1988).

315. *Id.* The Forest Service Regulations, 36 C.F.R. §§ 228.4, 228.8 (1992), adopted under the Forest Service Organic Act, 16 U.S.C. §§ 475-82, 551 (1988), set forth the rules and procedures under which mining operations on the surface of National Forest Land are to be conducted so as to minimize any adverse environmental impact on surface resources. See Stanley Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations on Service Resources*, 8 NAT. RESOURCES LAWYER 481 (1975); Jerry L. Haggard, *Regulation of Mining Law Activities on Federal Lands*, 21 ROCKY MTN. MIN. L. INST. 349, 365-76 (1975); Randy L. Parcel, *Federal, State and Local Regulation of Mining Exploration*, 22 ROCKY MTN. MIN. L. INST. 405 (1976).

Under the National Environmental Policy Act every major federal action significantly affecting the quality of the environment requires that a federal agency study and prepare a

has since been qualified and redefined by the Surface Resources and Multiple Use Act ("SRMUA") of 1955.³¹⁶ Under this Act, the miner's right of excluding others and of processing minerals became subject to the right of the United States to manage and dispose of surface resources and to the right of the public to enjoy the surface.³¹⁷ By enacting SRMUA, Congress intended to clarify the law and to address abuses that had occurred under the General Mining Law.³¹⁸ The abuses included acts by persons locating mining claims "with no real intent to prospect or mine but rather to gain possession of the surface resources,"³¹⁹ and acts by persons who might have had a "legitimate intent to utilize the claim for the development of the mineral content at the time of the location [but who] often did not"³²⁰ engage in any significant mineral production efforts. These abusive claims had the effect of withdrawing areas of public domain from general public uses and of blocking public access to adjacent tracts, water needed for grazing purposes, and valuable recreational areas.³²¹ In other cases, groups of fisherman-prospectors would locate

detailed statement on the environmental impacts of that proposed action. 42 U.S.C. § 4332(c) (1988). No environmental impact statement is required on an application for a patent. See *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980).

316. 30 U.S.C. § 612 (1989).

317. *Id.* The Act provides *inter alia*:

Rights under any mining claim hereinafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof. . . . Any such mining claims shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however*, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.

Id. § 612(b) (emphasis added).

318. The purpose of [this legislation] is to permit multiple use of the surface resources of our public lands, to provide for their more efficient administration, and to amend the mining laws to curtail abuses of those laws by a few individuals who usually are not miners. At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws.

S. REP. NO. 554, 84th Cong., 1st Sess. 1-2 (1955).

319. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1282 (9th Cir. 1980).

320. *Id.*

321. *Id.* Recently, the General Accounting Office ("GAO") also reported that an examination of 240 randomly selected claims showed that 239 were not being mined at the time of GAO visits, and that there was no evidence that any mineral extraction had ever taken place

a good stream, stake out successive mining claims flanking the stream and proceed to enjoy their own private fishing camps.³²² "Hunter-prospectors" would also block-out "mining claims" which embraced wildlife habitats.³²³ Under SRMUA, the claimant may mine to the extent that such activities do not unreasonably degrade surface resources and the claimant's right to exclude others extends only to other potential claimants as to the site of the actual mining operations, but no further, as "any member of the public is free to picnic on the claim, sleep on it, or watch tumbleweeds blow across it."³²⁴

The right of excluding others under a mining claim has been further qualified by the Multiple Mineral Development Act of 1954,³²⁵ which provides that the same tract of public land can be developed concurrently under the General Mining Law and the Mineral Leasing Act.³²⁶ This means that the United States can grant leases for mining of fuel minerals in the same land in which mining claimants explore for non-fuel minerals.

Under the FLPMA, a miner may even be excluded from areas otherwise open to mineral exploration.³²⁷ A miner can be denied a right of access to a claim in order to "prevent unnecessary or undue degradation of the lands."³²⁸

Other laws enacted since 1872 limit the right of a claimant to destroy or injure the land in which a claim is located, although it is doubtful that this right ever inhered in the mining claim, since a

on 237 claims. GAO REPORT NO. B-118678 (1989). The GAO estimated that no minerals had ever been extracted in 197,000 of the estimated 200,000 claims filed in ten counties in the four western states it studied. *Id.* In an examination of 93 randomly selected claims that had been patented, the GAO found that only seven were being mined, while 66 were put to no apparent use. *Id.* Twenty of the patented claims were being used for non-mining purposes, including resorts, junkyards, a shopping center and even a house of prostitution. *Id.*; see also LESHY, *supra* note 14, at 49-67.

322. LESHY, *supra* note 14, at 65-66.

323. See *id.* at 66.

324. *United States v. Fahey*, 769 F.2d 829, 837 (1st Cir. 1985); see also *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 337 (10th Cir. 1989) (surface encroachment upon an unpatented lode mining claim did not impede the claim owner's mining operations); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283 (9th Cir. 1980) ("limit[ing] the exclusive possession of mining claimants so as to permit the multiple use of the surface resources of the claims prior to the patenting of the claims, so long as that use did not materially interfere with prospecting or mining operations").

325. 30 U.S.C. § 521 (1988).

326. *Id.*

327. 43 U.S.C. § 1732(b) (1988).

