STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

BERT L. COLE, Commissioner of Public Lands
DON LEE FRASER, Supervisor

DIVISION OF GEOLOGY AND EARTH RESOURCES

VAUGHN E. LIVINGSTON, JR., State Geologist

BULLETIN NO. 67

MINING LAWS
OF THE
STATE OF WASHINGTON

By

JOHN L. NEFF and ROBERT L. MAGNUSON

1974

For sale by Department of Natural Resources, Olympia, Washington
Price $1.50

FOREWORD

This bulletin is one of the continuing series of bulletins published by the Division of Geology and Earth Resources for the assistance of those interested in the development of mineral deposits in the State of Washington. The Division of Geology and Earth Resources, Department of Natural Resources, was formerly known as the Division of Mines and Geology. Prior to July 1, 1967, this division was part of the Department of Conservation.

The Division of Geology and Earth Resources acquires information on the geology and mineral resources of the state and disseminates the information in the form of bulletins, maps, reports, and other publications.

A pamphlet was published in 1940 by the then Division of Mines and Mining under the title, "An outline of the Mining Laws of the State of Washington." This pamphlet was prepared by M. H. Van Nuys, a practicing attorney in Seattle. The work was substantially expanded, revised, and brought up to date in Bulletin 41, by Mr. Van Nuys, in 1953, and a supplement was issued in 1956. Due to the continuing popularity of the publication and to the substantial changes in the mining laws since 1956, the division concluded that the publication should be rewritten.

The current bulletin, under the title, "Mining Laws of the State of Washington," has been prepared by John L. Neff (E.M., Colorado School of Mines; LL.B., University of Washington) and Robert L. Magnuson (B.S., University of Idaho; LL.B., George Washington University), both practicing attorneys in Spokane.

The Division of Geology and Earth Resources of the Department of Natural Resources adds this revised bulletin, "Mining Laws of the State of Washington," to its series of publications available to the public.

Vaughn E. Livingston, Jr.
Washington State Geologist
Division of Geology and Earth Resources
Olympia, WA 98504

August 1, 1974.

CONTENTS

	Page
Foreword	III
Introduction	1
Article I.	
Federal lands—Classification for mining	3
1.1 Public domain	3
1.2 Acquired lands	3
1.3 National forests	4
1.4 Wilderness and primitive areas	5
1.5 National parks, national monuments, and Federal recreation areas	6
1.6 Federal powersites	6
1.7 Withdrawals under the Reclamation Act of 1902	7
1.8 Taylor Grazing Act lands	7
1.9 Indian reservations	8
1.10 Military reserves	8
1.11 Wildlife sanctuaries	9
1.12 Nonmineral entry acts	9
1.13 Northern Pacific Railroad lands	10
1.14 State of Washington lands	10
1.15 Reservation of minerals in United States land patents	11
1.16 Lands overlain by water	12
1.17 Classification Act of 1964	13
1.18 Effect of lode claims, placer claims, and leasing	13
Footnotes	17
Article II.	
Federal lands—Location of claims	21
2.1 Mineral Location Law of 1872	21
2.2 Rights of prospectors	21
2.3 Necessity of discovery	22

CONTENTS

Article II.—Continued Page

2.4 What constitutes discovery 23

2.5 Law governing location procedure 24

2.6 Qualifications of locator 24

2.7 Lode locations—procedure for making 25

Discovery 25

Posting location notice 25

Staking claim 26

Recording location notice 27

2.8 Placer locations—procedure for making 27

Discovery 28

Posting location notice 28

Staking boundaries 28

Recording location notice 29

Location work 29

File affidavit of labor 29

Association placer claims 29

2.9 Millsite locations 30

2.10 Tunnel sites 30

Location of tunnel claims 31

Recording of location notices 31

Footnotes 33

Article III.

Federal lands—Rights and obligations following location 37

3.1 Multiple Surface Use Act 37

3.2 Extralateral rights 38

3.3 Annual assessment work 42

3.4 Forfeiture and resumption of work 44

CONTENTS

Article III.—Continued

Page

3.5 Abandonment 46

3.6 Relocation 46

3.7 Amended locations 47

3.8 Maintenance of markers and boundaries 49

Footnotes 51

Article IV.

Federal lands—Patents of locations 55

4.1 Patent procedure 55

4.2 Contests 55

4.3 Rights granted 55

Footnotes 57

Article V.

Federal lands—Miscellaneous considerations affecting locations 59

5.1 Personal property 59

5.2 Separate property 59

5.3 Quiet title actions 59

5.4 Adverse possession 59

5.5 Conveyance 59

Footnotes 61

Article VI.

Federal lands—Leasing 63

6.1 Legislative pattern 63

6.2 Administration 63

6.3 Phosphate, potassium, and sodium leases 63

6.4 Coal leases 63

6.5 Oil shale leases 64

6.6 Oil and gas leases 64

CONTENTS

Article VI.—Continued | Page

6.7 Other leasing provisions 64

Footnotes 67

Article VII.

Lands owned by the State of Washington 69

7.1 Classification of state-owned lands 69

7.2 Mineral disposition by the State 69

7.3 Mineral leasing law 70

7.4 Oil and gas leases 72

7.5 Coal leases 72

7.6 County lands 73

Footnotes 75

Article VIII.

Private lands 77

8.1 Source of title as affecting mining rights 77

8.2 Reserved mineral rights 77

Footnotes 79

Article IX.

Rights-of-way and water rights 81

9.1 Rights-of-way—Federal lands 81

9.2 Rights-of-way—State lands 81

9.3 Rights-of-way—private lands 81

9.4 Mine-to-market roads 82

9.5 Water rights 82

9.6 Dams and reservoirs 83

9.7 National forest use permits 83

Footnotes 85

CONTENTS

Article X. Page

Regulation for protection of the environment 87

10.1 Reclamation of surface-mined lands 87

10.2 Water pollution control 87

10.3 Air pollution control 88

10.4 Oil spillage regulation 88

Footnotes 89

Article XI.

Miscellaneous 91

11.1 Mining corporations 91

11.2 Labor regulations—State of Washington 91

11.3 Industrial insurance 92

11.4 Unemployment insurance 92

11.5 Securities regulation—Blue-sky laws 92

11.6 Labor and material liens 93

11.7 Explosives 93

11.8 Mining engineers and surveyors 93

11.9 Uranium 93

11.10 Gold 93

11.11 Taxation 94

11.12 Mining Claims Occupancy Act 94

11.13 Criminal offenses 94

Footnotes 97

Glossary of terms 99

References 101

Index 103

ILLUSTRATIONS

		Page
Figure 1.	Lode claims	26
2.	Placer claims	29
3.	Tunnel site claim	31
4.	Extralateral portion of vein	39
5.	Extralateral rights for vein crossing side lines	40
6.	Extralateral rights for vein crossing one end line and one side line	41
7.	Extralateral rights for vein crossing one end line and terminating inside claim	41
8.	Extralateral rights for vein not crossing any boundary line	41
9.	Conflicting extralateral rights	41

MINING LAWS

OF THE

STATE OF WASHINGTON

By

JOHN L. NEFF and ROBERT L. MAGNUSON

INTRODUCTION

In order to determine which laws and regulations are applicable in regard to any specific tract of land in the State of Washington, it may be necessary to have an understanding of the history of the tract, together with knowledge of its present status in regard to withdrawals and restrictions. In many instances it may also be necessary to determine the specific mineral commodity of interest in order to determine which laws or regulations apply. Any attempt to discuss the mining laws results in a certain amount of confusion, because there is no completely logical organization of the laws and regulations in effect. It is the purpose of this bulletin, by use of appropriate headings, to furnish the user with a guide to the areas of interest, but any specific problem may require additional source materials.

The State of Washington was created out of territorial lands of the United States that were acquired in the Oregon Compromise with Great Britain in 1846. Subsequent to acquisition of this territory, the Federal Government has disposed of approximately 70 percent of the land area in the State into private or State ownership. The Federal mining laws apply to the remaining Federal lands and to minerals reserved under Federal statutes. The Federal Government has reserved minerals in an area of about 280,000 acres in the State of Washington, out of the approximately 30 million acres that have been disposed of into private and State ownership.[1/]

Disposition of Federal lands has been made under a variety of programs, the most extensive of which in point of area involved are the grants to the

Northern Pacific Railroad Company (now Burlington Northern, Inc.), and to the State of Washington, which between them account for about 30 per cent of the total land area of the State.[2/] There are a variety of other procedures that have been followed in disposing of Federal lands to the public, and the status of these lands, even in private hands, in many instances is dependent upon the specific statute under which title was granted. This is particularly true of lands conveyed to private individuals under the mining laws, because such lands carry rights and liabilities appropriate to mineral exploitation, which are unique.

It is beyond the scope of this bulletin to include all details of the history of Federal land policy, but in those instances in which the history is particularly significant, or is essential to an understanding of the present status of the lands, a brief review of history is included.

There are two principal approaches of the Federal statutes in regard to granting mining rights to the public. The first of these, and most important from the viewpoint of complexity and difficulty of interpretation, is found in the location laws, which permit individuals to locate a mining claim or claims upon certain Federal lands, and to obtain title to the land claimed. The second Federal program, which in general relates to different minerals than those included under the location laws, is one to permit leasing of Federal lands for mining, without the right to obtain title to the land.

Generally, mining rights upon lands owned by the State of Washington are limited to the right to lease for mineral exploitation only. Mining rights upon private lands can be acquired either through ownership of the land or by leasing from the individual owner. The Federal location laws apply only to Federal lands which are subject to location, and there is no comparable procedure for obtaining mineral rights in lands of the State of Washington or in lands in private ownership.

ARTICLE I.

FEDERAL LANDS—CLASSIFICATION FOR MINING

1.1 PUBLIC DOMAIN

The Mineral Location Law of 1872,[3] which constitutes the backbone of the general mining law of the United States, provides that all "lands valuable for minerals" shall be reserved from sale by the United States, and "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed," shall be open to location for mining by citizens and by aliens who have declared their intent to become citizens. This language has not received the broad interpretation that might be expected, and must be interpreted at the present time. Generally, the language of the location law has been interpreted to be restricted to land that is owned by the United States and that is held for disposal under the land laws, and has been held not to apply to lands that have been specified for a particular use, or which are classified for a particular use only.[4] This becomes all the more confusing, because classification for certain uses, by express authority of Congress, has left the lands so classified open for location, even though no longer part of the "public domain." On the other hand, lands that would appear to fit the statutory language have been held not to be open to location, in the absence of congressional expression to the contrary, because of the method of acquisition. A number of types of reservations or classifications, such as inclusion within the national forests[5] or classification for grazing purposes,[6] do not remove the lands from availability under the location laws, even though it would appear these lands are no longer public domain. However, although the language used in the statute would appear to apply, it is only in special instances that lands acquired by the Federal Government through purchase, condemnation, or gift, or by exchange for purchased, condemned, or donated lands, or for timber on such lands, are open to location under the mining laws. These lands are commonly denoted "acquired lands"; and they constitute over one-eighth of the total Federal lands in the State of Washington, and are generally closed to mining location.[7]

In addition to laws granting the right of location in unappropriated public lands, other legislation has been enacted to permit exploitation of certain minerals not subject to the location laws. Perhaps the most important of these statutes is the Mineral Leasing Act of 1920,[8] which provides for leasing for helium, coal, phosphate, oil and gas, oil shale, sodium, sulfur, and potash. Although this statute was originally designed to remove these mineral substances from consideration under the general location laws, and as a new procedure for disposition of these minerals instead of an extension of rights to lands not otherwise covered, the Mineral Leasing Act of 1920 was extended by the Mineral Leasing Act for Acquired Lands of 1947,[9] to permit leasing of deposits of these minerals in acquired lands, except for lands within incorporated cities and towns, national parks, monuments, military reserves, or tidelands or submerged lands. Other leasing laws permit mining within Indian reservations. Thus, the leasing laws extend to lands which are not open to location under the location laws at the present time.

1.2 ACQUIRED LANDS

Acquired lands are lands in Federal ownership that have been obtained for a particular purpose. Unless otherwise established in the legislation provid-

ing for the acquisition of lands for a special purpose these lands are not open to location under the general mining laws, and were not considered to be subject to leasing under the Mineral Leasing Act of 1920 until adoption of the Mineral Leasing Act for Acquired Lands of 1947. However, it is believed that lands acquired by the United States under the National Forest Exchange Act of 1922,[10] are subject to the location and leasing laws.[11] Under this statute, exchange of lands of the United States "surveyed and nonmineral in character" for tracts within the exterior boundaries of national forests was authorized. The statute does provide that either party, or both, may reserve minerals in any such exchange, with the value of the reserved mineral interest being taken into account in the exchange.[12] Minerals reserved in this manner may be subject to location or leasing upon payment to the surface owner for damage caused to the land and improvements thereon.[13] Lands acquired for national forests under recommendation of the National Forest Reservation Commission, established by the Act of March 4, 1917,[14] are subject to leasing not only under the Mineral Leasing Act of 1920, but also leasing for locatable minerals as well.[15]

Generally, because acquisition of lands for national parks, military reservations, reclamation projects, and other like Federal uses are made under specific statutes that do not provide for mineral entry or leasing, mineral entry in these lands requires a specific statute that reclassifies the lands.[16]

1.3 NATIONAL FORESTS

National forests, constituting over three-fourths of all Federal lands in the State of Washington, are the single most important category. This is true not only because they constitute the largest single category, but also because the national forest lands include areas of much interest from the viewpoint of mineral potential. National forests were originally established as forest reserves by Presidential proclamation under the Act of March 3, 1891.[17] By the Act of February 1, 1905,[18] jurisdiction of the national forest lands was transferred from the Secretary of the Interior to the Secretary of Agriculture, with a proviso which reserved to the Secretary of the Interior the jurisdiction to administer "such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any other lands."[19] In 1907, the authority of the President to establish national forests in the State of Washington was withdrawn,[20] and any additions to the national forests since that time have been made by express legislation. However, except for acquired lands, all national forest lands in the State were originally designated as such by Presidential proclamation and the President still retains the right to revoke or amend these designations.[21]

Although many activities within the national forests are subject to administration by the Department of Agriculture, through the Forest Service, the national forest lands are expressly open to location and leasing, unless withdrawn or reserved under some specific act of Congress.

It should be noted that the boundaries designated for the national forests invariably encompass many private lands. These boundaries are established for administrative purposes only, and there is no indication whatsoever that the lands enclosed within them are entirely Federal lands. In some parts of the national forests, large tracts with only small Federal holdings are included within the boundaries.

The Forest Service, in order to perform its essential functions, has established lookout towers, forest ranger stations, timber experiment areas, roads, and recreation areas. The Department of Justice at an early day issued an opinion to the effect that such lands appropriated by the Forest Service for adminis-

trative purposes, which were improved at public expense, were not subject to location or entry under the mining laws.[22] Of course lands within national forests are not exempted from withdrawal or classification under a variety of other acts for purposes such as powersites, townsites and the like.

1.4 WILDERNESS AND PRIMITIVE AREAS

In order to preserve primitive conditions within certain lands administered by the Forest Service, the so-called "L Regulations" were adopted in 1929. These were superseded by Regulations U-1 and U-2, adopted in 1939.[23] These regulations did not have the effect of closing any lands to mining activity, but, by drastically limiting surface access and construction of access roads, they had a very real effect upon the availability of lands involved for mining. Under these regulations a number of areas in the national forests in Washington, particularly in the Cascade Mountains, were classified as primitive areas under the L Regulations, or wilderness areas and wild areas under the U Regulations.

In 1964 Congress enacted the Wilderness Act.[24] This act defines a number of wilderness areas, including the Glacier Peak Wilderness in Washington, and provides for hearings to be held in regard to later inclusion of all of the "wild areas" and "wilderness areas" previously established under the U Regulations of the Forest Service. The Wilderness Act provides that wilderness areas designated by Congress in the act, or by later legislation, shall be open to entry under the location laws and the mineral leasing laws until December 31, 1983, but not thereafter. Restrictions are placed upon the rights obtained in any patent arising from the location of any mining claim after the effective date of the legislation (September 3, 1964), and any such patent shall convey only the title to the minerals and use of the surface reasonably required for mining or prospecting. In addition, the act gives statutory authority to the Forest Service, which was claimed by regulation only prior to the Wilderness Act, to regulate construction of roads, powerlines, waterlines, and other facilities in wilderness areas, and authorizes regulations requiring restoration of the surface disturbed by prospecting, discovery, and exploration work.

The Wilderness Act expressly provides that any privately owned property existing within the wilderness at the time it was made a wilderness by Congress shall be guaranteed "such rights as may be necessary to assure adequate access to such . . . privately owned land . . . ."[25] This applies to unpatented mining claims existing at the effective date, as well as to other private lands.

Since adoption of the Wilderness Act the Forest Service has adopted new regulations regarding wilderness areas and areas previously designated as wilderness and wild under Regulations U-1 and U-2, for the administration of these areas.[26] These regulations specifically prohibit the use of motor vehicles; the establishment of roads, except to recognized private property; the landing of aircraft, dropping of materials or supplies from aircraft; and the cutting of trees, except as permitted by the Wilderness Act, which permits required timber use for any valid mining claim. The statute and the regulations do not prohibit either the location or leasing of minerals prior to December 31, 1983, the cutoff date specified for statutory wilderness areas, but do drastically restrict prospecting and exploration activities.

In addition to the Glacier Peak Wilderness Area that was established by the Wilderness Act, the Act of October 2, 1968,[27] which was the North Cascades National Park enabling legislation, added additional area to the Glacier Peak Wilderness and created the Pasayten Wilderness, adding to the areas in the State of Washington that are administered under the Wilderness Act.

1.5 NATIONAL PARKS, NATIONAL MONUMENTS, AND FEDERAL RECREATION AREAS

In the enabling legislation establishing Mount Rainier National Park, the lands included were specifically closed to location of mining claims, although the validity of any mining location made prior to May 27, 1908, the date of the enabling act, is specifically recognized.[28] When Olympic National Park was established on June 29, 1938, a provision was made permitting location of mining claims within a portion of the park lands for a period of five years from that date.[29] Except for that provision, the park lands have been closed to mineral location. As is the case with Mount Rainier National Park, valid rights existing at the date of establishment of the park are recognized.

Marcus Whitman National Monument was authorized by the Act of June 29, 1936[30] and the Fort Vancouver National Monument was authorized by the Act of June 19, 1948. Because these lands were acquired by gift and by purchase for a specific purpose, although there is no express provision in regard to mineral locations, it can only be assumed that these lands are closed to any mineral locations or mineral leasing.

The North Cascades National Park was established by the Act of October 2, 1968.[31] The Secretary of the Interior is specifically authorized to acquire private lands within the park, which would include mining claims, and has the power of eminent domain to condemn such properties.[32] There is no express direction in the enabling legislation specifying when this acquisition shall take place, and presumably this is at the discretion and within the budgetary limitations of the Interior Department. Although the enabling legislation does not specifically close the lands within the park to location or leasing under the mining laws, it would appear that in all likelihood the construction that will be placed upon the legislation will be that mining is inconsistent with the purposes of the park, and therefore the lands within the park boundaries must be considered closed to further location.

The Act of October 2, 1968, also established the Ross Lake and Lake Chelan National Recreation Areas, a new category of recreation areas to be administered by the Department of the Interior. The enabling legislation expressly closes these lands to location under the general mining laws, but permits the Secretary of the Interior to promulgate regulations as he may deem appropriate to permit leasing of leasable minerals under the Mineral Leasing Act and the Acquired Lands Mineral Leasing Act,[33] and to permit removal of nonleasable minerals or locatable minerals under a lease entered into in accordance with the Act of August 4, 1939.[34] Although no express provision is made in the enabling legislation to permit condemnation of existing mining properties within the National Recreation Areas, the Secretary of the Interior has a general power of eminent domain which could be applied for this purpose if policy requires this action.[35]

1.6 FEDERAL POWERSITES

The Pickett Act was enacted effective June 25, 1910.[36] This act permits the President to withdraw from settlement, location, sale, or entry any public lands of the United States to reserve them for waterpower sites, irrigation, classification of lands, or other public purposes. As originally enacted, the act provided that any land so withdrawn would remain open to exploration and discovery for minerals except for coal, oil, gas, and phosphates. By amendment dated August 24, 1912, the act was amended to provide that withdrawn lands would remain open to exploration, discovery, occupation, and purchase under the mining laws of the United States "so far as the same (mining laws) apply to metalliferous min-

erals."[37] Except as left open to entry by these provisions lands withdrawn by Presidential proclamation under the Pickett Act were closed to mineral locations.

The Federal Power Act was enacted June 10, 1920,[38] and contains a provision that from and after the date on which any applicant applies for a license under the act to develop a power project, the lands described in the application shall be reserved from entry or location. It is unclear whether the enactment of the Federal Power Act closed lands classified as powersite withdrawals under the Pickett Act at the time the Federal Power Act was enacted,[39] or whether these lands are closed to entry only when an application is actually filed by a prospective Power Act licensee.[40] The Federal Power Act provides that once lands have been withdrawn by the filing of an application the Secretary of the Interior may reopen the lands to location when he finds it can be done without detriment to future power development, subject to a reservation in favor of future licensees under the Federal Power Act, with the proviso that "no claim or right to compensation shall accrue" to any locator thereafter.

Effective August 11, 1955, the Mineral Development of Lands Withdrawn for Power Development Act[41] was enacted. That act had the effect of restoring to entry and location under the mining laws all lands previously withdrawn as powersites, except to the extent that such lands were then included in an existing preliminary permit or license under the Federal Power Act. However, the act provides that neither the United States nor its licensees under the Federal Power Act shall be liable for any damage to any mining claim, millsite, or facility by reason of any damage caused by any hydroelectric project which is constructed encompassing the lands involved.

1.7 WITHDRAWALS UNDER THE RECLAMATION ACT OF 1902

One of the specific purposes for which the President may withdraw lands from entry under the Pickett Act (1910) is for irrigation. Withdrawals for purposes of irrigation by the Secretary of the Interior had previously been authorized by the Reclamation Act of 1902.[42] It is possible for lands to be encompassed simultaneously with withdrawals under both acts.[43]

From 1902 until enactment of the Act of April 23, 1932,[44] lands withdrawn under the Reclamation Act of 1902 were considered closed to mineral entry.[45] However, by the terms of the 1932 act the Secretary of the Interior, in his discretion, may reopen lands to entry under the mining laws, subject to the obtaining of an agreement between an intending locator and the Secretary of the Interior, if the Secretary deems this necessary for the protection of irrigation interests. In the absence of a reopening order, however, such lands are closed to location.

1.8 TAYLOR GRAZING ACT LANDS

The Taylor Grazing Act[46] was enacted June 28, 1934, authorizing the Secretary of the Interior to create grazing districts out of public lands which are in his judgment chiefly valuable for grazing and the raising of forage crops, and to issue stock-grazing permits for as long as ten years. The act specifically provides that any land so classified shall be open to prospecting, locating and patenting of mining claims, and to leasing under the mineral leasing acts. It further provides that water rights for mining, rights of ingress and egress, and rights-of-way, and the right to use timber for mining are preserved. Permits issued under the act are expressly subject to a reservation for prospecting and mining

and a mining locator or lessee is not required to compensate a permit holder for damage to his grazing operations[47] with the possible exception of improvements.[48]

The Taylor Grazing Act contains a provision permitting the Secretary of the Interior to exchange lands with private parties or with any state. Such an exchange may be with or without the mineral reservations. Mineral rights either obtained or reserved by the Federal Government in any such exchange are subject to leasing or location under the location laws.

1.9 INDIAN RESERVATIONS

Lands set aside in an Indian reservation are not open to location or other disposition under the Federal laws.[49] However, since the enactment of the Indian Reorganization Act of 1934,[50] any "unallotted lands within any Indian reservation or lands owned by any tribe, group or band of Indians under Federal jurisdiction" may be leased by the tribal council, with the approval of the Secretary of the Interior, for mining purposes. It should be noted that there are many privately owned tracts within some of the reservations, which typically were allotted to an Indian who retains the land or has sold it to some other private party.

The lands of the Colville Tribe in the Colville Indian Reservation have received unique treatment. By the Act of July 1, 1892,[51] the north half of the Colville reservation was reopened to entry and location by being restored to the public domain. By the Act of February 20, 1896,[52] the rest of the reservation was opened. Again by the Act of July 1, 1898,[53] provision was made for entry upon mineral lands in the Colville reservation, except for lands previously allotted to Indians or used by any government agency or any school. Under the Act of March 22, 1906,[54] after providing for an allotment of 80 acres per Indian, and reservations in favor of all government buildings, schools, churches and the like, all lands in the Colville reservation were opened to disposition under all of the public land laws, mineral and nonmineral, with the provision that any surplus remaining after five years would be sold at auction. The Indian Reorganization Act of 1934 provided that all valid rights or claims of any person would be protected, but the Secretary of the Interior was authorized to restore the surplus lands then available to tribal ownership. This restoration was effected by an order of the Secretary of the Interior on September 19, 1934. Although the Indians of the Colville Tribe voted on April 6, 1935, to exclude themselves from the operation of the Indian Reorganization Act of 1934, it has been held that this vote of the tribe did not have the effect of reopening the lands to entry and location.[55] Thus, locations made between the dates of the statutes reopening the reservation and the statute closing the reservation again in 1934, if valid at the time when made and if maintained, are still valid, but since September 19, 1934, the Colville Indian Reservation has been closed to location.

Under the Act of May 11, 1938,[56] leasing was made uniform for all tribal lands, and the lands of the Colville Tribe are subject to leasing under this act. The other reservations in the State were never opened to entry and location, but are subject to leasing under the Act of May 11, 1938.

The leasing laws are administered by the agency superintendent or other officer of the Bureau of Indian Affairs in charge of the tribal lands involved, and information can be obtained from this source.

1.10 MILITARY RESERVES

At a very early date the opinion was expressed that lands reserved by the President for military purposes were not open to disposition under the mining laws.[57] This appears to be the position taken until enactment of the Defense Withdrawal Act of February 28, 1958.[58] Under that act all lands thereto-

fore or thereafter withdrawn or reserved for use by any agency of the Department of Defense, except for the naval petroleum, oil shale and coal reserves, were opened to disposition under the mining and mineral leasing laws, with the sole exception that any such lands were not so opened if the Secretary of Defense determined that the disposition or exploration for minerals would be inconsistent with the military use of the lands.[59]

1.11 WILDLIFE SANCTUARIES

Wildlife refuges, game ranges, migratory bird refuges, and other like sanctuaries, have in some instances been established by specific acts of Congress, which typically specify whether or not the lands set aside are open to location and entry under the mining laws.[60] It is believed that the President of the United States has authority under the Pickett Act to withdraw public lands for game refuges, and to specify in the withdrawal order whether or not the lands are closed to location.[61] In 1934 the President was given statutory authority to establish game refuges within national forests,[62] but the statute that was enacted expressly provides that such areas shall remain a part of the national forests, and that such other uses shall be permitted as are consistent with the purpose for which the refuges are established. Whether or not prospecting and mining can be consistent with a game refuge is open to question, but there is at least some expression of authority that a permanent withdrawal by the President closes the lands to mining.[63]

Whether such lands are open to leasing under the Mineral Leasing Act of 1920 presents a different question, because of the express statutory authority of the Secretary of the Interior to regulate leasing. Apparently the present (1974) policy of the Bureau of Land Management is to make inquiry of the Assistant Secretary of the Interior for Fish and Wildlife before granting a lease, and then based upon his recommendations to deny the application or to include such stipulations as he may recommend in any lease which is entered into by the Interior Department.[64] Inquiry may also be made of the Forest Service, if the area is within a national forest.[65]

1.12 NONMINERAL ENTRY ACTS

There have been many Federal statutes for disposition of public lands for nonmining purposes, but they contain an identifiable pattern of treatment of contained mineral resources. The earliest important statute which is still in effect is the Homestead Law of 1862.[66] It follows the earlier pattern of excluding mineral lands from entry, but does not establish any satisfactory procedure for determining just what constitutes mineral lands. As is the case with the railroad lands, once a final certificate of patent is issued, it is too late to question the nonmineral status of the lands, but this status can be questioned prior to patent. In 1909, 1910, and 1914, statutes were enacted to permit entry under the homestead laws upon lands that had previously been classified as valuable for coal, phosphate, nitrate, potash, oil, gas, or asphaltic minerals, with a reservation in any patent issued for these lands reserving these minerals to the United States, its lessees and licensees, when the existence of such minerals was known prior to patent.[67] This pattern was extended to lands known to be valuable for sodium and sulfur in 1933.[68] Except under these relief statutes, lands known to be mineralized could not be entered under the Homestead Act; however, if they were not known to be valuable for minerals, entry could be made and patent issued, even though the lands later proved to be valuable for minerals. Even under these statutes, patent was issued without a reservation of minerals in the absence of knowledge of the existence of minerals.

