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THE "EXTRALATERAL" RIGHT IN THE UNITED STATES

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Abstract: The law of the apex, one of the best-known features of American mining law, accords dip rights to mining claims located upon the tops of veins which plunge less then vertically into the earth. The right to pursue such veins to depth is a right extralateral to the mining claim. This "extralateral" right to a vein traditionally has been said to have its origin in the Derbyshire lead mining customs. Analysis of the American authorities, which refer to "rake veins" in Derbyshire, and consideration of the meaning of the term "rake" in Derbyshire, suggests that the traditional view is incorrect and that the extralateral right, as it has developed in the United States, is the result of experience and common sense applied to the shallow-dipping veins of Grass Valley, California, rather than the result of some conscious adoption of the "rake claim" of Germany or of some custom thought to provide dip rights on "rake veins" not applicable to "rakes" in general, that is, to veins crossing the horizontal bedding of the host limestones of Derbyshire.

INTRODUCTION

There is in the statutory "General Mining Law" (Act of May 10, 1872, see comment 1) applicable in the western mining areas of the United States a concept called the "extralateral right" always "one of the most damned and praised features of the mining law" (Leshy 1987 p95), which is discussed far more often than it is found to have practical application. Nonetheless, in acquiring title to mineral deposits and in planning for underground mining in the American West, including Alaska, one must understand what that right is.

The extralateral right is a curious combination of tradition, custom, and statutory law, for which there is an abiding fondness among prospectors and miners, not to mention their lawyers. It evolved from the experience of those who made the rules which became the customs which in 1866 became the "Lode Law" statute applicable to almost all lands which the national government held as proprietor: That the right to mine should be awarded to the discoverer of the vein "together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining [if sold by the national government] shall be sold subject to this condition" (Act of July 26, 1866). It is a cherished notion: That the free miner should have the right to work his vein "to an indefinite depth, regardless of the occupation or possession of the surface under which it might penetrate, and to hold in connection with the main vein, without regard to any inclosing surface boundaries, the 'dips, spurs, angles, and variations' of the . . . vein" (Lindley 1914 p76). If the vein, which is the main thing (Lindley 1914 p76), was the only subject of the American mining law, the extralateral right would probably not be so called. It might not in that case even be said to exist. This is because the right just described is not "extralateral" to anything.

The early miners' customs and the 1866 Act of Congress on the subject did not speak of claiming the "apex" or "top" of the vein; claims were to be made to the vein itself. But since 1872, under the second enactment of Congress concerning veins, the vein is to be appropriated through the device of a parallelogram of surface ground (referred, of course, to horizontal), not to exceed 1,500 feet in length and not to exceed 300 feet on either side of the vein at the surface: about twenty acres (see comment 2). The claimant, on the surface of the ground, is to be restricted to this land as the act provided that "[n]othing in this section [3 of the Act of May 10, 1872] shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another" (US. Code, Title 30, No.26). Underground, in pursuit of the vein, the claimant can depart from within the boundaries of his claim, extended to depth vertically, on the dip through the longer side lines, but not (because it would be on the strike) through the shorter end lines. Vertical planes drawn downward through the end lines of the claim located on the top of the vein bound horizontally the right to mine down the dip. Accordingly, the "law of the apex" is that the miner can work his vein downward from within his claim, so long as he stays within his vein, without committing either waste or trespass against his neighbour, provided only that he holds the top of the vein within the surface boundaries of his claim.

No such concept of extralateral pursuit exists in the common law, of course, either in England or in the United States, and no comparable right is to be found in the history of mining elsewhere in the United States prior to the discovery of gold-bearing quartz lodes in 1850 at Grass Valley, California (Dempsey 1988). Precisely because the concept is so novel - described as "a monstrous violation of all known customs" (Raymond 1914 p316) - its admirers have endeavoured to find antecedents for the customs of the earliest California hardrock miners (Lindley 1914 p73; see comment 3) in ancient mining codes on the continent of Europe (Neff 1973 pp389-91; see comment 4), in the codes adopted for New Spain (Lacy 1988; Lacy 1987 p5-7; Shamel 1908 p97-99; see comment 5), and in the mining customs of England. Conceding that the concept is not without some such precedents, its antecedents, that is,the original sources relied upon in the first stages of the evolution of the concept in the United States, are still the subject of dispute (Neff 1973 p387; Neff 1984 p230), but clearly the origin of the right is not lost in the mists of antiquity; it is a rather recent relic in the history of a country of recent immigrants, dating from the interval between the discovery of the lodes at Grass Valley and the promulgation of the Nevada County, California, Quartz Regulations of December 20, 1852. Certainly, the ordinances of New Spain, particularly as applied in Mexico and Peru, influenced the early development of mining district rules in California, and miners from Cornwall did bring European practices and ideas to California directly from England (Yale 1866 p58; Rowe 1974 ch.5). But no one has suggested that extralateral rights existed in Cornwall. Did the concept have antecedents in England?