328. *Id.*; see also 43 C.F.R. § 3809.0-1 (1992).

mining claim gave only the right to possess for purposes of extracting minerals, and did not give title to the land. As described earlier, under SRMUA,³²⁹ miners are prohibited from removing vegetative resources from the area within the claims except to the extent required for the claimant's mining operations. One court has interpreted the provisions of SRMUA to give the government the power to decide the optimal and least destructive methods of mining, even if the methods chosen preclude fruitful mining or result in substantially greater burdens to the claimant. In *United States v. Richardson*,³³⁰ the mining claim holders filed notices of location for six mining claims in the Wind River Ranger District, in the Gifford Pinchot National Forest in the State of Washington.³³¹ "The claims were situated at the confluence of Slide Creek and the East Fork of the Lewis River, an area reforested after a destructive fire some forty years ago."³³² The miners explored and prospected their claims by use of heavy equipment and by blasting.³³³ Approximately 1.6 acres of land were affected by the surface disturbance created by bulldozing of three separate acres.³³⁴ "From the early days of these activities, forest rangers remonstrated with the miners respecting the excessive and unnecessary surface and environmental damage caused by their methods of prospecting and suggested core drilling as an alternative."³³⁵ However, the miners did not heed to these suggestions.³³⁶ "Ultimately [an] action was filed to enjoin further blasting and bulldozing and to restore surface damage."³³⁷

The miners had expended approximately \$40,000 in developing the mine.³³⁸ They maintained that they used methods best-suited for the purpose of removing the overburden and for uncovering the ore body.³³⁹ Because the mineral prospect was, at best, a low grade copper deposit, it was essential to determine that a large body of ore for commercially feasible mining existed.³⁴⁰ The report written by the government's expert geologist justified continued exploration and

329. See *supra* notes 316-25 and accompanying text.

330. 599 F.2d 290 (9th Cir. 1979).

331. *Id.* at 290.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* at 291.

339. *Id.*

340. *Id.*

found that "[t]he only acceptable initial approach to exploration of the type [of] deposit [at issue] would be core drilling after performance of all applicable surface geotechnical surveys."³⁴¹ Nonetheless, the District Court rendered judgment for the government, holding that the "[s]tripping away [of] over burden to expose rockbed, particularly in the initial exploration stages, [was] not proper mining procedure, under the circumstances of [the] case."³⁴² Instead, the mining techniques employed, blasting and bulldozing, were destructive to the surface resources and, therefore, were an unreasonable method of exposing subsurface deposits.³⁴³ Accordingly, the court held that the Forest Service could require the use of only nondestructive methods of prospecting.³⁴⁴

The Ninth Circuit affirmed, holding that the SRMUA speaks of "the right of the United States to manage and dispose of the vegetative resources thereof and to manage other surface resources thereof." It limits such control so 'as not to [e]ndanger or [m]aterially interfere with prospecting, mining . . . or uses [r]easonably incident thereto.'³⁴⁵ "It also . . . precludes the exploitation of surface resources by a locator 'except to the extent [r]equired for . . . prospecting, mining . . . and uses [r]easonably incident thereto.'³⁴⁶ In light of these provisions, the Ninth Circuit held that the District Court's findings reflected a correct interpretation of the statute.³⁴⁷

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 295.

346. *Id.*

347. *Id.*; see also *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989). In *Doremus*, the claimants maintained that the Forest Service Regulations did not apply to their mining operations. *Id.* at 631. The regulations required all miners to submit an operating plan before commencing mining operations. *Id.* The plan at issue provided that "the area[s] of exploration would be concentrated to the clear cut, and that no more than five trenches would be open at any one time." *Id.* (quoting 36 C.F.R. § 261.10(k) (1987)). Furthermore, the plan provided that the cutting of live, green trees for firewood would be prohibited, and that "if timber is needed [the] operator is asked to cut small dead timber." *Id.* The plan neither expressly authorized, nor expressly prohibited, the removal of live trees to be used in the mining operation. *Id.* On several occasions, the Forest Service representatives visited the site and observed multiple open trenches, many of substantial size, crisscrossing more than 1.25 acres, trees that had been pushed over "and a road that had been constructed through the trees on one side of the claim." *Id.*

Claimants maintained that their operations were exempt from the regulations by the proviso which states: "[n]othing in this part shall preclude activities as authorized by . . . the U.S. Mining Laws Act of 1872 as amended." *Id.* at 632 (citing 36 C.F.R. § 261.1(b) (1992)). The

Uses that are otherwise injurious to the environment are prohibited by the Mining in the Parks Act.³⁴⁸ This statute was enacted in 1976 to eliminate most national park areas from mineral exploration and development,³⁴⁹ leaving open six national areas for mineral development: Crater Lake National Park, Mount McKinley National Park, Coronado National Memorial, Organ Pipe Cactus National Monument, Death Valley National Monument, and Glacier Bay National Monument.³⁵⁰ But Congress declared that,

all mining operations in areas of the National Park System should be conducted so as to prevent or minimize damage to the environment and other resource values, and, in certain areas of the National Park System, surface disturbance from mineral development should be temporarily halted while Congress determines whether or not to acquire any valid mineral rights which may exist in such areas.³⁵¹

Since enactment of this act, the National Park Service ("NPS") has reported to the General Accounting Office ("GAO") that their regulations prevent unnecessary surface disturbance and minimize

court pointed out that the Surface Resources and Multiple Use Act of 1955, which amended the general mining law, reserved to the United States the right to manage and dispose of surface resources on unpatented mining claims and prohibited the removal of vegetative surface resources "[e]xcept to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto . . . or to provide clearance for such operations or uses." *Id.* (citing Surface Resources and Multiple Use Act, 30 U.S.C. § 612(c) (1988)). In this respect, the regulations were not inconsistent with the mining law and claimants activities therefore were not exempt from the regulations. *Id.*

348. Mining in the Parks Act, 16 U.S.C. §§ 1901-1912 (1988). Section 1902 provides in pertinent part:

[a]ll activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System shall be subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.

Similar laws have been enacted to assess the environmental harm posed by coal mining. The Surface Mining Control and Reclamation Act of 1977, regulates coal mining on non-federal lands. 30 U.S.C. §§ 1201-1328 (1988). The Act "embodies Congress' recognition that the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to the productivity of the soil and to protect the health and safety of the public." *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 516 (D.C. Cir. 1981) (holding that the Act gave the Secretary rule-making power to prescribe minimum information requirements for permit applications submitted to state regulatory agencies).

349. 16 U.S.C. § 1901.

