VOLUME NO. 37 OPINION NO. 164

CONTRACTORS - Applicability of Open Cut Mining Act to; MINES AND MINING - Open Cut Mining Act, reclamation contract requirement of; PUBLIC LANDS - Open Cut Mining Act, applicability to open cut mining operations conducted on; UNITED STATES - Applicability of Open Cut Mining Act to agencies of; REVISED CODES OF MONTANA, 1947 - Title 50, chapter 15.

HELD: 1. The Open Cut Mining Act, Title 50, chapter 15, R.C.M. 1947, does not apply to federal agencies conducting open cut mining operations on private or federal land absent congressional authorization.

2. The Open Cut Mining Act does apply to private contractors mining on private land and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to section 59-1507, R.C.M. 1947.

4 October 1978

Leo Berry, Jr., Commissioner
Department of State Lands
Capitol Station
Helena, Montana 59601

Dear Mr. Berry:

You have requested my opinion on the following questions:

1. Does the Open Cut Mining Act, Title 50, chapter 15, R.C.M. 1947, apply to federal agencies conducting open cut mining operations on private or federal land; and, if so, are such agencies required to enter into contracts pursuant to section 50-1507, R.C.M. 1947?

2. Does the Open Cut Mining Act apply to private contractors, mining on federal or private land, who supply materials and labor on federal projects such as the Libby Dam Regulating Project; and, if so, are such private contractors required to enter into contracts pursuant to section 50-1507, R.C.M. 1947?

The Open Cut Mining Act (hereinafter the Act), sections 50-1501 through 50-1517, R.C.M. 1947, provides for the reclamation and conservation of lands subjected to open cut bentonite, clay, scoria, phosphate rock, sand or gravel mining. Section 50-1516 exempts surface mining operations regulated by Title 50, chapter 12, R.C.M. 1947, and section 50-1517 allows for the exemption of operations conducted on federal lands subject to federal reclamation controls which equal or exceed controls mandated by the Act. Whether the open cut operation is conducted on federal or private land, the Act itself applies unless the operation is exempt under the above provisions.

Persons engaged in and controlling the specified open cut operations are required by the Act to enter into a reclamation contract with the State Board of Land Commissioners. Section 50-1517, R.C.M. 1947. This contract requirement applies to "a natural person or a firm, association, partnership, cooperative or corporation or any department, agency or instrumentality of the state or any governmental subdivision or any other entity whatever." Section 50-1504(8), R.C.M. 1947. On its face, the contract requirement applies to federal agencies and to private contractors who supply labor and material on federal projects.

When a state seeks to regulate federal agencies or the use of federal property, however, the state's regulatory scheme alone is not determinative. The state's reach must finally be measured in light of constitutional principles governing federal-state power relationships. While the kinds of

operations addressed by your questions are within the scope of the Act itself, they may be shielded from state regulation as a matter of constitutional law. The discussion of those operations necessarily involves consideration of constitutional constraints that can limit or preclude an exercise of state regulatory power authorized by state law.

1. Federal agencies conducting open cut mining operations on private or federal lands. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court ruled federal supremacy embodied in the Supremacy Clause, U.S. Constitution, Article VI, chapter 2, modified the taxing power vested in state governments, exempting federal operations from state taxation. Subsequent decisions have invoked this intergovernmental immunities doctrine to prevent or limit state regulation of federal instrumentalities in other contexts. A postal worker was found to be immune from state driver's license requirements in Johnson v. Maryland, 254 U.S. 51 (1920), and federal transportation procurement bids were found to be free from state minimum rate schedules in United States v. Georgia Public Service Commission, 371 U.S. 285 (1962), and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

In a leading case, Mayo v. United States, 319 U.S. 441 (1943), state regulations were held inapplicable to a federal fertilizer distribution plan. Mayo should not be read to support categorical immunity from state regulation of federal operations, but it does underscore the court's willingness to use the Supremacy Clause to block state authority over federal operations.

Another limitation on state regulatory power is grounded in the Property Clause, U.S. Const. Art. IV, section 3, cl. 2, which provides, "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Standing alone, the Property Clause grants a federal proprietorship over Art. IV lands, not complete sovereignty. Accordingly, except with regard to the creation or recognition of private rights in such lands, which remain an exclusively federal concern, Art. IV lands are subject to the legislative jurisdiction of the states. Federal preemption of this jurisdiction should occur only when the federal property is used to effectuate a constitutionally enumerated federal power. See Wilson v. Cook, 327 U.S. 474 (1946); Colorado v. Tell, 208 U.S. 228 (1925).

