OFFICIAL OPINION NO. 75-151, Does the state of South Dakota have any control over surface mining activities on Forest Service land, and if so, under what condition?

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

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Pierre, South Dakota 57501

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Dear Mr. Griffiths:

This opinion is in response to your question:

Does the state of South Dakota have any control over surface mining activities on forest service land, and if so, under what condition?

In SDCL 45-6A-I our Legislature has set out its policy in enacting surface mining controls for this state. The Legislature states in part:

The development and extraction of these minerals by means of surface opening is necessary for the economic development of the state and nation and proper safeguards must be provided by the state that ... the affected land is usable and productive ...; that water resources are not endangered; and that esthetics and a tax base are maintained, all for the health, safety and general welfare of the people of the state.

In these words and in the remainder of chapter 45-6A, there is nothing to be found suggesting the exclusion of federal lands from this act. Every policy objective stated in the

Surface Mining Land Reclamation Act will be furthered by the reclamation of our national forests.

Admittedly, improvement of federal property does little to directly maintain the state's tax base. The fact that one of the Act's many policies will not be directly advanced in a given situation, however, is little reason to deny total fulfillment to the remaining objectives. The reclamation of national forest land, in addition, maintains indirectly the value of taxable land bordering the federal property. Few things can damage neighboring property values more assuredly than the dust, mud and ugliness of a strip mine. For these reasons, I conclude that our Legislature intended chapter 45-6A-I to apply to any national forests in South Dakota. (See *Dunn v. Hardesty*, 76 S.D. 232, 76 N.W. 2d 393 (1956); *Argo Oil Corp. v. Lathrop*, 76 S.D. 70, 72 N.W. 2d 431 (1955); *Friese v. Gulbrandson*, 69 S.D. 179,8 N.W. 2d 438 (1943) and *Brink v. Dunn*, 33 S.D. 81,144 N.W. 734 (1913) for the proposition that a statute should be construed to give it effect rather than defeat its purpose.)

Our Legislature, however, is not the supreme authority in this matter. Article VI, Clause 2 of the United States Constitution states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary not withstanding.

Article IV, Section 3, Clause 2 of the United States Constitution states:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

If the Forest Service regulations are within the scope of congressional authority, the constitutional provisions just cited would invalidate the South Dakota statute in the case of direct conflict. This statement of the problem defines two issues in your question. First, does the Forest Service have authority to regulate mining in national forests? Second, if so, is that authority or other federal legislation so extensive as to completely occupy the field and preempt state legislation by creating a direct conflict?

The Forest Service claims two sections of federal law as authority for its strip mining regulations: 16 U.S.C. §§ 478 and 551; 39 Fed. Reg. 31317.16 U.S.C. 478 states in part:

Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

16 U.S.C. § 551 states in part:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredation upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.

Section 478, in its entirety, appears to be a warning to miners that they must adhere to the general rules and regulations governing national forests more than it is authority for the Secretary of Agriculture (Forest Service) to write rules and regulations specifically governing mining. Section 551, however, seems to cover mining entirely by granting authority for regulations "to preserve the forests ... from destruction."

My research has found no reported case law supporting or rejecting these two sections as authority for the Forest Service regulations. This is hardly surprising since the notice of adoption for these regulations was published a year ago, 39 Fed. Reg. 31318, August 28, 1974, and they became effective September 1, 1974. The strength of these two sections as authority for Forest Service regulations weakens, however, under the light of 16 U.S.C. § 482 which states in part:

And any mineral lands in any national forest which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, *not withstanding any provisions contained in sections 473 to 478, 479 to 482 and 551 of this* title. (Emphasis mine.)

Although clumsily worded, § 482 makes a great deal of sense when one realizes that the lands contained in national forests were once part of the general public domain open to mining under the Mining Act of 1872. The President of the United States, however, was given authority to reserve forested sections of the public domain to be national forests. 16 U.S.C. 471, 475. But, "it is not the purpose or intent of these provisions ... to authorize the inclusion ... of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." 16 U.S.C. § 475. On the contrary, the new forest lands that "were subject to entry under the existing mining laws of the United States (Mining Act of 1872) and the rules and regulations applying thereto, shall continue to be subject to such location and entry .... " 16 U.S.C. § 482.