350. H.R. REP. NO. 1428, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 2487, 2492-93.

351. 16 U.S.C. § 1901(b).

adverse environmental effects.³⁵² For example, in Death Valley National Monument, the area with the most mining activity, very little surface disturbance has occurred since 1976, while mineral production has increased.³⁵³ All mining operations within the National Park System are subject to NPS regulations which require that each mining operator develop a plan of operation in cooperation with the NPS.³⁵⁴ The regulations describe the constraints under which miners must operate, including those relating to the potential effects of mining on air and water quality, on any endangered or threatened plant or animal species, and on natural and historic landmarks.³⁵⁵ The plan must also include a reclamation plan "to ensure that the land is returned as nearly as possible to original contours when the mine is closed."³⁵⁶

The Mining in the Parks Act has been interpreted to prohibit the operation of heavy, off-road vehicles in Alaska's Yukon-Charley Rivers National Preserve without first obtaining an access permit.³⁵⁷ The Tenth Circuit has held that permits may be required to prevent the unreasonable degradation of a wilderness study area, even if access to the area could not be totally denied.³⁵⁸

352. REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON MINES AND MINING, HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS OF THE UNITED STATES, "MINING ON NATIONAL PARK SERVICE LANDS—WHAT IS AT STAKE?" EMD-81-119, 30-31 (1981).

353. *Id.* at 30.

354. *Id.* at 31.

355. *Id.*

356. *Id.*

357. *United States v. Vogler*, 859 F.2d 638, 640 (9th Cir. 1988). "The Yukon-Charley Rivers National Preserve was created and made a part of the National Park System by the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 410hh(10) [(1988)]." *Id.* at 639. Vogler was a placer miner who owned "between 50 and 150 patented and unpatented mining claims." *Id.* at 640. He operated a Caterpillar and a multi-ton transport vehicle along what is "commonly called the Bielenberg trail." *Id.* Vogler maintained "that the marshy condition of the trail in the summer made it necessary to travel with the caterpillar alongside the transport vehicle, off the trail. He acknowledged that this process 'raises cain' with the trail." *Id.* He stated "that when he came to streams or creeks, he cut bunches of poles and trees, making a 'bridge' so he could cross." *Id.* Experts testified about "uprooted trees, areas where all the vegetation had been scraped away, and a strip about six feet wide along the side of the trail where vegetation had been flattened by Vogler's Caterpillar. One expert noted that some of the areas could require up to 100 years to return to their original condition." *Id.*

The Court found "that compliance with the Park Service's permit regulations is essential to ensuring the protection of the Preserve's natural beauty and value." *Id.* at 641. The "regulations are designed to 'conserve the scenery and the natural and historic objects and the wildlife therein and to . . . leave them unimpaired for the enjoyment of future generations.'" *Id.* (quoting 16 U.S.C. § 1).

358. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).

The Wilderness Act of 1964,³⁵⁹ which formally established the National Wilderness Preservation System, withdrew wilderness lands from mineral development, although preserving valid existing rights.³⁶⁰ The Act required periodic surveys of the mineral values in wilderness areas by the U.S. Bureau of Mines, limited mining law patents in wilderness areas to the minerals only (subject to "valid existing rights"), and gave the Department of the Interior the authority to regulate mineral activity in the wilderness for the protection of the wilderness' character as "consistent with the use of the land for mineral location and development and exploration, drilling and production."³⁶¹

VII. EFFECT OF THE PROPOSED MINERAL EXPLORATION AND DEVELOPMENT ACT OF 1993³⁶²

While the concept that the legislature holds the power to qualify or redefine existing property rights, especially those created by statute, seems firmly established as discussed in *Locke*, *Texaco*, and *Hodel*, these cases also admit that the power of Congress is not limitless.³⁶³ Instead, a redefinition that "goes too far" may be a taking, entitling the property owner to just compensation. However, as discussed earlier, the monuments for determining when this point is reached seem more apparent than real.³⁶⁴

A. *Holding Fee, Royalty, and Duration of Claim*

The proposed Act assesses a fee per acre (starting at five dollars) on all mining claims, and charges royalties on minerals extracted starting at eight percent.³⁶⁵ Currently, a claimant pays noth-

359. 16 U.S.C. §§ 1131-36 (1988).

360. The Act by its terms was to be applied prospectively to mineral leasing, becoming effective on January 1, 1984. *Id.* § 1133(d)(3).

361. *Id.* For example, with respect to access to mining claims, the regulations provide: Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness. The Forest Service will, when appropriate, issue permits which shall prescribe the routes of travel to and from the surrounded claims or occupancies, the mode of travel, and other conditions reasonably necessary to preserve the National Forest Wilderness.

36 C.F.R. §§ 228.15(c), 293.13 (1992).

362. H.R. 322, 103rd Cong., 1st Sess. (1993).

363. *See supra* part V.A.

364. *See supra* part V.A.

365. *See supra* notes 161-63 and accompanying text.

ing for his claim or the minerals extracted, but, in order to obtain a patent, he must demonstrate that he has expended at least \$100 per year in labor or improvements or a total of \$500 on the claim.³⁶⁶ The proposed assessment would apply to existing as well as to future claims.³⁶⁷ A property interest, which at its creation entitled the owner to the complete enjoyment of the fruits and profits, is being redefined as one in which the fruits and profits must be shared. However, the effect of the proposed redefinition may be viewed not as denying the claimant any fundamental rights inhering in the property, but as a form of user or impact fee³⁶⁸ since, under the proposed legislation, all fees and royalties derived from mining operations are to be held in a fund for the purpose of assuring clean-up and preservation.³⁶⁹ There is an apparent rational relationship between the assessment of a fee and the costs of the benefits conferred or harmful effects of mining activities. Numerous reports and studies show harmful environmental effects from hardrock mining.³⁷⁰ The only issue may lie in the amount of the fee, whether it is purely arbitrary or founded upon some scientific estimates.

