

**NOTE CONCERNING OPPORTUNITIES  
FOR RESEARCH IN THE HISTORY OF MINING LAW  
BY  
STANLEY DEMPSEY  
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One of the purposes of The Society of Mining Law Antiquarians is to encourage "the pursuit of knowledge concerning the history of the laws and customs relating to the ownership and working of mines." It has been my hope since the founding of the Society in 1976 to contribute to that goal by providing an outline of some of the opportunities for research in the history of mining law. This Note is a first attempt at providing such an outline. I hope it will serve as a starting point for those who are new to the study of mining law history.

I hasten to add at the very beginning of this imperfect piece that I am offering these materials as a first draft and not as a finished product. I hope that, in the years ahead, I might perfect this Note and that other members of the Society would contribute to making it more useful.

## Getting Acquainted With the History of Mining Law

Newcomers to mining law who want an overview of the field would do well to start with Herbert Hoover's Historical Note on the Development of Mining Law, a four-page footnote to their translation of Book IV of Agricola's De Re Metallica (the Dover Publications, Inc. reprint of 1950, at page 82). Hoover provides an analytical framework for understanding the law relating to minerals, and then proceeds to describe the customs and laws pertaining to mines at different times and places, tracing them from ancient times to the end of the 19th Century. The framework he offers is as follows:

"Unlike the land, the minerals have ever been regarded as a sort of fortuitous property, for the title of which there have been four principal claimants--that is, the Overlord, as represented by the King, Prince, Bishop, or what not; the Community or the State, as distinguished from the Ruler; the Landowner; and the Mine Operator, to which class belongs to the Discoverer. The one of these that possessed the dominant right reflects vividly the social state and sentiment of the period. The Divine Right of Kings; the measure of freedom of their subjects; the tyranny of the land-owning class; the rights of the Community as opposed to its individual members; the rise of individualism; and finally, the modern return to more communal view, have all been reflected promptly in the mineral title. Of these parties the claims of the Overlord have been limited only by the resistance of his subjects; those of the State limited by the landlord; those of the landlord by the Sovereign or by the State; while the Miner, ever in a minority in influence as well as in numbers, has been buffeted from pillar to post, his only protection being the fact that all other parties depended upon his exertion and skill."

The Hoover Note starts with Greek and Roman times, and proceeds quickly to the Europe of the Middle Ages. It devotes more than a full page to English mining customs and laws, describing in particular the special mining communities that developed, such as Cornwall, Devon, the Forest of Dean, the Forest of Hindip, Alston Moor, and the High Peak.

Judge Lindley in the third edition of his treatise, On Mines, provides background on English mining law, mineral ownership under civil law, and on Mexican mining law.

Shinn, in Mining Camps, also traces German, English, Spanish and Mexican precursors of United States mining customs and laws.

Mining Camps is also the place to begin a study of the mining districts organized by miners in the western United States before a federal mining code was enacted. District governments were set up and mining codes were adopted wherever mines were discovered. In many cases, these governments extended their authority beyond the regulation of mining rights and operations, to include a broad variety of civil and criminal matters. For those who want to pursue mining district laws in more detail, I recommend Fritz, The Mining Districts of Boulder County, Colorado ( ). If you have trouble finding a copy, I suggest that you try at

the library of the University of Colorado in Boulder. A shorter version of this thesis is Frits, The Constitutions and Laws of Early Mining Districts in Boulder County, Colorado, 21 Univ. of Colo. Studies 127 ( ). A good overview of the development of public lands mining law in the United States is provided by Robert W. Swenson's chapter on "Legal Aspects of Mineral Resources" in Gates, History of Public Law Development (1968), one of the documents produced by the Public Land Law Review Commission.

These are good starting places. I am sure I have overlooked some good introductory materials. I will include any that come to my attention in a subsequent edition of this Note.

#### An Outline of Possible Research Topics

For those who would pursue mining law history in more depth, and particularly for those who hope to make a contribution to this field of knowledge through original research, I offer the following outline of topics that deserve more attention than they have received up to now. This is merely a rough first cut, put together to encourage others to help me develop a more thoughtful and comprehensive listing of topics. As with the introductory or

overview materials. I will upgrade this outline in subsequent revisions of this Note.

### Antiquity

Archaeologists have devoted considerable effort to the winning of metals by ancient man. Ira Joralemon traces copper mining back into antiquity in his books, Romantic Copper and Copper. But we know very little about the customs and laws governing ancient mining.