The Stock-Raising Homestead Act of 1916[69] requires that any patent issued thereunder contain a reservation of all the coal and other minerals in the

lands patented, together with the right to prospect for, mine, and remove them whether or not there are known minerals. Thus the earlier pattern of a determination of mineral character prior to patent was eliminated, and an absolute reservation is made at the time of patent.

Under various acts, provision was made for townsite entries.[70] Although a pre-existing mining claim is protected under the statutes when a townsite entry is made, once patent is issued for a townsite no further mineral entry is possible.[71]

Under the Timber and Stone Law,[72] enacted in 1878 and repealed in 1955,[73] entry could be made upon public lands that were valuable for timber or for stone, but not upon lands containing known valuable deposits of gold, silver, cinnabar, copper or coal. These entries have been treated essentially the same as other nonmineral land entries, and upon issuance of a final certificate the owner obtained clear title, including any minerals thereafter discovered.

Under the Building Stone Act,[74] enacted in 1892, a placer location may be made covering lands "chiefly valuable for building stone." Under the Act of January 31, 1901,[75] a placer claim may be made upon lands chiefly valuable for deposits of salt, but such claims are limited to one claim to a person.

Under the Small Tracts Act,[76] enacted in 1938, the Secretary of the Interior may sell tracts not exceeding five acres of unreserved public land for residence, recreation, business, or community site purposes, but is required to reserve all "oil, gas, and all other mineral deposits," together with the right to prospect for and mine them.

1.13 NORTHERN PACIFIC RAILROAD LANDS

Although lands of the Northern Pacific Railroad Company (now Burlington Northern, Inc.), once patent has been issued, are private lands, it is necessary to review the history of these lands and its effect upon mining locations. The Northern Pacific Railroad Company was incorporated by act of Congress in 1864.[77] It was granted every alternate section of land, "not mineral," designated by odd numbers to twenty alternate sections per mile on each side of its right-of-way through the area which is now the State of Washington. All mineral lands were specifically excluded, and a provision was made for claiming other land in lieu thereof up to ten miles farther from the right-of-way. In 1890[78] Congress provided that all railroad grants were forfeited except for lands opposite to and coterminous with the part of the railroad then completed and in operation.

In 1896 the company was reorganized and its name was changed to the Northern Pacific Railway Company. From time to time application for patent for portions of the lands granted or selected in lieu was made, and, after a perfunctory determination of the mineral character of the lands patent was granted, and these lands became private lands not subject to the Federal mining laws. However, some of the lands were not patented and some of the granted and indemnity lands remain unpatented. Because of the restriction that the lands granted to or selected by the railroads must be nonmineral in character, a valid mining location made on these lands prior to patent establishes the fact that the lands are mineral and are not properly patentable by the railroad.[79] However, once patent has been issued, even though issued upon mineral lands erroneously, the lands are not open to location, and the patent is effective to make the lands private lands unless and until the Federal Government, through appropriate procedures, cancels the patent which has been issued.[80]

1.14 STATE OF WASHINGTON LANDS

As is the case with the lands of the Northern

Pacific Railroad Company, the granted lands of the State of Washington are not properly Federal lands, but because there was a designation of certain lands long before title was actually transferred from the Federal Government, the mineral-title problem is comparable. When Congress enacted the enabling legislation to establish the State of Washington in 1889, the State was granted sections 16 and 36 in every township within the State, with a right to select "in lieu lands" to substitute for numbered sections subject to prior disposition.[81] The enabling act also granted additional lands for state educational and other institutions. Excluded from the lands granted, requiring selection of in lieu lands, were "all mineral lands," and Indian, military, and other Federal reserves. By Act of January 25, 1927,[82] Congress eliminated the exception of mineral lands, and confirmed the grant of the numbered sections to the states whether or not mineral in character. However, in any subsequent conveyance of the land so granted, this act expressly requires the states to reserve the coal and other minerals in the land, but provides that the states may lease these lands for mineral exploitation if the rentals and royalties are utilized for support of the common or public schools. By the Act of June 21, 1934,[83] Congress provided that upon application of the states, patents may be issued for numbered school sections, provided the public land surveys have been completed.

Unlike the Northern Pacific Railroad Company lands, which pass from the jurisdiction of the Federal Government for disposition under the mining laws at the time of patent, the controlling date in regard to State-owned lands is the date of completion of the public land survey. Before completion of the survey the land is subject to location under the mining laws, even though granted to the State in the enabling act.[84] After completion of the survey, the granted lands are the property of the State, and are not subject to disposition under the Federal laws.[85] A survey is complete only when the section lines have been surveyed, as well as the township corners. Completion of the township corners only is not adequate to vest title in the State.[86] It should be noted that there are still areas in the State in which the public land survey has not been completed.

The State was granted lands other than the numbered school sections, and some of these lands have not yet been selected, as is the case with the "in lieu lands," to be selected in lieu of lands previously disposed of in the numbered school sections. The in lieu lands must be selected from lands nonmineral in character, but upon issuance of patent the State obtains title to any mineral later discovered therein.

1.15 RESERVATION OF MINERALS IN UNITED STATES LAND PATENTS

As has been pointed out on preceding pages,[87] starting in the year 1909 and continuing through to the present (1974), Congress has made provision for the reservation of specific minerals or of all minerals in various statutes permitting entry for nonmineral purposes. Perhaps the culmination of this practice was reached in the Stock-Raising Homestead Act of 1916,[88] which provides for the reservation of all coal and other minerals. If a reservation of a specific leasable mineral exists, a lease under the Mineral Leasing Law of 1920 may be permitted. If a complete reservation of minerals has been made, such as under the Stock-Raising Homestead Act of 1916, the lands are subject to location under the general mining laws and leasing under the mineral leasing laws. The Stock-Raising Homestead Act specifically provides for use of as much of the surface as may be required for all purposes reasonably incident to mining. Written consent from the surface owner must be obtained and payment for damages to crops and tan-

gible improvements of the surface owner must be made. In lieu thereof, a sufficient bond may be executed to secure payment of such damages to the surface owner in an amount to be determined in accordance with regulations of the Secretary of the Interior.[89] Damages were extended to include value of the land for grazing by the Act of June 21, 1949.[90] It should be noted that any patent issued to a mining locator under these circumstances is required to contain reservations in favor of the surface owner.

1.16 LANDS OVERLAIN BY WATER

The ownership of the lands comprising the beds, banks, and shores of bodies of water, rivers, and streams is determined by whether the body of water is navigable or nonnavigable. Except to the extent that there was disposition by the Federal Government prior to statehood, at statehood the State of Washington acquired title to the beds, banks and shores of all navigable inland waters up to the line of ordinary high water existing at the time of statehood.[91] The term "ordinary high water mark" has been defined by the United States Supreme Court as follows:

> This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed, a character distinct from that of the banks, in respect of vegetation, as well as in respect to the nature of the soil itself.[92]

The concept of whether or not a body of water is navigable is not a clear concept, and results cannot be readily predicted. The State of Washington Supreme Court has indicated that the fact that a seaplane can safely land or take off from a lake is not conclusive upon the question of whether or not the lake is navigable,[93] nor is the fact that logs can be floated down a stream.[94] The State of Washington Supreme Court has indicated that a stream is not navigable when it can become navigable only by artificial means,[95] but a contrary position is taken by the Federal Government in the Water Power Act of 1920.[96] Perhaps the clearest statement that can be furnished is the one appearing in the Washington State Constitution[97] that provides that a navigable water "is a body of water capable of being used to a reasonable extent in the carrying on of commerce in the usual manner by water, and so situated and having such length and capacity as will enable it to accomodate the public generally as a means of transportation." At the present time (1974), lands below the ordinary high water line of navigable bodies of water, to the extent that they are inland bodies of water, are subject to disposition for mineral exploitation only by lease by the State of Washington.[98]

The concept of nonnavigable bodies of water applies only to inland waters. The upland owners adjacent to a nonnavigable body of water own the lands beneath the water to the "thread" of the stream or lake. The thread is the deepest part of the channel. If the upland owner is the United States, the lands beneath the water are subject to location and leasing if they would have been subject to location and leasing in the absence of the water.

There was open dispute for years regarding the ownership of the lands lying offshore from the various states out to the so-called three-mile limit. Finally, in 1947 the United States Supreme Court held that the lands out to the three-mile limit belong to the United States.[99] Because of the interest in leasing for oil and gas, a number of bills were introduced in Congress, resulting in the Submerged Lands Act of 1953[100] and the Outer Continental Shelf Lands Act of 1953.[101] These acts have the effect of granting back to the states title to all lands "within three geographical miles of each State's coastline or all

lands within the State's historic boundary, if it is further seaward than three miles." The minerals in these lands are presently subject to leasing by the State of Washington out to the three-mile limit. Under the Outer Continental Shelf Lands Act of 1953, Congress provided for leasing by the Federal Government for oil, gas, and sulfur from the three-mile limit out to the edge of the Continental Shelf, which is generally regarded to be a depth of 600 feet. Presumably, if other minerals were sought, the Mineral Leasing Act of 1920 would apply to this area.

Meander lines, which were surveyed as part of the public land survey, have no effect as a boundary along the shore of navigable waters, and were surveyed solely for purposes of land disposition.[102] The boundary is the line of ordinary high water or line or ordinary high tide.

1.17 CLASSIFICATION ACT OF 1964

In 1964 Congress established the Public Land Law Review Commission to review all laws relating to the public lands and to report back to Congress. In conjunction with this legislation the Classification Act of 1964[103] was enacted, under which the Secretary of the Interior could determine, on a temporary basis, which Federal lands should be disposed of because they were necessary for the development of a community or were chiefly valuable for residential, commercial, agricultural, industrial, or public uses, or should be retained and managed for certain specified uses. Under this act the Secretary of the Interior could classify public lands to be retained by the United States for a variety of purposes, many of which would exclude mineral location or leasing. If any one classification involved over 2,560 acres, a 60-day published notice was required. Any such classification could continue for two years, and might be renewed upon appropriate notice to Congress. The act by its terms expired prior to December 31, 1970. Apparently no lands in the State of Washington were classified for purposes that would preclude mining location or mineral leasing, although it is believed that if such classification was made, while the classification continued in effect, it would constitute a complete withdrawal of the lands so classified from location or leasing under the mining laws.

1.18 EFFECT OF LODE CLAIMS, PLACER CLAIMS, AND LEASING

As previously noted,[104] the Mineral Location Law of 1872 reserves all lands valuable for minerals from sale by the United States and makes them subject to location under the act. The Placer Act of 1870, which amended the Lode Location Law of 1866, provides for location of placer mining claims but does not adequately define the difference between a "lode," subject to the lode location laws, and a "placer," subject to the placer location laws. Since this subject is reviewed elsewhere in this bulletin,[105] it is sufficient here to point out that, although the proper classification of a mineral deposit as a "lode" or a "placer" is quite important, the acts provide for disposition of all "valuable mineral deposits" under one classification or the other. This included oil and gas, coal, and a variety of other types of valuable mineral deposits, and, under appropriate circumstances where value could be shown, was previously held to extend even to sand and gravel.[106]

An existing valid unpatented lode mining claim closes the area encompassed to any other location under the location laws.[107] In addition, whether or not a valid claim has been established, an occupant in possession attempting to establish a valid mining claim may foreclose location of a claim for a period of three years.[108] An existing unpatented placer mining claim closes the area it encompasses to

further placer location, but under certain circumstances the owner of the placer claim or others with his permission may locate lode claims across it.[109] A lode known before location of a placer claim may be located without the owner's permission, either before or after patent.[110] Except for previously known lodes in placer claims, issuance of patent is conclusive and the patented lands are not subject to location.[111]

By enactment of the Mineral Leasing Act of 1920,[112] coal, phosphate, sodium, oil, oil shale, and gas "and lands containing such deposits" were made subject to disposition by leasing only, and these mineral substances were removed from the location laws at that time, with the exception of coal, which was not subject to location anyway. By amendment in 1927 the act was extended to include potassium deposits, and by amendment in 1960, native asphalt, solid and semisolid bitumen, and bituminous rock were added to the list of minerals subject to the leasing act.

As a matter of historic interest only, by the Act of March 3, 1873,[113] coal lands were treated differently from other mineral lands and were made subject to special statutory restrictions. Coal was not considered subject to location. There was a problem created during the late 19th century resulting in the Oil Placer Act of 1897,[114] resolving the question that had arisen regarding whether or not oil lands were locatable as placer claims. Both of these acts were superseded by the Mineral Leasing Act of 1920 and have no further effect, except to show the difficulty generated by the concept of "valuable mineral deposits" in the original mining laws.

In a decision of the Department of the Interior in 1924,[115] it was concluded that a valid location could not be made during the effective period of a prospecting permit under the Mineral Leasing Act of 1920. This was further extended by departmental decision to the effect that lands classified by the Department of the Interior as potentially valuable for leasing act minerals were closed to mining locations.

During the uranium boom that started after World War II, difficulty was generated because a large percentage of the available uranium lands were held under Federal oil and gas leases under the Mineral Leasing Act of 1920. The Atomic Energy Act of 1946[116] added further confusion by reserving all fissionable source materials in the public domain to the Federal Government. As special relief legislation, the Uranium Relief Act[117] (commonly known as Public Law 250) was enacted in 1953. This statute established a procedure for validating mining claims located after July 31, 1939, and prior to January 1, 1953, which would have been considered invalid because the lands were included in a permit or lease under the mineral leasing laws. During a period from prior to the Uranium Relief Act of 1953 until the Atomic Energy Act of 1954,[118] a procedure known as the "Circular 7" program was in effect under which the Atomic Energy Commission attempted to dispose of uranium deposits by a leasing procedure. The subject was partially clarified by the Atomic Energy Act of 1954, which has the effect of eliminating the original withdrawal of fissionable source materials that was established by the Atomic Energy Act of 1946 and of validating claims located during the period between the Act of 1946 and the Act of 1954. Fissionable source materials are subject to mining location at the present time.

The difficulty engendered by the conflict between the Mineral Leasing Law of 1920 and the location laws was substantially eliminated by the Multiple Mineral Development Act of 1954[119] (commonly known as Public Law 585). The act was primarily directed at correcting the problem generated by the uranium boom, but has continuing effect. The act

first established a procedure for posting and recording an amended notice of location, to establish the validity of locations made under the location laws between July 31, 1939, and February 10, 1954, which would have been valid except for the conflict with the leasing law. This procedure was also made to apply to any lode or placer claim or millsite claim located after August 13, 1954. However, all such locations were subject prior to patent, and after patent by reservation in the patent, to the rights of the United States, its lessees, permittees, and licensees to enter upon the land to prospect for, mine, treat, etc., leasing act minerals to the extent that any of the land included in the claim or patent was on either the date of location or the date of issuance of patent, whichever is relevant, included in an application for a permit or a lease, or a permit or lease which was issued under the mineral leasing laws, or lands which were known to be valuable for minerals subject to disposition under the mineral leasing laws. In addition, there is a procedure established under which an applicant for a lease, by filing with the Secretary of the Interior, may require a mining claimant with an interest in a claim within the proposed area of the lease to respond and furnish a statement detailing the location by showing recording data, physical location, and the names of the persons claiming an interest. Failure to respond will cause the claimant to forfeit any claim he might have to the leasing act minerals contained in his claim. The act contains another provision for settlement by appropriate court proceedings of operational disputes between persons operating under a mining location and persons operating under a mineral lease of the same land.

One other major point of confusion regarding the applicability of the general mining laws is the subject of the Surface Resources Act of 1947, as amended by the Common Varieties Act of 1955.[120] The combined effect of these acts is an attempt to eliminate the confusion resulting from conflicts in the decided cases regarding whether or not substances such as sand and gravel are locatable under the general mining laws. These statutes provide that the Secretary of the Interior, concerning the lands under his jurisdiction, and the Secretary of Agriculture, concerning the national forests, have the sole right to dispose of "common varieties" of "sand, stone, gravel, pumice, pumicite, cinders, and clay," which are removed from the effect of the location laws. The appropriate Secretary must dispose of the materials by competitive bid, unless the materials are to be used for a public works project or unless it is impractical to obtain competing bids. In its regulations the Department of the Interior has attempted to define the distinction between "common varieties" and other varieties by providing by regulation that common varieties include deposits that "although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits." However, a particular deposit shall not be classified "common varieties if it has distinct and special properties making it commercially valuable for use in manufacturing, industrial, or processing operations."[121] The regulation gives the example of limestone, which will not be classified as a common variety if it is used in the production of cement or is used as metallurgical or chemical grade limestone. The language of the regulation makes it adequately clear that in many situations the determination of what is or is not a common variety is indeed difficult.

A considerable amount of confusion regarding location of lands valuable for building stone was caused by the combination of actions taken by Congress in 1955. The Timber and Stone Law of 1892

was repealed, and the Common Varieties Act was enacted. However, the statute authorizing placer claims upon lands "chiefly valuable for building stone" was left in effect.[122] The net effect of this combination has been to permit locations for building stone, provided that the deposit is not classified as a "common variety." The test appears to be that of applying the regulations of the Department of the Interior, and the principal concern in establishing that a deposit is "unique" appears to be a market-value approach.[123]

It should be noted that mining locations subject to the terms of what is commonly known as Public Law 167[124] are subject to the right of the Department of the Interior or the Department of Agriculture to dispose of common varieties, as well as timber resources, from an unpatented mining claim subject to that act, prior to the issuance of patent.

FOOTNOTES—ARTICLE I.

1. See Public Land Statistics, 1972, U.S.D.I.; the State of Washington contains 42,693,760 acres, exclusive of lands overlain with water. Of this area the United States retained title to 12,630,901.6 acres as of June 30, 1971.
2. Through 1972 Federal grants to the State of Washington aggregated 3,044,471 acres and grants to the railroads in the State aggregated 9,617,384.26 acres.
3. 30 U.S.C. 21-52, as amended.
4. See Oklahoma v. Texas, 258 U.S. 574 (1922).
5. See Section 1.3, this bulletin.
6. See Section 1.8, this bulletin.
7. See Section 1.2, this bulletin. As of June 30, 1971, 1,515,662.3 acres of the total of 12,630,901.6 acres held by the Federal Government were classified as acquired lands. See Public Land Statistics, 1972, U.S.D.I.
8. 30 U.S.C. 181-293, as amended; see Article VI, this bulletin.
9. 30 U.S.C. 351-359.
10. 16 U.S.C. 485-486.
11. See 40 Op. Atty. Gen. 260 (1943).
12. See 16 U.S.C. 486.
13. See Section 1.15, this bulletin.
14. 16 U.S.C. 520.
15. 43 C.F.R. 3501.2-5(b) (2).
16. See Section 1.10, this bulletin - Military Reserves. See Section 1.7, this bulletin - Reclamation lands.
17. 16 U.S.C. 471.
18. 16 U.S.C. 472, 476, 495, 524, 551, and 554.
19. 16 U.S.C. 472.
20. 16 U.S.C. 471 (By Amendment of March 4, 1907).
21. 16 U.S.C. 473.
22. 35 L.D. 262 (1906). See also U.S. v. Schaub, 103 F. Supp. 873 (1952) - gravel pit for government road construction closed to location.
23. Regulations U-1 and U-2 were revoked in 1966.
24. 16 U.S.C. 1131-1136.
25. 16 U.S.C. 1134.
26. 36 C.F.R. 293.1 - 293.17.
27. P.L. 90-544; 82 Stat. 926.
28. 16 U.S.C. 94.
29. 16 U.S.C. 252.
30. 16 U.S.C. 433k - 433k-1, and 16 U.S.C. 450 ff - 450ff-2.
31. P.L. 90-544; 82 Stat. 926.
32. See United States v. Kennedy, 278 F.2d 121 (9th Cir. 1960); Perati v. United States, 352 F.2d 788 (9th Cir. 1965).
33. See Article VI, this bulletin.
34. 43 U.S.C. 387.
35. 40 U.S.C. 257.
36. 43 U.S.C. 141-143.
37. 43 U.S.C. 142.
38. 16 U.S.C. 791a-793, 795-818, 820-825.
39. Coeur d'Alene Crescent Mining Co., 53 I.D. 531 (1931); see also Minner v. Sadler, 139 P.2d 356 (Cal. 1943); White v. Ames Mining Co., 349 P.2d 550 (Ida. 1960).
40. 33 Op. Atty. Gen. 34 (1921).
41. 30 U.S.C. 621-625.
42. 43 U.S.C. 416.
43. Dawson, 58 I.D. 670 (1944).
44. 43 U.S.C. 154.
45. James C. Reed, 50 L.D. 687 (1924).

46. 43 U.S.C. 315.
47. Scoggin v. Miller, 189 P.2d 677 (Wyo. 1948).
48. Carey, A-26140 (1951).
49. Kendall v. San Juan Mining Co., 144 U.S. 658 (1892).
50. 25 U.S.C. 461-479.
51. 27 Stat. 62.
52. 29 Stat. 9.
53. 30 Stat. 571 at 593.
54. 34 Stat. 80.
55. 60 I.D. 318 (1949); U.S. v. Consolidated M. & S. Co., Ltd., 455 F.2d 432 (9th Cir. 1971).
56. 25 U.S.C. 396a - 396f.
57. 17 Op. Atty. Gen. 230, 232 (1881).
58. 43 U.S.C. 155-158.
59. 43 U.S.C. 158.
60. E.g. 16 U.S.C. 678a (1948) - Custer State Park Game Sanctuary, S.D.
61. 37 Op. Atty. Gen. 476 (1934).
62. 16 U.S.C. 694.
63. Birdsell, A-25440 (1949).
64. See 43 C.F.R. 3501.2-6 - 3501.3-2.
65. See Richfield Oil Co., 66 I.D. 106 (1959).
66. 43 U.S.C. 161, et seq.
67. 30 U.S.C. 81, 83, and 121-123.
68. 30 U.S.C. 124.
69. 43 U.S.C. 291-301.
70. See 43 U.S.C. 711-731.
71. Dower v. Richards, 151 U.S. 658 (1894).
72. 43 U.S.C. 311-313.
73. 69 Stat. 434.
74. 30 U.S.C. 161.
75. 30 U.S.C. 162.
76. 43 U.S.C. 682a-682e.
77. 13 Stat. 365.
78. 43 U.S.C. 66.
79. Borden v. N.P.R.R. Co., 154 U.S. 288 (1894).
80. Burke v. So. Pac. R.R. Co., 234 U.S. 669 (1914).
81. 10 Stat. 172.
82. 43 U.S.C. 870 and 871.
83. 43 U.S.C. 871a.
84. People v. Dorr, 157 P.2d 859 (Cal. 1945).
85. Wheeler v. Smith, 5 Wash. 704 (1893).
86. U.S. v. Wyoming, 331 U.S. 440 (1947).
87. See Section 1.12, this bulletin. Through 1972, patents had been issued reserving some or all minerals to the United States in 280,281 acres in the State of Washington, of which 262,444 acres involved a reservation of all minerals. See Public Land Statistics, 1972, U.S.D.I.
88. 43 U.S.C. 291-301.
89. 43 U.S.C. 299. See 43 C.F.R. 3418.1.
90. 30 U.S.C. 54.
91. See Wash. Const. Art. XVII, Sec. 1.
92. Howard v. Ingersoll, 54 U.S. 381 (1851).
93. Snively v. State, 167 Wash. 385 (1932).
94. Dowis v. Watkins, 24 Wash. 636 (1891).
95. East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142. (1898).
96. 16 U.S.C. 796(8).
97. Wash. Const., Art. XVII, Sec. 1.

98. See Article VII, this bulletin.

99. United States v. California, 332 U.S. 19 (1947).

100. 43 U.S.C. 1301-1330.

101. 43 U.S.C. 1331-1343.

102. Harper v. Holston, 119 Wash. 436 (1922).

103. 43 U.S.C. 1411-1418.

104. See Section 1.1, this bulletin.

105. See Section 2.4, this bulletin.

106. U.S. v. Schaub, 163 F. Supp. 875 (D. Alaska 1958).

107. Lucky Five Min. Co. v. Central Ida. Pl. & M. Co., 235 P.2d 319 (Ida. 1951).

108. RCW 78.08.060. See Section 2.2, this bulletin.

109. McCarthy v. Speed, 77 N.W. 590 (S.D. 1898).

110. Crofoot v. Hill, 326 P.2d 417 (Nev. 1958).

111. Reynolds v. Iron Silver Mining Co., 116 U.S. 687 (1886).

112. 30 U.S.C. 181-293, as amended. See Article VI, this bulletin.

113. 30 U.S.C. 71-76.

114. 29 Stat. 526.

115. Joseph E. Clory, 50 L.D. 623 (1924).

116. 42 U.S.C. 1805(b) (7).

117. 30 U.S.C. 501-505.

118. 42 U.S.C. 2098(b).

119. 30 U.S.C. 521-531.

120. 30 U.S.C. 601-615.

121. 43 C.F.R. 3711.1.

122. See Section 1.12, this bulletin.

123. United States v. Coleman, 390 U.S. 599 (1968); McClarty v. Secretary of Interior, 408 F.2d 907 (9th Cir. 1969).

124. See Section 3.1, this bulletin.

ARTICLE II.

FEDERAL LANDS—LOCATION OF CLAIMS

2.1 MINERAL LOCATION LAW OF 1872

The Mining Law of 1866[1] established the basic Federal policy for the location of mining claims on the public domain. With the exception of the minerals covered by the Mineral Leasing Act of 1920, this policy has endured in essentially its original form to this day. The Mineral Location Law of 1872[2] restates the then existing Federal mining law, including the Mining Law of 1866, and provides that, except as otherwise stated, all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become citizens, under regulations prescribed by law, and according to the local customs or rules of miners. The clear intent of the act is to promote and encourage the development of mineral deposits by giving the discoverer of valuable minerals the right to acquire title to them.[3]

It was under the Mining Law of 1866 and the Mineral Location Law of 1872 that the peculiar marriage of Federal and State law governing the location of mining claims took place. Whereas the Federal mining laws established the right of location and the overall policy, most of the details were left to the states and local mining districts. As we shall see throughout this article, seldom does a question arise concerning the location of mining claims that does not involve both Federal and State law.