Under the current rules, a mining claim arises upon the discovery of a "valuable mineral deposit" which is defined as one for which a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a mine.³⁷¹ To preserve the claim, a claimant need only expend \$100 worth of labor or improvements per year.³⁷² The claim otherwise continues so long as it is mined.³⁷³ Under the proposed legislation, a claimant must, in addition, actually produce ore

366. See *supra* note 29 and accompanying text.

367. See *supra* note 164 and accompanying text.

368. See *supra* notes 184-91 and accompanying text.

369. Section 104 of the proposed legislation provides for the distribution of receipts: [R]eceipts from royalties . . . shall be paid into the Treasury of the United States. Twenty five percent thereof shall be paid . . . to the State within the boundaries of which the locatable mineral deposits are or were located, 25 percent shall be deposited in the Hardrock Abandoned Mine Reclamation Fund, . . . 25 percent shall be deposited into the Hardrock Mining Impact Assistance Trust Fund, . . . and 25% thereof shall be deposited as miscellaneous receipts in the Treasury. Upon termination of Abandoned Reclamation Fund, 33 percent of such royalties shall be paid [by the Secretary of the Treasury to the States], 33 percent shall be deposited in the Hardrock Impact Assistance Trust Fund . . . , and 34 percent shall be deposited as miscellaneous receipts in the Treasury.

370. See *supra* note 13 and accompanying text.

371. *E.g.*, *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

372. See *supra* note 29 and accompanying text.

373. See *supra* notes 57-58 and accompanying text.

in paying or commercial quantities within twenty years, or else the claim is deemed abandoned. These provisions make no allowance for the difficult, although promising, mining claim. If the twenty year period does not reflect the actual experience of miners and may be extinguished without regard to any variables, the provision may not meet the test under *Locke* and *Texaco* that the extinguishment not be arbitrary and the conditions for continued ownership not be unreasonable.³⁷⁴

B. *Withdrawal of Opportunity to Patent*

Under the proposed legislation, all mining claims, including those existing at the effective date of the Act, will remain mere claims with the right to mine, but without the right to exclude the public or the government from the area in which the claim is located.³⁷⁵ Thus, a mining claim has been redefined as a property interest more akin to a servitude, which gives the right to possess, but which cannot lead to the acquisition of title.³⁷⁶ Congress' objective in this is quite clear—by withdrawing the opportunity to patent, claimants will be forced to abandon the lands once the claims have been exhausted or they are unable to produce commercial quantities of ore. The repeal of the patent provisions of the mining law by the proposed legislation is not the first direct attempt by Congress to limit fee titles in public lands stemming from mining claims. Almost from the time of passage of the General Mining Law, the government has withdrawn particular lands from mineral exploration in order to protect federal interests, such as the integrity of military installations, Indian reservations, wildlife and other environmental concerns.³⁷⁷

374. See *supra* part VI.A.

375. See H.R. 322, 103rd Cong., 1st Sess. § 102 (1993).

376. See *id.*

377. See MICHAEL BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 119-25 (cited in LESHY, *supra* note 14, at 31). By approximately 1910, several million acres had been withdrawn and closed to mining. LESHY, *supra* note 14, at 31. The first withdrawals were accomplished by executive order, rather than legislative act. *Id.* The executive's power to withdraw lands was challenged and decided in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). The Supreme Court found that the "rules or laws for the disposal of public land are necessarily general in their nature [such that] conditions may so change as to require [land to be withheld] in the public interest." *Id.* at 474. In this case, the Court found that Congress had given the power to withhold lands to the executive branch by implication. *Id.* By 1919, about 50 million acres had been withdrawn; 40 million of which were coal lands; nearly 7 million were oil lands; almost all of the remaining acres were phosphate lands. See 58 CONG. REC. 4784 (1919) (statement of Sen. Walsh). On other occasions in mining law history, Congress has withdrawn areas or substances from the privileges offered by the 1872 mining law. Under

The questions concerning withdrawal of public lands and the opportunity to obtain a patent (based upon claims existing at the time of passage of the Sawtooth Act) were raised, but not settled, in *Freese v. United States*.³⁷⁸ There, the plaintiff owned five unpatented mining claims located on federal land.³⁷⁹ In 1972, Congress incorporated these lands into the newly established Sawtooth National Recreation Area.³⁸⁰ Like the proposed Mineral Exploration and Development Act of 1993, the Sawtooth Act expressly terminated the ability of existing claimholders to obtain a patent to lands in which the claims were located.³⁸¹ The plaintiff maintained that denial of

the Mineral Leasing Act of 1920, lands previously open to location and patent became available solely on a lease basis. 30 U.S.C. § 193 (1992). However, previously located valid claims which were in existence on February 25, 1920 were protected and the Act allowed such claims to continue to qualify for patents so long as they are "maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." *Id.* The Act enacted in 1920 removed deposits of oil, gas, coal, phosphate, and sodium from the general mining law and added them to the Mineral Leasing Act. *Id.* The Materials Act in 1947, authorized the Secretary of the Interior to sell materials including, but not limited to, sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States. 30 U.S.C. § 601 (1992). By amendment in 1955, "common varieties" of stone, sand, gravel, cinder and pumice were removed from the general mining law and made subject to purchase only. *Id.* § 611. In 1960, various asphalt deposits were removed from the general mining law and added to the Mineral Leasing Act. *Id.* § 181.

Under the Surface Resources and Multiple Use Act of 1977, Congress declared certain lands to be unsuitable for mining, including: lands within the National Park or National Wildlife Refuge systems, federal lands within a national forest, areas in which mining might adversely affect a designated historic site, or within 300 feet of occupied dwellings, public schools, or churches. 30 U.S.C. § 1272 (1992). Congress, however, limited the application of the surface mining proscriptions to avoid infringement of existing property rights. *Id.* The Act provided: "After [the enactment of this Act], and subject to valid existing rights no surface coal mining operations except those which exist on [the date of enactment of this Act] shall be permitted. . . ." *Id.* § 1272(e).