Most commonly advanced is the idea that the concept came from Germany to the United States by way of the Derbyshire customs, an idea no doubt fostered by the obvious affinities between the earlier German and Derbyshire precedents, and the rather pleasing similarities between the basic concepts on other points found both in the Derbyshire precedents and in the general form of the early rules adopted in California. To that end, the German codes and the customs of Derbyshire are often compared in American literature, when, it is submitted, they should be distinguished,on the ground that the geology in Derbyshire did not there require use of a concept so unusual as the **gestrecktfeld** or "rake claim" of Germany, which was a form of inclined claim containing a vein (within an inclined three-dimensional block of ground) (Lindley 1914 p77; Kirkham 1968 p32-52; see comment 6). The extralateral right, as evolved in the United States, can be traced to the prominent shallow dip (30 to 35 degrees below horizontal) of the Mother Lode veins which were the subject of the first lode rules (see comment 7). To attribute that right in its American form to antecedents in the customs of Derbyshire is to ignore the great dissimilarity between the geology there and that of the Sierra Nevada.

The most noted writer on the law of mining on publicly-owned lands in the United States, Curtis H. Lindley, remarked that the peculiar departure in America "from the rule of vertical planes drawn through surface boundaries may possibly be traced to the customs then in vogue among the lead miners of Derbyshire with reference to 'rake veins'" and that "there is historical evidence of the existence of [a] right to follow a vein in its downward course outside of the vertical boundaries of the claim in the lead mines of Derbyshire," but he concluded that that system, like the **gestrecktfeld** of the early German codes, "had become obsolete long before the discovery of gold in California" (Lindley 1914 p77). Yet, elsewhere (Lindley 1914 pp12-18; see comment 8), he recounted "the customs recognised and established in certain portions of Derbyshire," and concluded that "more striking than any other resemblance between these customs [and the early customs in California and in the 1866 Act of the United States Congress] was the extralateral feature or right to follow the vein indefinitely on the dip, but with rigid limitation as to length . . . We have in these mining laws of Derbyshire the closest analogy to the theory of locating veins and the exercise of the extralateral right that prevailed in the mining regions of the . . . [American West in the early days] that exists in any of the mining laws of the world. [But] any direct relation between the two systems has not been so positively traced, and we are forced to resort to inference to explain the similarity ..." (Lindley 1914 p18).

The author of another treatise, Wilson I. Snyder, went even further: "If the vein [in Derbyshire] was a rake vein, that is, one having an inclination to the horizon, the miner was allowed an extra surface right . . . . Here we have the first idea in England, and one of the foundations of the law in this country, of following the vein on its dip" (Snyder 1902 p31). Similarly, elsewhere, Mr. Snyder said that ". . . the idea of the existence of a right . . . to follow . . . [a vein] on its dip . . . must have proceeded partially from the right recognized in Derbyshire of granting a more extended right in respect of a 'rake vein' than any other" (Snyder 1902 p62 and p666).

Plainly, both Mr. Lindley and Mr. Snyder believed that in Derbyshire "rake veins" were inclined, as opposed to vertical, veins, to which special rights were accorded. Mr. Lindley was rather more cautious that Mr. Snyder, but both seem to have considered the term "rake" to qualify the term "vein" to signify oblique rather than vertical dip. Since the term "rake" in modern parlance implies inclination, at least to those who are familiar

with the use of the term by geologists, Americans tend to read the Derbyshire Rules as referring to inclined veins, rather than to veins for the most part vertical. But, in Derbyshire, "rake" means "vein", whether oblique or vertical (Bainbridge 1900 p744; Ford & Rieuwerts 1975 pp1-4; Ricketts 1943 p127; see comment 9) and as orebodies in Derbyshire were for the most part either vertical or flat-lying, "rakes" were veins which crossed the horizontal bedding of the host limestones. While it is not doubted that in Derbyshire the right to mine a vein included "dip rights" to some extent, the situation in Derbyshire did not call for anything approaching the extralateral right as it evolved in the United States; nor can it be said that the Derbyshire rules provided the antecedent for the extralateral right.

CONCLUSION

We should resort, instead, to common sense: Customs framed not by landowners but by free miners allowed to make their own rules for their own governance in finding and winning metals from the earth, not only as between themselves, but as between them and the proprietors of the lands in which they discover valuable mineral deposits, in any district in which veins have been found often to dip into the earth other than vertically, will likely be found to contain provision for extralateral rights downward along the dip but with constraints against mining beyond one's claim along the strike of the vein. Only laws and regulations framed by or principally in the interest of landowners will restrain the miner to artificial vertical boundaries having no relation whatever either to the top of the vein or to the dips, angles or variations of the vein in its downward course. It is interesting to speculate, for example, what the course of history in South Africa would have been in the miners in the Transvaal had been able simply to follow their great gold-bearing reef to depth from its outcrop in the Witwatersrand. But the Boers made the rules. Title to the deep levels of that reef had to be acquired down dip through what amounted to the purchase of individual farms. Engineers from the deep mines of America proved the wisdom in Cecil Rhodes' decision (only slightly paraphrased) to "sell out our entire holdings in outcrop companies" and "acquire the ground for a new deep level enterprise," but to "buy deeps with good parents" (Hammond 1936 pp293-95, esp. p293).