2.2 RIGHTS OF PROSPECTORS

If the purpose of the Federal mining laws, to encourage the discovery and development of valuable minerals, is to be fulfilled, a prospector searching for those minerals must have the right freely to enter upon the public domain to conduct his search. In addition to the rights of entry and search, the law has accorded additional protection to the prospector from those who would sit back and wait to harvest the fruits of his labor. This protection was recognized in a number of early California cases and came to be known as the doctrine of pedis possessio.[4]

The doctrine of pedis possessio, simply stated, is that upon the public domain the miner may hold the place in which he may be working against all others having no better right, and while he remains in possession diligently working toward discovery, he is entitled, at least for a reasonable time, to be protected against forcible, fraudulent, or clandestine intrusions upon his possession.[5]

The question that arises under the practical application of the doctrine is: How much land can be said to be in the prospector's possession? It appears to be fairly well established that one relying on pedis possessio must do so on a claim-by-claim basis, and cannot extend the protection to a group of claims or a large area of land.[6] This, however, does not answer the question of how the boundaries of a claim held by pedis possessio should be established, and the decided cases are not of much help on the question except that they establish the rule that the prospector's protection covers only land in his actual possession to the extent needed to give him room for work and to prevent probable breaches of the peace.[7]

Because of the uncertainty involved in establishing the extent of possession, it appears fairly obvious that it would be prudent for one intending to rely upon the doctrine of pedis possessio to lay out the boundaries of his claim before he invests his time

and labor in making a discovery. This would tend to more accurately establish the limits of his possession. After discovery, the boundaries of the claim can be amended, provided the right to amend is not exercised in derogation of valid intervening rights.[8]

It is important to note that the doctrine of pedis possessio is limited in its scope to apply only to forcible, fraudulent, or clandestine intrusions, and affords no protection against one who without force or fraud enters upon the land, and, acting in good faith, makes a discovery before the one first in possession.[9]

In the State of Washington the doctrine of pedis possessio, with certain modifications, has received recognition by statute. In 1963, the Washington location statute[10] was amended to provide that "prior to valid discovery the actual possession and right of possession of one diligently engaged in the search for minerals shall be exclusive as regards prospecting during continuance of such possession and diligent search." "Diligently engaged" is defined in the statute as performing not less than $100 worth of annual assessment work each year, or any larger amount that may be designated now or later by Federal law. Read literally, this statute appears to exclude all subsequent locations, whether forcible or fraudulent or not, and thereby to differ from the common law concept of pedis possessio. It is conceivable that the statute could be challenged as affording greater rights than those conferred by the Federal mining laws, especially when one considers the emphasis placed upon discovery as the act initiating rights under the Federal mining laws.

2.3 NECESSITY OF DISCOVERY

By Federal statute, discovery of a vein or lode within the limits of a claim is essential to a valid location.[11] The requirement of a discovery applies to the location of a placer mining claim as well as to the location of a lode claim.[12]

A valid mineral discovery is the primary and initial prerequisite for establishing ownership of a mining claim.[13] Without a discovery there can be no location or patent. A patent once issued, however, conclusively establishes that the land is valuable for mineral purposes, and thereafter the fact of a discovery is no longer open to question.[14]

Under the generally accepted view that the sequence of the acts of location may be varied, discovery may precede or follow the acts of location, provided that if it follows location, the rights of others have not intervened.[15] The actual time of discovery is important, however, in that if a conflict exists between two otherwise validly located claims, priority of discovery gives priority of right against naked location and possession.[16]

After discovery, the land upon which the discovery is made is temporarily removed from the public domain and the discoverer is protected in his possession during the time allowed for the performance of the location work.[17] Once the acts of location are completed, the land covered by the mining claim is segregated from the unappropriated public domain, and remains so segregated until the claim is either abandoned or forfeited; until such time as the claim is worked out or the discovery becomes valueless; or until the claim is patented.[18]

Discovery is important not only as determining rights between conflicting locations, but also between the locator and the Federal Government. The presence or lack of a discovery is essential to the determination of whether the land is mineral or nonmineral in character, and therefore the availability of the land for nonmineral entries is affected.[19] The withdrawal of land from mineral entry by the Federal Government often brings the sufficiency of a prewithdrawal location into question. If the locator can establish his discovery, his claim will be recognized in spite of the withdrawal.[20] If he cannot, his claim is invalid.

2.4 WHAT CONSTITUTES DISCOVERY

The questions of what constitutes a discovery and whether or not a particular discovery is legally adequate are somewhat dependent upon the nature of the dispute in which the questions are raised. The burden of proving a discovery in cases involving controversies between mineral locators and nonmineral entrymen, or in patent or withdrawal proceedings, is much more difficult to sustain than it is in controversies between rival mining locators.[21]

In patent proceedings, withdrawal proceedings, and disputes between mineral and nonmineral claimants, the test, or definition of discovery, that has generally been applied is the prudent man test. The prudent man test was first set forth in the Land Department decision of Castle v. Womble,[22] in which the Secretary of the Interior stated the rule to be as follows:

> Where minerals have been found and the evidence is of such a character that 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 valuable mine, the requirements of the statute have been met.

The case of Castle v. Womble involved a gold mining prospector. The case was decided in 1894, and held that the prospector would be protected by a finding that a valid discovery existed during the period of exploration, if "so far as human foresight can determine," a paying valuable mine will be developed. The concept of Castle v. Womble, in general, was applied until 1968, when the test of present marketability was added as a part of the prudent man rule.[23]

The present marketability test was first applied in a case involving the common varieties of minerals found on claims located prior to July 23, 1955 (the date the common varieties of minerals were removed from the operation of the mineral location law).[24] In 1968, in a case involving a claim for quartzite, the Supreme Court of the United States first recognized the present marketability test as a part of the test of whether a valid discovery exists.[25] The original application of the rule requiring a showing of present marketability or profitability as a part of the prudent man rule was limited to common varieties of minerals, and did not include intrinsically valuable minerals such as metalliferous deposits. Some of the factors relevant in showing present marketability are accessability of the deposit, proximity to market, and the existence of a present demand.

Since 1970, the test applied to all mineral deposits by the Department of the Interior, including deposits of metalliferous minerals, in determining whether a valid discovery has been demonstrated, is as follows:

> "In order to have a valid discovery of a valuable mineral deposit, minerals must be found, and the quantity and quality of the minerals must be such as to warrant a person of ordinary prudence in the expenditure at that time (and not possibly at some unknown time in the future) of labor and means in actually working the property. A valid discovery does not exist until sufficient prospecting or exploration work has been done to enable one to reach an informed decision that the particular mineralization justifies as a present fact the expenditure of money for the development of a mine and the exploitation of the mineral."[26]

Although this test of what constitutes a valid discovery has not been ruled upon by the United States Supreme Court, it has been accepted in at least one federal appeals court,[27] and presumably would be upheld as a valid test by the United States Supreme Court.

As mentioned, the burden of proving a discovery is relaxed a bit in cases involving rival locators of the same mining claim.[28] This is due in part to the fact that in such cases the real issue is usually priority of location and not whether the land is valuable for its minerals. In such cases it has been said

that "no more than a slight showing . . . of discovery of a mineral bearing vein or lode is needed to satisfy the legal requirements requisite to a valid location."[29]

It behooves the discoverer of a mineral deposit to ascertain with as much certainty as possible whether his find is a placer or a lode deposit. It has been generally held that a lode discovery will not sustain a placer location,[30] and that a placer discovery will not sustain a lode location.[31] In some instances it is difficult to distinguish between a lode and a placer deposit. The test usually applied is whether the deposit has hanging walls and footwalls, these being indicative of a lode deposit. However, the presence or absence of hanging walls and footwalls is not necessarily conclusive on the question.[32]

Claims must be mineral in character at the time of application for patent, and the applicant must be able to show his discovery as a present fact.[33] It appears settled that if a claim has been worked out at the time of patent application, a patent will not be issued regardless of the fact that the claim may have previously had substantial production.[34]

2.5 LAW GOVERNING LOCATION PROCEDURE

The location of a mining claim is an appropriation of Federal land for private use. It follows that the fundamental rights and interest acquired by the locator arise under Federal law, and there would appear to be no reason why the entire procedure for locating mining claims could not be controlled by Federal law. However, Congress, in the Mining Law of 1866[35] and the Mining Location Law of 1872,[36] established a procedure for the location of mining claims under which many of the requirements for location and retention of mining claims are subject to state law and local miners' regulation, to the extent that those requirements are not inconsistent with the Federal law.[37] Under this system, the states have adopted laws dealing with such things as posting location notices, marking claim boundaries, discovery work, and filing location notices, and proofs of labor. Federal law controls such matters as the maximum and minimum size of the claim, extralateral rights, use of the land, and annual labor.

Local mining district regulations or ordinances, although recognized by Federal law, are no longer of much importance in the field of mining law. Before the enactment of the Federal mining legislation, local mining ordinances were important for the reason that there was little other law on which to base a mining location. Because of the informal nature of the organization of mining districts, mining ordinances generally were inexact and suffered from the lack of any real governmental body to enforce them. Many were nothing more than customs. Today, most local mining regulations have been superseded by state law. However, it is still possible for miners to organize and adopt regulations and ordinances dealing with the location and possession of mining claims, as long as the regulations or ordinances they adopt are not inconsistent with Federal or State law.

2.6 QUALIFICATIONS OF LOCATOR

Federal law provides that mineral deposits in public lands are open to location by citizens of the United States and by those who have declared their intention to become citizens.[38] However, the title to a mining claim located and held by an alien who has not declared his intention to become a citizen is voidable, not void, and can be divested only at the instance of the United States.[39] A subsequent locator cannot assert priority of location by virtue of the fact that the prior locator was an alien and had not declared his intention to become a citizen.[40] It has been held that a conveyance of a mining claim from an alien locator to a citizen cures the voidable state of the title, allowing the citizen to acquire title free of the defect.[41]

Case law has established that a corporation organized under the laws of the United States or of any state can locate or own mining claims,[42] provided it has the necessary power to own mineral properties under its charter and State law.

Mining claims may be located by two or more persons acting as an association, partnership, or joint venture.[43]

Locations of mining claims may be made by an agent acting in behalf of another person or persons not present, thereby vesting the title acquired in his principal.[44]

There appears to be no reason why a minor may not be a locator of a mining claim, provided he meets the other qualifications of a locator. Accordingly, it has been held that minors who are citizens may locate placer claims.[45] The same rule should apply to lode claims.

Employees of the Bureau of Land Management are prohibited by statute from locating mining claims.[46] A similar prohibition has been extended to practically all employees of other bureaus of the Department of the Interior by Interior Department regulation.[47] As the statutory and regulatory prohibitions apply to those currently employed by the Department of the Interior, an employee would not be disqualified from making locations after his employment ends.

2.7 LODE LOCATIONS—PROCEDURE FOR MAKING

Federal law limits the maximum dimensions of a lode claim to 1,500 feet by 600 feet (1,500 feet in length along the vein or lode and 300 feet on either side of the middle of the vein at the surface).[48] The measurements are made horizontally, without regard to the contour of the land.

The proper sequence for the steps necessary to locate a lode claim in the State of Washington under normal circumstances are as follows:

1. Make a lode discovery.
2. Post location notice.
3. Stake corners and mark boundaries.
4. Record location notice.

The order of performance of the steps necessary for a proper location of a lode claim is not essential.[49] The sequence presented above is the one usually followed, as it is consistent with the order of the statutory requirements. Although prior to 1963 it was necessary for the locator to sink a discovery shaft upon the lode or to do certain equivalent work in order to perfect his claim, this requirement has now been eliminated from the Washington laws.[50] No similar requirement exists under Federal law.

Discovery

As discussed in Section 2.3 of this bulletin, a valid mineral discovery is the primary and initial prerequisite for establishing ownership to a mining claim under Federal law.[51] Washington law varies from this concept by granting a locator the right to exclusive possession of his claim for purposes of prospecting during the time he is in possession and diligently engaged in the search for minerals.[52] "Diligently engaged" is defined as the performance of annual assessment work on or for the benefit of the claim as prescribed by Federal law.

Posting Location Notice

Washington law provides that, before filing a location notice for record," . . . the discoverer shall locate his claim by posting at the discovery at the time of discovery a notice containing the name of the lode, the name of the locator or locators, and the date of discovery."[53] Although not specifically required by the Washington statutes, it would seem

prudent to include a brief description of the ground claimed with reference to some natural object or permanent monument. The description should state the distance and direction claimed along the lode from the point of discovery and also the distance claimed on either side of the vein.[54] Otherwise, it is possible that a dispute could arise before the claim is finally staked as to the extent of the ground appropriated.

The location notice should be posted at or as near as possible to the point of discovery. The notice should be attached to some substantial and conspicuous object, such as a post, stump, tree, or a monument of stones. The important factor in this regard is that the notice be posted in such a way that it will have as much permanency as possible and yet be readily visible to anyone searching for it. Care should be taken to protect the notice against the elements. A common practice is to place the notice inside a closed can or jar and to fasten the can or jar securely to the discovery monument.

Staking Claim

Federal law provides that the location of a mining claim ". . . must be distinctly marked on the ground so its boundaries can be readily traced."[55] The requirements of Washington law are met by:

> . . . marking the surface boundaries of the claim by placing substantial posts or stone monuments bearing the name of the lode and date of location; one post or monument must appear at each corner of such claim; such posts or monuments must be not less than three feet high; if posts are used they shall be not less than four inches in diameter and shall be set in the ground in a substantial manner. If any such claim be located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines.[56]

In staking a lode claim it is important to remember that the dimensions of the claim may not exceed 1,500 feet along the vein or 300 feet on either side of the center of the vein.[57] As the length is to be measured along the course of the vein, a claim located on a curved vein would have end lines actually less than 1,500 feet apart. To secure extralateral rights the end lines of the claim must be parallel.[58] The side lines of the claim need not be straight or parallel, but each side line should not be more than 300 feet from the center of the vein at the nearest point.[59]

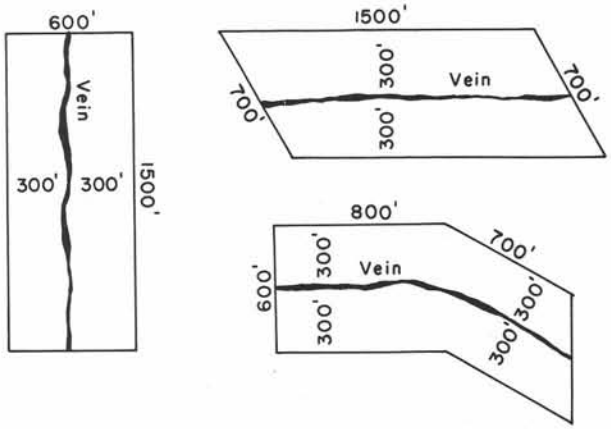

FIGURE 1.—Lode claims.

Depending on the roughness of the terrain, the locator should consider marking the exterior lines of his claim. Federal law states that the boundaries of a claim must be marked so that they can be readily traced.[60] Washington State law requires that if the claim is located on ground covered wholly or partly by brush or trees, the brush shall be cut and trees be marked or blazed to indicate the location of lines of the claim.[61]

If one or more corners of the claim are so inaccessible to an experienced climber that an attempt to reach them would endanger his life, the use of a witness stake is permissible.[62] A witness stake is nothing more than a post or monument placed on line as near as accessible to the true corner, with a notice carved on or attached to it stating the approxi-

mate distance and direction to the location of the true corner.

If a locator in good faith stakes a mining claim on the ground in excess of the maximum size allowed by law, the excess of the claim is invalid and open to location by others.[63] However, if the excess is so great as to indicate bad faith, the entire claim may be void.[64]

Recording Location Notice

Washington law provides that:

> The discoverer of a lode shall within ninety days from the date of discovery, record in the office of the County Auditor of the county in which such lode is found, a notice containing the name or names of the locators, the date of location, the number of feet in length claimed on each side of the discovery, the general course of the lode and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. [65]

Although not specifically required by the above-quoted statute, the recorded location notice should also contain the name of the claim in order for the claim to be readily identifiable.

In the State of Washington the recording of a location notice is essential to a valid location.[66] A location notice that does not state the number of feet claimed on each side of the vein, or the general course of the lode, or identify the claim by reference to some natural object or permanent monument is defective.[67]

The purpose of the recording of the location notice is to provide constructive notice of the location to the public. It follows that one having actual notice of a location and boundaries of a mining claim cannot take advantage of a technical defect in the location notice to deprive the owner of his rights.[68]

It is not necessary that a metes and bounds description of the claim be stated in the recorded location notice, although this is frequently done, or that the description be tied into an existing survey. The important requirement is to describe the location of the claim with reference to some nearby natural object or permanent monument so that the claim can be readily found by anyone searching for it. Examples of natural objects are mountain peaks, lakes, canyons, cliffs, or the junction of two streams or rivers. Permanent monuments are manmade objects, such as a well-known mine, roads, trails, bridges, patented mining claims, a U.S. Survey section corner, or a U.S. mineral monument.

In addition to the items specifically required to be included in the recorded location notice, it is generally considered to be a safe practice to include the name of the county and state, and if applicable, the name of the mining district and national forest. Whenever possible, the location notice should also include the section, township, and range in which the claim is situated.

The recording of the location notice is the last act necessary to establish a valid claim. Within the 90-day period specified for recording of the location notice, all the other location work should be completed; if not completed within the 90 days, the claim is open to location by another.[69] However, if the work is completed and the notice filed after the expiration of the 90 days, but before another person makes a discovery and posts his notice, it has generally been held that the first location will be protected.[70]

2.8 PLACER LOCATIONS—PROCEDURE FOR MAKING

The procedure for locating a placer claim is much the same as the procedure for locating a lode claim but there are a few important exceptions that are noted on succeeding pages in this section.

The maximum size for a placer claim located by an individual is 20 acres.[71] Association placer

claims may exceed 20 acres in size but in no case may they be larger than 160 acres.[72]

The proper order for performance of the steps necessary for the location of a placer claim is as follows:

1. Make a discovery.
2. Post location notice.
3. Stake boundaries.
4. Record location notice.
5. Perform discovery work.
6. File affidavit of labor.

Discovery

The existence of a valid mineral discovery is as essential in the location of a placer claim as it is in the location of a lode claim.[73] Although a single placer claim or an association placer claim requires only one discovery, the Land Department (now part of the Department of the Interior) has ruled that for purposes of patent proceedings the Department may require that each 10-acre tract composing the claim must have a discovery of mineral.[74]

It is incumbent upon the placer locator to determine with as much certainty as possible that his discovery is in fact a placer deposit and not a lode, for a lode discovery will not support a placer claim.[75]

Posting Location Notice

Washington State law[76] provides for the posting of a location notice as follows:

> The discoverer of placers or other forms of deposits subject to location and appropriation under mining laws applicable to placers shall locate his claim in the following manner:
>
> First. He must immediately post in a conspicuous place at the point of discovery thereon a notice or certificate of location thereof, containing (1) the name of the claim; (2) the name of the locator or locators; (3) the date of discovery and posting of the notice hereinbefore provided for, which shall be considered as the date of the location; (4) a description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys, otherwise, a description with reference to some natural object or permanent monuments as will identify the claim; and where such claim is located by legal subdivisions of the public surveys, such location shall, notwithstanding that fact, be marked by the locator upon the ground the same as other locations.

The location notice should be attached to some more or less permanent and conspicuous object, such as a tree, post, mound of stones, or stump, as in the case of lode claims.[77] The same degree of care should also be used in protecting the notice from the elements.

Staking Boundaries

Washington State law requires that the locator of a placer claim shall so distinctly mark his location on the ground that its boundaries may be readily traced.[78] The comments made in Sections 2.2 and 2.7 of this bulletin in connection with marking the boundaries of lode claims have equal application to placer claims, and the statutory requirements for marking the boundaries of a lode claim should be followed.[79] It should be noted, however, that the law controlling dimensions of a placer claim is not the same as the law in the case of a lode claim.

The Federal mining law provides that placer claims located on surveyed lands shall conform as near as practicable with the United States system of public land surveys, and with the rectangular subdivision of such surveys, and that no such locations shall include more than 20 acres for each claimant.[80] Legal subdivisions of 40 acres may be subdivided into 10-acre tracts.[81] Where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.[82]

If a locator knows of or can find a United States survey corner, he should describe his claim

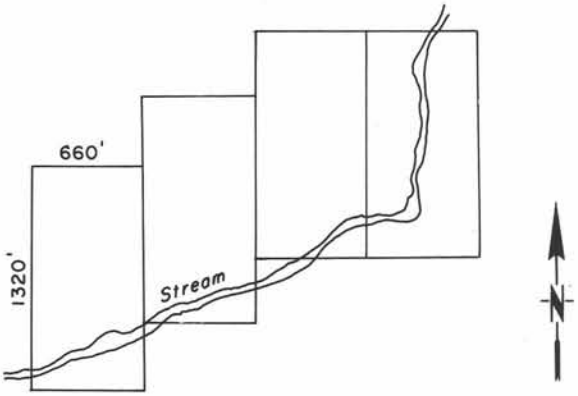

FIGURE 2.—Placer claims.

as a part of that section and stake it accordingly. For example, the south half of the northeast quarter of the southwest quarter, section 10, township 9 north, range 45 east, W.M., Spokane County, Washington. If a locator does not know of or cannot find a United States survey corner, or if the claim is made on unsurveyed public land, the claim is required to conform as nearly as practicable to the United States survey system. In other words, the claim should be composed of 10-acre squares (660 feet by 660 feet) or 20-acre tracts (660 feet by 1,320 feet), and the lines of the claim should run north and south and east and west.[83]

There are two exceptions to the rule that placer claims must conform to the United States survey system. The first exception is in the case of claims located in a deep gulch or canyon having steep and nonmineral sides. It has been held that because it would be impractical to require conformance with the survey system, such claims may be irregular in shape so as to include the actual placer ground, provided the area limitation is not exceeded, and provided the claim is not unduly long.[84] The second exception is in the case of a claim that encompasses an irregular-shaped area surrounded by other valid claims or by land not otherwise available for mineral entry. In such a case, it has been held that the claim need not conform to the survey system.[85]

Recording Location Notice

Washington law provides that within 30 days from the date of discovery the locator must record a copy of his notice of location in the office of the auditor of the county in which the discovery is made.[86] The location notice must set forth the items discussed under "Posting Location Notice."

Location Work

Washington law requires that within 60 days from the date of discovery, the discoverer must perform labor upon his claim developing the claim to an amount that shall be equivalent in the aggregate to at least 10 dollars' worth of such labor for each 20 acres, or fractional part, contained in the claim.[87]

File Affidavit of Labor

Upon the performance of the required development labor, the locator must file an affidavit with the auditor of the county in which the claim is located, showing the performance of the labor and generally the nature and kind of work so done.

Association Placer Claims

Federal law permits several locators to associate themselves together for the purpose of locating a placer claim larger than the 20-acre maximum available to an individual locator.[89] The maximum size allowed for an association claim is 20 acres per member, but in no case can the claim be larger than 160 acres. For example, a two-member association could locate a 40-acre claim, a three-member association could locate a 60-acre claim, and an eight-member association could locate a 160-acre claim. There is no limit to the number of members an association may consist of, but there is the 160-acre size limitation. All land making up an association claim must be contiguous.[90]

An association claim is legally one and not

several claims. For this reason the location and discovery requirement need be met only once. Only $100 of assessment work is required to be performed annually for the benefit of an association claim.[91]

There is no limit to the number of association placer claims an association of locators may locate, even though such claims adjoin, forming a group of association claims.[92]

2.9 MILLSITE LOCATIONS

Under the Federal mining laws, nonmineral unappropriated land in the public domain may be acquired as a millsite under two circumstances: (1) for use in connection with an existing lode or placer location, and (2) for use as a site for a quartz mill or reduction works otherwise unconnected with a mineral location.[93] The State of Washington has not adopted any statutes dealing with millsite locations.

The Federal law is silent with respect to the manner in which the acts of location must be performed. It has been assumed by most authorities on mining law that a millsite location should be posted, staked, and recorded in the same manner as a lode location.[94] A millsite location cannot exceed 5 acres in size.[95] There is no limitation as to the shape of a millsite. Because the land encompassed by a millsite must be nonmineral in character, no discovery or discovery work is necessary. Annual assessment work is not required.

Although formerly a subject of much contention, it has been held that a millsite may be adjacent to a side line of a lode claim,[96] and may be adjacent to an end line of a lode claim if the claimant can successfully rebut the presumption that the lode traverses the claim from end to end.[97]

A millsite location made in connection with an existing lode or placer location may be used for purposes other than milling as long as the use made is a bona fide mining use.[98] On the other hand, a millsite location made independent of existing mineral locations may be used only as a site for a quartz mill or reduction works, and there must be actual construction of such a facility on the land prior to patent,[99] and within a reasonable time after location.[100]

2.10 TUNNEL SITES

A tunnel site location cannot technically be classified as a mining claim location.[101] It is merely a procedure established by Federal law whereby, under circumstances hereinafter discussed, a person may acquire ownership of previously unknown veins discovered as a result of his driving a tunnel.

The State of Washington has no statutes dealing with tunnel site locations. The relevant Federal statute provides as follows:

> Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. [102]

It has been held that the location of a tunnel site under the statute, followed by diligent performance of work gives the tunnel owner a right to appropriate as much as 1,500 feet on either side of the bore of the tunnel along a previously undiscovered vein found in the tunnel.[103] The date for determination of whether a particular vein was previously known or unknown has been held to be the date the tunnel was commenced.[104]

In order to be entitled to possession of a vein, one must discover it in the first 3,000 feet of tunnel.[105] A good faith location of a tunnel site for

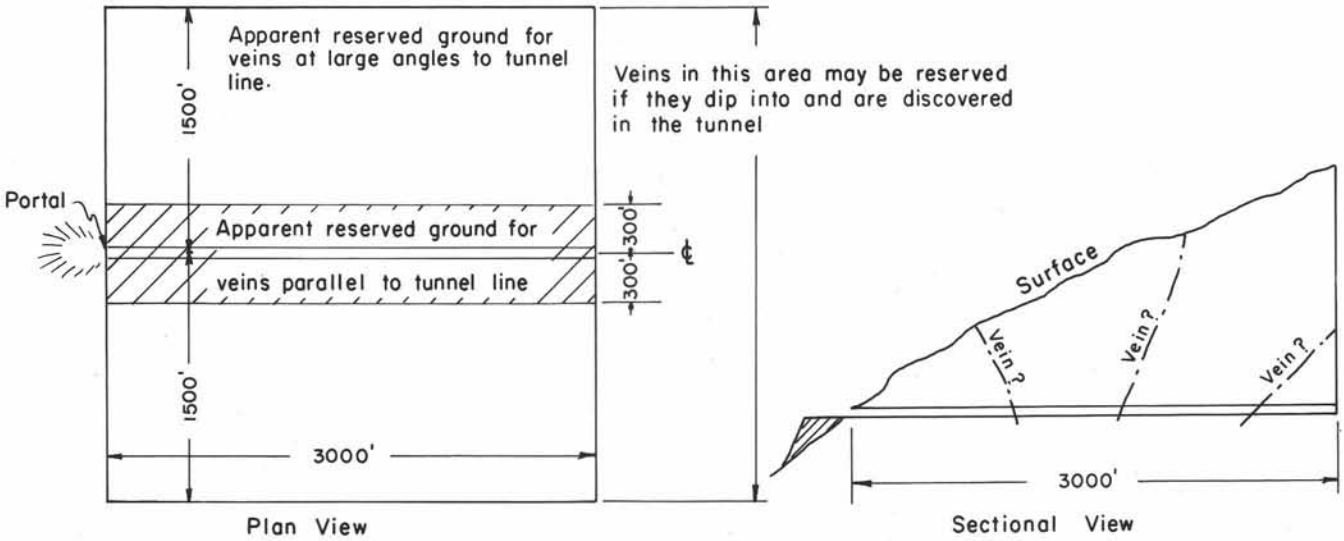

FIGURE 3.—Tunnel site claim. (From Stout, K. S., 1961, Montana mining law: Montana Bureau of Mines and Geology Bulletin 22, p. 18.)

a tunnel longer than 3,000 feet will be void as to the excess.[106]

Considerable confusion exists among the cases and mining law commentators as to the extent a tunnel location preempts subsequent surface locations of the ground covered thereby.[107] The statute refers only to veins not previously known to exist. The controversy has centered over whether this language is limited in its meaning to blind veins (veins having no surface outcrop), or whether it applies to all veins, regardless of whether or not they outcrop at the surface, which were undiscovered at the time the tunnel location was initiated. Uncertainty also exists as to whether extralateral rights are afforded to the tunnel owner.[108]

The laws of the State of Washington and of the United States are silent as to the procedure and acts of location required to initiate a tunnel location. The Bureau of Land Management has adopted the following regulations governing the procedure:

Location of Tunnel Claims

To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the 3,000 feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence. [109]

Recording of Location Notices

A full and correct copy of such notice of loca-

tion defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference. 110/

It has been suggested by leading commentators that in addition to the surface marking of the lines of the tunnel required by the above-quoted regulation, it would be prudent for the tunnel locator to mark on the surface the line of and the width of the projected tunnel bore and the exterior limits of the ground affected by the tunnel location; that is, 1,500 feet on either side of the tunnel and 3,000 feet along the tunnel (a 3,000-foot square). 111/ The purpose of staking the exterior limits is to give the surface prospector notice that he locates in the area at his peril, subject to the tunnel owner's rights.

