Glenn A. Olds
Commissioner
Department of Natural Resources

May 6, 1993

661-93-0641

269-5255

Reservation of mineral rights to Alaska

Kyle W. Parker
Assistant Attorney General
Oil, Gas, & Mining Section
Anchorage

On April 26, 1993, your Department requested an opinion on the meaning and application of the state's mineral reservation and bonding requirement contained in article 5 of Title 38, Alaska Statutes. In particular, you asked whether securing the surface estate holder's consent, or in lieu thereof, posting a surety bond, is a condition precedent to the location of a valid mining claim. For the reasons stated below, we are of the opinion that it is not.

Introduction

In Alaska, state ownership of severed mineral interests generally arises from either the state's acquisition from the United States of a previously severed mineral interest, or a mineral reservation by the state when it conveys state lands. Severed mineral estates are common in Alaska as most contracts for the sale, lease, or grant of state lands and most deeds to state lands or interest therein (other than mineral leases or mining leases) must contain an express reservation to the state of all oil, gas, coal, minerals, and geothermal resources. AS 38.05.125(a); see also Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 • 6(i), as amended, 48 U.S.C. note preceding • 21 (1988). In addition to reserving all minerals, the state retains a long list of surface rights granting a mineral locator access to and use of the surface in order to develop the mineral estate. AS 38.05.125(a).

The concepts involved in the construction of AS 38.05.125(a), and the resulting impact on the bonding requirements of AS 38.05.130, arise from the common law, federal mining practices, and federal mineral reservations. As a result, an understanding of these sources is crucial to the resolution of the question raised.

Origin of Mineral Reservations

Historically, land owned by the United States was

disposed of in accordance with its classification as mineral or non-mineral land. See R. Bate, "Mineral Exceptions and Reservations in Federal Public Land Patents," 17 Rocky Mt. Min. L. Inst. 325, 328-34 (1972) (hereinafter Bate); L. Mall, "Federal Mineral Reservations," 20 Rocky Mt. Min. L. Inst. 399, 401-08 (1975) (hereinafter Mall). However, all mineral lands were not properly identified prior to disposition, and vast tracts of valuable mineral lands in the Western United States passed to private owners under various laws allowing agricultural or homestead entry. Bate at 330; Mall at 402; see also Watt v. Western Nuclear, Inc., 462 U.S. 36, 48 n.9 (1983). Therefore, "the system of land classification came to be viewed as a poor means of ensuring the optimal development of the Nation's mineral resources," and a movement arose to replace it with a system of mineral reservation. See Watt, 462 U.S. at 48.

The first step away from the land classification system occurred in 1906 when President Theodore Roosevelt, "citing the prevalence of land fraud and the need to dispose of coal 'under conditions which would inure to the benefit of the public as a whole,'" withdrew from all forms of entry large areas of the public domain thought to be valuable for coal. Watt, 462 U.S. at 49. Roosevelt urged Congress to adopt a leasing system for coal, oil, and gas. Bate at 333. In addition, Roosevelt advocated the creation of a system that would permit separate disposal of the surface estate on withdrawn coal lands while reserving the mineral rights to the United States. Id.; see also Watt, 462 U.S. at 49.

Roosevelt and his successor, President Taft, continued to withdraw public lands from any type of entry while Congress debated a solution to the land classification problem. Mall at 402-03. These withdrawals halted western settlement, and Congress was compelled to adopt legislation which severed the mineral and surface estates to ensure the continued flow of settlers to the Western United States. Id.

All of the agricultural entry acts enacted prior to 1916 reserved specific minerals to the United States, and patents issued to surface entrymen under those acts were not required to contain a mineral reservation unless the land had been classified as of mineral character prior to vesting of title. See Bate at 334; Watt, 462 U.S. at 49. For example, the Coal Lands Acts of 1909 and 1910 authorized nonmineral entry of coal lands and opened previously withdrawn coal lands to agricultural entry and patent, but reserved to the United States "all coal in said

lands, and the right to prospect for, mine, and remove the same." 30 U.S.C. • 81; 30 U.S.C. • 83. In addition, by the Agricultural Entry Act of 1914, Congress provided for nonmineral entries on lands "withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for these deposits," and reserved to the United States "the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same." 30 U.S.C. • 121. However, because these acts were still founded on the land classification system, and classification of land as mineral or nonmineral prior to disposition did not result in the identification of all mineral land before it was sold, unreserved minerals still passed to patentees under the agricultural entry acts.

The loophole whereby unreserved minerals passed to patentees under the early agricultural entry acts was closed by Congress in 1916 with the enactment of the Stock-Raising Homestead Act, 43 U.S.C. •• 291-302 (1988). The Stock-Raising Homestead Act authorized qualified persons to enter designated lands for agricultural purposes and acquire a patent, but provided for reservation of all minerals in patents issued under its authority regardless of how the land may have been classified.[1] 43 U.S.C. 299.