COMMENTARY

Comment 1. The Act of Congress generally known as the General Mining Law, has been amended as to details from time to time subsequent to the original Act of May 10, 1872, but is still in substance a codification of the rules which miners developed in the middle of the last century, during the California Gold Rush. It is a statute intended by the national government, as the proprietor of lands, to promote mineral exploration and mine development on its lands in lieu of such activities by the government itself. Claims initiated under that law "appropriate" from the government some portion or all of the title held, in effect, in trust by the government pending that eventuality. With minor exceptions of limited effect, other land in the United States, particularly privately owned land, cannot be so appropriated.

Comment 2: The law, strictly, does not require lode claims to be in the form of parallelograms, though almost all such claims take that form. The law requires, at least if extralateral rights are to be awarded to the claim, that the end lines be parallel. Act of May 10, 1872, No.2, now U.S. Code, Title 30, No.23). Mining claimants "shall have the exclusive right of possession and enjoyment of . . . all veins, lodes or 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 sidelines of such surface locations" (Act of May 10, 1872, No.3, now U.S. Code, Title, 30, No.26].

Comment 3: Mr. Lindley commented wryly that "order was brought out of chaos by . general acquiescence in customs whose antiquity dated from the discovery of the 'diggings.'" (Lindley, 1914, p.73).

Comment 4: Mr. Neff, in his 1973 article, describes the conclusion of Herbert C. Hoover (Agricola 1912 tran. pp84-86), that the "American 'apex' conception came [to the United States] straight from Germany." Certainly it is true that in the early years of mining in the American West, those miners who had received any sort of formal instruction in mining very often were educated at Freiburg, and many of the standard geological texts of the time were German, but there is little, if any, evidence to support Mr. Hoover's conclusion, and, significantly' Mr. Hoover cited none.

Comment 5: Mr. Lacy, in an as-yet unpublished study of the mining laws of New Spain, concludes that the extralateral right as found in the 1584 Ordinances of New Spain may have formed, at least in part, the basis for the extralateral right found in the U.S. mining law, arguing that Francisco Gamboa's 1761 Commentary on the law of the mines of New Spain was known to American miners, and that they simply chose to ignore Gamboa's criticism that "or all the ordinances contained in the new code, and in the old law, there

are none more difficult, or which have been more frequently the subject of litigation in the courts, than this" (citing Gamboa 1761 ch.4, Comment 1). Mr. Lacy points out that the 1783 Code for New Spain rejected "the earlier theories of a right of extralateral pursuit which were contingent upon possession of the apex of the vein . . ."

Comment 6: The **gestrecktfeld** is described by Mr. Lindley (Lindley 1914 p77), but there is apparently no trace of the **gestrecktfeld** in the Derbyshire customs (Kirkham 1968 pp35-52).

Comment 7: The inclined headframes still standing at Grass Valley, California, make it impossible to ignore the impact that this shallow dip must have had upon the prospectors who first found the Mother Lode veins in the summer of 1850 (McQuiston 1986 pp14-15 and pp22-25). Mr. McQuiston gives the average dip of the many veins in the Grass Valley District as about 35 degrees and that of the great Empire Vein as 30 degrees down to 3,000 feet, at which depth it steepened markedly (McQuiston 1968 pp22-23).

Comment 8: Mr. Lindley seems to have relied primarily upon what he called the "quaint little volume" by Mr. Houghton published in 1681. Examination of that volume suggests precious little support for the conclusions which Mr. Lindley reached.

Comment 9: Mr. Bainbridge, in his "Glossary of English Mining Terms," (Bainbridge 1900 p744) defines "Rake" as "applied to a vein when oblique or vertical." This should be compared with Ford & Rieuwerts (1975 p1-4) and Ricketts (1943 p127), who assert that a "rake" or a "rake vein" implies a fissure vein which crosses strata as opposed to mineralisation which conforms with bedding; a rake can be inclined to vertical, but in Derbyshire it was usually vertical.

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DISCUSSION

Q. (Jim Rieuwerts) With regard to the significance between "veins" and "rakes" - it was always "vein" in Derbyshire. There is some evidence of common usage between the "vein" and "rake", for instance, Hading Vein at Cromford - but there is probably no reason why it should not be called a "rake".

A. In most of my reading, "rake" and "vein" basically mean the same thing.

Q. (Forrest) Are all mines in the States subject to the same legislation?

A. Under our system, all mines on the public land of the United States are subject to the general mining law except where specific exceptions have been made. With respect to oil, for example, the United States Congress, after first trying to apply the location system, settled on a leasing system in 1920.