

THE MINING LAW OF 1872: Past, Politics, and Prospects

GORDON MORRIS BAKKEN

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REVIEW BY STUART BANNER*

Gordon Bakken has written more books than some entire history faculties. It would be an exaggeration, but only a slight one, to say that his output alone accounts for more than half the field of western legal history. He may be just as well known for his other contributions to the field, including a period as editor of this journal, and a longer stretch as editor of the University of Oklahoma Press's series on the Legal History of North America. *The Mining Law of 1872* is a characteristic Gordon Bakken book: no fancy theory, no speculation beyond the evidence, just a straightforward and thoroughly researched account of an interesting topic in western legal history.

The broad outlines of Bakken's narrative will be familiar to many readers. The government's unambiguous goal in the nineteenth century was to encourage mining. Minerals were in remote places, far from white settlements. They were often hard to find and expensive to remove from the ground. So the government in effect subsidized miners, by granting land and mineral rights at extremely low prices, in a series of statutes, the

* Professor of law, UCLA School of Law.

most important of which was the Mining Law of 1872. This policy was a great success, so long as the only goal involved was to encourage mining and that goal could not be achieved without these in-kind subsidies. By the middle of the twentieth century, however, both conditions were weakening. Protecting the environment emerged as a competing goal, one that focused public attention on the sometimes-catastrophic environmental consequences of large-scale mining. Mining diminished in importance, and much of the land once devoted to mining was converted to housing sites and ski resorts or exploited for other resources like timber. Meanwhile, as the cost of land and minerals grew over time, the government's policy of granting both at sub-market prices came to seem more and more like a senseless giveaway. By the end of the twentieth century, the Mining Law of 1872 had outlived the conditions in which it was born. But it remained on the books, a testament to the ability of a small but powerful interest group to fight off attacks on its accustomed privileges.

Bakken's title is a bit misleading, because the book is about much more than just the Mining Law of 1872. The first half is a thickly detailed account of mining and mining regulation in the late nineteenth and early twentieth centuries. Chapter 1 is indeed about the Mining Law, but chapters 2 through 8 turn to the ways miners regulated themselves by formulating mining district regulations, other mining statutes enacted by Congress, court decisions interpreting those statutes, the methods by which miners staked claims and "jumped" the claims of others, the legal and geological details of how mineral rights related to surface rights, and the litigation that accompanied all of the above. In chapters 9 and 10, Bakken previews the second half of the book by addressing the environmental degradation produced by mining, a source of conflict nearly as old as mining itself.

In these chapters Bakken makes excellent use of collections of the papers of miners and their lawyers, most from the Huntington Library and the Montana Historical Society. These records bring to life what might otherwise have been a dry discussion of the rules governing who was entitled to what. In his description of title abstracts, for example, Bakken quotes a letter from the Montana lawyer Cornelius Nolan to a client who hoped to secure rights to minerals in a few particular locations. "There is

a very serious question as to whether the locations made are valid,” Nolan explained. “Under the Laws of the United States, in making mining locations they must be described with reference to some natural object or permanent monument.” But the client’s locations, Nolan observed, “are not tied down to any natural object or permanent object; there is the simple statement that they are located in the Rocky Mountains” (45).

The second half of the book is about the rise of the environmental movement and the movement’s effect on mining. Chapters 11 through 14 proceed chronologically, from the early 1970s through the mid-1990s. Chapter 15 is a close study of the battles over a single copper and gold mine in Wisconsin. A concluding chapter takes the environmental story nearly up to the present.

The book’s second half is not as satisfying as the first. Bakken does make effective use of industry periodicals like the *Mining Record* and *California Mining* to present an inside story of how mining companies attempted to rebuff criticism from environmentalists. At times, however, a glut of small events obscures the big picture: a meeting was held here, congressional hearings took place there, so-and-so wrote an editorial in the newspaper, and so on, all without much pause to distinguish what was significant from what was not. Readers may wish Bakken had done more to address the larger question his narrative raises. How could a declining industry concentrated in a small number of sparsely populated states be powerful enough to withstand all the political forces mustered against it? Bakken’s close focus on the mining regions of the West, a key to the liveliness of the first half, may be a less appropriate narrative strategy in the second half, which tells a national rather than a regional story, one in which decisions in Washington, D.C., played a bigger role than actions taken in Montana or Colorado.

As Bakken explains in a lengthy autobiographical introduction, he began working on this book back in 1967. Its long gestation has no doubt contributed to the virtues of the book’s first half. Bakken has been living for a long time with the miners and mining lawyers of a century ago. He knows them as well as anyone alive today. As in the work of many of the best historians of the West, one senses Bakken’s immersion in the places about which he writes and his fascination with the nuts and bolts of his

subject. On the other hand, the events that occupy the book's second half took place after 1967. The reason the two halves feel so different may simply be that they were researched and written at different times.

Bakken ends his book in midstream, with the House of Representatives' passage in late 2007 of a bill that would have effectively repealed much of the Mining Act of 1872. That bill never came to a vote in the Senate. A new bill has been introduced in the Senate (as of mid-2009), and so the battle over the Mining Act is still going on. It may end soon, but then again, as Bakken ably shows in this book, people have been saying that for a very long time. ★