NOTICE OF TUNNEL SITE LOCATION*

Notice is hereby given that I, the undersigned, have this ___ day of _____, 19__, located a tunnel right, the name of which shall be and is _____ Tunnel Claim, for the purpose of discovering mines on the line thereof. Said tunnel right or location is situate in _____ Mining District, County of _____, State of _____, and is described as follows: Commencing at the face or point of commencement of said tunnel, at which this notice of location is posted, and running thence three thousand feet in a _____ direction, to a post marked _____, and _____ feet wide on each side of the center line of said tunnel. The boundary lines of said tunnel are marked by stakes (or monuments) placed along said lines at an interval of not more than (six) hundred feet from the face or commencement of said tunnel to the terminus of three thousand feet therefrom, and respectively marked _____. Said tunnel shall be _____ feet in width and _____ feet high in the clear. This tunnel claim is located about _____ from _____. (State courses and distances to some natural object or permanent monument as shall identify the claim or tunnel right.)

_____
Locator.

State of _____ }
County of _____ } SS.

_____, being first duly sworn according to law, deposes and says, that he is the locator of _____ Tunnel Claim. That it is his bona fide intention to prosecute work on said tunnel with reasonable diligence for the discovery of mines and the development of the same. That he has commenced such tunnel at the face or commencement of said tunnel as described in the foregoing notice of location and has driven said tunnel a distance of _____ therefrom, at an expense of _____ dollars.

_____

Subscribed and sworn to before me, this ____ day of _____, 19____.

_____
Notary Public
In and for the County
of _____,
State of _____.
My commission expires _____.

*This example of a tunnel-site location notice is Form 54 from: Ricketts, A. H., 1943, American mining law: State of California Division of Mines Bulletin No. 123, p. 750-751.

FOOTNOTES—ARTICLE II.

1. Act of July 26, 1866, Ch. 262, 14 Stat. 251.
2. 30 U.S.C. 22, et seq.
3. U.S. ex rel U.S. Borax Co. v. Ickes, 98 F.2d 271 (D.C. Cir. 1938), cert. denied, 305 U.S. 619 (1938).
4. See 1 American Law of Mining sec. 4.8-4.9.
5. Ranchers Exploration and Development Co. v. Anaconda, 248 F. Supp. 708 (D. Utah 1965).
6. Ranchers Exploration and Development Co. v. Anaconda, 248 F. Supp. 708 (D. Utah 1965).
7. Hanson v. Craig, 170 Fed. 62 (9th Cir. 1909).
8. Sanders v. Noble, 55 Pac. 1037 (Mont. 1899).
9. Hanson v. Craig, 170 Fed. 62 (9th Cir. 1909); Noyes v. Black, 2 Pac. 769 (Mont. 1883).
10. RCW 78.08.060.
11. 30 U.S.C. 23.
12. 30 U.S.C. 35; Spokane Portland Cement Co. v. Larson, 71 Wash. 301 (1912).
13. Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563 (1905).
14. Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U.S. 394 (1892).
15. Walton v. Wild Goose Mining Co., 123 Fed. 209 (1903), cert. denied, 194 U.S. 631 (1904); Cedar Canyon Consol. Mining Co. v. Yarwood, 27 Wash. 271 (1902).
16. Bevis v. Markland, 130 Fed. 226 (1904).
17. Burke v. McDonald, 33 Pac. 49 (Ida. 1890).
18. Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220 (1904); see Sec. 2.4, this bulletin, for the importance of a continuing discovery.
19. Wheeler v. Smith, 5 Wash. 704 (1893).
20. United States v. McCutcheon, 238 Fed. 575 (1916).
21. Berto v. Wilson, 324 P.2d 843 (Nev. 1958).
22. 19 L.D. 455 (1894).
23. See Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).
24. 30 U.S.C. 601.
25. United States v. Coleman, 390 U.S. 599 (1968).
26. The rule is quoted from the opinion in the hearing examiner's decision dated September 5, 1969, in U.S. v. Gunsight Mining Corporation, Arizona contest 6-3597 in the U.S. Bureau of Land Management. This was affirmed by the Interior Board of Land Appeals on March 1, 1972, reported as 5IBLA62, - I.D. - (1972).
27. See United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971).
28. Berto v. Wilson, 324 P.2d 843 (Nev. 1958).
29. Nevada-Pacific Corp. v. Gustin, 226 F.2d 286 (9th Cir. 1955).
30. Big Pine Mining Corporation, 53 I.D. 410 (1931).
31. Cole v. Ralph, 252 U.S. 286 (1920).
32. Titanium Actynite v. McLennan, 272 F.2d 667 (10th Cir. 1959).
33. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Alvis F. Dennison et al, 71 I.D. 144 (1964).
34. United States v. Logomarcini, 60 L.D. 371 (1949).
35. 14 Stat. 251.
36. 30 U.S.C. 22 - 52, as amended.
37. 30 U.S.C. 28.
38. 30 U.S.C. 22.
39. Manuel v. Wulff, 152 U.S. 505 (1894).
40. Herrington v. Martinez, 45 F. Supp. 543 (S.D. Cal. 1942).

41. Stewart v. Gold & Copper Co. of Bingham, 82 Pac. 475 (Utah 1905).

42. See 1 American Law of Mining sec. 5.5.

43. People v. Rankin, 325 P.2d 10 (Cal. 1958).

44. McCulloch v. Murphy, 125 Fed. 147 (1903).

45. Thompson v. Spray, 14 Pac. 182 (Cal. 1887).

46. 43 U.S.C. 11.

47. 43 C.F.R. 7.1-7.6.

48. 30 U.S.C. 23.

49. Cedar Canyon Consolidated Mining Co. v. Yarwood, 27 Wash. 271 (1902).

50. Between 1899 and 1949 a prior statute required sinking of a discovery shaft in areas east of the Cascades. Laws 1899, Ch. 45, Secs. 2 and 9. In 1949 the statute was amended to require discovery work west of the Cascades and to permit the performance of an equal amount of development work to suffice in lieu of the discovery shaft; Laws of 1949, Ch. 12, Sec. 1. In 1959 the law was again changed to allow certain geological work to substitute for discovery work, Laws of 1959, Ch. 114, Sec. 1. In 1963 the discovery work requirement was eliminated entirely; Laws of 1963, Ch. 64, Sec. 1.

51. See Section 2.3, this bulletin.

52. RCW 78.08.060; see Section 2.2, this bulletin.

53. RCW 78.08.060.

54. 1 American Law of Mining, sec. 5.51.

55. 30 U.S.C. 28.

56. RCW 78.08.060.

57. 30 U.S.C. 23.

58. See Section 3.2, this bulletin.

59. Quilp Gold Mining Co. v. Republic Mines Corp., 96 Wash. 439 (1917).

60. 30 U.S.C. 28.

61. RCW 78.08.060.

62. Gird v. California Oil Co., 60 Fed. 531 (1894).

63. Flynn Group Mining Co. v. Murphy, 109 Pac. 851 (Idaho 1910).

64. Madeira v. Sonoma Magnesite Co., 130 Pac. 175 (Cal. 1912).

65. RCW 78.08.050.

66. Florence-Rae Copper Co. v. Kimbel, 85 Wash. 162 (1915).

67. Knutson v. Fredlund, 56 Wash. 634 (1910).

68. Ninemire v. Nelson, 140 Wash. 511 (1926).

69. Butte & S. Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609 (9th Cir. 1918).

70. Protective Min. Co. v. Forest City Min. Co., 51 Wash. 643 (1909).

71. 30 U.S.C. 35.

72. 30 U.S.C. 36.

73. See Discovery under Section 2.9, this bulletin.

74. Central Pacific Railroad Co. v. Mullin, 52 L.D. 573 (1929).

75. Cole v. Ralph, 252 U.S. 286 (1920).

76. RCW 78.08.100.

77. See Posting Location Notice under Section 2.7, this bulletin.

78. RCW 78.08.100.

79. See Staking Claim under Section 2.7, this bulletin; RCW 78.08.115 and RCW 78.08.060.

80. 30 U.S.C. 35.

81. 30 U.S.C. 36.

82. 30 U.S.C. 35.

83. Dripps v. Allison's Mines Co., 187 Pac. 448 (Cal. 1919).

84. Dripps v. Allison's Mines Co., 187 Pac. 448 (Cal. 1919).

85. 43 C.F.R. 3416.5(b).

86. RCW 78.08.100.

87. RCW 78.08.100.

88. RCW 78.08.100.

89. 30 U.S.C. 36.

90. 30 U.S.C. 36; Stenfjeld v. Espe, 171 Fed. 825 (1909).

91. Merced Oil Mining Co. v. Patterson, 122 Pac. 950 (Cal. 1912); McDonald v. Montana Wood Co., 35 Pac. 668 (Mont. 1894).

92. Houck v. Jose, 72 F.Supp. 6 (S.D. Cal. 1947); Aff'd. 171 F.2d 211 (9th Cir. 1948).

93. 30 U.S.C. 42.

94. Lindley on Mines sec. 521, (3d ed. 1914); Costigan on Mining Law sec. 61 (1908).

95. 30 U.S.C. 42.

96. Yankee Millsite, 37 L.D. 674 (1909).

97. In re Anna Dillon, 40 L.D. 84 (1911).

98. See 1 American Law of Mining sec. 5.34 for uses that have been allowed.

99. In re Le Neve Mill Site, 9 L.D. 460 (1889).

100. Cleary v. Skiffich, 65 Pac. 59 (Colo. 1901).

101. Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337 (1905).

102. 30 U.S.C. 27.

103. Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108 (1897).

104. Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108 (1897).

105. Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108 (1897).

106. Glacier Mountain Silver Min. Co. v. Willis, 127 U.S. 471 (1888).

107. See discussion in 1 American Law of Mining sec. 5.38.

108. See 1 American Law of Mining sec. 5.38.

109. 43 C.F.R. 3843.2.

110. 43 C.F.R. 3843.3.

111. Lindley on Mines sec. 475, (3d ed. 1914); Costigan on Mining Law sec. 62 (1908).

ARTICLE III.

FEDERAL LANDS—RIGHTS AND OBLIGATIONS FOLLOWING LOCATION

3.1 MULTIPLE SURFACE USE ACT

The purpose of the Multiple Surface Use Act,[1] popularly known as Public Law 167, was to restrict the abuse of surface resources by mining locators that was thought to exist under the prior statutory scheme. Under the Mining Law of 1872,[2] the locator of a mining claim was given the exclusive right of possession and enjoyment of all the surface included within the lines of his location. This allowed the locator to make many uses of the surface that were not reasonably connected with bona fide mining or prospecting purposes.

The Multiple Surface Use Act is only a part of the Federal legislation dealing with the multiple use concept. A similar statutory pattern has developed to resolve conflicts between locations for locatable minerals, mineral leasing, and the removal of common varieties, where more than one of these types of minerals are found in the same land.[3]

The Multiple Surface Use Act provides that any mining claim located under the Federal mining laws after the effective date of the act (July 23, 1955) shall not be used, prior to patent, for any purpose other than prospecting, mining or processing operations and uses reasonably incident thereto.[4] The right to manage and dispose of vegetative surface resources and mineral resources, other than locatable minerals, is reserved to the United States at all times prior to the issuance of patent, and the United States, its permittees, and its licensees retain the right to use as much of the surface of such a mining claim as is necessary for the management of the resources or for access to adjacent land,[5] provided the use does not materially interfere with or endanger prospecting or mining operations on the claim.

Under the terms of the act, the post-1955 mining claimant may not, prior to patent, sever, remove, or use any vegetative or other surface resources, except to the extent required for prospecting, mining or processing operations, or for the construction of buildings or structures used in connection with such operations.[6] If the locator's mining operations require more timber than is available to him on his claim after disposition of timber on the claim by the United States subsequent to his location, he is entitled to be supplied, free of charge, with such timber as may be required from the nearest timber administered by the disposing government agency.[7]

Public law 167 also affects claims located prior to the date of its enactment. The act contains a procedure whereby claims located prior to the enactment of the law may lose their surface rights and thereafter be treated the same as claims located subsequent to the enactment.[8] Basically, the procedure consists of having the governmental agency that is charged with the administration of surface resources on any given tract of land publish notice to mining claimants for a determination of surface rights. If a mining claimant affected by the publication of the notice fails to file a verified statement of the nature and description of his claim, as required by the notice, within 150 days after the date of the first publication, he shall be conclusively deemed to have waived his rights to the surface resources and consented to the surface restrictions placed upon post-1955 locations.[9] If a mining claimant does file a verified statement of his claim, the Secretary of the Interior may hold a hearing to determine the validity and effectiveness of the interest asserted by the claimant.[10] The procedure followed at the hearing

is the same as that used under the general rules and practice of the Department of the Interior with respect to contests or protests affecting public lands of the United States.[11]

3.2 EXTRALATERAL RIGHTS

The same section of the Federal mining laws which gives the locator of a lode claim possession of the surface rights subject to the qualifications discussed under Section 3.1 of this bulletin also provides the statutory basis upon which extralateral rights or apex rights are founded.[12] That section provides that locators of lode mining claims:

> . . . shall have the exclusive right of possession and enjoyment . . . of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges . . . .

Stated in another way, the extralateral right of a locator of a vein is the right to follow a vein, the apex of which is within the boundaries of his claim, downward wherever it may go, regardless of the fact that the vein crosses the vertical planes of his sidelines, and for a length along its strike equal to the length of the apex within his claim, restricted only by the vertical, extended planes of his end lines.[13]

The courts have drawn a distinction between the exercise of extralateral rights against adjoining mining lands and lands acquired under agricultural patents. As a general proposition, lands acquired by agricultural patent are subject to extralateral penetration only if the adjoining mining location was perfected prior to the issuance of the agricultural patent.[14] This limitation stems from the conclusive presumption, which arises upon issuance of patent, that the land embraced within an agricultural patent is nonmineral in character. Unless an adjoining mineral deposit was known to exist prior to the issuance of an agricultural patent, the provisions of the extralateral rights statute will not be read into it.[15] Conversely, extralateral rights will not accrue to the benefit of an agricultural patent.[16]

The burden of establishing ownership of ore by virtue of extralateral rights is upon the one who asserts them.[17] The presumption is that the owner of a mining location owns all ore found within the surface boundaries of his claim extended downward.[18] If the extralateral rights claimant is to be successful, he must establish by the preponderance of the evidence that he is the owner of the apex of the vein in question.[19]

In rebutting the presumption that all ores found within the surface boundaries of another's claim belong to that person, the extralateral rights claimant must be able to show ownership of the ore found outside his location by establishing an identity of such ore with a vein or lode apexing within his location.[20] The ability to identify the vein does not depend upon the ability to show a continuous deposit of ore along the vein.[21] However, the mineral-bearing rock must be such that it can be traced through the surrounding rock.[22] Where the mineral and fissure disappear so that the identity of the vein can no longer be traced, extralateral rights are lost.[23] The courts will not indulge in speculation or conjecture or permit mathematical calculations to establish identify of the vein.[24]

The apex of a vein or lode can be defined as the highest point or terminal edge of a vein, from which the vein extends downward on its dip and onward on its strike.[25] Not all veins have an apex. Broad bedlike veins or blanket veins lacking an apex

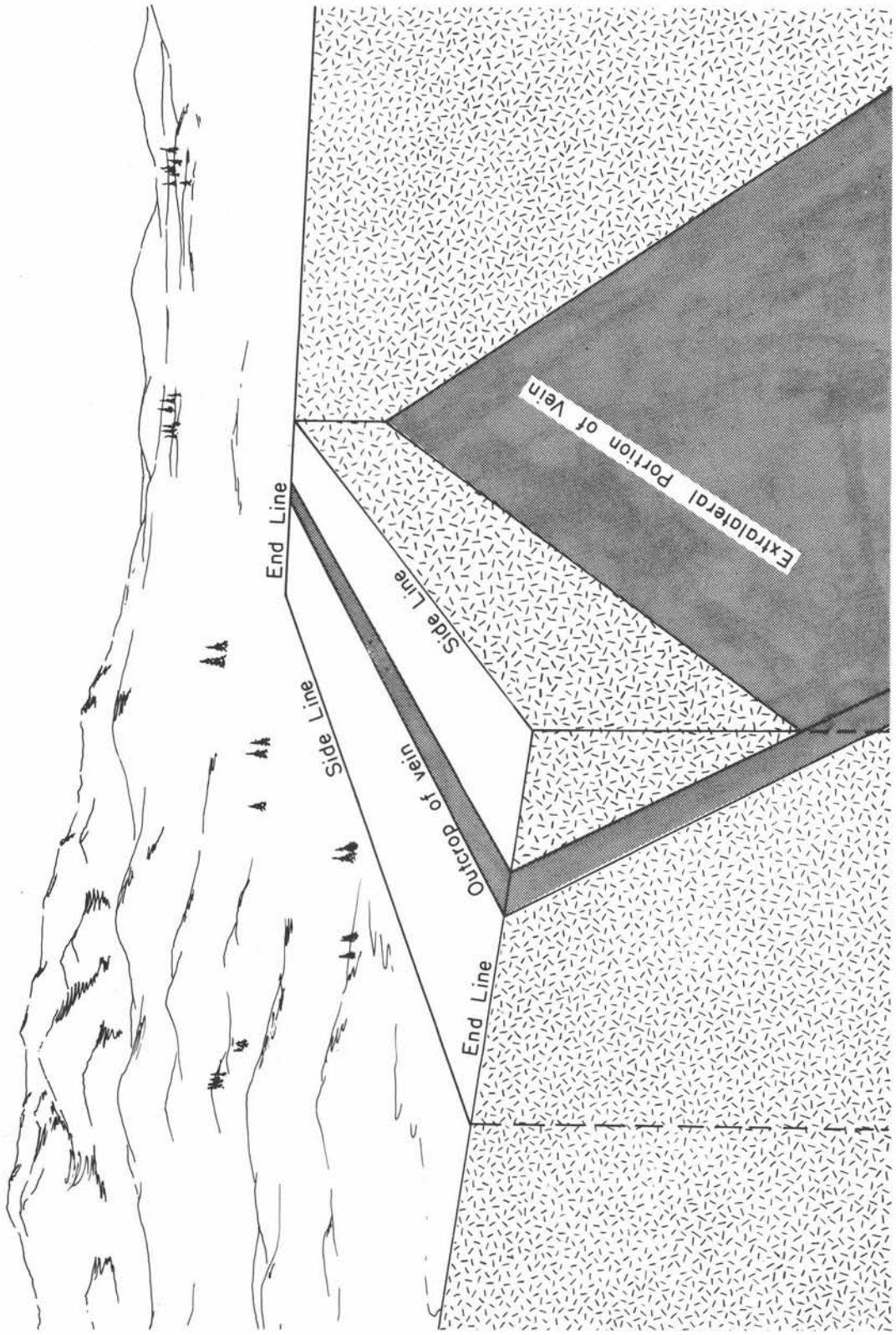

FIGURE 4.—Extralateral portion of vein.

carry no extralateral rights, notwithstanding the fact that they may be properly locatable as a lode claim.[26]

As a general proposition, it may be stated that the end lines of a claim must be parallel in order for that claim to be entitled to the benefits of extralateral rights.[27] A distinction is usually made, however, where end lines converge rather than diverge in the direction of the vein's dip. In the case of diverging end lines, it has been held without exception that under the Mineral Location Law of 1872 extralateral rights are denied.[28] If the law were otherwise, the extralateral rights claimant would receive an ever-increasing piece of a vein by virtue of his diverging end lines. In the case of converging end lines, a split of authority exists. The majority view holds that such a claim carries extralateral rights to the point on the dip where the converging end lines cross, thus forming a wedge-shaped area.[29] The minority view follows a strict interpretation of the statute and denies extralateral rights entirely.[30] The requirement of parallelism has no application to side lines, and they may be zigzagged, curved or otherwise not straight with no effect on extralateral rights.[31]

Certain rights are closely associated with the exercise of extralateral rights. It has been generally established that in addition to the right to pursue a vein on its dip across a side line of a claim into another's land, there is the right to excavate necessary workings in the surrounding country rock where the vein cannot be feasibly worked within its walls.[32] This includes the right to excavate necessary shafts, stations, pockets and chutes.[33]

In the ideal case, the apex of the vein traverses both end lines of the claim and the locator is entitled to pursue the vein along its strike for the full length of the claim. Unfortunately, this is not always the case. Frequently, a locator will mistake the true course of the vein when laying out his claim, and it will be later discovered that the apex of the vein in fact crosses one or both of the side lines. Often, the vein over which an extralateral rights dispute arises is not the vein upon which discovery was based and the claim located. Rather, the vein is a secondary vein which was unknown at the time of location, and therefore the locator was not able to lay his claim to the best advantage of the vein in question. Such circumstances have led to a fairly uniform body of laws dealing with various fact situations. The most common fact situations and the applicable laws are discussed separately below.

Where the apex of a vein crosses both side lines of a claim rather than one or both of the end lines, the courts have uniformly applied the rule that the locator's designation of which of the claim's lines are the end lines and which are the side lines is not controlling for extralateral rights purposes. In such a case, it is held that the side lines become the end lines and vice versa, allowing the locator to follow the vein on its dip across one of the end lines of the claim.[34] Figure 5 illustrates the result.

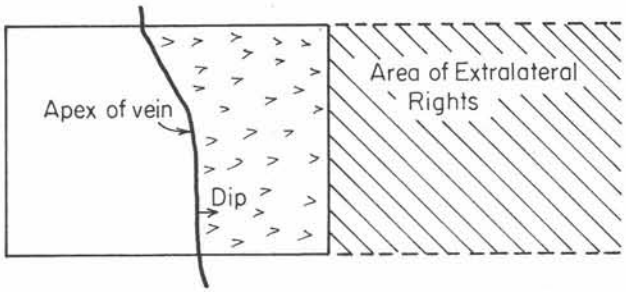

FIGURE 5.—Extralateral rights for vein crossing side lines.

Where the apex of the vein crosses one end line and one side line of a claim, the courts have declared that the extralateral rights of the claim are limited as if an end line were located at the point the vein crosses the side line, which imaginary end line is parallel to the end that is crossed.[35] Figure 6 illustrates the result.

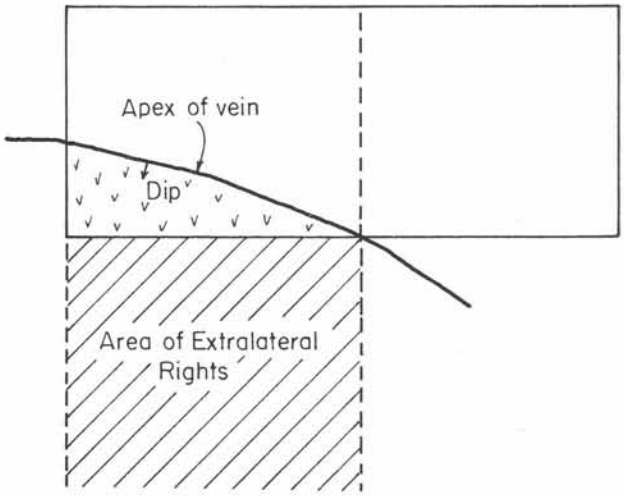

FIGURE 6.—Extralateral rights for vein crossing one end line and one side line.

Where the apex of the vein crosses one end line of a claim and terminates inside the claim without crossing any other lines, much the same rule is applied as in the case of a vein crossing one end line and one side line. An imaginary parallel end line is presumed to exist at the point the vein terminates.[36] Figure 7 illustrates the result.

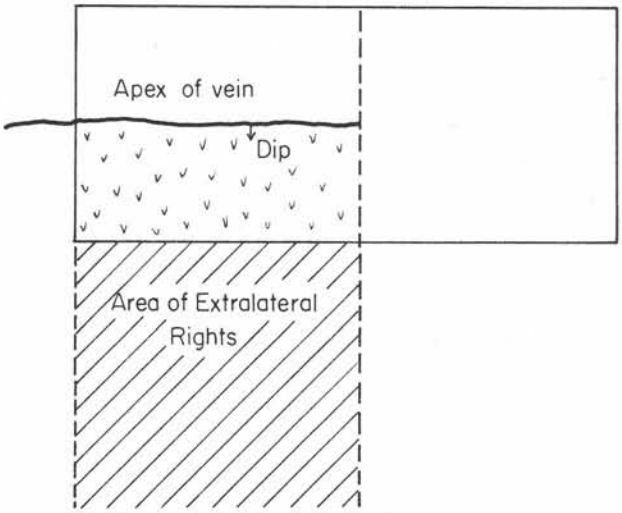

FIGURE 7.—Extralateral rights for vein crossing one end line and terminating inside claim.

Where the apex of a vein is confined wholly within one claim and does not cross any boundary lines, imaginary end lines will be presumed to exist at each end of the apex. The imaginary end lines would be parallel to the actual end lines and would probably be deemed controlling for extralateral rights purposes, although there appears to be no reported case precisely on the point.[37] Figure 8 illustrates the result.

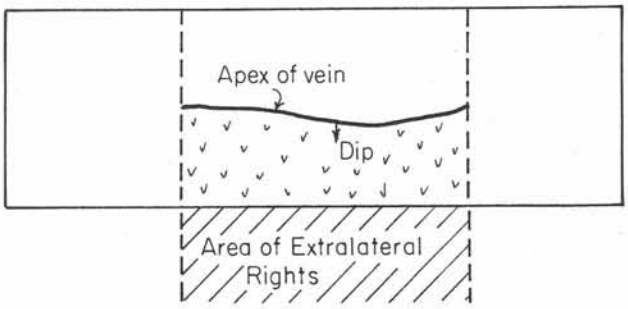

FIGURE 8.—Extralateral rights for vein not crossing any boundary line.

Under some circumstances it is possible for the extralateral rights of two or more claims to conflict by intersecting each other on the dip of a vein. In such a case the rule that has been applied by the courts is that the senior location prevails, but that the junior location has a right-of-way through the point of intersection for the purpose of pursuing its extralateral rights beyond the point of conflict.[39] This type of situation is illustrated by Figure 9.