The Hoover Note discusses mining rights at Mount Laurion as described in Greek writings of the period from 400 to 300 B.C. It also describes the state of knowledge of Roman mining law, saying "that as to the detailed conditions under which the mine operator held his title we know less than of the Greeks--in fact, practically nothing other than that he paid a title."

Ancient mining laws seem a fertile field for original research. The Romans mined extensively at many sites across Europe and in Britain. It would be particularly interesting to determine whether any trace of Roman mining law survived the Dark Ages--whether Spanish mining laws, or the customs of post-Roman/pre-Norman miners in places like Derbyshire and Cornwall were influenced by Roman practices and precedents.

Research in this field would be difficult for most of us because it would require an ability to use the classic languages of Greek and Latin. But the rewards could be great for a persistent scholar.

As a starting point, I think it would be worthwhile for someone to check with the Hoover Library to see if Hoover collected any further items on ancient mining laws. Perhaps he found other items after De Re Metallica was published. A real sleuth might find something of value .

#### Medieval Europe

The Hoover Note provides some information about European mining codes and charters, and Book IV of De Re Metallica gives us a detailed account of 16th Century mining law in Saxony.

The European development of mining law is of importance to students of mining law history because European, and particularly German, mining and smelting technology was exported to Britain and the new world during the 16th, 17th and 18th Centuries. With the technology came a mining heritage which included legal institutions that could be applied with only minor adjustments to fit local conditions.

Students of English mining laws and customs have noted the possible influences of Saxon law on the laws of Derbyshire and Cornwall. There is some evidence of German influence on Spanish mining law. More work to trace the influence of European practices is needed, and could give us a better understanding of some of the peculiar features of mining law such as extralateral rights provisions.

Again, language is a barrier to English-speaking scholars. It seems likely that there is much information available in both Latin and German, and that we are merely ignorant of its existence.

#### England

English mining law, particularly as developed in Derbyshire and Cornwall, is well documented. Publications of the Peak District Mines Historical Society describe customs and laws of Derbyshire where lead and fluorspar mining can be traced back to Roman times.

Robert R. Pennington's book, Stannary Law, published in 1973, covers tin bounding and the cost book companies of Cornwall and Devon. An appendix to the book lists all of the Lord Wardens of the Stannaries of Cornwall and Devon, beginning with William de Wrotham who was appointed to the post on November 20, 1197.

Perhaps the most pressing need from the point of view of mining law enthusiasts in the United States is for someone to put together an annotated bibliography of the materials available on English law. When that is completed, it will be easy to determine what topics remain for original scholarship.

The English laws are, of course, of great interest to students of United States and Canadian mining law, because, as Judge Lindley has stated, "the common law of England was to a certain extent grafted into our legal system when we separated from the mother country, and was, and still is, the rule of action in the absence of legislation." Lindley, Mines, 3rd ed., p. 5 (1914). Efforts to trace features of the 1872 mining law to English precedent, and perhaps even back to the German antecedents of English laws, may be rewarding.

#### Spanish Mining Law and Its Impacts on the New World

Spain has been a mining country since ancient times. The discovery of the New World by Columbus late in the 15th Century pushed Spain to revise its mining code for use in its newly acquired lands.



Much has been written about the mining laws of Spain as they were adapted to conditions in Peru, Mexico and other mining countries of Central and South America. Prieto's Mining in the New World (19\_\_ ) contains a helpful chapter on the development of mining law in Mexico and Peru during the colonial period. Like English law, it would be helpful if someone would put together an annotated bibliography of materials on Spanish and Spanish colonial mining law, with emphasis on materials available in the English language.

#### Mexican Mining Law

When Mexico became independent from Spain in 1821, it adopted the mining law existing previous to separation. Subsequent development of Mexican mining law is worth studying, particularly since Mexican practices were widely adopted by California gold rush mining districts.

The Mexican mining law was of particular relevance to land claims asserted following the takeover of California by the United States. The treaty of Guadalupe Hidalgo provided for recognition of private land claims by United States authorities if the claims were valid under Mexican law. In ~~the~~ celebrated case involving the New Almaden Quicksilver Mine, lawyers for the mining claimant were required to prove

that the original claim to the mine was valid under the law in effect in 1845. That proof is contained in a four volume transcript of the proceedings in the Federal district court. It provides very good information about the operation of Mexican mining law during the period in question.