In 1974, Congress gave recognition to the public interest by protecting the wilderness through the Wilderness Act of 1974, which prohibited large regions from becoming new mining claims after 1983 and imposed restrictions on the occupancy and use of pre-existing mining claims. *See* 16 U.S.C. § 1131 (1985). The National Parks and Recreation Act of 1978 provided for an absolute prohibition against dredge or placer mining "within the banks or beds of the main stem of the St. Joe [River] and its tributary streams in their entirety above the confluence of the main stem with the North Fork of the river." 16 U.S.C. § 1274(a)(23) (1992). The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 410hh-5 (1988), formally withdrew federal lands in Alaska from all forms of mineral activity. Finally, the Sawtooth Act, discussed in *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1981), withdrew the right to patent in withdrawn national park land. 16 U.S.C. § 460aa to 460aa-14 (1988).

378. 639 F.2d 754 (Ct. Cl. 1981).

379. *Id.*

380. 16 U.S.C. § 460aa (1992).

381. The Act provided that, "[s]ubject to valid existing rights, all Federal lands located

the ability to obtain patents upon the five unpatented mining claims which plaintiff held on the effective date of the Act amounted to an unconstitutional taking of property.³⁸² The plaintiff argued that a "vested right to a patent" arose upon discovery and location of a mining claim.³⁸³ The plaintiff meant that this "vested right" to patent was a property interest, as much as a mining claim or a fee simple title. The court rejected the plaintiff's takings argument, explaining that a vested right to the issuance of a patent "does not arise until there has been full compliance with the extensive procedures set forth in the federal mining laws."³⁸⁴ Since the "plaintiff had not yet taken the first step towards obtaining patents" before the passage of the Act, no private property had been taken.³⁸⁵

The holding in *Freese* is logical and flawless as to the issue it addressed. However, the issue the court addressed was clearly not the one raised by the plaintiff. The court ruled on the right to the issuance of written evidence of title (the patent) upon completion of an application. The plaintiff argued for a right to submit an application for a patent.³⁸⁶ The court ruled correctly that only a completed application entitles a mining claimant to a patent, but it did not appear to grasp the gist of the plaintiff's theory, that is, the opportunity to file an application for a patent is a property interest protected by the Fifth Amendment. In any event, the issues in *Freese* could not be decided solely by reference to *Wilbur v. United States ex rel. Krushnic*.³⁸⁷ There, as discussed earlier,³⁸⁸ notwithstanding the withdrawal of certain minerals from exploration by the Mineral Leasing Act, the holder of a claim covering the withdrawn minerals existing at the time of enactment of the statute was entitled to a patent upon application by virtue of a clause saving existing mining claims from extinguishment.³⁸⁹ To the extent that the language of the savings clause under the Sawtooth Act in *Freese* is similar to that in *Wilbur*

in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States." 16 U.S.C. § 460aa-9 (1992). The Act further provided that "[p]atents shall not hereinafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States." *Id.* § 460aa-11.

382. *Freese*, 639 F.2d at 757.

383. *Id.* at 758.

384. *Id.*

385. *Id.*

386. *Id.* at 755.

387. 280 U.S. 306 (1930).

388. See *supra* notes 44-52 and accompanying text.

389. *Wilbur v. United States ex. rel. Krushnic*, 280 U.S. 306, 314 (1930).

(as well as in *Seldovia Native Ass'n v. Lujan*),³⁹⁰ an existing mining claim should be interpreted to give the claimant the right to file an application for a patent and the right to the issuance of a patent upon completion of the application.³⁹¹ But the withdrawal provisions of the Sawtooth Act in *Freese* go further than those in the Mineral Leasing Act in *Wilbur* and the ANCSA in *Seldovia*. The Sawtooth Act, by express terms, extinguished the inchoate right to patent, even as to claims preserved by the savings clause.³⁹² This is precisely the effect of the proposed legislation. While one might conclude that *Wilbur* implicitly held that a right to apply for a patent inheres in a mining claim, the question whether extinguishment of this right (in the same way that denying a fee owner the right to possess the property) so interferes with the claimant's expectations as to effect a taking was not before the Court.³⁹³

390. 904 F.2d 1335 (9th Cir. 1990).

391. The Supreme Court's dicta in *Stockley v. United States* would seem to support a conclusion that in the absence of a savings clause, a non-vested interest in government largess could be withdrawn at Congress' will. See *Stockley v. United States*, 260 U.S. 532, 536 (1923).

392. 16 U.S.C. § 460aa-11.

393. Compare *Clawson v. United States*, 24 Cl. Ct. 366 (1991). The plaintiff argued that a taking occurs when the government removes the opportunity to patent by withdrawing lands from public exploration. *Id.* at 369. At issue was the Central Idaho Wilderness Act ("CIWA"), 16 U.S.C. § 1274(a)(24), enacted in 1980, which incorporated various sections of the Salmon River in Idaho into the National Wild and Scenic Rivers System. The Forest Service of the Department of Agriculture determined that under the Act, mining near tributaries of the Salmon River could take place only outside of their "perceptible banks above ordinary high water." *Id.* at 368. In 1981, Clawson "staked out a placer mining claim adjacent to Silver Creek, a tributary of the Salmon River." *Id.* To proceed with mining activities on his claim, Clawson submitted a plan of operations to the Forest Service. *Id.* The Forest Service commenced a study to assess the environmental risks of the proposed mining operation and concluded that subject to minor modifications, the plan "would not have a significant adverse effect on the environment." *Id.* But before Clawson could commence operations, the Idaho Environmental Council and the State of Idaho brought suit to enjoin him from proceeding and to force the Forest Service to rescind its approval of the mining plan. *Id.* The petitioners maintained that the CIWA prohibited all placer and dredge mining within the watershed of any tributary to the Middle Fork of the Salmon River, rather than just inside the perceptible banks of these tributaries below their ordinary high water marks. *Id.*