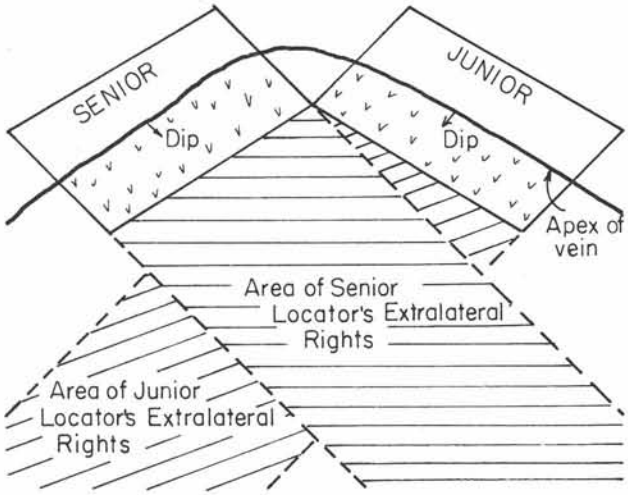

FIGURE 9.—Conflicting extralateral rights.

3.3 ANNUAL ASSESSMENT WORK

By the Mineral Location Law of 1872, Congress enacted a requirement that certain work be performed annually on mining claims. For claims located after May 10, 1872, the requirement is that $100 worth of labor shall be performed or improvements made during each year. The pertinent part of the Federal statute reads as follows:

> On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such locations. 40/

Federal law further provides that for claims located after May 10, 1872, the period within which the required annual work must be performed shall commence at 12 o'clock meridian on the 1st day of September succeeding the date of location.41/ The deadline for performing the work is 12 o'clock meridian on the 1st day of September of the following year.

The annual work required under Federal law has popularly become known as "assessment work" or "annual labor." Although not expressly so stated in the statute, the work requirements have uniformly been held to apply to placer as well as to lode claims.42/

The law is not as clear as it might be as to what type of work will or will not satisfy the requirement. However, the work must be performed in good faith and must tend to develop the claim and facilitate the extraction of ore.43/

Failure to perform assessment work may result in forfeiture of the claim if the ground is relocated by another after the deadline for performing the work has passed and before work is resumed.44/ It is important to note, however, that failure to perform annual labor will not automatically result in loss of the claim, and there is no forfeiture unless and until there is a relocation.45/ It was formerly the view of the Department of the Interior that it was not concerned with compliance with the annual labor requirements.46/ However, under an opinion of the United States Supreme Court in 1970 47/ holding that substantial compliance with the assessment work requirement is required, the Department of the Interior has published regulations to the effect that failure substantially to comply with the requirement of an annual expenditure of $100 in labor or in improvements per claim each year will render the claim subject to cancellation.48/

The word "improvement" as used in the statute 49/ would seem broad enough to encompass the normal meaning of the word "labor," because a certain amount of labor is involved in making any improvements. However, it has particular reference to artificial changes or tangible additions put in place or erected for the purpose of developing the claim and extracting mineral.50/

The building of roads has generally been held to count toward assessment work provided its purpose is to facilitate development of the claim and extraction of ore.51/ Likewise, the construction of an aerial tramway to haul ore has been held to be valid assessment work.52/

The construction or repair of mills or smelters has usually been held to be not properly includable as assessment work on the theory that the mill itself does not develop the claim.53/ The construction of mine buildings has met with a little more liberal interpretations. The erection of an ore house has been

held to apply toward assessment work.[54] The construction of a tool house and a blacksmith shop has been held proper,[55] while the construction of a cabin has not.[56]

Federal law specifically provides that the expense of running a tunnel for the purpose of developing a lode or lodes, shall be considered as expended on the lode.[57] This would undoubtedly be the case even in the absence of such a statute.

A good example of the importance of the requirement that the work or improvements must tend to develop the claim is found in the case of dewatering old mine workings. Where a mine was dewatered so that it could be examined by a prospective purchaser, it was held that the expense of dewatering could not be credited to assessment work.[58] However, if the dewatering was done in order that active mining operations could be resumed, it probably would be properly considered as valid assessment work.[59]

Other examples of particular work that have been held to be valid assessment work are the following: The value of iron rails and the cost of transporting rails, powder, fuses and candles to the mine;[60] a reasonable compensation for the use of tools, but not the full cost thereof;[61] and the expense of sharpening picks.[62]

The expense of keeping a watchman on the property has been allowed where his services were necessary to preserve buildings and equipment.[63] However, if the purpose of the watchman was to warn off prospectors and thereby prevent relocation, his services could not count toward assessment work.[64]

By virtue of a Federal statute,[65] geological, geochemical, and geophysical surveys conducted by qualified experts can be counted as assessment work provided a verified and detailed report is filed in the county in which the claim is located, setting forth: (a) the location of the work performed in relation to the point of discovery and the boundaries of the claim, (b) the nature, extent and cost thereof, (c) the basic findings, and (d) the name, address, and professional background of the person or persons conducting the work. Such surveys, however, may not be applied as labor for more than two consecutive years or for more than a total of five years on any one claim. A State of Washington statute provides for the filing of the verified reports in duplicate in the office of the county auditor at the time annual assessment work is recorded.[66]

It is important to note that in order to determine whether sufficient work has been done, the test is the value of the work performed, and not the amount actually paid for the work.[67] The fact that work is gratuitously contributed is of no moment, provided sufficient work is performed.[68]

Where a group of claims under common ownership is involved, the Federal statute provides that the expenditure may be made upon any one claim.[69] Certain limitations have been placed on group assessment work by case law. The claims comprising the group must be under common ownership.[70] The work performed must tend to benefit all claims in the group.[71] The claims must be contiguous.[72] The value of the work done must, of course, equal at least $100 multiplied by the number of claims in the group.

Aside from group assessment work, it has been held that assessment work may be performed outside the boundaries of a claim, provided the work tends to benefit the claim.[73] There appears to be a requirement that where the work is done outside the boundaries of the claim, it must be performed on land contiguous to it.[74]

In order for assessment work to apply, it must be performed by or at the instance of the owner of the claim or someone in privity with him. Work done by a trespasser or stranger not in privity with the

owner will not suffice.[75] It has been held, however, that work done by a stockholder on claims owned by his corporation in order to prevent forfeiture will inure to the benefit of the corporation.[76]

Where a claim is owned in common by two or more owners and one of the owners fails to contribute his proportionate share of the cost of assessment work performed by the other owners, a procedure exists under Federal law for the forfeiture of the delinquent owner's interest in the claim to his co-owners.[77] Basically, the procedure consists of the other owners giving the delinquent owner notice of his delinquency, either by personal service or by publication for at least once a week for a period of 90 days, and, if at the expiration of a 90-day period following personal service or publication, the delinquent owner has not contributed his share of the expenditure, his interest in the claim shall become the property of his co-owners.[78]

Washington law requires the recording of an affidavit within 30 days after the time fixed for performance of annual labor.[79] The affidavit is commonly called a "proof of labor." The relevant statute reads as follows:

> Within thirty days after the expiration of the period of time fixed for the performance of annual labor or the making of improvements upon any quartz or lode mining claim or premises, the person in whose behalf such work or improvement was made or some person for him knowing the facts, shall make and record in the office of the county auditor of the county wherein such claims are situate an affidavit or oath of labor performed on such claim. Such affidavit shall state the exact amount and kind of labor, including the number of feet of shaft, tunnel or open cut made on such claim, or any other kind of improvements allowed by law or by rules of mining districts made thereon. Such affidavit shall contain the section, township and range in which such lode is located if the location be in a surveyed area.[80]

Once recorded, the affidavit of performance of annual labor is prima facie evidence of the performance of the required annual labor.[81] The failure to file a proof of labor has been held under a similar statute to be prima facie evidence that the work was not performed.[82] There appears to be no State of Washington case on this point, however.

During periods of national emergency and financial crisis, Congress has seen fit to suspend the assessment work requirement by specific legislation. Usually this has occurred during times of war and financial depression. At present (1974), there is a Federal statute which allows the Secretary of the Interior to postpone temporarily the performance of assessment work upon claims where the owner is unable to obtain a right-of-way for access to his claims.[83]

The Soldiers' and Sailors' Civil Relief Act provides that the annual labor requirements shall not apply during periods in which the claim owner is in military service or until six months after termination of his military service.[84] The act also exempts assessment work for periods in which the claim owner is hospitalized by reason of wounds or disability incurred in the line of military duty. In order to obtain the benefits of the Soldiers' and Sailors' Civil Relief Act, the claim owner must, before the expiration of the assessment year in which he enters the service, file a notice in the county office in which the claim is recorded, stating that he has entered military service and that he desires to hold his claim under the act.[85]

The duty to perform annual assessment work continues until payment of the purchase price for patent to the Federal government, and the mere pendency of proceedings for patent will not excuse nonperformance.[86]

3.4 FORFEITURE AND RESUMPTION OF WORK

"Forfeiture" is the term applied to the loss of title to a mining claim through relocation by another claimant after the original owner has failed to per-

form sufficient annual labor. Forfeiture is to be distinguished from abandonment, although both are a means by which ownership of a mining claim can be lost.[87]

The concept of forfeiture for failure to perform the requirements of annual labor is based upon a Federal statute which provides in part that ". . . the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location had ever been made . . . ."[88] Failure to perform annual labor leaves the claim subject to forfeiture, however, the forfeiture is not complete until the land encompassed in the original claim is relocated.[89]

The burden of proving a forfeiture is upon the one who asserts it.[90] Despite the fact that the failure to file a proof of labor within 30 days after the expiration of the time for performing the work may be prima facie evidence that the work was not performed,[91] the prima facie showing may be rebutted by a showing that work was performed, and in such a case the burden of proving that the work was not in fact performed or was insufficient rests with the party claiming the forfeiture.[92] On the other hand, the filing of a proof of labor is merely prima facie evidence that the work was performed,[93] and this can be overcome by the party claiming the forfeiture proving the contrary.[94]

Proof of a forfeiture can be established only by clear and convincing evidence.[95] Every reasonable doubt will be resolved in favor of the prior locator.[96]

The relocation upon which the forfeiture is based can take place only after the expiration of the time for performance of annual labor.[97] An attempt to relocate a claim before the assessment work is in default will confer no rights, and the attempted relocation is void.[98] No rights will arise under such an attempted relocation notwithstanding the fact that the original locator subsequently fails to do the work.[99]

Forfeiture of a claim upon which the annual labor has not been performed within the required time can be avoided if the owner of the claim resumes work before relocation.[100] The owner of a claim who has failed to do annual labor for one or more years may be protected as though no failure has ever occurred, if he resumes work before relocation by another,[101] provided there has been substantial compliance with the assessment work requirements.[102]

Assessment work may be resumed at any time before relocation and the original claim owner's interest will be preserved.[103] It has been held that a defective relocation does not prevent the original owner from resuming the work, and thereby validating his claim, if the resumption takes place after the time for completing the relocation has expired but before the defects in the relocation are corrected.[104]

The cases seem to indicate that once work is resumed it is necessary to do only the amount of work required for the current year, and that there is no need to make up for assessment work not performed in prior years.[105] Under this rule, if $50 worth of assessment work was performed in year A and work resumed in year B and $100 worth of work was done, the entire amount of work done in year B would apply to the work requirement for year B.

Once work is resumed it must be diligently pursued until the required amount of work for the current year is completed.[106] An unwarranted interruption of work once resumed but not completed could result in the claim being lost to an intervening relocator.[107]

A split of authority exists as to whether a claim owner can protect his rights by resuming work after relocation by another has commenced but before it is completed. Some courts have held that the resumption of work can take place at any time before the relocation is completed.[108] Other courts have held that once relocation is commenced, the relocator is

entitled to the period allowed by statute for completing the relocation, and that the original owner cannot defeat the relocation by resuming the work during such period.[109] The latter rule seems to be the sounder of the two. Otherwise, a claim owner could fail to do assessment work and then sit comfortably by, knowing that even though someone else might commence relocation, he could defeat the relocation by resuming work before relocation was complete.

The procedure for relocating a claim subject to forfeiture is discussed in Section 3.6 of this bulletin.

3.5 ABANDONMENT

Abandonment of title to a mining claim occurs when the owner forms the intent to give up the claim and asserts no further right thereto.[110] The concept of abandonment differs from that of forfeiture in that the intent of the claim owner is the controlling factor in the case of abandonment, whereas in the case of forfeiture, the intent of the claim owner is largely immaterial.[111] Abandonment operates instantly to restore the land to the public domain.[112] Forfeiture requires the intervention of a relocator before it can take place.[113]

The intent to abandon must be absolute and cannot be conditional.[114] Abandonment can take place any time after the acts of location are first commenced.[115]

Like forfeiture, the burden of proving an abandonment is upon the one who asserts it.[116] Abandonment can be sustained only by clear and convincing proof.[117] Proof of abandonment is necessarily difficult as it involves the subjective intent of the claim owner. Statements of the claim owner are admissible evidence to reveal the owner's state of mind.[118] Acts that tend to show an intent to abandon are also admissible.[119] However, neither lapse of time, absence from the claim, nor failure to work a claim for any definite period, if unaccompanied by other circumstances, are conclusive as to the question of abandonment,[120] but the claim still may be subject to cancellation by the Department of the Interior for failure substantially to comply with the assessment work requirement, if not satisfied.[121] Presumably this would require a proceeding by the Department.

Resumption of work by the original owner of a claim after a bona fide abandonment will not restore ownership of the claim to him.[122] Because the land is returned to the public domain by abandonment, ownership of the claim can be reacquired only by relocation.[123]

Abandonment and subsequent relocation by the original owner cannot be used as a device to evade the requirement of assessment work.[124] Because of the Federal law which provides that assessment work need not be performed until the assessment year following the year of location,[125] a few unfortunate claim owners have felt that assessment work could be successfully avoided by abandonment followed by relocation in the name of a friend. In such a case, the court refused to recognize the abandonment and held that the claim was open to relocation at the expiration of the assessment year for failure to perform the required work.[126]

The procedure for relocating an abandoned claim is discussed in Section 3.6 of this bulletin.

3.6 RELOCATION

The work "relocation" is sometimes used interchangeably with the word "amendment," and under some state statutes it is difficult to draw a firm distinction between what is meant by the two words.[127] In the State of Washington, however, relocation and amendment have received separate statutory treatment,[128] and it is possible to draw a distinction that will be used for the purpose of this bulletin. As used herein, relocation shall refer to the acquisition of land that was previously the subject of another loca-

tion, but which location has since been lost through forfeiture or abandonment.

The relevant Washington statute on the subject of relocation reads as follows:

> The relocation of a forfeited or abandoned quartz or lode claim shall only be made by sinking a new discovery shaft, or in lieu thereof performing at least an equal amount of development work within the borders of the claim, and fixing new boundaries in the same manner and to the same extent as is required in making a new location, or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of commencement of such relocation, and shall erect new, or make the old monuments the same as originally required; in either case a new location monument shall be erected. 129/

The part of the above-quoted statute relating to development work and the sinking of a discovery shaft would no longer seem to have any application, because the corresponding requirements have been eliminated as requisites for a valid location in the State of Washington. 130/

Relocation can be accomplished either by an original locator or by another person. In either case it is necessary that the rights under the original location have been extinguished by abandonment or that they have become forfeitable by failure to perform annual labor. 131/ In the case of a relocation by an original locator, it would appear that it would be necessary that he had previously abandoned the claim, as it has been held that forfeiture is not complete until someone else has appropriated the property. 132/

Various schemes have been devised by fertile-minded claim owners whereby they would abandon their claims and then immediately relocate as a means of avoiding assessment work. These arrangements have met with little success, however. 133/

The procedure for relocation is much the same as the procedure for an original location, and basically the same method should be used as is set forth in Sections 2.7 and 2.8 of this bulletin. The State of Washington statute does require that the relocator shall erect new, or make the old, monuments the same as originally required, but that in either case a new location monument shall be erected. 134/ It appears to be well settled that the original discovery can be adopted by the relocator, provided he has actual knowledge thereof. 135/

Prior to June 8, 1949, the State of Washington statute required that the relocation notice ". . . state if the whole or any part of the new location is located as abandoned property." 136/ The word "abandoned" as used in this state was deemed to include forfeiture. 137/ If a relocator omitted such a statement from his notice, his location was treated as a new location rather than a relocation, and for that reason the relocator was not allowed to show that the original locator had not performed the annual labor or had abandoned the claim. 138/ He was allowed to show only that the original location was in and of itself void. 139/ Presumably, under the present wording of the relocation statute, a relocator could question the validity of the original location as well as attempt to show abandonment or forfeiture, provided his relocation was in the form of an original location and not designated as a relocation. 140/ There appears to be no State of Washington case on this point, however.

An attempted relocation before the original locator of a valid claim has abandoned it or defaulted on his annual labor is void. 141/ Such an attempt is a complete nullity and will confer no rights even though the original locator may subsequently fail to do the work or abandon the claim. 142/

3.7 AMENDED LOCATIONS

As discussed in Section 3.6 of this bulletin, the words "amendment" and "relocation" are sometimes used interchangeably. As the two procedures

are subject to separate statutory treatment in the State of Washington, it is possible to draw a conceptual distinction. As used herein, the words "amendment" and "amended location" shall refer to the modification of a previously existing mining claim, either to correct some defect or deficiency in the mode of location, or to change the boundaries of the claim.

The Washington statute providing for amendment reads as follows:

> If at any time the locator of any quartz or lode mining claim heretofore or hereafter located, or his assigns, shall learn that his original certificate was defective or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries or of taking in any additional ground which is subject to location, or in any case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of RCW 78.08.050 through 78.08.140, such locator or his assigns may file an amended certificate of location, subject to the provisions of RCW 78.08.050 through 78.08.140, regarding the making of new locations. 143/

In the area of correcting defects in the original location, amendment cannot be used to validate a claim that was void at the outset. 144/ The problem then becomes one of distinguishing between defects that make a claim void and those that only serve to make a claim voidable. In this respect it is impossible to reconcile the statutes of the various states and the cases. Often, the word "void" as used in a statute has been held to mean "voidable." 145/ A total failure to comply with the marking requirements, so that a claim cannot be found, has been held to render a claim void. 146/ Likewise, a location of a claim is based upon a discovery within the boundaries of another valid location, 147/ or a location on withdrawn land 148/ will be held void. Defects such as failing to tie the claim to a natural monument have been held not to make the claim void and can be corrected by amendment. 149/

Courts as a rule tend to construe liberally the right of amendment so as to prevent others from taking advantage of technicalities. In the absence of intervening rights of others, an amended location, even if it takes in new ground, relates back and takes effect as of the date of the original location. 150/ It is therefore to be distinguished from a relocation by the original owner, which takes effect as a new location.

Courts have construed the original location notice and the amended location notice as one. If one is defective, the defect can be cured by the other. 151/

In the absence of intervening rights, amendment can be used as a means of taking additional ground into a claim, provided the claim does not exceed the maximum size after the amendment. It can also be used as a means of casting off excess ground, 152/ or disclaiming an overlap with a prior location. 153/

Frequently it is possible to swing the boundaries of a lode claim to better take advantage of extralateral rights. 154/ Amendment is also resorted to in order to make end lines parallel. 155/ Both purposes can be accomplished by amendment, provided there are no intervening rights.

Other purposes for which amendment can be used are to correct clerical errors, 156/ to change the name of the claim, 157/ and to correct a description of the claim location. 158/ The particular examples of amendment mentioned in this section are not and cannot be all inclusive. Generally, any defect in the location itself or the location notice can be corrected by amendment, provided the defect is not serious enough to render the original location absolutely void. 159/

The procedure to be followed to perfect an amendment varies somewhat with the type of amendment made. For amendments that do not change the boundaries of the claim, the location notice should contain the information required of an original location notice, and it should be posted and recorded in

the same manner as the original.[160] It is not necessary to describe in the certificate the purpose of the amendment.[161] There is no statutory requirement that the amended location notice make reference to the original location. However, it is probably a good practice to make at least sufficient reference to allow identification on the records with the original location.

If the boundaries of the claim are changed, it is necessary to mark the new boundaries in the same manner as is required of a new location.[162] The amended location notice should, of course, contain the amended description of the claim.

Provided the claim after amendment contains the original discovery, there is no necessity that an additional discovery be made in any additional land included in the claim, because in theory the new land becomes part of the old claim.[163]

3.8 MAINTENANCE OF MARKERS AND BOUNDARIES

It has been held that once a mining claim is marked on the ground as required by law, and all other required acts of location are performed, rights to the claim vest in the locator, and such rights cannot be divested by the subsequent removal or obliteration of the claim markers through the passage of time or the acts of others.[164]

Despite the lack of any specific requirement that claim markers be preserved in good condition, the practical difficulty of proving the location of a claim in the absence of markers strongly suggests that the locator of a claim use reasonable diligence in preserving and restoring his boundary monuments. In the usual case, the description of the location of the claim set forth in the location notice is not definite enough to allow the claim boundaries to be established without the aid of boundary monuments. If witnesses and locators are dead or unavailable, the claim owner may find himself unable to prove his boundaries in a subsequent dispute.

The preservation of boundary monuments is also of value in putting other locators on notice that the ground has been previously located, thereby lessening the chance of a conflicting location. Despite the priority of the first location, a subsequent location by another creates practical problems for the first locator in establishing and protecting possession to the claim.

FOOTNOTES—ARTICLE III

1. 30 U.S.C. 611-615.
2. 30 U.S.C. 26 (lode claims); 30 U.S.C. 35 (placer claims).
3. See Section 1.19, this bulletin, for a discussion of these aspects.
4. 30 U.S.C. 612(a).
5. 30 U.S.C. 612(b).
6. 30 U.S.C. 612(c).
7. 30 U.S.C. 612(b).
8. 30 U.S.C. 613.
9. 30 U.S.C. 613(b).
10. 30 U.S.C. 613(c).
11. 30 U.S.C. 613(c).
12. 30 U.S.C. 26.
13. Tyler Mining Co. v. Last Chance Mining Co., 71 Fed. 848 (1894).
14. Loney v. Scott, 112 Pac. 172 (Ore. 1910).
15. Davis v. Wiebbold, 139 U.S. 507 (1891).
16. Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228 (9th Cir. 1938).
17. Carson City Gold & Silver Min. Co. v. North Star Min. Co., 83 Fed. 658 (1897), cert. denied, 171 U.S. 687 (1898).
18. St. Louis Mining & Milling Co. v. Montana Mining Co., 194 U.S. 235 (1904).
19. Lawson v. United States Mining Co., 207 U.S. 1 (1907).
20. Gold, Silver & Tungsten, Inc. v. Wallace, 91 P.2d 975 (Colo. 1939), cert. denied 308 U.S. 612 (1939).
21. Butte & Boston Mining Co. v. Societe Anonyme des Mines de Lexington, 58 Pac. 111 (Mont. 1899).
22. Tom Reed Gold Mines Co. v. United Eastern Mining Co., 209 Pac. 283 (Ariz. 1922) cert. denied 260 U.S. 744 (1922).
23. Iron Silver Mining Co. v. Cheesman, 116 U.S. 529 (1886).
24. Collins v. Bailey, 125 Pac. 543 (Colo. 1912).
25. Alameda Mining Co. v. Success Mining Co., 161 Pac. 862 (Idaho 1916).
26. Duggan v. Davey, 26 N.W. 887 (Dak. Ter. 1886).
27. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898).
28. Iron Silver Mining Co. v. Elgin Min. & Smelting Co., 118 U.S. 196 (1886). Under the Mining Law of 1866 extralateral rights attached even if the end lines were diverging, there being no requirement of parallel end lines. See Walrath v. Champion Mining Co., 171 U.S. 293 (1898).
29. Grant v. Pilgrim, 95 F.2d 562 (9th Cir. 1938).
30. Iron Silver Mining Co. v. Elgin Min. & Smelting Co., 118 U.S. 196 (1886).
31. Jim Butler Tonopah Mining Co. v. West End Consolidated Mining Co., 247 U.S. 450 (1918).
32. Twenty-One Mining Co. v. Original Sixteen To One Mine, Inc., 255 Fed. 658 (9th Cir. 1919).
33. Twenty-One Mining Co. v. Original Sixteen To One Mine, Inc., 255 Fed. 658 (9th Cir. 1919).
34. King v. Amy & Silversmith Consolidated Mining Co., 152 U.S. 222 (1894); Northport Smelting and Refining Co. v. Lone Pine-Surprise Consolidated Mines Co., 271 Fed. 105 (E.D. Wash. 1920), aff'd. 278 Fed. 719 (9th Cir. 1922).
35. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898).
36. Republican Mining Co. v. Tyler Mining Co., 79 Fed. 733 (1897), cert. denied, 166 U.S. 720 (1897).
37. Lindley on Mines sec. 592, (3rd ed. 1914).

38. Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478 (1887).

39. Empire State-Idaho Mining & Development Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 Fed. 973 (1903).

40. 30 U.S.C. 28.

41. 30 U.S.C. 28.

42. Carney v. Arizona Mining Co., 2 Pac. 734 (Cal. 1884).

43. Jackson v. Roby, 109 U.S. 440 (1883).

44. For a discussion of forfeiture, see Section 3.4, this bulletin.

45. Law v. Fowler, 261 Pac. 667 (Idaho 1927).

46. U.S. ex rel Krushnic v. West, 30 F.2d 742 (D.C. Cir. 1929). Modified on other grounds, 280 U.S. 306 (1930); Udall v. Oil Shale Corporation, 406 F.2d 759 (10th Cir. 1969); reversed 400 U.S. 48 (1970).

47. Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

48. 43 C.F.R. 3851.3(a).

49. 30 U.S.C. 28.

50. Power v. Sla, 61 Pac. 468 (Mont. 1900).

51. Sexton v. Washington Min. & Mill. Co., 55 Wash. 380 (1909). See RCW 78.08.140 for road building as assessment work in organized mining districts.

52. U.S. v. El Portal Mining Co., 55 I.D. 348 (1935).

53. Golden Giant Mining Co. v. Hill, 198 Pac. 276 (N.M. 1921).

54. McCaig v. Bryan, 15 Pac. 413 (Colo. 1887).

55. Pacific Gas & Electric Co., 50 L.D. 599 (1924).

56. Remmington v. Bandit, 9 Pac. 819 (Mont. 1886).

57. 30 U.S.C. 28.

58. Evalina Gold Min. Co. v. Yosemite Gold Min. & Mill Co., 115 Pac. 946 (Cal. 1911).

59. Lindley on Mines sec. 629, (3rd ed. 1914).

60. Fredricks v. Klauser, 96 Pac. 679 (Ore. 1908).

61. Fredricks v. Klauser, 96 Pac. 679 (Ore. 1908).

62. Hirschler v. McKendricks, 40 Pac. 290 (Mont. 1895).

63. Merchants Nat. Bank v. McKeown, 119 Pac. 334 (Ore. 1911).

64. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 45 Pac. 1047 (Cal. 1896).

65. 30 U.S.C. 28-1 and 28-2.

66. RCW 78.08.072.

67. Stolp v. Treasury Gold Min. Co., 38 Wash. 619 (1905).

68. Anderson V. Caughey, 84 Pac. 223 (Cal. 1906).

69. 30 U.S.C. 28.

70. Jackson v. Roby, 109 U.S. 440 (1883).

71. Little Dorrit Gold Min. Co. v. Arapahoe Gold Mining Co., 71 Pac. 389 (Colo. 1902).

72. Chambers v. Harrington, 111 U.S. 350 (1884).

73. Hall v. Kearny, 33 Pac. 373 (Colo. 1893).

74. Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205 (9th Cir. 1910); but see St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. 636 (1882).