---

[1] Prior to the recent passage of amendments to the Stock-Raising Homestead Act controverting not only the common law but also the Act's existing provisions, Pub. L. No. 103-23, 107 Stat 60 (April 16, 1993), no bond or surface estate holder consent was required for prospecting and location until and unless certain damage (damage to permanent improvements or crops) occurred. See, e.g., Visintainer Sheep Co. v. Centennial Gold Corp., 748 P.2d 358, 360 (Colo. App. 1987) (land belonging to the United States is free and open to exploration, and a mineral claimant does not need permission from the surface holder prior to entry on the surface estate for the purposes of staking a claim); McMullin v. Magnuson, 78 P.2d 964, 973 (Colo. 1938) (the purpose of the Stock-Raising Homestead Act is not to restrict prospecting and mining, and the securing of the surface holders' consent or posting of a surety bond is not a condition precedent to mineral location). The Stock-Raising Homestead Act, as initially enacted, reserved the minerals in homestead lands "together with the right to prospect" for the same, plus the implicit right to locate claims in the event minerals were discovered. The Act further provided that "[a]ny person who has acquired from the

Passage of the Stock-Raising Homestead Act marks the culmination of the shift from a land classification system to a complete mineral reservation. See Watt, 462 U.S. at 49 ("Unlike the preceding statutes containing mineral reservations, the SRHA [Stock-Raising Homestead Act] was not limited to lands classified as mineral in character, and it did not reserve only specifically identified minerals."); see also Bate at 334. Subsequent federal legislation has followed the Stock-Raising Homestead Act's pattern of reserving all minerals to the United States.[2] 1 American Law of Mining • 9.05[2][a] (2d. ed. 1992). Moreover, the traditional dominance of the mineral estate at common law generally prevails to this day, and the owner of the mineral estate, whether he/she takes by exception, reservation, grant, or lease, enjoys a broad array of rights implied in the law.[3] See, e.g., 6 American Law of Mining • 200.02 [1][b][i] (2d. ed. 1992); Yaquina Bay Timber & Logging Co. v. Shiny Rock Mining Corp., 556 P.2d 672, 675 n.3 (Or. 1976).

Alaska's Mineral Reservation, AS 38.05.125

Like the federal practice initially developed in the

(..continued)
United States the coal or other mineral deposits . . . may re-enter [after location] and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals . . . ."

[2] "Generally, minerals thus reserved are subject to location or leasing, unless the land or particular mineral has been withdrawn from mineral entry, or the statute fails to reserve the right to extract the minerals, or the Secretary of the Interior has not promulgated implementing regulations prescribed by the statute." 1 American Law of Mining • 9.03[3] (2d. ed. 1992) (citations omitted).

[3] The mineral owner continues to have the right to realize the benefits from the development of the mineral estate so long as his activities do not unreasonably interfere with the rights of the surface owner. Norken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991); Aleut Corp. v. Arctic Slope Regional Corp., 484 F. Supp. 482 (D. Alaska 1980). This dominance includes rights of ingress and egress, and the right to use so much of the surface as is reasonably necessary to explore for, develop, and produce minerals which are a part of the mineral estate.

Stock-Raising Homestead Act of 1916, Alaska does not transfer land based on a land classification system. Rather than relying on a classification of land as mineral or nonmineral, or reserving only specific minerals to the state, Alaska transfers title to land reserving all minerals.

The reservation of the mineral estate to Alaska is codified at article 5 of Title 38, Alaska Statutes. AS 38.05.125(a) reserves all the minerals in lands patented by the state together with the implicit right of the prospector to locate claims in the event minerals are discovered:

> Each contract for the sale, lease or grant of state land, and each deed to state land, properties or interest in state land, made under AS 38.05.045 -38.05.120, 38.05.321, 38.05.810 - 38.05.821, AS 38.08, or AS 38.50 except as provided in AS 38.50.050 is subject to the following reservation: "The party of the first part, Alaska, hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, and which may be in or upon said land above described, or any part thereof, and the right to explore the same . . . .

AS 38.05.125(a). This mineral reservation contemplates that a person qualified to locate mineral deposits may at all times enter the surface estate overlying reserved mineral lands to prospect for minerals therein, and, as a necessary incident to this right, locate under the appropriate act such mineral as he/she may discover.