The District Court held for the environmental group, ruling that "the Central Idaho Wilderness Act of 1980 prohibited as of the effective date of [the] Act dredge and placer mining in any form within the watershed and drainage area of the Middle Fork of the Salmon River and all of its tributaries." *Id.* at 369. Because the claim was clearly within the watershed of Silver Creek, a tributary of the Salmon River, the court required the forest service to rescind its approval of plaintiff's mining operation located in the same area. *Id.* Clawson did not appeal this ruling, but filed suit alleging among other things a taking of his claim without just compensation, in violation of the Fifth Amendment. *Id.* The court easily rejected Clawson's complaint on the ground that he never acquired any property interest in the land or to the minerals in place because the mining claim was not established until *after* the lands had been

Even assuming that the opportunity to obtain a patent is property, one must consider the extent of constitutional protection due. Is it an interest in government largess, like welfare benefits, which can be withdrawn, but only after the recipient has been given notice of the impending withdrawal and an opportunity to be heard on the issue? Or, is it a more substantial interest, the withdrawal of which requires compensation? If it is the latter, that is, an aspect of a right inhering in the mining claim, or a property interest which vests upon the discovery of valuable mineral deposits (the opportunity thereby losing its character as a mere expectation in the continued availability of government largess), then substantive rights are at issue.

C. *Permissible Uses*

On its face, the proposed Act does not regulate mining claims to the point of leaving no economically viable use, although this fact can only be determined by an examination of the costs of the reclamation requirements in relation to particular mining activities.³⁹⁴

withdrawn by the CIWA. *Id.*; see also *Fixel v. United States*, 26 F.2d 353 (Cl. Ct. 1992) (mining claims acquired after passage of CIWA).

394. See *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991). In *Whitney*, the court held that the operation of the Surface Mining Control and Reclamation Act ("SMCRA"), which prohibited surface mining of alluvial valley floors, constituted a taking of the coal property where the property had only one use and that use was prohibited by the Act. *Id.*

The Court of Claims addressed the same issue in *Ainsley v. United States*, 8 Cl. Ct. 394 (1985). There, the plaintiff alleged that a combination of two acts of Congress resulted in a taking of her property without just compensation. *Id.* at 395. In 1978, Congress authorized the Secretary of the Interior to establish the Friendship Hill National Historic Site. *Id.* The site would be a part of the National Park System. *Id.*

The Act also appropriated the necessary funds to acquire the property for the park. Pursuant to the Act, the Secretary acquired certain properties on December 27, 1979, including the surface property which overlies plaintiff's coal property. [Accordingly, t]his property was made a part of the Friendship Hill National Historic Site.

As a result of [the] defendant's purchase of the land overlying the plaintiff's coal property, and the placement of that land in the Friendship Hill National Historic Site, [the] plaintiff contend[ed] that her coal property [was] within the boundaries of the National Park System. As such, [the] coal property [was] subject to the prohibition on surface coal mining operations set out in the [Surface Mining] Act.

At the time of the passage of the Surface Mining Act and the creation of the Friendship Hill Historic Site, [the] plaintiff maintained that neither any coal mining operations existed on her property nor had she applied for or obtained a permit for mining coal.

Id. at 396-97. The plaintiff maintained that the mining of coal on her land was the only beneficial use for her coal property. *Id.* at 397. She alleged that the Acts reduced the value of her land to zero, which constituted a taking without just compensation. *Id.*

The court denied the defendant's motion to dismiss for failure to state a claim on the

While the requirement that money be spent is not, in and of itself, a taking of property, the result may be different where the expenditures exceed the value of the property.³⁹⁵ That issue, as it related to the Uranium Mill Tailings Radiation Control Act of 1978,³⁹⁶ was addressed in *Atlas Corp. v. United States*.³⁹⁷ In *Atlas*, "the plaintiffs sought recovery of costs associated with the stabilization of mill tailings that were generated from the uranium and thorium production under the completed contracts with the government."³⁹⁸ The court dismissed the contract claim, finding no contractual agreement as to the matters at issue.³⁹⁹ The plaintiffs also argued that the statute's requirement of spending large sums of money for reclamation and decommissioning of the tailings and its mill upon termination of its license was a taking.⁴⁰⁰

The court found that plaintiffs had "not alleged a physical taking of any of its property" inasmuch as the government action did not invade or permanently appropriate the plaintiff's property for public use and that "[r]equiring money to be spent is not a taking of property."⁴⁰¹ Nor was there a regulatory taking.⁴⁰² The Act served

ground that there was a definite question of fact, the resolution of which might entitle the plaintiff to the relief she requested. *Id.* One of those questions was whether the exceptions under 30 U.S.C. § 1272(e) applied. *Id.* The exceptions included the existence of mining operations on the site on August 3, 1977, and/or the establishment of valid existing rights to mine her property. *Id.* at 398. Although plaintiff admitted that her property had never been mined, the court noted that the definition of "valid existing rights" is not cut and dried and thus plaintiff might possibly have had such rights. *Id.* at 400.

The court noted that the 1983 definition of "valid existing rights" appeared to be broader than the 1979 version and that the definition was evolving. *Id.* at 398. As such, the court believed that the agency should be given the opportunity in the first instance to apply the proper regulatory provision in determining the plaintiff's right to mine. *Id.* Thus, the court concluded that the plaintiff's taking claim could not be resolved until an administrative decision was reached regarding her "valid existing rights" and rights to mine her property. *Id.* at 400. These points led the court to consider the second basis for the defendant's motion to dismiss, i.e., that the claim was not ripe for judicial resolution because the plaintiff had failed to exhaust her administrative remedies (to request a variance or waiver) set out in the Act and regulations. *Id.* at 402. The court concluded that the plaintiff should have initially sought an agency determination. *Id.* at 403.