75. See Lindley on Mines sec. 633, (3rd ed. 1914).

76. Wailes v. Davies, 158 Fed. 667 (1907), aff'd. 164 Fed. 397 (1908).

77. 30 U.S.C. 28.

78. 30 U.S.C. 28.

79. RCW 78.08.081.

80. RCW 78.08.081.

81. RCW 78.08.082.

82. McCulloch v. Murphy, 125 Fed. 147 (1903).

83. 30 U.S.C. 28b - 28e.

84. 50 U.S.C. App. 565.

85. 50 U.S.C. App. 565.

86. Poore v. Kaufman, 119 Pac. 785 (Mont. 1911).

87. For a discussion of abandonment, see Section 3.5, this bulletin.

88. 30 U.S.C. 28.

89. Shank v. Holmes, 137 Pac. 871 (Ariz. 1914).

90. Copper State Mining Co. v. Kidder, 179 Pac. 641 (Ariz. 1919).

91. McCulloch v. Murphy, 125 Fed. 147 (1903).

92. McCulloch v. Murphy, 125 Fed. 147 (1903).

93. RCW 78.08.082.

94. California Dolomite Co. v. Standridge, 275 P.2d 823 (Cal. App. 1954); cert. denied, 349 U.S. 921 (1955).

95. Hammer v. Garfield Mining Co., 130 U.S. 291 (1889).

96. Thornton v. Kaufman, 106 Pac. 361 (Mont. 1910).

97. U.S. v. El Portal Min. Co., 55 L.D. 348 (1935).

98. Farrell v. Lockhart, 210 U.S. 142 (1908).

99. Rooney v. Barnette, 200 Fed. 700 (1912).

100. 30 U.S.C. 28.

101. Belk v. Meagher, 104 U.S. 279 (1881).

102. See Section 3.3, this bulletin.

103. Florence-Rae Copper Co. v. Kimbel, 85 Wash. 162 (1915).

104. Field v. Tanner, 75 Pac. 916 (Colo. 1904).

105. Temescal Oil, Mining & Development Co. v. Salcido, 69 Pac. 1010 (Cal. 1902).

106. Hirschler v. McKendricks, 40 Pac. 290 (Mont. 1895).

107. Hirschler v. McKendricks, 40 Pac. 290 (Mont. 1895).

108. Featherston v. Howse, 151 F. Supp. 353 (D.C. Ark. 1957).

109. Frazier v. Consolidated Tungsten Mines, 296 P.2d 447 (Ariz. 1956).

110. Harkrader v. Carroll, 76 Fed. 474 (1896).

111. McKay v. McDougall, 64 Pac. 669 (Mont. 1901).

112. Harkrader v. Carroll, 76 Fed. 474 (1896).

113. Hartman Gold Mining Co. v. Warning, 11 P.2d 854 (Ariz. 1932).

114. Inez Mining Co. v. Kinney, 46 Fed. 832 (1891).

115. Lockhart v. Johnson, 181 U.S. 516 (1901).

116. Gear v. Ford, 88 Pac. 600 (Cal. App. 1906).

117. Peachy v. Gaddis, 127 Pac. 739 (Ariz. 1912).

118. McCann v. McMillan, 62 Pac. 31 (Cal. 1900).

119. Hartman Gold Mining Co. v. Warning, 11 P.2d 854 (Ariz. 1923).

120. McCarthy v. Speed, 77 N.W. 590 (S.D. 1898).

121. See Section 3.3, this bulletin.

122. McKay v. McDougall, 64 Pac. 669 (Mont. 1901).

123. McKay v. McDougall, 64 Pac. 669 (Mont. 1901).

124. McCann v. McMillan, 62 Pac. 31 (Cal. 1900).

125. 30 U.S.C. 28.

126. McCann v. McMillan, 62 Pac. 31 (Cal. 1900).

127. See 2 American Law of Mining, sec. 8.21.

128. Amendment - RCW 78.08.080; Relocation - RCW 78.08.090.

129. RCW 78.08.090.

130. See RCW 78.08.060 and Section 2.9, this bulletin.

131. Lockhart v. Wills, 54 Pac. 336 (N.M. 1898).

132. McCarthy v. Speed, 77 N.W. 590 (S.D. 1898).

133. McCann v. McMillan, 62 Pac. 31 (Cal. 1900).

134. RCW 78.08.090.

135. Eagle-Picher Mining & Smelting Co. v. Meyer, 204 P.2d 171 (Ariz. 1949).

136. Laws of 1899, Ch. 45, sec. 8.

137. Florence-Rae Copper Co. v. Kimbel, 85 Wash. 162, (1915).

138. Gold Creek Antimony Mines & Smelter Co. v. Perry, 94 Wash. 624 (1917).

139. Paragon Mining & Development Co. v. Stevens County Exploration Co., 45 Wash. 59 (1906).

140. See discussion under 2 American Law of Mining sec. 8.39.

141. Farrell v. Lockhart, 210 U.S. 142 (1908).

142. Lehman v. Sutter, 198 Pac. 1100 (Mont. 1921).

143. RCW 78.08.080.

144. Sullivan v. Sharp, 80 Pac. 1054 (Colo. 1905).

145. McDonald v. Midland Mining Co., 293 P.2d 911 (Cal. App. 1956).

146. Flynn v. Vevelstad, 119 F. Supp. 93 (D.C. Alaska 1954).

147. Belk v. Meagher, 104 U.S. 279 (1881).

148. Jose v. Houck, 171 F.2d 211 (9th Cir. 1948).

149. Olympic Manganese Mining Co. v. Downing, 156 Wash. 686 (1930).

150. Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., 125 Fed. 389 (1903).

151. Duncan v. Fulton, 61 Pac. 244 (Colo. 1900).

152. Nichols v. Ora Tohoma Mining Co., 151 P.2d 615 (Nev. 1944).

153. Tyler Mining Co. v. Last Chance Mining Co., 71 Fed. 848 (1895).

154. Duncan v. Fulton, 61 Pac. 244 (Colo. 1900).

155. Doe v. Sanger, 23 Pac. 365 (Cal. 1890).

156. Seymour v. Fisher, 27 Pac. 240 (Colo. 1891).

157. Seymour v. Fisher, 27 Pac. 240 (Colo. 1891).

158. Olympic Manganese Mining Co. v. Downing, 156 Wash. 686 (1930).

159. Sackville v. Mann, 135 P.2d 1014 (Colo. 1943).

160. See Sections 2.9 and 2.10, this bulletin.

161. Johnson v. Young, 34 Pac. 173 (Colo. 1893).

162. Becker v. Pugh, 29 Pac. 173 (Colo. 1892).

163. Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., 125 Fed. 389 (1903).

164. Jupiter Mining Co. v. Bodie Consolidated Mining Co., 11 Fed. 666 (1881).

ARTICLE IV.

FEDERAL LANDS—PATENTS OF LOCATIONS

4.1 PATENT PROCEDURE

The issuance of patents for locations under location laws is administered by the Bureau of Land Management, and particularly its office in the state wherein the claims are located.[1] A copy of the regulations[2] pertaining to patent procedures can be obtained from the Bureau of Land Management.

Basically, the steps in a patent proceeding start with a survey by a licensed Deputy United States Mineral Surveyor, unless the application is for patent of a placer claim that conforms to the public land survey. Application is made to the Bureau of Land Management for a survey, accompanied by a deposit to cover the estimated costs of preparing a plat of the survey when completed. The surveyor's fees and charges must be paid by the applicant. Following completion of the survey, an application for patent must be filed. The statutory requirement of development work to the amount of $500 per claim,[3] except for millsite claims, must be satisfied, and upon field examination by the mineral examiner for the Bureau, a showing that the discovery requirement has been met for each claim is an absolute necessity.[4]

A group of claims can be surveyed and patented in the same proceeding.[5] The work requirement may be satisfied by work upon one or more of the claims, so long as the required total amount of work has been done.[6]

If patent for a claim is refused, the claim remains valid as a mining location as though the application for patent had never been made,[7] unless patent is denied for lack of discovery,[8] or unless patent is denied because the land claimed was not open to location when located. The Department of the Interior may commence proceedings to cancel a claim after refusing patent, as well as at any other time, regardless of the reason for denial.

Pending issuance of a final certificate entitling the applicant to a patent it is necessary for the applicant to perform his annual assessment work in order to protect his claim from other locators.[9]

4.2 CONTESTS[10]

As part of the patent application proceedings, a copy of the plat of the survey of lands for which application for patent has been made must be posted conspicuously upon the claims involved, and notice must be published in the county in which the lands are located. A procedure exists for anyone to contest the right of the applicant to obtain a patent, either by reason of an adverse mineral claim, or for any other reason which would affect the right of the applicant to obtain a patent under the mining laws, by intervening in the patent proceedings and objecting to the issuance of a patent. The Department of the Interior has full authority to hear and to adjudicate any contests which are commenced in this manner, and any party not satisfied with the determination of the department can appeal the results in a Federal court.

4.3 RIGHTS GRANTED

Upon issuance of a patent the patentee acquires full title to the lands patented, including all surface rights, timber, and minerals, with certain exceptions noted below, even though these were subject to Public Law 167 prior to patent.[11] The owner of the patented lands may use them for any lawful purpose, either for mining or for any other purpose.[12]

The major difference between the rights obtained with a mineral patent and the rights obtained under the nonmineral entry laws, except for patents reserving minerals, are those rights concerned with extralateral rights. The holder of a patent obtained upon a lode claim owns the extralateral rights to any lode that has its apex within the vertical boundaries of the claim, but on the other hand his claim is subject to being invaded by an adjacent lode locator holding the apex of a vein.[13] The annual assessment work requirement no longer applies after a patent is issued.

A patented placer claim carries with it all lodes or veins which apex within the claim if they were unknown at the time of application for patent,[14] but the owner does not acquire extralateral rights unless the lodes or veins are located as lode claims as well.

It should be noted that locations made in certain categories of lands may be subject to special restrictions in the patent, such as wilderness areas,[15] areas known to be valuable for leasable minerals,[16] lands restored to entry within a powersite withdrawal,[17] and lands the surface of which has been otherwise disposed of, reserving the mineral to the United States.[18]

FOOTNOTES—ARTICLE IV.

1. Application is made to the office in Spokane, Washington, but many aspects of patent procedure are currently handled at the office of the Bureau of Land Management, 729 Northeast Oregon Street, Portland, Oregon 97208.

2. 43 C.F.R. 3860-3870, contains regulations regarding patent procedures.

3. 30 U.S.C. 29.

4. See Section 2.4, this bulletin; see Dennison v. Udall, 248 F. Supp. 943 (1965) - discovery must be demonstrated at time of patent application in order to permit patent.

5. St. Louis Smelting & L. Co. v. Kemp, 104 U.S. 636 (1881).

6. Carretto, 35 L.D. 361 (1907).

7. Clipper M. Co. v. El. M. Co., 194 U.S. 220 (1904).

8. Commencing with George A. Carlile, 67 I.D. 417 (1960), the Department of the Interior reversed its previous position and included in its order of denial of patent a finding that the claim was null and void when no discovery could be shown.

9. Poore v. Kaufman, 119 Pac. 785 (Mont. 1911); South End Min. Co. v. Tinney, 35 Pac. 89 (Nev. 1894).

10. See generally 30 U.S.C. 30-32; 43 C.F.R. 3481.1-3483.3.

11. See Section 3.1, this bulletin regarding P.L. 167.

12. Schwab v. Beam, 86 Fed. 41 (1898).

13. St. Louis Min., etc., Co. v. Montana Min. Co., 194 U.S. 235 (1904).

14. 30 U.S.C. 37; see Section 1.18, this bulletin.

15. See Section 1.4, this bulletin.

16. See Section 1.18, this bulletin.

17. See Section 1.6, this bulletin.

18. See Section 1.16, this bulletin.

ARTICLE V.

FEDERAL LANDS— MISCELLANEOUS CONSIDERATIONS AFFECTING LOCATIONS

5.1 PERSONAL PROPERTY

Although in almost all other jurisdictions an unpatented mining claim is considered to be real estate for all purposes, at an early date the pattern developed in the State of Washington of treating unpatented mining claims as personal property. It was first concluded that a judgment that is a lien upon real estate is not a judgment upon an unpatented mining claim,[1] and then the rule was expanded to require that in any execution sale by the sheriff an unpatented mining claim must be sold as personal property.[2] Although the State of Washington Supreme Court has been invited on several occasions to retreat from this position and to adopt the majority rule that an unpatented mining claim is real property, it has refused to do so[3] and has even held that unpatented mining claims must be listed and taxed as personal property instead of as real property.[4]

5.2 SEPARATE PROPERTY

In spite of the community property laws of the State of Washington that make all property acquired during marriage presumptively the community property of the husband and wife,[5] at an early date the Supreme Court of the State of Washington concluded that the Federal mining laws controlled and that the interest of a locator in an unpatented mining claim was the separate property of the locator, and not community property of the locator and his spouse.[6] Even though a contrary result was reached with homestead entries,[7] it has been held in Washington State that a mining claim is separate property of the locator, even after patent has been issued.[8]

5.3 QUIET TITLE ACTIONS

Quiet title actions affecting the title to unpatented mining claims have been tried on a number of occasions,[9] and apparently there is no problem created by the personal property classification that has been applied by the State of Washington Supreme Court.[10] This has been true both before and after enactment of a statute in 1929 that specifically authorizes quiet title actions for personal property.[11]

5.4 ADVERSE POSSESSION

Although such cases have been reasonably common in other jurisdictions, apparently only one case has reached the State of Washington Supreme Court regarding adverse possession of an unpatented mining claim. In that case the court indicated that a period of adverse possession by the defendant (open and notorious, hostile possession) for a period of 11 years was sufficient to deny the plaintiff the right to recover possession, when the defendant had performed all required annual labor. The court mentioned the 7-year and 10-year statutes normally controlling adverse possession cases involving real property, but simply noted that in either event the holding had been long enough. If the rationale of the personal property aspect really applies, an adverse holding for 3 years under the statute that denies recovery of personal property after three years should control,[13] but this question has yet to be presented to the court.

5.5 CONVEYANCE

Although the concept of classifying unpatented mining claims as personal property would appear to

permit conveyance by a simple bill of sale, the universal practice is to convey by deed,[14] typically a quitclaim deed. There is a statutory provision requiring the recording of all location notices, bonds, assignments and transfers of mining claims in the office of the auditor of the county in which the claim is situated within 30 days after execution.[15] This recording statute does not specifically require acknowledgment by a notary public, but since most documents recorded with the auditor are required to be acknowledged, and recording can be refused if not acknowledged,[16] it would appear only prudent to use an acknowledged instrument to convey an unpatented mining claim.

Because unpatented mining claims have been classified as personal property, the conveyance of an unpatented mining claim is not subject to the 1 percent real estate excise tax levied by the counties in the state.[17] It appears that the conveyance of an unpatented mining claim is not subject to the documentary stamp tax imposed by the State of Washington upon conveyances, either.[18]

FOOTNOTES—ARTICLE V.

1. Phoenix Mining Co. v. Scott, 20 Wash. 48 (1898).

2. Huffman v. Ellen Mining Co., 118 Wash. 546 (1922).

3. Woodward v. Edwards, 3 Wn.2d 579 (1940).

4. American Smelting and Refining Co. v. Whatcom County, 13 Wn.2d 295 (1942).

5. RCW 26.16.030.

6. Phoenix Mining Co. v. Scott, 20 Wash. 48 (1898); see also Karnes v. Flint, 153 Wash. 225 (1929).

7. Kromer v. Friday, 10 Wash. 621 (1895).

8. Guye v. Guye, 63 Wash. 340 (1911).

9. Karnes v. Flint, 153 Wash. 225 (1929); Woodworth v. Edwards, 3 Wn.2d 579 (1940); Priestley M. & M. Co. v. Bratz, 40 Wn.2d 525 (1952); Fisher v. Jackson, 120 Wash. 107 (1922) - In the last case it was held that the decree entered must be limited to right to possession, because paramount title is in the United States. See 30 U.S.C. 53.

10. Unlawful detainer and forcible detainer actions have been permitted as well. See Rayburn v. Stewart-Calvert Company, 105 Wash. 575 (1919); Priestly M. & M. Co. v. Lenox M. & M. Co., 41 Wn.2d 101 (1952).

11. RCW 7.28.310.

12. Newport Mining Co. v. Bead Lake G-C Min. Co., 110 Wash. 120 (1920). See Nugget Properties, Inc. v. Kittitas County, 71 Wn.2d 748 (1967), regarding nonmineral adverse possession of a mining claim. It was held that adverse possion of a nonmineral character will not defeat the title of the original holder of the claim, but recovery was still denied on the basis of laches.

13. RCW 4.16.080. See Jones v. Jacobson, 45 Wn.2d 265 (1954).

14. E.g., see Woodworth v. Edwards, 3 Wn.2d 579 (1940).

15. RCW 78.08.040.

16. See Eggert v. Ford, 21 Wn.2d 152 (1944).

17. Op. Atty. Gen. (Wash.) 51-53-408 (1952) - 1 percent excise tax levied by counties, pursuant to RCW 28.45.010 - 28.45.110, does not apply to sale of unpatented mining claims.

18. RCW 82.20.010. See Rule 194 of Washington Department of Revenue.

ARTICLE VI.

FEDERAL LANDS — LEASING

6.1 LEGISLATIVE PATTERN

Leasing of Federal lands for mining, and disposing of minerals reserved to the United States in patents that have been issued, is administered under the Mineral Leasing Law of 1920. The history of this law has been previously reviewed in Section 1.18 of this bulletin. Since each first became subject to leasing under this law, coal, phosphate, sodium, oil, oil shale, gas, potassium, potash, native asphalt, solid and semisolid bitumen, and bituminous rock have been subject to disposition only in accordance with the terms of the law,[1] although before enactment of the law, except for coal, they were subject to location under the location laws. Generally, all lands which are open to location under the location law are subject to leasing under the mineral leasing law; in addition "acquired lands" are subject to leasing, although not subject to location.[2]

6.2 ADMINISTRATION

The mineral leasing law is administered by the Bureau of Land Management of the Department of the Interior, pursuant to regulations that have been adopted.[3] Under the law, an applicant for a prospecting permit or mineral lease must be a citizen of the United States, an association of citizens, or a corporation organized under the laws of the United States or any state or territory of the United States.[4] Each lease is required to contain provisions insuring the exercise of reasonable skill and care in the operation of the property, provisions restricting labor underground to 8 hours in 1 day, and provisions prohibiting employment of females of any age or males under the age of 16 underground; further, the lease must require payment of wages at least twice monthly in lawful money. A lessee has the right to relinquish rights under a lease or to surrender any legal subdivision of the area included within the lease, but may not assign or sublet without the consent of the Secretary of the Interior.[5]

6.3 PHOSPHATE, POTASSIUM AND SODIUM LEASES[6]

Lands that are not known to contain phosphate, potassium or sodium are subject to prospecting under prospecting permits issued for a period of 2 years. If there is a discovery of the mineral sought, the permit holder is entitled to a preference lease. As to lands known to contain phosphate, potassium, or sodium, all leasing is done on a competitive basis according to published notice. Leases are for a period of 20 years, or so long thereafter as the lessee complies with the conditions of the lease. The area in any one lease may not exceed 2,560 acres in the United States land survey subdivisions. For phosphate leases rental of 25 cents per acre for the first year is charged, 50 cents for the second and third years, and $1 per acre for each year thereafter, with a minimum royalty of 5 percent. For potassium and sodium leases the rental is 25 cents per acre for the first year, 50 cents per acre for the second through fifth years and $1 per acre thereafter, with a 2 percent royalty. In each instance, rentals apply against minimum royalties.

6.4 COAL LEASES[7]

Coal prospecting permits for a period of 2 years can be obtained where it is necessary to conduct prospecting or exploratory work to determine the existence of coal deposits. If coal in commercial quantities is discovered, a preference lease can be

obtained. In areas of known coal deposits the Secretary of the Interior has authority to divide the land into leasing tracts and advertise for bids in leasing tracts not exceeding 2,560 acres in any one tract. Under any lease the annual rental shall be 25 cents per acre for the first year, not less than 50 cents for the second through the fifth years, and not less than $1 per acre thereafter, with a fixed royalty of not less than 5 cents per ton.

6.5 OIL SHALE LEASES[8]

A lease to mine for oil shale can be obtained covering tracts not exceeding 5,120 acres of land, pursuant to regulations adopted by the Secretary of the Interior. There is no minimum statutory royalty, but there is a minimum rental of 50 cents per acre per year. Royalties are set by the Secretary of the Interior when a lease is granted.

6.6 OIL AND GAS LEASES

Because of the large areas involved, leasing for oil and gas has become much more highly regulated than other leasing under the mineral leasing law. Reference is made to the regulations published by the Bureau of Land Management for detailed information regarding oil and gas leasing.[9] Leases are granted for areas not exceeding 640 acres, and in general include a 12½ percent royalty for noncompetitive leases. A noncompetitive lease can be obtained on areas not within any known geologic structure of a producing oil or gas field. Lands within a known structure can be leased only by competitive bidding, either at public auction or by sealed bid, at which time bidding may be based upon the bonus to be paid, upon the royalty to be paid, or both, as is specified in the notice which is published. In addition to a royalty, rental at the rate of 50 cents to $2 per acre is charged. It should be noted that oil and gas exploration and production in the State of Washington is regulated under the Washington Oil and Gas Conservation Act.[10]

6.7 OTHER LEASING PROVISIONS

Under the Outer Continental Shelf Lands Act, leases can be obtained for areas lying more than 3 miles from the shoreline in lands overlain by maritime waters.[11] Although the original purpose of the act was to permit leasing for oil and gas, and for sulfur, a lease can be obtained for any minerals. The Bureau of Land Management can supply full information regarding current regulations[12] and procedures for leasing lands in the Outer Continental Shelf.

Because of the limitations imposed by the Wilderness Act, regulations have been adopted requiring that any lease of wilderness areas be subject to the restrictions imposed by the Secretary of Agriculture to preserve the wilderness character of the lands included in the wilderness area.[13]

Regulations have been adopted to permit leasing for minerals other than those covered by the Mineral Leasing Law of 1920 in lands administered by the Department of the Interior that are not part of the public domain.[14] These are principally acquired lands that are not included in Indian reservations, national parks or monuments. Provision is made for prospecting permits, and if there is discovery of valuable mineral, a preference right to lease. The royalty to be established in any lease is subject to negotiation. If minerals are known to exist competitive leasing is required, with oral auction or sealed bids; the lease to be awarded to the highest bidder.

Mineral rights reserved to the United States are subject to leasing, provided the regulations established to protect the surface owner are satisfied.[15]

By the Act of May 21, 1930,[16] the Secretary of the Interior may lease lands for production of oil and gas that are included within a railroad or other right-of-way.

Under the Act of August 4, 1939,[17] the Secretary of the Interior is granted the right to permit removal of sand, gravel, and other minerals and

building materials from lands withdrawn or acquired and being administered under the Federal reclamation laws, in connection with the construction or operation and maintenance of any project. In the act of October 2, 1968,[18] it is specifically provided that nonleasable minerals in the Ross Lake and Chelan National Recreation Areas shall be disposed of by leasing under this statute. This appears anomalous on its face, and presumably the matter will be clarified by subsequent regulation by the Interior Department. However, to the date of publication of this bulletin (1974), such regulations have not been published.

FOOTNOTES—ARTICLE VI.

1. 30 U.S.C. 193. Sulfur was added in 1926 but is limited to the States of Louisiana and New Mexico.
2. See Section 1.1, this bulletin. In regard to reserved mineral rights see 30 U.S.C. 182 and Section 1.15, this bulletin.
3. See generally 43 C.F.R. 3500 - 3504.9-1.
4. 30 U.S.C. 181; 43 C.F.R. 3502.1-1.
5. See 30 U.S.C. 187.
6. Generally, see 30 U.S.C. 211-214 regarding phosphate; 30 U.S.C. 281-287 regarding potassium (potash); and 30 U.S.C. 261-263 regarding sodium.
7. Generally, see 30 U.S.C. 201-209.
8. Generally, see 30 U.S.C. 241.
9. 43 C.F.R. 3100.0 - 3109.5. See 30 U.S.C. 221-229 for statutory requirements.
10. See Section 7.4, this bulletin.
11. See Section 1.16, this bulletin.
12. 43 C.F.R. 3307.1 - 3307.6.
13. 43 C.F.R. 19.1 - 19.8. See Section 1.4, this bulletin.
14. 43 C.F.R. 3500.0 - 3500.2. See Section 1.2, this bulletin.
15. See Section 1.15, this bulletin.
16. 30 U.S.C. 301-306.
17. 43 U.S.C. 387-390.
18. P.L. 90-544; 82 Stat. 926.

ARTICLE VII.

LANDS OWNED BY THE STATE OF WASHINGTON

7.1 CLASSIFICATION OF STATE-OWNED LANDS

Under various Federal statutes the State of Washington has been granted somewhat more than 3 million acres of land since statehood, which constitutes approximately 7 percent of the lands in the state not overlain by water.[1] In addition to these grants, the State acquired title to the beds and shores of all navigable inland waters, and to lands underlying maritime waters out to 3 miles from the coastline.[2] By far the most important category is the grant of lands for common schools of numbered sections 16 and 36 in each township contained in the enabling legislation admitting Washington to statehood. The history of these grants is discussed in Section 1.14 of this bulletin, but it is important to note that the grants for the benefit of the common schools encompassed approximately 80 percent of all Federal grants to the State of lands other than those overlain by water. In addition to these lands, grants have been made for a number of purposes, principally for the support of various educational institutions. Where mining laws are concerned, the purpose of the original grant is not particularly relevant because it simply controls the disposition of income received from the lands.

The State has classified as "public lands" those lands either belonging to or held in trust by the State "which are not devoted to or reserved for a particular use by law."[3]

In addition to other classifications, the State has classified tidelands and shorelands as first and second class.[4] First-class tidelands lie between the line of ordinary high tide and a line defined as the inner boundary of the harbor area, within 1 mile of the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide out to 2 miles from the corporate limits of any city. Second-class tidelands are lands lying between ordinary high tide and the line of extreme low tide more than 2 miles from the corporate limits of any city. First-class shorelands are lands under a navigable lake or river between the line of ordinary high water and the line of navigability within 2 miles of the corporate limits of any city, and second-class shorelands are lands between the line of ordinary high water and the line of navigability more than 2 miles from the corporate limits of any city. These classifications are important only because the state has in some instances separately platted and sold the shorelands and tidelands.

7.2 MINERAL DISPOSITION BY THE STATE

Since 1907, the State has reserved in all sales of any state lands all "oils, gases, coal, ores, minerals and fossils of every name, kind or description," together with the right to explore for them and to open, develop, and work mines for the reserved minerals and the right to essential surface usage for the purpose of mining.[5] Since 1907, all reserved minerals have been subject to disposition only by lease from the State of Washington. Minerals have been leased under three separate leasing categories: oil and gas, coal, and mineral. At the present time all leasing by the State for mining purposes is administered by the Department of Natural Resources in Olympia, Washington.