A serious student of Mexican mining law could make a significant contribution to our field of interest by writing a monograph or book about Mexican mining law of the early Republican period. Much has been written about the New Almaden case, but I am sure that modern reexamination by a mining lawyer would turn up some new angles.

Twentieth Century developments in Mexican mining law also deserve attention. Again, an annotated bibliography would be a good starting point.

#### United States

I now come to the United States which, as the world's most prolific mineral producer, has a rich mining law history--a history that draws upon all that has gone before, that has benefited from the experience of Germany, Spain, England, Mexico and the other great mining nations of the world.

For those who feel most comfortable when history is divided up into various periods, we can suggest that there are five major periods of mining law development in United States history: the period before the California gold rush (1848); the period from 1848 until the first national mining law was enacted in 1866; the period from 1866 until the General Mining Law was enacted in 1872; the period from 1872 until the so-called "conservation era" began in the early years of the 20th Century; and the contemporary period. One can argue about this classification, but it provides a reasonable starting point for the purposes of this Note.

Little has been written about mining laws of colonial North America, probably because there was so little mining during that period. Likewise, mining law was not a pressing issue with the new government of the United States because mines were scarce in the eastern states and the Northwest Territory. Robert Swenson provides some information about early federal mineral policy in History of Public Land Development. It seems likely that much more could be done with this period, and that historians have only scratched the surface of what would be an interesting period of United States mining law history.

The California gold rush brought mining issues forcefully to the attention of the United States government. No army could have stopped prospectors and miners from going on to public lands to search for gold. In the absence of a federal code, the miners made their own laws.

The two principal historical themes of the period are the development of mining district laws, and the struggle to enact a federal mining law. Both deserve more attention than they have received.

I have described some of the principal sources of information on mining district laws, supra. Shinn and Fritz did pioneering work, but the definitive book on mining district laws is yet to be written. There is still much to be done. The laws of the various districts need to be compiled. I am sure that many district laws remain hidden away in county records, unavailable to serious scholars. And someone needs to trace the influence of the California district laws on the laws developed in Colorado, Idaho, British Columbia and other areas where gold rushes post-date the California rush.

The story of the Lode Law of 1866 also needs more attention. Much has been written about the 1866 Act, and its sponsor, Senator Stewart, but more could be done with the available materials.

The period between 1866 and 1872 is interesting because the 1866 law recognized the validity of local mining district laws. Much more needs to be done with this period. How many lodes were patented under the 1866 law? How well did the law work? What was the status of mining districts during this period? Can we learn more about mining district laws by digging out transcripts of trials involving proof of mining district laws where 1866 lodes were involved?

The 1872 Mining Law is the focal point of most people's interest in the history of United States mining law. This law, much maligned by miners and environmentalists alike all during its 107-year life, seems to have as its only saving grace a record of almost unequalled political resilience, and a claim to being the institutional underpinning of the most prolific mineral economy in the world.

There are so many possible topics of historical inquiry with respect to the 1872 Mining Law that the subject deserves a separate note. Hopefully, I will be able to expand this outline enough to eventually provide such a note. For the purposes of this first draft, I will restrict my suggestions for research to the extralateral rights feature of the 1872 act.

Extralateral rights are an anomaly in property law. They are apparently of European origin, imported to this country and first given force locally in mining district laws. Embraced by the 1866 and 1872 acts, the law of the apex gave rise to much of the litigation that plagued nearly every mining camp during the last quarter of the 19th Century. Again, much as been written about the colorful apex cases, which pitted the best lawyers and mining engineers against one another in colossal trials, and which often resulted in violence which Reno Sales styled "underground warfare" at Butte. But again, the book on the apex cases, one that would pull the whole story together in a thoughtful, analytical way, is yet to be written.

The materials are available to anyone who would work on the apex cases. Perhaps they should be written up one at a time, in the hope that someone will eventually be able to weave them all together in a study dealing with the significant issues in the cases, and how they were ultimately settled.

The coming of the "conservation era," the period which saw government put limitations on the freedom of miners with respect to certain commodities, brought government more prominently into mining, and presents a different pattern of

historical development. Although perhaps less colorful than the periods which emphasize free mining institutions, the conservation era provides interesting topics for study, nonetheless. The debate over coal leasing policy that started early in the 20th Century continues unabated today. The story of that debate might help this nation's energy policy planners find a better way to provide access to coal.