In Alaska, valuable mineral deposits in land belonging to the state are open to exploration, development, and the extraction of minerals unless those lands are specifically closed to mining or mineral location. AS 38.05.135, 38.05.185; 11 AAC 86.135; cf. General Mining Law of 1872, 30 U.S.C. • 22 (valuable mineral deposits in land belonging to the United States shall be free and open to mineral exploration). Rights to mineral deposits in or on state land that is open to claim staking may be

acquired by discovery, location, and recording. AS 38.05.195.[4] Because the term "state lands" is defined to include all lands and interests in lands belonging to or acquired by the state, AS 38.05.965(19), all state-owned severed mineral interests, including reserved mineral interests, are subject to location. 11 AAC 86.135. The securing of the surface holder's consent, or in lieu thereof posting a surety bond, is not a condition precedent to the location of a valid mining claim.

The bonding requirement of AS 38.05.130, intended to protect the rights of the surface estate holder, arises only when a mineral locator proposes to develop his/her claim. AS 38.05.130 defines the mineral locator's obligations to the surface estate holder, and prescribes the time when and the manner in which those obligations are to be performed:

> Rights may not be exercised by the state, its lessees, successors or assignees under the reservation as set out in AS 38.05.125 until the state, its lessees, successors, or assignees make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering upon the land. If the owner for any cause refuses or neglects to settle the damages, the state, its lessees, successors, assigns, or an applicant for a lease or contract from the state for the purpose of prospecting for valuable minerals, or option, contract or lease for mining coal or lease for extracting geothermal resources, petroleum or natural gas, may enter upon the land in the exercise of the reserved rights after posting a surety bond determined by the director, after notice and an opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages, and may institute legal proceedings in a court where the land is located, as may be necessary to determine the damages which the owner

[4] Three essential and necessary acts for locating a claim are: (1) the claim corners must be posted; (2) a notice of location must be recorded; and (3) there must be an actual discovery sufficient to justify a person in expending his/her time, labor, and money in further mineral exploratory activity. 11 AAC 88.100 - 88.140, 11 AAC 88.100.200 - 88.100.245.

may suffer.

AS 38.05.130.

The "rights" limited by AS 38.05.130 are the state's reserved rights "to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and remain on said land . . . and to occupy as much of said land . . . as may be necessary or convenient" or to generally make such use of the surface as "reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved." See AS 38.05.125. The act of self-initiation of mining claims, as guaranteed by the Alaska Constitution and embodied in the Alaska statutes, see Alaska Const. art. VIII, • 11; see also AS 38.05.135, 38.05.185, 38.05.195, does not require exertion of these rights and hence is not affected by AS 38.05.130. The obvious purpose of the AS 38.05.130 bonding requirement is to assure protection of the surface estate holder's rights in the event of significant surface disturbance resulting from mineral development, not to protect the surface holder from the acts of location.

The conclusion that bonding is not required prior to the location of a mining claim is further supported by the regulatory framework controlling land use in Alaska. Chapter 96 of the Alaska Administrative Code contains provisions for general land use activity. 11 AAC 96.020 lists equipment types the use of which does not require a permit. The list includes, but is not limited to:

> (1) light portable field equipment; such as, hand-operated picks, shovels, pans, earth augers and backpack power drills and augers; (2) vehicles such as snow machines, jeeps, pickups and weasels. Augers and drills may be mounted on such equipment; (3) Airborne equipment; (4) marine equipment, except equipment which will disturb the submerged land.

11 AAC 96.96.020. These are the types of equipment a mineral prospector may use in making a discovery, and surety bonding would not be required for the use of this equipment. However, when a mineral locator plans "mineral exploratory activity[5] on

[5] "Exploration" is defined as:

land, the surface of which has been granted or leased by the State of Alaska," he/she is required to make arrangements with the surface holder to compensate for damages caused by such activity or, if agreement cannot be reached, make adequate provisions for the full payment of any damages the holder of the surface estate may suffer. 11 AAC 96.140(10).

Conclusion

For the reasons stated herein, we are of the opinion that the securing of the surface estate holder's consent, or in lieu thereof posting a surety bond, is not a condition precedent to the location of a valid mining claim. Under Alaska's mineral reservation, a qualified person may enter the surface estate overlying reserved mineral lands to prospect for minerals therein, and, as a necessary incident to this right, locate under the appropriate act such mineral as he/she may discover. The surety bonding requirements of AS 38.05.130 arise when the activities on the land are more destructive, and are substantially those that would occur after location of a mining claim in the extensive delineation of an orebody, the construction of a mine or actual removal of ores.

KWP:crg

(..continued)

> The work of investigating a mineral deposit to determine by geological surveys, geophysical surveys, geochemical surveys, boreholes, pits and underground workings if it is feasible to mine. Exploration is undertaken to gain knowledge of the size, shape, position, characteristics and value of the deposit.

T. Maley, Handbook of Mineral Law, 693 (3d. ed. 1983). This definition necessarily means that "mineral exploratory activity," as utilized in 11 AAC 96.140(10), occurs after the discovery of a mineral deposit and location of a mining claim.