395. *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

396. Pub. L. No. 95-604, 92 Stat. 3021 (codified as amended in scattered section of 42 U.S.C. The Act provided that the federal government had the responsibility for the stabilization and decommissioning of mill sites and required that operators of mills conduct their business in a manner that would not expose the public to harm. See 42 U.S.C. § 2022 (1988).

397. 895 F.2d 745 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990).

398. *Id.* at 748-49.

399. *Id.* at 749.

400. *Id.* at 756.

401. *Id.*

402. *Id.*

to safeguard "the public against potential hazards of tailings radiation and radon gas emissions by requiring the owners and operators of uranium mills to stabilize the tailings and mill site to minimize the health hazards."⁴⁰³ While the costs would mean that the plaintiffs would be deprived of the use of large amounts of money, they had failed to allege that the costs exceeded the value of the mill.⁴⁰⁴ They also did not claim that the government had interfered with their production of uranium or that the government had made use of their mills unprofitable.⁴⁰⁵ Moreover, the plaintiffs failed to show any interference with their investment-backed expectations because, from the outset of the uranium procurement program, in light of the regulation of the nuclear industry, the plaintiffs should have expected that the legislative scheme would be "buttressed by subsequent amendments to achieve the legislative end."⁴⁰⁶

In the hardrock mining context, claimants have argued unsuccessfully that the application of certain environmental laws to mining activities have effected a taking of property. For example, in *Rybachek v. United States*,⁴⁰⁷ the plaintiffs, owners and operators of a gold placer mine, sought recovery from the government for deprivation of property consisting of 255 acres of patented claims and twenty-one unpatented mining claims.⁴⁰⁸ The plaintiffs contended that the limitations and conditions on discharges imposed by the Environmental Protection Act and the Clean Water Act forced them to curtail the hydraulic removal of overburden and made mining the property unprofitable.⁴⁰⁹ They argued that mining was the only economically viable use of their land, that the land could be successfully mined only by means of hydraulic removal of overburden, and that the cost of mining under the permit restrictions far exceeded the value of any gold extracted.⁴¹⁰ The government asserted that the plaintiffs were not deprived of economically viable use of their property.⁴¹¹ The government reasoned that the plaintiffs had, in fact, mined their land continuously, admitted only to losing their subsur-

403. *Id.* at 757 (citing 42 U.S.C. § 7901).

404. *Id.* at 758.

405. *Id.*

406. *Id.*

407. 23 Cl. Ct. 222 (1991).

408. *Id.* at 223.

409. *Id.*

410. *Id.*

411. *Id.* at 224.

face rights, and had retained their water rights.⁴¹²

The court applied the three-factor regulatory takings test.⁴¹³ First, with respect to the character of the government action, the court inquired "whether the government act closely parallele[d] an act of eminent domain. . . . [with t]he central question [being] whether the act [was] equivalent to the physical invasion of substantial rights held in the property."⁴¹⁴ "These rights include the right to possess, use, and dispose of the property, as well as the right to exclude others."⁴¹⁵ In this case, the plaintiffs claimed that they were deprived of a substantial use of their property.⁴¹⁶ "However, [because] their rights to possess, dispose, and exclude others [were] not directly affected[,] . . . the character of the government action . . . [was] not equivalent to the physical destruction or intrusion of an act of eminent domain."⁴¹⁷ "This factor, as a matter of law, weighed against finding a taking of the plaintiffs' land."⁴¹⁸

"The second and third factors, the economic impact of the regulation and interference with reasonable investment-backed expectations, involve a comparison of the property before and after the regulation's alleged interference including a comparison of property value."⁴¹⁹ The court stated that "[t]he concern in our case is whether the plaintiffs' right to mine gold could be 'exercised with profit,'"⁴²⁰ though the mere diminution in property value, as opposed to the destruction of economically viable use, would not constitute a regulatory taking.⁴²¹ The court left open the possible showing by defendant that the land was useful for purposes other than mining, such as recreational activity.⁴²² However, if the only viable defense identified by the court (namely, the ability of the plaintiffs to use the land for recreational purposes), is removed because mining claims can be used for mining purposes only, then the provision of the proposed legislation which impose financial costs greater than the value of any ore extracted, may be a taking.⁴²³

412. *Id.*

413. *Id.*

414. *Id.* (quoting *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 391 (1988)).

415. *Id.* at 224-25 (quoting *Loveladies*, 15 Cl. Ct. at 391).

416. *Id.* at 225.

417. *Id.* (citing *Loveladies*, 15 Cl. Ct. at 391).

418. *Id.*

419. *Id.*

420. *Id.* (citation omitted).

421. *Id.*

422. *Id.* at 225-26.

423. *Id.*; see *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984).

Furthermore, regarding the subsurface and surface rights, the court held that it did not follow that the plaintiffs "were not deprived of economically viable use of their property because they allege[d] that the permit restrictions interfered with only their subsurface rights."⁴²⁴ Instead, the court must consider the value of the plaintiffs' property as a whole in measuring both the severity of the regulation's impact and interference with reasonable investment-backed expectations.⁴²⁵

D. Deference to the Legislature

Using the most recent Supreme Court regulatory takings case as the central focus, Professor John R. Nolon attempts to offer some analytic precision to the regulatory takings cases.⁴²⁶ He argues that all regulatory takings cases fit into one of four factual contexts: 1) "public values," where regulations such as historic preservation ordi-

424. *Rybachek*, 23 Cl. Ct. at 225 (citing *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 405 (1989), *aff'd*, 926 F.2d 1169 (D.C. Cir. 1991)).