A recent decision indicates the traditional view of Art. IV property power may be too restrictive. In Kleppe v. New Mexico, 426 U.S. 529 (1976), the Supreme Court ruled the Property Clause entrusts Congress with broad power over Art. IV land. Under Kleppe's holding, federal power over such lands is more like sovereignty than a proprietorship and state power is correspondingly diminished.

Taken together, the Property Clause, the Supremacy Clause and the doctrine of intergovernmental immunities would seem to preclude enforcement of the Open Cut Mining Act's contract requirement as to federal mining operations. A similar conclusion was reached in 37 OP. ATT'Y GEN. NO. 15 (1977), where the Montana Natural Streambed and Land Preservation Act was held to be inapplicable to projects undertaken by the federal government either on or off federal lands.

As that opinion noted, the federal government's immunity from state regulation may be waived and the States invited to assert their jurisdiction. However, the intent to do so must be clear and unambiguous, and any authority so granted will be narrowly construed. See Kentucky ex rel. Hancock v. Ruckelshaus, (6th Cir. 1974) 497 F.2d 1172, aff'd sub. nom. Hancock v. Train, 426 U.S. 167 (1976); Minnesota v. Hoffman (8th Cir. 1976) 543 F.2d 1198.

I therefore conclude that Montana's Open Cut Mining Act does not apply to federal agencies conducting open cut mining operations on private or federal land absent Congressional authorization. However, cases construing the scope of authority granted the states also reflect a tendency on the part of the courts to approve federal compliance with substantive requirements of state regulations while denying that federal agencies must comply with procedural requirements. Absent congressional consent to state regulation, it is arguable whether this distinction would be accepted by a court asked to construe the applicability of the Open Cut Mining Act to federal operations in Montana. In any event it is questionable whether a federal agency could be required to enter into a reclamation contract pursuant to section 50-1507, R.C.M. 1947.

2. Private contractors who supply materials and labor on federal projects conducting open cut operations on private or federal lands. The constitutional constraints discussed above do not protect a private contractor mining on private lands, and the fact such a contractor supplies materials and

labor on a federal project does not cloak him with immunity from state regulation. If the operation is on private land and is open cut mining as defined in section 50-1504, R.C.M. 1947, the Act applies.

If the private contractor is mining on federal lands he may or may not be spared from compliance with the Act, depending on whether state regulation directly conflicts with federal legislation or policy. If not, the Act applies. Penn Dairies v. Milk Control Commission, 318 U.S. 257 (1943). If there is such a conflict, however, the Act would not apply. Paul v. United States, 372 U.S. 245 (1963); Kleppe v. New Mexico, 416 U.S. 529 (1976).

An Idaho decision, State ex rel. Andrus v. Clik, 97 Id. 791, 554 P.2d 969 (1976), includes an analysis of federal pre-emption in the context of a private operation conducted on federal land. The Idaho Board of Land Commissioners sought an injunction against a dredge mining operation conducted on Art. IV lands without a permit required by state law. The court found there was no federal preemption, reasoning that since there was neither a direct conflict between state and federal regulation nor a pervasive federal regulatory scheme, the state retains jurisdiction over federal lands. That decision emphasized the following language from the National Environmental Quality Improvement Act of 1970, 42 U.S.C 4371:

> The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality ***. The primary responsibility for implementing this policy rests with state and local governments.

Congressional policy expressly favors state control of environmental policy. Thus, private contractors operating on federal lands should be held to the Open Cut Mining Act's contract requirement unless there is a conflicting federal law. The Act itself provides that federal lands subject to federal reclamation controls may be exempt from the Act (section 50-1517, R.C.M. 1947), so only if an applicable federal law set reclamation standards lower than those of the Act would a conflict arise.

THEREFORE, IT IS MY OPINION:

1. The Open Cut Mining Act, Title 50, chapter 15, R.C.M. 1947, does not apply to federal agencies conducting open cut mining operations on private or federal land absent congressional authorization.

2. The Open Cut Mining Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Open Cut Mining Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to section 50-1507, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General