In *Honchok v. Hardin,* 326 F. Supp. 988 (D. Md. 1971) the court said:

And persons may not be prohibited from entering national forests for all 'lawful purposes' including specifically 'prospecting, locating, and developing the mineral resources thereof.' (16 U.S.C. § 478)

Activities carried out by such persons on lands which have the status of national forest and which are outside the surface boundaries of a claim must be in accordance with the rules and regulations covering the national forest. (16 U.S.C. §§ 472,478, 551.) Thus, if a mineral locator wishes to gain access to his claim by means of a road across national forest lands not within the boundaries of his claim, he must first obtain a permit for such activity from the forest service in the Department of Agriculture (16 U.S.C. § 551, 36 C.F.R. § 251.1)

Honchock did not deal with Forest Service authority to control mining, and the language quoted would not be binding on this issue. It is interesting to note, however, that *Honchok's* authority for excluding Forest Service regulations from mineral claims is that cited by the forest service as authority to regulate mining claims. To this I would only add that the above emphasized portion of 16 U.S.C. § 482 quite plainly says that lands previously open to location and entry under the mining laws and regulations of the United States shall continue to be open under the same conditions regardless of any powers given to the Secretary of Agriculture (Forest Service) by 16 U.S.C. §§ 478 and 551.

This pattern of congressional intent is repeated in 16 U.S.C. § 678A which concerns mining in the Norbeck Wildlife Preserve in South Dakota. The second proviso of that section manifests a clear intention that within the boundaries of the Preserve activities necessary to mining are not bound by Forest Service regulations, and on the claim itself, Forest Service

regulations may expand the range of allowable activities beyond those necessary to mining but may not diminish that range in interference with mining necessities.

On this basis I conclude that Congress intended the general mining laws of the United States to be the body of federal law governing mining on federal lands, within and without the national forest regardless of any authority possessed by the Secretary of Agriculture. The Forest Service, therefore, is without authority to regulate mining activities on national forest land.

This does not end the inquiry, however, for the exclusion of the Forest Service is not necessarily a grant of power to the states. Under the Property and Supremacy clauses of the federal Constitution, Congress is the supreme authority over activities on federal lands and any state statutes conflicting with the congressional scheme of regulations must stand aside.

In the area of mining and mineral leasing on federal lands the states are normally allowed control unless Congress has exercised exclusive authority over the federal lands. *Texas Oil and Gas Corp. v. Phillips Petroleum Co*., 277 F. Supp. 366 (W.D. Ok\. 1967) while dealing with the Federal Mineral Leasing Act of 1920,30 U.S.C. 181 et seq., and not the general mining laws presents an excellent example of the allowable extent of state regulation over federal mineral lands. The plaintiffs in *Texas Oil and Gas* owned oil and gas leases on federal land situated in Oklahoma. The Corporation Commission of the State of Oklahoma ordered that working interests in the formation underlying these leases and others be pooled to conserve oil and gas resources. Under the order the working interests in this formation were all transferred to the defendant Phillips.

The authority of Oklahoma to issue such orders was challenged on the basis of the property clause. In approaching this question the court said:

This clause does not place the exclusive control of the federal public domain in the United States government. It only confers this power on Congress and leaves to Congress the determination of when and where and to what extent this power will be exercised.... Furthermore, the authorities treating with the matter of exclusive control of federal lands by the Federal Government clearly and definitely hold that state law and the state police power extends (*sic*) over the federal public domain unless and until Congress has determined to deal exclusively with the subject. (Citations omitted) 277 F. Supp. at 368-69.

The question presented to us then is whether "Congress has determined to deal exclusively with the subject" at hand. Section 187 of the Mineral Leasing Act of 1920 provided that "None of such provisions shall be in conflict with the laws of the state in which the leased property is situated," and the court in *Texas Oil and Gas* held the Oklahoma pooling regulations to be valid restrictions on federal land.

We are involved not with the Mineral Leasing Act of 1920 but with the general mining laws of the United States, Mining Act of 1872 *as amended*, 30 U.S.C. § 22 *et seq*. The two situations are, however, analogous. The federal mining laws generally make provisions for the operation of state statutes.