425. See *Chemical Manufacturers Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989). In *Chemical Manufacturers*, the plaintiffs contended that the cost of installation of equipment required by the EPA was wholly out of proportion to the effluent reduction and failed to meet the cost effectiveness test required by the Act. *Id.* at 178. The court refused to find that the costs were totally disproportionate to the benefits and relied on the fact that BPT was the lowest level in the progression of increasingly stringent technology-based requirements imposed by the Clean Water Act. *Id.* at 185. This was the average of the best and Congress did not intend that initial BPT must be "cheap." *Id.* at 205. In fact, Congress anticipated that BPT would cause plant closures and the loss of 50,000 to 125,000 jobs. *Id.* Congressman Harsha, speaking in the house in March 1972, called the attention of the Members to a private study that estimated the loss of these jobs because of the 1976 date of BPT. *Id.* Therefore, the court deferred to the decision of the EPA in finding that the costs were not "wholly disproportionate." *Id.* at 185; see also *Trustees for Alaska*, 749 F.2d at 552-53 (miners failed to show that the provisions of Federal Water Pollution Control Act Amendments which limited the discharge of pollutants deprived them of economically viable use of their property as would support their takings claim). But see *Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161 (1990). There, the plaintiff was a large-scale miner of limestone. *Id.* at 164. Prior to the commencement of any mining activities, Congress passed amendments to the Clean Water Act which required a permit to conduct mining activities. *Id.* The plaintiff applied to the Army Corps of Engineers for a permit, but its application was denied on the stated ground that a permit would not be in the public interest. *Id.* The plaintiff argued that the denial effected a taking of property. *Id.* The court first rejected the Army Corps assertion of the "nuisance exception" to the Fifth Amendment, since rock mining of the type planned for the plaintiff's property had never become a nuisance. *Id.* at 166. The court went on to apply the three-factor regulatory takings test and found a taking. *Id.* The value of the property after the government action was only nominal (falling from \$10,500 per acre to \$500). *Id.* The plaintiff purchased the property for the sole purpose of limestone mining, and there was virtually no other business by which the plaintiff could "recoup its investment or better, subject to the regulation." *Id.* at 175.

426. Nolon, *supra* note 177.

nances tend to apply to a limited number of properties with historical characteristics; 2) "arbitration," where the regulatory regime burdens and benefits many properties across a broad geographical area and where courts give great deference to the legislature; 3) "public injury," where regulations are designed to prevent uses which threaten injury to public health and safety and where courts give even more deference to the legislature; and 4) "undue burden," where the regulations operate to deprive an owner of a fundamental right inhering in property, such as the right to exclude, and where the courts give very little deference to the legislature.⁴²⁷ Nolon continues by arguing that the "operating method" and, therefore, the result of reviewing courts within each of these categories is predictable.⁴²⁸

As to the mining claim and the patented claim, the provisions of the proposed legislation do not purport to destroy one of the essential rights inhering in ownership of property (i.e., the rights to possess, to exclude others, to use, to injure or destroy, to enjoy the fruits and profits, and to transfer), such that they do not fall into the "undue burden" class of cases.⁴²⁹ However, if the opportunity to patent is regarded as a separate property interest, then its withdrawal would fall into this class of cases since the effect of the legislation would be to extinguish all fundamental rights inhering in the property interest, and indeed the interest altogether. Those provisions of the proposed legislation relating to reclamation seem to fall in the "public injury," as well as the "public values" category of cases. On the whole, considering the "unique" nature of the property at issue, that it is the product of government largess and that the interest in regulating harmful mining activities fall into the "public injury" type of regulatory takings cases, one should expect the courts to show great deference to the legislature's judgment in evaluating the validity of the reclamation requirements of the proposed legislation.

VIII. CONCLUSION

The central belief of the proposed legislation is that the nation will benefit from the curtailment of the privatization of public lands. The assumption underlying this belief is that privatization entails profit-maximizing use of the land, and that public ownership, in con-

427. *Id.* at 25.

428. *Id.* at 29.

429. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987).

trast, means conservation and preservation for public low-impact recreational use. This premise, however, may be unfounded in the context of public lands open to mineral exploration. The existing array of laws and regulations already deny the mining claimant as well as the patentholder much power over their claim areas, limiting any additional benefit to the patentholder to those that are privately recreational and aesthetic. A patentholder is not free to construct a resort hotel or factory on land within his original mining claim, although he might well build a summer cottage or grow peaches. The latter two activities were the kind that Congress sought to foster by the general mining law in 1872. At that time, the law reflected then contemporary public values. Since then, public values concerning land ownership have changed. The proposed legislation, like zoning, environmental protection, and historic preservation laws that have developed over the last century, contemplates a redefinition of our conception of appropriate private rights in land. Thus, when resources were abundant and the population was relatively sparse, mining and agricultural pursuits made sense.

Today, however, the converse is true—resources are scarce and the erstwhile frontier well-populated. Without any doubt, mining activities threaten national interests in ecology and the environment. Likewise, non-mining uses pose the same threat, but in ways that are different and perhaps more severe than mining operations. They cause waste and destruction of valuable resources on the surface of lands embraced within claims, including timber, water, forage, fish and wildlife. This waste, in turn, reduces recreational value. Non-mining uses also cause loss through increased expenditures for management and administration. Litter, water pollution by improper sewage disposal, and forest fires are additional consequences of non-mining uses of public lands.⁴³⁰ The question remains, though, whether the existing laws and regulations are inadequate to confront these threats and whether the proposed legislation will only add confusion and conflict among enforcing agencies and their goals. It has become increasingly evident that “long-term environmental safety of many mining activities is a function of the site itself, and not merely of good or bad practices, [i.e.,] some locations cannot be mined without creating permanent environmental damage.”⁴³¹ A plan which

430. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1282 (9th Cir. 1980) (citing H.R. REP. NO. 730, 84th Cong., 1st Sess. 6 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2474, 2478-79); *Bales v. Ruch*, 522 F. Supp. 150, 156 (E.D. Cal. 1981).

431. CONG. REC. S2017 (daily ed. Feb. 20, 1991) (statement of Sen. Wallop quoting

would include the entire withdrawal of all public lands from future mineral exploration and the aggressive enforcement of existing rules to curtail and extinguish exhausted claims would best serve to reclaim the public domain.

former Secretary Steward L. Udall).