Alaska's mining industry has been particularly effected by special federal conservation policies, which singled that state out for special attention. Special studies of these policies and their impacts upon Alaskan development could be very useful.

Finally, contemporary issues surrounding the 1872 Mining Law are making history. Serious students of that law have an opportunity to capture history in the making if they see these issues in their true perspective.

The law of discovery, in particular, has developed during recent years to accommodate notions that the mineral estate is no longer dominant, that other values should have a preference over mining. The fight over the marketability rule is now largely history, history that someone should write up while most of the participants in the battles are still around.

The struggle over revision of the mining law is another contemporary matter which deserves continuous attention from historians. The 1872 Mining Law has been under continuous attack since it was passed. Mining boosters such as Rositer Raymond and Clarence King criticized the law during all of their working lives. Yet today, mining people tenaciously resist efforts to modify the law in even the most minor respects. In recent years, the pressures for revision comes not from mining engineers who were offended by the egalitarianism of the 1872 Mining Law, but from a new kind of elitist who alleges that the freedom offered prospectors and miners under the 1872 Mining Law is a license to "rape, ruin and run," and that it is a law that "permits mining in the wrong places." Callison, It's High Time To Scuttle the Giveaway Mining Law, 42 Living Wilderness (1979). The story of this struggle is worth recording, again while much of the story is unfolding.

Finally, the impact of the environmental era on mining rights under the 1872 Mining Law deserves attention as a contemporary issue that will someday attract the attention of historians. The relationship of the new state reclamation laws to rights of miners under the 1872 act needs attention. The story of federally imposed environmental regulation, such as the Forest Service regulations, also needs to be preserved.



### Other Paths

Having outlined some of the main roads of mining law history, albeit only briefly, I would like to conclude with two suggestions for special topics of study that might be worthy of pursuit by mining law historians. As with the subjects described above, this is but the start of a list, a list I hope to add to in subsequent editions of this Note.

First, a narrow subject, illustrative of the kinds of peculiar situations that might merit careful study. Most of the early gold rushes in the western United States and Canada took place before federal mining codes were perfected. Placer claims under mining district laws were small, a reflection of popular lawmaking where latecomers had a vote. When the rich pockets played out at the end of a season or two individual miners left for new diggings, leaving gulches cut up into tiny claims, each constituting a potential title problem. When it became necessary to consolidate these old districts for hydraulic mining or dredging, the old, mostly abandoned claims were a nightmare for the large operators and a bonanza for lawyers. Practical measures were utilized to extinguish these titles. In places like California Gulch and Fairplay, some pretty loose practices were employed. In Canada, consolidation of the Klondike district was attempted

by means of an Order-in-Council extinguishing some rights, and granting concessions on abandoned or open ground to dredge operators. The hue and cry from individual miners crimped the play, but consolidation was accomplished in most districts by one means or another. Similar consolidation problems have occurred in the great lode mining districts in the world; e.g., Bingham Copper; Utah; Butte; the iron ore mines in Minnesota; the Kimberly Diamond mine. The stories of these consolidations are often colorful, and have required the use of ingenious legal devices to accomplish the desired end. Research in this field could yield some interesting insights into the peculiar branch of law dealing with mines, and some good stories, too!

Second, let me suggest that biographical studies of mining lawyers, judges and scholars would contribute importantly to our field of interest. Law is of human invention, reflecting the pride, passion, wisdom, and inadequacies of its makers. I can think of no more useful work than developing information about the people who came before us in this field of knowledge.

Several people come quickly to mind as candidates for biographical sketches. Judge Lindley, who combined careers as a judge, trial lawyer, scholar and teacher, is already

the subject of an ongoing study. Others who come to mind are: Colorado Judge Moses Hallett; author and lawyer R. S. Morison; lawyer and scholar Gregory Yale; and Nevada lawyer and Senator Stewart. I'm missing some important people, but we can add them to the next edition.

In closing, I would like to observe that few fields of study offer so much opportunity for contributing to man's understanding of history. The materials compiled to date are but a beginning. I sincerely hope that this Note will stimulate interest in mining law history and that it will help point newcomers in the field in useful directions. Perhaps in the years ahead, people will be able to enjoy the fruits of our labor, and hopefully, they will look back favorably upon our efforts.