30 U.S.C. § 22 provides in part:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase ... under regulations prescribed by law ... so far as the same are applicable and not inconsistent with the laws of the United States.

Courts as far back as 1888 have had no trouble holding that the phrase "under regulations prescribed by law" encompasses both federal and state legislation. *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *O'Donnell v. Glenn*, 19 P. 302 (Mont. 1888). Both these cases held that additional description and filing requirements necessary to register a claim under state law were valid although these requirements did not appear in the federal law.

30 U.S.C. § 23 states that a locator is entitled to a claim covering 1500' along a vein and up to 300' on each side of the vein, but the claim shall not be limited to less that 25' on each side of the vein. State regulations shortening the maximum length allowable and decreasing the width under 300' but not less than 25' are valid. *Taylor v. Parenteau*, 48 P. 505 (Colo. 1897). It is interesting to note that there is no express provision for state regulation under § 23 but the implication has developed into hard law.

30 U.S.C. § 26 states that "the locators of all mining locations made on any mineral vein ... situated on the public domain ... so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict, with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations .... " This is another explicit recognition of state regulation. *Butte City Water Co., supra*.

30 U.S.C. § 28 sets out the annual work requirements necessary to hold a claim. *Northmore v. Simmons*, 97 F. 386 (9th Cir. 1899) held that the federal law prescribed the' 'minimum amount of expenditure in labor or improvements which was exacted by the United Stateswithin a maximum period," 97 F. at 387, and that stricter state requirements are permissible.

When a patent is issued and the title to the land passes to the locator, 30 U.S.C. § 43 allows the state to "provide rules for working mines, involving easements, drainage and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. " This section allows the states "as a condition of sale, in the absence of necessary legislation by Congress," 30 USC § 43, to govern the conduct of any locator on his land once that land is no longer federal property. *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal 1884).

From the above statues and cases the following conclusions can be drawn.

1) Unless specifically prohibited, as in 30 U.S.C. § 23, the state legislature may place such additional restrictions on the location process as it deems necessary over and above those required by federal law.

2) The federal mining law is not intended to cover the area of reclamation and environmental protection addressed by our Surface Mining Act. The federal statutes deal only with the steps necessary for a locator to receive from the owner of the land, the United States, the exclusive right to minerals located on that land as against all other persons interested in obtaining the same right.

In *Northmore, supra* at 388, the court said "the statute was not intended to interfere with the rights of the states .... It was intended to express the most liberal terms on which the United States would part with its right in mining claims." The statutes deal with a right to mine as against other private parties. This is an exclusive right, but it is not an unbridled right.

The situation can be likened to a private property owner who has the exclusive right to the use of his land, but the manner in which he exercises that right is subject to the police power of the state and its subdivisions as manifested by fire codes, zoning laws and other regulations.

Zoning may restrict property without violating the Fifth Amendment so long as all reasonable uses of the property have not been destroyed. *Stratakis v. Beauchamp*. The South Dakota Surface Mining Act does not destroy any reasonable uses, but instead ensures their reasonableness.

It is my opinion in light of the general federal scheme allowing state regulation wherever possible, that the federal mining laws were intended to govern the acquisition of mining rights from the federal government and the exclusion of other possessory claims to those rights. As 30 U .S.C. § 26 states, locators are entitled to the exclusive right of possession and enjoyment of the surface of their locations so long as they comply with state laws "not in conflict with the laws of the United States governing their possessory title."

The South Dakota Surface Mining Act has nothing to do with "possessory titles." It governs mining methods, an area tangential to the acquisition of possessory title but in no way conflicting. The South Dakota statute covers an area not within the intent of the federal mining laws and is, therefore, valid as applied to national forest land.

In summary my opinion is that Congress intended to exclude the Forest Service from regulating mining activities on national forest land and limited federal regulation to that contained in the general mining laws of the United States. There is, however, no specific exclusion of state regulations, nor is there a conflict of purpose or effect between the South Dakota statute and the federal mining laws. For these reasons I advise you that South Dakota may regulate surface mining activities on all national forest land within its borders.

Respectfully submitted,

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