Since the early days of statehood, "valuable materials" have been handled on a different basis, and have been subject to sale. Some difficulty was generated by the problem of determining which mineral substances were subject to disposition as "valuable materials," and which were subject to disposition

only under the leasing laws. In 1959 the State Legislature established a definition for "valuable materials," which are now defined to mean "any product or material on (State) lands, such as forest products, forage or agricultural crops, stone, gravel, sand, peat, and all other materials of value except mineral, coal, petroleum, and gas . . . ."[6] Valuable materials are subject to sale by the Commissioner of Public Lands, following appraisement, for not less than the appraised value of such materials. If the appraised value is more than $2,000, sale must be by auction or sealed bids after advertising for bids for 4 weeks. If the appraised value is less than $2,000, sale must be by public auction after a 10 day publication of notice of sale; if the appraisal is less than $100, the materials may be sold for cash without advertising for bids.[7]

7.3 MINERAL LEASING LAW

1927 to 1965[8]

Prior to the last major revision of the mineral leasing law, which was effective June 10, 1965,[9] mineral leasing was conducted under a statutory program adopted in 1927.[10] Under this program, lands could be leased to prospect for, and contracts could be entered into for the mining of, all valuable minerals (except coal) in tracts not exceeding 80 acres according to the legal subdivisions established in the United States Government surveys.

The prospecting lease provided for under this program was a 2-year lease requiring work or improvements upon the leased premises in an amount not less than $50 for each 40 acres, and giving the lessee the right to use timber on the leased property for the purpose of construction of buildings, drains, tramways, and supports, as necessary for prospecting only, and also giving the lessee the right to remove not more than 5 tons of ore from the leased property during the term of the prospecting lease for the purpose of testing and assaying. The holder of the prospecting lease had a preference right to a renewal by giving notice 60 days prior to expiration of the prospecting lease.

The holder of the prospecting lease had the right to apply for a mining contract, whereupon the Commissioner of Public Lands was charged with the duty of making an investigation of the lands described in the application, in order to determine whether the lands contained mineral in quantities sufficient to warrant extraction, whether extraction was feasible, and the estimated amount of damages that would accrue by reason of the proposed mining. If the lands had previously been leased, with a reservation of minerals, for any purpose other than mineral prospecting, the Commissioner was required to hold a hearing to determine the damages that would accrue to the lands by mining, and to require payment of the damages before execution of the mining contract. Mining contracts were permitted for periods not exceeding 20 years. The contract holder was required to pay rental of $10 for each 40 acres or fraction thereof, plus a royalty "at a rate to be determined by the Commissioner of Public Lands, but which rate shall not be less than 1 percent of all moneys received from the sale of minerals from the lands covered by the contract," after deducting transportation costs from mine to market, or to any smelter, concentrating plant, or other place of sale, and the costs of treatment such as milling, smelting, and refining after mining and before sale. The statutes provided for a renewal of a mining contract upon notice given within 90 days before the expiration of the contract, provided there had been good faith compliance with the terms of the contract.

Statutory provision was made for consolidation of mining contracts under a common management by the holders of two or more contracts, after application to the Commissioner of Public Lands. However, the opinion has been expressed that the 80-acre limi-

tation upon holding of leased lands was mandatory under the statutes, and that any attempted outright assignment of contracts aggregating more than 80 acres to any one holder was void.[11]

1965 to date (1974)

Under the 1965 revision of the State mineral leasing law, the Department of Natural Resources has the power to execute leases to prospect for, and contracts for mining of, "valuable minerals and specified materials, except hydrocarbons," from any "public lands" owned by or held in trust by the State, or which have been sold and the minerals reserved by the State, in tracts not exceeding the equivalent of one section of land, and not less than one-sixteenth of a section in legal subdivisions according to the United States Government surveys.[12] The Department of Natural Resources has authority to establish rules and regulations to administer the mineral leasing law, and rules and regulations have been adopted and may be obtained from the Department of Natural Resources.[13] Many of the provisions that were formerly statutory are now set forth in the rules and regulations.

Application may be made for a prospecting lease for a 2-year term, which can be converted into a mining contract,[14] or application may be made for a mining contract in the first instance.[15] A prospecting lease requires payment of rental of 25 cents per acre per year during its 2-year term, and the holder must show development work in an amount of not less than $1.25 per acre per year before the lease can be converted to a mining contract. If a lessee fails to convert a prospecting lease to a mining contract prior to its expiration, he is prohibited from obtaining a new prospecting lease or mining contract covering the same land for a period of 1 year.

A mining contract requires rental of 25 cents per acre per year during the first and second years, and 50 cents per acre during the third and fourth years. During the fifth through the twentieth years, minimum royalty payment of $2.50 per acre per year is required in lieu of annual rental. The minimum royalty is payable in advance; however, it will be credited against any production royalties that are payable. During the first through the fourth year of a mining contract, the holder must perform development work or make improvements, as those terms are defined in the regulations[16] in an amount of not less than $1.25 per acre each year. For the fifth year and each year thereafter, development work must be performed in an amount of not less than $2.50 per acre per year. A contract holder has the right at any time to terminate the contract or to surrender one or more legal subdivisions covered by the contract by giving written notice to the Department of Natural Resources.[17]

The 1965 statute provides that under any lease or contract the State retains the right to sell or otherwise dispose of any timber, sand, or gravel on lands covered by the lease or contract.[18] If the lands are the subject of an outstanding lease for other purposes, or the retained mineral right of the State is the only interest the State has, the burden is placed upon the prospective lessee or contract holder to reach agreement with the holder of the surface rights in regard to damages. If agreement cannot be reached, the Department will estimate the amount of damages, and the applicant must post a cash bond or a surety bond in an amount sufficient in the opinion of the Department, to cover such damages, prior to the issuance of the lease or mining contract.[19]

The regulations adopted by the Department of Natural Resources permit removal of valuable minerals up to a value of $100 per year for the purpose of testing and assaying, without payment of royalties. Any additional minerals mined or removed are subject to payment of royalties.[20] The regulations provide

for three categories of royalties: the "established royalty," the "standard royalty," and a "negotiated royalty."[21] The Department has authority to establish a royalty for any specific mineral on any specific tract of land at any time that no application for a lease or contract is pending, and is required to maintain a file of established royalties in its office. If there is no established royalty, a royalty of 3 percent is the "standard royalty," which will apply unless a "negotiated royalty" has been agreed upon. Any applicant has the right to make a proposal regarding royalties, which may include such matters as recoupment of agreed-upon exploration and development costs, royalties lesser in amount than the 3 percent standard royalty, or any other arrangement that can be negotiated with the Department of Natural Resources. In the absence of agreement upon a negotiated royalty, assuming no established royalty is in effect, the standard royalty will apply if the lease or contract is executed.

All royalties are determined by applying the applicable percentage against the "gross income from the property from mining," which is the amount used in determining the basis for percentage depletion under the Internal Revenue Code of the United States. This permits elimination of duplicate accounting.[22] In essence, this is comparable to "net smelter returns," being the gross value less treatment charges and transportation from mine to point of sale. The Department of Natural Resources has authority to require supporting books and records, including Federal and State tax returns, to support the computation of royalties.[23]

7.4 OIL AND GAS LEASES

Oil and gas leases are currently (1974) granted by the Commissioner of Public Lands of the State of Washington in tracts of not more than 640 acres, except for leases on lands overlain by water, which may include not more than 1,920 acres.[24] Leases are subject to rules and regulations that have been adopted by the commissioner, and a copy of these rules and regulations may be obtained from the State Department of Natural Resources. An initial lease is for a period of 5 years, but preference right is given for renewal for additional 20-year periods. Rental is required at the rate of 50 cents per acre per year until commencement of production, and thereafter a minimum royalty of $5 per acre per year is payable. Royalties are established at 12½ percent of the gross production of all oil, gas, or other hydrocarbons produced.

Lands that have been classified by the Commissioner of Public Lands as being within a known geologic structure of a producing oil or gas field are subject to leasing by bid to the person offering the greatest cash bonus following publication of notice by the commissioner.[25] Regulations of the Department of Natural Resources require all oil and gas leasing to be by bid, whether or not within a known geologic structure.

Since 1951 all oil and gas exploration and production in the State of Washington has been regulated by the Oil and Gas Conservation Act,[26] which established the Oil and Gas Conservation Committee to administer the act. The act is a comprehensive conservation law regulating all aspects of exploration and production. The committee has adopted rules and regulations in order to implement enforcement of the act.

7.5 COAL LEASES

Public lands of the State containing known deposits of coal and reserved coal deposits owned by the State may be leased by the Commissioner of Public Lands for periods not exceeding 20 years.[27] Leases require payment of a royalty for each long ton (2,240 pounds) at the rate of not less than 10 cents for lignite coal, not less than 15 cents for subbituminous coal, and not less than 20 cents per ton for high-grade bituminous and coking coals, with a minimum royalty

of not less than $1 nor more than $10 per acre per year.

For lands not known to contain coal, a prospecting lease (option contract) can be obtained in tracts of up to 640 acres for $1 per acre (with a minimum of $50). These prospecting leases are called option contracts and are for a term of 1 year for the purpose of testing to determine whether coal is present. The holder has the option to obtain a lease at any time during the term of the option contract.

Provision is made for agreement with the owner of any surface rights regarding the amount of damages that will accrue to the surface owner by prospecting for or mining of coal. In the event the parties cannot agree, the holder of the option contract or lease has the right to commence an action in the Superior Court to determine the amount of damages.

7.6 COUNTY LANDS

The county commissioners have authority to sell, lease, or grant options to purchase any mining claims, reserved mineral rights, or other county property, however acquired, for purposes of mining.[28] In doing so, county commissioners can negotiate a transaction in much the same manner as a private owner can do. In the sale of lands the county commissioners have the right to reserve mineral rights.[29] Provision is made for payment of damages to the surface owner when mining is contemplated under any reserved mineral right. If agreement cannot be reached with the surface owner regarding damages, the county, its successors or assigns, or any applicant for a lease or a mining contract may institute proceedings in the Superior Court to determine the damages.

FOOTNOTES—ARTICLE VII.

1. Public Land Statistics, 1971, U.S.D.I.
2. See Section 1.16, this bulletin.
3. RCW 79.01.004.
4. RCW 79.01.008 - 79.01.032.
5. Laws of 1907, Ch. 256; now codified in RCW 79.01.224.
6. RCW 79.01.038.
7. RCW 79.01.124, RCW 79.01.132, and RCW 79.01.200.
8. It is necessary to review the law of this period because many contracts executed by the State prior to 1965 are still in effect.
9. Laws of 1965, Ch. 56; codified as RCW 79.01.617 - 79.01.650.
10. Laws of 1927, Ch. 255.
11. Op. Atty. Gen. (Wash.) 1923-1924, p. 162.
12. RCW 79.01.616; "tracts" is used in the plural and there should be no limit upon the number of leases which may be held by one person.
13. Rules and regulations must be adopted pursuant to the Administrative Procedure Act, RCW 34.04; the regulations that have been adopted are designated WAC 332-16-010 through 332-16-340.
14. RCW 79.01.620; RCW 79.01.632.
15. RCW 79.01.636.
16. See WAC 332-16-200 through 332-16-240. Acceptable development work includes construction of roads and trails (for direct access to or on leased premises); construction of buildings useful only for mining; and geophysical, geochemical, and geological surveys (for up to 2 years), if maps showing sampling or survey stations are submitted to the department. Unacceptable development work includes travel or living expenses; construction of buildings such as cookhouses or residences; milling; and smelting. Reports upon department forms are required.
17. RCW 79.01.636.
18. RCW 79.01.650; see also WAC 332-16-150.
19. RCW 79.01.624; see also WAC 332-16-180.
20. WAC 332-16-260.
21. WAC 332-16-270.
22. WAC 332-16-280.
23. WAC 337-16-300.
24. Generally see RCW 79.14.010 - 79.14.900.
25. RCW 79.14.080.
26. RCW 78.52.001 - 78.52.310.
27. Generally see RCW 79.01.644 - 79.01.696.
28. Generally see RCW 78.16.010 - 78.16.070.
29. RCW 36.34.010, and RCW 84.64.270.

ARTICLE VIII.

PRIVATE LANDS

8.1 SOURCE OF TITLE AS AFFECTING MINING RIGHTS

Because all lands in the State of Washington were at one time Federal lands,[1] the first determining point of private mining rights held is the law under which the lands were conveyed by the Federal Government. In Articles I and IV of this bulletin the subjects of reservations of minerals in the United States,[2] patents under the various nonmineral acts,[3] lands segregated for the Northern Pacific Railroad Company,[4] lands granted to the State of Washington,[5] and lands patented under the mineral location laws[6] have been discussed.

Assuming that the appropriate mineral rights have been transferred by the Federal Government by way of patent, or otherwise, private mineral rights fall into three broad categories: Unpatented mining claims; rights acquired under a mineral patent; and rights acquired under the nonmineral entry acts, including patents issued to the Northern Pacific Railroad Company or to the State of Washington. Except for unpatented mining claims, in which the sole right of possession is for the purpose of mining, mineral rights can be severed by any owner in the chain of title by appropriate reservation or by appropriate grant in a deed. It should be noted that one of the principal differences in mineral rights acquired under a patent of a mining claim, or under a nonmineral patent, is the effect of extralateral rights, which are both a benefit and a burden to lands acquired under mining-claim patent. Extralateral rights arise only under the location laws and are unique.[7]

The private owner of mineral rights in or of the entire fee interest in property can either mine the property himself or can convey or lease the right to mine.

8.2 RESERVED MINERAL RIGHTS

Much potential difficulty has been caused by the language used in reserving or granting a mineral right in conveyances between private parties. Although very little litigation has reached the Supreme Court of Washington to date (1974), there could be serious question regarding the rights that are actually reserved or granted by some of the language that has been used in separating the mineral rights from the surface rights. The State of Washington Supreme Court, in construing the meaning of the word "minerals" in a reservation, has indicated that each case must be decided on the language used in the grant or reservation, the circumstances surrounding the grant or reservation, and the intention of the grantor if it can be ascertained.[8] Although a different rule has been applied in regard to minerals inherently valuable, common mineral substances such as sand and gravel,[9] limestone,[10] granite,[11] and marble[12] have been held not to be reserved by a broad reservation of mineral. This is particularly true when the mining would have to be by open pit and a large percentage of the surface area would necessarily have to be destroyed.[13] In some instances, before attempting to mine pursuant to any mineral right that has been severed from the surface ownership, it may well prove prudent to seek court interpretation of the rights that have been reserved or granted.

Although it is possible to assess real estate taxes against a severed reserved mineral right separate and apart from the taxes assessed against the surface ownership, this has generally not been done. If the surface owner loses his interest through tax sale by reason of nonpayment of taxes, the owner of the reserved mineral right does not lose his interest, and the same is not subject to tax sale, unless taxes have been as-

sessed against the reserved mineral interests separately, and a tax sale is imposed by reason of nonpayment of the separate taxes.[14/] It has been held that the loss of surface rights to an adverse party by adverse possession does not affect a previously severed mineral right, and the holder of surface title by adverse possession does not acquire the mineral rights.[15/]

FOOTNOTES—ARTICLE VIII.

1. See Introduction, this bulletin.
2. See Section 1.15, this bulletin.
3. See Section 1.12, this bulletin.
4. See Section 1.13, this bulletin.
5. See Section 1.14, this bulletin.
6. See Section 4.3, this bulletin.
7. See Section 4.3, this bulletin.
8. Puget Mill Company v. Duecy, 1 Wn.2d 421 (1939).
9. See Kinder v. LaSalle County Carbon Coal Co., 141 N.E. 537 (Illinois 1923).
10. See Campbell v. Tennessee Coal, Iron & R. Co., 265 S.W. 674 (Tenn. 1924).
11. See Armstrong v. Lake Champlain Granite Co., 42 N.E. 186 (N.Y. 1895).
12. See Deer Lake Co. v. Michigan Land & Iron Co., 50 N.W. 807 (Mich. 1891).
13. See Carson v. Missouri Pacific R. Co., 209 S.W. 2d 97 (Ark. 1948).
14. McCoy v. Lowrie, 42 Wn.2d 24 (1953).
15. McCoy v. Lowrie, 42 Wn.2d 24 (1953).

ARTICLE IX.

RIGHTS-OF-WAY AND WATER RIGHTS

9.1 RIGHTS-OF-WAY—FEDERAL LANDS

The Secretary of the Interior is authorized to permit the use of a right-of-way through public lands of the United States,[1] including national forests,[2] that are not within the limits of a national park, military or Indian reservation, upon application to the Bureau of Land Management. Regulations regarding rights-of-way have been adopted and are administered by the Bureau of Land Management.[3] In order to obtain a right-of-way, the applicant must be a citizen or association of citizens of the United States engaged in the business of mining, quarrying, or logging. A right-of-way can be obtained not only for roadway purposes, but also for canals, water pipes, ditches, and the like, for mining or milling purposes.[4]

Since adoption of the Wilderness Act, rights-of-way into wilderness areas have been substantially restricted, particularly to any mining location made after the date the wilderness area is first designated as such.[5]

An 1866 Federal statute[6] provides "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Under this statute, public usage of a right-of-way, or the opening of a road by any public authority, is deemed to be acceptance of the grant, making a public roadway across Federal lands.[7] However, it appears that usage by only one mining locator, or one mining company, is probably not adequate to constitute such a roadway a public highway under the statute.[8]

9.2 RIGHTS-OF-WAY—STATE LANDS

Upon receipt of a written application, the Commissioner of Public Lands of the State of Washington has authority to grant a right-of-way across any State-owned lands, upon payment of the appraised value of any timber that will be destroyed or any other damages that may be incurred.[9] Since 1911 all State lands, whether or not sold or leased in the meantime, have been subject to the right of the State or any grantee or lessee of the State to have a right-of-way to cross such lands for the purpose of transporting and moving timber, minerals, stone, sand, gravel, or other valuable materials.[10] The only condition is that the party seeking the right-of-way must pay reasonable compensation to the owner of the lands, and if the parties cannot agree, damages are to be set in a proceeding comparable to a condemnation action.

9.3 RIGHTS-OF-WAY—PRIVATE LANDS

A right-of-way across private lands must be obtained by agreement, or, under very limited circumstances, by condemnation. The Washington State constitution[11] provides for taking of private property by condemnation for "private ways of necessity, and for drains, flumes, or ditches on or across the land of others for agricultural, domestic, or sanitary purposes." Statutes have been enacted to establish procedures for condemnation of land for private ditches and drains,[12] and condemnation of private ways of necessity.[13] Necessity need not be shown in its strictest sense, as long as it can be shown that the private way that is being condemned is necessary to avoid other means that are not adequate, practical, safe, expeditious, or reasonable in cost.[14] However, mere improved convenience is not adequate to support condemnation.[15] It might be noted that the Federal mining laws make no provision for access across patented mining claims, and it is questionable

that there is any right-of-way automatically granted across a patented mining claim, unless the right-of-way could be supported by "local customs or rules of miners" in the district.[16] Access across unpatented claims is provided by Public Law 167 for claims subject to that act,[17] which includes all claims located after July 23, 1955.

Washington has a statute providing for condemnation of land for a right-of-way to erect and operate surface tramways or elevated cable tramways for the purpose of carrying, conveying, or transporting the product of mines, mills, or reduction works,[18] which can be exercised by corporations incorporated for and engaged in the business of owning and operating mines, mills, or reduction works. Presumably, by reason of the Washington State constitution, this right of condemnation would be limited by the concept of the "way of necessity," and could perhaps not be applied beyond this limitation.

9.4 MINE-TO-MARKET ROADS[19]

In 1939 a statute was enacted providing for mine-to-market roads in the State of Washington. A commission designated the Mine-to-Market Road Commission was created, and a procedure was established whereby five or more citizens interested in the development of mineral deposits to be serviced by a road or a trail can petition the county commissioners in the county or counties in which the proposed road would be located. If the county commissioners approve the petition, it is forwarded to the Mine-to-Market Road Commission for a feasibility study. If construction of the proposed road is determined to be feasible, the Director of Highways is empowered to construct the road or trail, but the county is required to furnish the right-of-way at its own expense, and to maintain the road after it is completed. Authorization is established for any private individual, firm, or corporation to donate labor, machinery, or equipment in aid of the location or construction of the road or trail. The mine-to-market road program is inactive now because no money has been appropriated for it from 1950 to the present time (1974).

9.5 WATER RIGHTS

Starting with the Desert Land Act of 1877,[20] which was enacted prior to Washington's admission to statehood, the Federal Government declared all waters upon public lands, except for navigable waters, free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes. The Supreme Court of the United States has held that the Desert Land Act separated the nonnavigable waters from the lands and that any patent issued thereafter impliedly reserved the water.[21] However, the court indicated that each state could control the disposition of water according to its own program. The State of Washington adopted what has been called the "California Doctrine," which recognizes both riparian rights and rights by appropriation. The basic concept of riparian rights is that a riparian owner, one who owns land abutting on a stream (or littoral rights for lands abutting on a lake), has a right to have a stream flow by his property free from unreasonable detention or substantial diminution in quantity or quality. As this doctrine is applied in Washington, the riparian right has been restricted to a reasonable use theory,[22] and waters in excess of the amount that can be used beneficially within a reasonable time on riparian lands have been held to be subject to appropriation for use on nonriparian lands.[23]

Appropriation of water has been recognized in Washington since the earliest days, first by custom, then by a notice statute, and, under the 1917 Water Code,[24] by permit only. The 1917 Water Code is very explicit in its terms regarding the right to use water in the state, and application for a permit must be made before any rights can be acquired. An ap-

plication for appropriation must be made to the Department of Ecology in Olympia, Washington, for a permit to make appropriation.[25] A temporary permit can be issued while the application is acted upon, but it is not lawful to use water in the absence of a permit. The application must state[26] the name and the address of the applicant, the source of water supply, the nature and the amount of the proposed use, the time during which water will be used each year, the location and description of proposed ditches or other works, and the time within which construction will be completed and the water will be put to use. If the water is desired for mining purposes, the application must state the nature of the mines to be served and the method of supplying and utilizing the water, as well as the location of the mines by legal subdivisions. In 1945, the appropriation procedure was extended to cover subsurface or ground waters.[27]

Although existing rights were recognized by the Water Code of 1917, the language of the code suggests the possibility that patents issued after its effective date cannot carry riparian rights,[28] even though riparian rights would have been recognized earlier. Priority to use water under the appropriation system is based upon the principle that first in time is first in right, and the rights acquired by appropriation under the 1917 Water Code date from the date of filing an application.[29]

A Federal statute provides that waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes under the laws of the state wherein the national forest is situated or under the laws of the United States and rules and regulations established thereunder.[30] It appears that no Federal rules and regulations have been established, and that the Washington State appropriation procedure should apply.

Use of water for irrigation, mining, and manufacturing is recognized to be a public use in the Washington State constitution,[31] and provision is made in the 1917 Water Code for condemnation of the right to use water, together with the property necessary for the storage of water or the application of water to beneficial uses.[32] Under this procedure the courts are charged with the duty of determining what use will be for the greatest public benefit.

9.6 DAMS AND RESERVOIRS

Before any dam or reservoir for the storage of ten acre-feet or more of water can be built in the State of Washington, the plans and specifications must be submitted to the Department of Ecology for approval and a permit.[33] The Commissioner of Public Lands has the authority to grant overflow rights to hold water over State-owned lands.[34] If the stream to be dammed or impeded is a navigable stream, a license is required from the Federal Power Commission under the Federal Power Act.[35]

9.7 NATIONAL FOREST USE PERMITS

Under the Act of June 4, 1897,[36] rights of ingress and egress are assured to settlers within the boundaries of national forests, giving them the right to cross to and from their property or homes. It would appear that the general rights of access granted should extend to persons who enter the land under the mining laws. However, the statute expressly provides that the right to build roads and other improvements shall be under such rules and regulations as may be prescribed by the Secretary of Agriculture. The same statute grants a clear right of access into national forest lands for purposes of prospecting, locating, and developing mineral resources, provided there is compliance with the rules and regulations covering the national forest.

The practice has developed of granting use permits for private usages within the national forests, including use for roads, reservoirs, airports, and the

like.[37] The Forest Service has reasonably broad discretion in establishing terms for private usage, either for roads or other usage. Permits may be granted on a month-to-month basis, or for a term of years, with or without rental. A fairly common practice is for the Forest Service to cooperate in establishing a road, at the expense of the user, which road then becomes a Forest Service road, subject to Forest Service regulation and Forest Service usage for fire control and forest maintenance. Application should be made to the Forest Supervisor of the national forest in which a use permit is sought.

FOOTNOTES—ARTICLE IX.

1. 43 U.S.C. 956.
2. 16 U.S.C. 524 and 525. A right-of-way across national forest lands is rarely obtained. The general practice is to obtain a Forest Service use permit (see Section 9.8, this bulletin).
3. 43 C.F.R., part 2800.
4. See 43 U.S.C. 956 and 16 U.S.C. 524-525.
5. See Section 1.4, this bulletin.
6. 43 U.S.C. 932.
7. Kirk v. Schultz, 119 P.2d 266 (Idaho 1941).
8. Ball v. Stephens, 158 P.2d 207 (Cal. 1945).
9. RCW 79.01.332.
10. RCW 79.01.312.
11. Wash. Const., Art. I, Sec. 16 (Amend. 9).
12. RCW 85.28.010 - 85.28.150.
13. RCW 8.24.010 - 8.24.040.
14. State ex rel. Sherman Creek Land & Irr. Co. v. Superior Court, 148 Wash. 680 (1928).
15. State ex rel. Stephens v. Superior Court, 111 Wash. 205 (1920). See Sherman Mining Co. v. Smith, 54 Wn. 2d 607 (1959), to the effect that condemnation of underground right-of-way for a mining tunnel is not permitted.
16. See 30 U.S.C. 22.
17. 30 U.S.C. 612(b); however, the converse appears to be true with regard to claims prior to the act. See Robertson v. Smith, 7 M.R. 196 (1871).
18. RCW 78.04.010 - 78.04.020.
19. Generally, see RCW 78.48.00 - 78.48.080.
20. 43 U.S.C. 321-329.
21. California Oregon Power Co. v. Beaver Portland Cement, 295 U.S. 142 (1935).
22. Geddis v. Parrish, 1 Wash. 587 (1890).
23. State v. American Fruit Growers, 135 Wash. 156 (1925).
24. RCW 90.03.010 - 90.03.480.
25. RCW 90.03.250; Chap. 62, Laws of 1970.
26. RCW 90.03.260.
27. RCW 90.44.010 - 90.44.250.
28. See RCW 90.03.010.
29. RCW 90.03.340.
30. 16 U.S.C. 481.
31. Wash. Const. Art. XXI, Section 1.
32. RCW 90.03.040.
33. RCW 90.03.350; Chap. 62, Laws of 1970.
34. RCW 79.01.408.
35. 16 U.S.C. 791a-793, 795-818, 820-825. See Section 1.16, this bulletin regarding the concept of navigability.
36. 16 U.S.C. 478.
37. See generally 36 C.F.R., Part 212; 36 C.F.R., Part 251.

ARTICLE X.

REGULATION FOR PROTECTION OF THE ENVIRONMENT

10.1 RECLAMATION OF SURFACE-MINED LANDS

In 1970 the State of Washington adopted a statute requiring reclamation of lands disturbed by surface mining.[1] In general, the statute requires that a permit be obtained by a proposed operator prior to commencing mining by surface-mining methods. An exception is made for excavation or grading for farming, onsite construction, and offsite borrow pits used solely for access roads on the property of the owner. Prospecting and exploration activities are included if they are of such nature to disturb more than one acre per eight acres of land area. All other surface excavations or openings made for the purpose of removing minerals of any description are subject to the permit requirement if the minimum size limitation is exceeded. If less than 10,000 tons of minerals are produced, or less than two acres of land is disturbed within a 12-month period, the mining activity is not subject to regulation under the act.

Generally, the program in the State of Washington requires application for a permit, prior approval of a reclamation plan, and posting of bond or other financial security to assure that reclamation is accomplished. The Board of Natural Resources is charged with the administration of the act, utilizing the services of the Department of Natural Resources. The effective date of the act was January 1, 1971.

Effective February 14, 1969, Federal regulations were adopted regulating reclamation of lands disturbed by mining under prospecting permits and mineral leases entered into under the various Federal mineral leasing laws.[2] The Federal regulations are very detailed and appear to cover activities not included under the State of Washington regulatory program, including onsite processing and discovery activities. The general program under the Federal regulations is similar to that administered under the State program, requiring posting of performance bonds or cash or negotiable U.S. Government bonds to insure compliance with a reclamation plan, which must be approved prior to commencement of activities. Administration of the Federal program is by both the Bureau of Land Management and the U.S. Geological Survey.

Presumably, a surface-mining operation conducted upon lands held under Federal mineral lease is subject to regulation both under the State program and the Federal program.

10.2 WATER POLLUTION CONTROL

Water pollution control is under the jurisdiction of the Department of Ecology of the State of Washington.[3] It is unlawful either to cause or permit any substance to pass into the waters of the State which causes or tends to cause a polluted condition except as permitted by the Department of Ecology of the State of Washington.[4] The Department of Ecology can issue, upon application, a waste disposal permit to allow the disposal of solid or liquid waste material into the waters of the State,[5] and has the authority to hold hearings if necessary in connection with an application for, or modification or termination of a waste disposal permit.[6] Provision is made for court appeals for persons aggrieved by orders or directive of the department.[7]

Effective October 18, 1972, the Federal Water Pollution Control Act[8] was amended to provide for a new program of regulation by the U.S. Environmental Protection Agency, under which, in general, a permit must be obtained before any industrial oper-

ation, including any mining operation, discharges any pollutant into any waters. The regulatory program encompasses almost any discharge of water, and any person proposing to commence operations of any nature should apply to the U.S. Environmental Protection Agency for more information and for details regarding permits.[9]

10.3 AIR POLLUTION CONTROL

Regulation of air pollution is administered by the Department of Ecology of the State of Washington, and by county air pollution control authorities.[10] The Department of Ecology has the power to adopt air quality objectives and air quality standards, which need not be uniform in all parts of the state. Reference is made to the county air pollution authority and to the Department of Ecology for specific rules and regulations affecting any particular area in the State of Washington.

10.4 OIL SPILLAGE REGULATION

In 1970, the State of Washington enacted a statute imposing absolute liability upon persons permitting oil or petroleum products to be discharged into any waters of the State.[11] This act is administered by the Department of Ecology of the State of Washington, which has the power to impose penalties.

FOOTNOTES—ARTICLE X

1. RCW 78.44.010 - 78.44.930; see regulations in WAC 332-18-010 through 332-18-120.
2. 43 C.F.R. Part 23.
3. Generally, see RCW 90.48.010 - 90.48.900; also Chap. 62, Laws of 1970.
4. RCW 90.48.080.
5. RCW 90.48.160 - 90.48.210.
6. RCW 90.48.230.
7. RCW 90.48.230.
8. 33 U.S.C. 1251-1376.
9. Detailed regulations were published May 22, 1973, in Volume 38 Federal Register No. 98, and will be published as 40 C.F.R. 125.1 - 125.44.
10. Generally, see RCW 70.94.010 - 70.94.950; also Chap. 62, Laws of 1970.
11. RCW 90.48.315 - 90.48.410.

ARTICLE XI.

MISCELLANEOUS

11.1 MINING CORPORATIONS

Corporations, which are organized under the laws of the State of Washington and engaged in the mining business, are organized under the General Business Corporation Act, which was last amended in its entirety effective July 1, 1967.[1] However, there are some old statutes, in regard to mining corporations specifically, that should be noted. There is a statute giving corporations incorporated for the purpose of "acquiring, owning or operating mines, mills, or reduction works, or mining or milling gold and silver or other minerals" the right to condemn land for a right-of-way for a surface tramway or elevated cable tramway for transporting the products of mining.[2] Another statute provides that no subscription to the capital stock of a mining corporation is necessary if the amount of the capital stock consists of the aggregate valuation of the whole number of "feet, shares, or interests in any mining claim," and each owner of an interest in the mining claim is deemed to have subscribed to his pro rata share.[3] The statute was enacted in 1881, at which time the general corporation laws required subscription to all of the authorized capital of a corporation before it commenced business, a provision that has long since been removed from the general corporation law, possibly making the statute obsolete. A 1901 statute provides that any owner of stock to the amount of 1,000 shares in any corporation doing business in Washington for the purpose of mining shall have the right during all business hours on the property of the corporation to enter the property and examine the same, either on the surface or underground.[4] The 1,000-share limitation is not qualified with any par value or any like restriction. However, a duty is imposed upon the officers, managers, agents, superintendents, or other persons in charge of any such mining property to permit the shareholder presenting certificates for 1,000 shares of stock in the corporation to enter the property and make examinations. Violation of this requirement is made a misdemeanor.

A special provision in the corporation laws permits a corporation organized "solely for the purpose of developing natural resources" that does not own or operate any producing mine or property, upon filing of the appropriate affidavit, to pay a state license fee of $10 in lieu of all other annual license fees.[5] This provision permits a mining company to take advantage of the special license fee during the years when it has had no producing mine or property.

11.2 LABOR REGULATION—STATE OF WASHINGTON

It is beyond the scope of this bulletin to set forth more than a bare outline of the various provisions regulating labor and employment that are established by State law. Except for coal mining, which is covered by the Coal Mining Code,[6] most regulation by the State of Washington is supervised by the Department of Labor and Industries. The Department, through its appropriate divisions, has the power to set safety standards[7] and to make required inspections to enforce them.[8] There is no general underground mining code, except for coal mining, but under a statute that was originally enacted in regard to caisson work, some amendments appear to be applicable to general underground mining.[9]

The State has its own Minimum Wage Act,[10] in addition to the Federal act. State statutes prohibit discrimination because of race, creed, or color,[11]

and prohibit discrimination because of sex.[12] The Industrial Welfare Committee of the Department of Labor and Industries has authority to issue orders in regard to employment of minors and of women,[13] and an 8-hour day has been established for women.[14]

It is unlawful to pay wages by any order, check, memorandum, token, or evidence of indebtedness that cannot be redeemed at its face value for lawful money of the United States,[15] which prevents payment of wages by issuance of corporate stock or by similar means.

11.3 INDUSTRIAL INSURANCE[16]

The State of Washington maintains a mandatory industrial insurance program (workmen's compensation), which generally operates as a State monopoly. No private insurance is accepted as a substitute for the State coverage, but large employers may self-insure in very limited circumstances. Occupational diseases as well as all industrial injuries are covered. Generally, extrahazardous occupations are classified by separate classes, and all mining and milling operations, except for coal mining, fall into one class. Coal mining is in a class by itself. "Premiums" are payable based upon the number of employee hours reported in the class, and these payments are collectible by the State much in the same manner as a tax. Rates are set separately for each class, and rates for each individual employer are determined by the Department of Labor and Industries. Each class contributes to the Accident Fund and to the Medical Aid Fund. The entire program is supported by employer payments except for half the cost of the Medical Aid program, which may be deducted from employees' pay. Further information can be obtained from the Supervisor of Industrial Insurance of the Department of Labor and Industries, Olympia, Washington.

11.4 UNEMPLOYMENT INSURANCE[17]

Unemployment insurance coverage is mandatory in the State of Washington and is administered by the Employment Security Department. Within very broad limitations, the required contributions to the program are based upon claim experience. The State has authority to collect contributions in much the same manner as a tax. Further information can be obtained from the Employment Security Department of the State of Washington, Olympia, Washington.

11.5 SECURITIES REGULATION—BLUE-SKY LAWS

In addition to the requirements of Federal law, which are principally set forth in the Securities Act of 1933,[18] the State of Washington regulates the issuance of securities such as stocks or bonds to the public. It should be noted that an interest in a profit-sharing agreement, a preorganization certificate or subscription, an investment contract, or a certificate of interest or participation in a mining title or lease, or in payments out of production, are included within the definition of a security.

Generally, the issuance of securities in Washington is regulated by the Securities Act of Washington,[19] which provides for a simplified procedure called registration by coordination when there has been compliance with the Federal Securities Act of 1933. In addition to this procedure for public offerings of securities when there has not been compliance with the Federal act, provision is made for a short form registration by notification, if the issuer has been in business for at least five years and has had substantial net earnings as defined in the act. If these provisions cannot be satisfied, provision is made for full registration, which is classified as registration by qualification.

11.6 LABOR AND MATERIAL LIENS

There is no special statute in Washington regarding labor or material liens in regard to mining properties, and these liens are controlled by the general lien statutes.[20] Generally, anyone furnishing labor or materials to improve any real property has a right to claim a lien by filing notice of lien,[21] provided that the labor or materials were furnished at the request of the owner. If the labor or materials were furnished at the request of a contractor or agent of the owner, notice must be given to the owner within sixty days after the first labor or materials are furnished or a lien cannot be claimed. Generally, a lien cannot be claimed because of work or materials ordered by a lessee, unless the lessee is required to make improvements.[22]

The general lien statutes specifically mention mining claims as being subject to liens, but the State of Washington Supreme Court has never yet been required to rule whether or not this includes unpatented mining claims, which the court has on numerous occasions determined to be personal property, and not real property.[23]

11.7 EXPLOSIVES

A new and comprehensive law was enacted in 1969 regulating the use and storage of explosives, which is cited as the Washington State Explosives Act.[24] The act requires a license issued by the Department of Labor and Industries in order to purchase or store explosives in the State of Washington. Any person seeking to purchase or store explosives in the state should contact the Department of Labor and Industries.

11.8 MINING ENGINEERS AND SURVEYORS

It is unlawful for any person to practice or to offer to practice engineering or land surveying in the State of Washington unless registered, following examination by the State Board of Registration for Professional Engineers and Land Surveyors. However, nonresidents of the state who are qualified to practice in their state of residence may practice in the State of Washington for as much as 30 days in any calendar year without registration.[25]

11.9 URANIUM

Under the Atomic Energy Act of 1954, a license is required before any "source material" is transferred, received, or delivered after it is mined.[26] Source material is defined to include any ore of uranium or thorium in any form that contains by weight 0.05 percent of either one or both.[27] Reference is made to the Atomic Energy Commission for other regulations regarding mining, transport, and sale of ores of source materials.

11.10 GOLD

Under one of the provisions of the Gold Reserve Act of 1934, the Secretary of the Treasury can prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked.[28] Under regulations that have been adopted, a license must be obtained from the Secretary of the Treasury before gold may be acquired and held, transported, melted or treated, imported, exported or earmarked.[29] Except for collectors' items, such as gold coins, the principal exceptions to the licensing requirements relate to gold in its natural state, which has been recovered from natural sources and which has not been melted, smelted, refined, or otherwise treated by heating or by chemical or electrical process.[30] Gold in its natural state may be mined, bought, sold, and transported without a license. In addition, retort sponge produced from gold amalgam by a mine operator, up to a maximum at one time of 200 troy ounces of gold, may be held without a license.[31] Before March 19,

1968, the United States Mint was the sole market for gold, except for gold in its natural state, and the mint regularly bought and sold gold at $35 per troy ounce, less a nominal refining charge. Effective March 19, 1968, gold was made subject to free-market pricing, but still can be sold only to a party holding a license from the United States Treasury, except for gold in its natural state.[32]

11.11 TAXATION

The State of Washington has no specific severance tax or special tax applying solely to mineral production. However, the business and occupation tax,[33] which is a tax upon the gross receipts of a business, applies to the business of extracting, which includes production of coal, oil, natural gas, ore, stone, sand, gravel, clay, and mineral or other natural resource products, among other businesses. Tax on the business of extracting is imposed only if in the sale of products the sale is not subject to the wholesale or retail sale classification under the business and occupation tax, such as instances where the product of extraction is shipped out of the State or sold to a purchaser outside of the State.[34] At the date of publication of this bulletin (1974) the different classifications were irrelevant because the tax was imposed at the same rate on all three categories of sale.[35]

All real property and personal property used in a mining operation is subject to taxation upon the value assessed by the assessor in the county where the property is located.[36] The distinction between what is real property and what is personal property for taxation in a mining operation has been confused since some early decisions of the State of Washington Supreme Court that classified as real property certain equipment that would normally be thought of as personal property.[37] The distinction would be somewhat irrelevant except that the taxpayer is required to list personal property annually, under threat of rather serious penalties,[38] and the assessor lists real property in his county. It is believed that an agreement with the assessor regarding the proper classification of property should be binding in most instances to clarify the problem of proper classification.

The State of Washington imposed a sales tax and a use tax or compensating tax for personal property that is purchased or used and upon which the sales tax has not been paid.[39] The business and occupation tax and the sales and use taxes are administered by the Department of Revenue, Olympia, Washington.

11.12 MINING CLAIMS OCCUPANCY ACT

The Act of October 23, 1962,[40] is a special relief statute enacted by Congress to permit the Secretary of the Interior to convey an interest up to and including a fee simple interest in an area of not more than five acres or the acreage actually occupied, whichever is less, to an occupant of an invalid mining claim who had been in possession for not less than seven years prior to July 23, 1962. Application for purchase was required to be made within five years following October 23, 1962. In any conveyance under the act all minerals are reserved, but are withdrawn from location and are subject to leasing only if mining can be done without surface access.

11.13 CRIMINAL OFFENSES

It is a Federal crime to destroy, move, or remove any survey marker established by Federal Government survey, or to interfere with the surveying of public lands or any private land claim that is being surveyed in conformity with the instructions of the Bureau of Land Management.[41] Under Washington State law it is a crime to maliciously remove, damage, or destroy any boundary, monument, or marker, in-

cluding mining location notices, posts, and monuments.[42] It is a felony to "salt" a mine, or to furnish false assays, either for the purpose of selling the property or any interest therein, or for the purpose of obtaining either money or property by this means.[43] It is also a crime to alter an assay or to publish a false assay for the purpose of defrauding.

Both civil and criminal penalties can be imposed for failure to properly fence or otherwise safeguard an open shaft or excavation.[44]

FOOTNOTES—ARTICLE XI.

1. RCW 23A.04.010 through 23A.98.050.
2. RCW 78.04.010 - 78.04.020. See Section 9.3, this bulletin.
3. RCW 78.04.030.
4. RCW 78.04.040 - 78.04.050.
5. RCW 23A.40.090.
6. RCW 78.40.010 - 78.40.759.
7. RCW 49.16.010 - 49.16.160.
8. RCW 49.20.010 - 49.20.110.
9. RCW 49.24.010 - 49.24.380.
10. RCW 49.46.005 - 49.46.910. At the date of publication of this bulletin the minimum wage for persons over 18 years of age was $1.60 per hour, to increase to $1.80 per hour for 1974, and $2.00 per hour for 1975.
11. RCW 49.60.010 - 49.60.320.
12. RCW 49.12.200.
13. RCW 49.12.010 - 49.12.230; RCW 43.22.280. By order of the Industrial Welfare Committee, the minimum wage for minors under 18 years of age was $1.25 per hour at the date of publication of this bulletin. See WAC 296-128.
14. RCW 49.28.070.
15. RCW 49.48.010.
16. Generally see Title 51 of RCW.
17. Generally see Title 50 of RCW.
18. 15 U.S.C. 77a-77aa.
19. RCW 21.20.005 - 21.20.940.
20. Generally, see RCW 60.04.010 - 60.04.190 and RCW 60.08.010 - 60.08.060.
21. RCW 60.04.020.
22. See Bengel v. Bates, 29 Wn.2d 779 (1948); Newell v. Vervaeke, 189 Wash. 144 (1937).
23. See Section 5.1, this bulletin.
24. RCW 70.74.010 - 70.74.350.
25. Generally, see RCW 18.43.010 - 18.43.920.
26. 42 U.S.C. 2091-2093.
27. 42 U.S.C. 2014 (x); 10 C.F.R. 40.4 (h).
28. 31 U.S.C. 442.
29. 31 C.F.R. 54.1 - 54.35.
30. 31 C.F.R. 54.19 (a).
31. 31 C.F.R. 54.19 (b).
32. Generally, see 31 C.F.R., Part 54.
33. Generally, see Chapter 82.04 of RCW, and particularly RCW 82.04.010.
34. See Rule 135 of Washington Department of Revenue.
35. At the date of publication of this bulletin the rate of tax was 0.44 percent of gross receipts from extracting, wholesale sales and retail sales.
36. Generally, see Title 84 of RCW.
37. See Eureka Dist. Gold Min. Co. v. Ferry Co., 28 Wash. 250 (1902); Doe v. Tenino Coal & Iron Co., 43 Wash. 523 (1906).
38. See Chapter 84.40 of RCW as amended in 1967. See Section 5.1 of this bulletin in regard to classification of unpatented mining claims as personal property.
39. At the date of publication of this bulletin sales and use taxes were imposed at the rate of 4.5 percent. In addition, cities are authorized to impose an additional tax of 0.5 percent.
40. 30 U.S.C. 701-709.
41. 18 U.S.C. 1858-1859.
42. RCW 9.45.200.
43. RCW 9.45.210 - 9.45.230.
44. RCW 78.12.010 - 78.12.060.

GLOSSARY OF TERMS

Acknowledgment

Signing before a notary public, under oath, after which the notary attests to the fact of signing and affixes his seal.

Adit

A horizontal opening driven from the surface for the working of a mine. Commonly the term "tunnel" is used in place of adit, but, technically, a tunnel is open to the surface at both ends.

Alluvial

A deposit transported and laid down by water or wind, typically gravel or sand.

Apex

The topmost part of a vein, which may or may not crop out at the surface.

Assay

The procedure for determining the amount of metal in a sample.

Attitude

The direction and degree of dip of a vein or bed.

Broad Lode

In mining law, a broad lode is a vein, ledge, or lode which, at the surface, is wide enough that it lies in two adjoining mining claims.

Claim Jumping

Locating a mining claim over a previous claim when the claim jumpers feel the original locator or claimant has not complied with all the provisions of the mining law necessary to hold a valid claim.

Collar

The top of a shaft.

Crosscut

A horizontal heading driven at a large angle to a vein.

Dip

The angle of inclination downward that a vein or tabular deposit or other geologic formation makes with a horizontal plane.

Dip Right

Dip right is the earlier name applied to extralateral right.

Discovery

Discovery is a complex legal term having various meanings and various applications. Generally, see the discussion in Section 2.4 of this bulletin.

Drift

Technically, a horizontal underground opening driven along the course of a vein. Sometimes applies to any horizontal underground opening.

Fault

A fracture in the earth, usually with displacement of one side of the fracture with respect to the other.

Footwall

The bottom or lower enclosing wall of a vein or fault.

Hanging Wall

The wall or rock on the upper side of an inclined vein.

Ledge

As used in the mining law, ledge is synonymous with vein.

Lode

As used in the mining law, lode is synonymous with vein or ledge.

Mineral

A generally homogeneous substance of defined chemical composition and physical properties naturally occurring in nature, other than coal, gas, and other hydrocarbon deposits.

Ore

This term is perhaps the most misused term in mining. Properly used, the term "ore" is an aggregate of minerals with sufficient value, both in quantity and quality, that it can be mined and processed at a profit.

Outcrop

The surface exposure of a stratum, vein, or mineral deposit.

Plat

A map of a mining claim or other tract showing its boundaries, usually drawn to scale.

Possessory Right

The right to possession of a mining claim. See discussion of Section 2.2 of this bulletin.

Strike

The compass bearing of a horizontal line parallel to the plane of a vein, fault, or tabular geologic formation.

Vein

Under the mining law a vein is defined as a continuous body of mineral or mineralized rock containing valuable minerals. It must either have defined boundaries, or else continuous mineralization, so that a practical miner can follow it. The definition is thus narrower than that usually applied by engineers or geologists, but the legal definition must be satisfied before extralateral rights can be obtained. Vein, ledge, and lode are essentially synonymous terms under the mining law. Another nontechnical synonym is "lead," which is generally used in the sense of a vein which can be followed by a practical miner.

REFERENCES

FEDERAL SOURCES

U.S.C.	U.S. Code.
- Stat. -	U.S. Statutes at Large.
U.S.	U.S. Supreme Court Reports.
Fed., Fed.2d	U.S. Circuit Court Reports.
F. Supp.	U.S. District Court Reports.
C.F.R.	Code of Federal Regulations.
I.D., L.D., A	Department of the Interior and Land Office Decisions.
Op. Atty. Gen.	Opinions of the Attorney General of the U.S.
U.S.D.I.	U.S. Department of the Interior, Public Land Statistics.

WASHINGTON SOURCES

R.C.W.	Revised Code of Washington.
Wash., Wn.2d	Washington Supreme Court Reports.
Wash. Const.	Constitution of the State of Washington.
Op. Atty. Gen. (Wash.)	Opinions of the Attorney General of Washington.
W.A.C.	Washington Administrative Code.

OTHER

N.W., N.W.2d, Pac., P.2d, N.E., N.E.2d, So., So.2d, S.E., S.E.2d, S.W., S.W.2d, Atl., A.2d	Reports of Highest Courts of the various states.
M.R.	Morrison's Mining Reports.

For further information regarding Federal lands contact:

U.S. Bureau of Land Management
U.S. Courthouse
Spokane, Washington 99201

(Continued on next page.)

U.S. Forest Service
Region 6
Portland, Oregon 97208

For further information regarding State lands contact:

Department of Natural Resources
Lands Division
Olympia, Washington 98504

INDEX

Page

Abandonment (See also Co-owners; Relocation; Forfeiture) 46
Acquired lands 3, 63
Adverse possession 59, 78
Agent, location by 25
Air pollution control 88
Aliens 24
Amendment to location 47
Apex rights (See Extralateral rights)
Assessment work:
- Affidavit of assessment work 44
- Association placer claims 29
- Contiguous locations—"Group assessment work" 43
- Co-owner failing to contribute 44
- Discontinuation and resumption 45
- During patent proceedings 44
- Eligible work 42
- Exemption during military service 44
- Geological or geophysical surveys 43
- Millsites 30
- Moratorium acts 44
- Person performing 43
- Placer claims 42
- Recording affidavit 29, 44
- Value of work 43
- Work outside of claim 43

Association placer claim 29
Atomic Energy Act 14, 93

Blue Sky laws (See securities acts)
Building stone locations 10, 16
Burlington Northern railroad lands 10

Page

Claims (See lode claims, placer claims, millsite claims, tunnel claims, patenting mining claims)
Classification Act of 1964 13
Coal—Federal lands 14, 63
Coal—State of Washington lands 72
Co-locators 25, 44
Common varieties 15
Community property 59
Compensation to surface owner 11, 71
Contribution by co-owner 44
Conveyance 59, 94
Corporations, mining 91
County mineral lands 73
Criminal offenses 94

Deed 59, 94
Definitions:
- Acquired lands 3
- Abandonment 46
- Adverse possession 59
- Amended location 47
- Apex of vein or lode 38, 99
- Assessment work 42
- Association placer claim 29
- Dip of vein 99
- Discovery 23
- Extralateral rights 38
- Ledge 99
- Lode 24, 99
- Placer 24
- Public domain 3
- Relocation 46
- Reserved minerals 11, 69, 77
- Riparian rights 82
- Strike of a vein 100
- Vein 100

Page

Desert Land Act 82
Discovery 22, 23, 25, 28
Discovery shaft (See footnote 50, p. 34) 25
Ditches 81

Eminent domain 81
Explosives 93
Extralateral rights 38, 56

Federal powersites 6
Forfeiture 44

Gas (See oil and gas)
Geological, geochemical, geophysical surveys 43
Glossary of terms 99
Gold 93
Grazing lands 7

Homesteads 9

Indian reservations 8
Irrigation 7

Labor laws 91
Labor liens 93
Leasable minerals, federal lands 63
Leasing—county lands 73
Leasing—federal lands 11, 63
Leasing—private lands 77
Leasing—State of Washington lands 70
Ledge, definition of 99
Liens 93
Locating mining claims 25, 27, 30, 31, 46, 47
Lode, definition 99

Page

Lode claims 25-27, 37-49
- Abandonment 46
- Amending claim 47
- Discovery requirement 22-23
- Excess size 27
- Extralateral rights 38
- Forfeiture 44
- Posts and markings 25-26
- Procedure to locate 25
- Recording notice 27
- Relationship to vein 40-41
- Relocation 46
- Right of possession 21
- Size and shape 26

Materials, State of Washington 69
Military reservations 8
Millsite claims 30
Mine-to-market roads 82
Mineral leasing acts
- County lands 73
- Federal lands 12, 63
- State of Washington lands 12, 70

Mining Claims Occupancy Act of 1962 94
Mining contracts (See mineral leasing acts)
Mining corporations 91
Mining engineers and surveyors, licensing 93
Moratorium acts 44
Multiple Surface Use Act (P.L. 167) 37

National forests 4, 81, 83
National Forest Exchange Act 3
National Monuments 6
National Parks 6
Navigable and non-navigable waters 12
Non-mineral entry acts 9, 94
Northern Pacific railroad lands 10

Page

Offshore leasing (See Outer Continental Shelf Leasing)
Oil and gas:
County lands 73
Federal lands 64
State of Washington lands 72
Oil and Gas Conservation Act 72
Oil shale leases 64
Oil spillage regulation 88
Outer Continental Shelf leasing 12-13

Patenting mining claims 55-56
Pedis possessio 21
Permits
Explosives, keeping or using 93
Forest Service use permits 83
Pollution discharge 87
Prospecting permits for leasing
Federal lands 63-64
State of Washington lands 70-71
Special use permits in national forests 83
Water, diversion and use 82
Personal property, mining claims 59
Pickett Act 6
Placer, definition 24
Placer claims 27-29
Assessment work 42
Association placer claims 29
Discovery requirement 28
Location work 29
Procedure to locate 27
Shape of claims 29
Vein in placer claim 14, 56
Pollution (See air pollution, water pollution)
Powersites 6
Prospecting permits for leasing
Federal lands 63-64
State of Washington lands 70-71
Public domain 3

Page

Quiet title actions 59

Railroad lands (See Northern Pacific Railroad Lands)
Reclamation Act of 1902 7
Reclamation of surface-mined lands 87
References 101
Relocation 46
Reserved mineral rights:
County-owned lands 73
Federal lands 11
Private lands 77
State of Washington lands 11, 69
Rights of way
Federal lands 81, 83
Private lands 81
State of Washington lands 81
Royalties
Federal mineral leases 63-64
State of Washington mineral leases 70-72

School land grants 10, 69
Securities acts 92
Separate property 59
Shorelands 69
Small Tracts Act 10
State of Washington Mineral Leasing Act 70
State of Washington water code 82
Stock-Raising Homestead Act 11
Submerged Lands Act 12
Surface-mined land reclamation 87
Surface uses of unpatented claims 15, 21, 37

Taxation 94
Taylor Grazing Act lands 7
Tidelands 69

Page

Timber and Stone Act 10
Timber rights 37
Townsites 10
Tramways 82
Tunnelsite locations 30
Unemployment compensation (See labor laws)
Unfenced tunnels, shafts, and pits 95
U.S. (See category or classification)
Uranium 14, 93

Vein, definition 100
Vein:
    Crossing side line 40, 41
    Extralateral rights 38
    Secondary veins 40

Wages, unlawful to pay in stock 92
Waters and water rights 12, 69, 82
Water pollution control 87
Wilderness and primitive areas 5
Wildlife sanctuaries 9
Workmen's Compensation (See labor laws)