MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 15, 1981

The seventh meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:01 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF SENATE BILL 45:

AN ACT REQUIRING THE RECORDING AND ANNUAL REGISTRATION OF SEVERED MINERAL INTERESTS AND PAYMENT OF A FEE THEREFOR; PROVIDING FOR ADVERSE POSSESSION OF UNRECORDED AND UNREGISTERED MINERAL INTERESTS; ABOLISHING THE TAX ON THE RIGHT OF ENTRY.

Senator Towe presented the bill and explained that it dealt with those interests in minerals which become severed from the land interest. Often those interests are inherited from one generation to the next with no indication of who owns them at the present time, resulting in confused title for the surface owner of the land. Presently the surface owner has no recourse for quieting title to these mineral interests. He further pointed out that no taxes are paid on these mineral interests, a situation which would be corrected by this bill. Senator Towe then read through the bill section by section for the benefit of the committee, and said that he feels the counties could pick up an additional revenue of one million dollars.

John Sullivan, representing Montana-Dakota Utilities, presented his testimony (marked Exhibit A and attached to these minutes) against the bill.

Tom Dowling, representing the Montana Railroad Association, stated that Burlington Northern is one of the major taxpayers. Under this proposed bill they would pay a tax of $184,757 per year, which is $30,000 more than the state is receiving overall at the present time. He felt it should not pass.

Bill Hand, of the Montana Mining Association, presented testimony (marked Exhibit B and attached to these minutes) against the bill.

Don Allen, Executive Director of the Montana Petroleum Association, gave testimony (marked Exhibit C and attached to these minutes) against the bill.

John North, Department of State Lands, spoke in opposition to the bill (testimony marked Exhibit D and attached to these minutes).

Gene Phillips, attorney from Kalispell, spoke in opposition to the bill, particularly because of lack of clarity over how to assess the proposed tax.

Karla Gray, speaking for the Anaconda Company, presented testimony (marked Exhibit E and attached to these minutes) against passage of the bill.

Peter Jackson, of the Western Environmental Trade Association, spoke in opposition to the bill, citing personal complications that would arise if the bill passed.

Joanne McFarlane, representing the Clerk and Recorders Association, spoke against the bill because of the cost and storage problems which would arise as a result.

Tom Keating, from Billings, representing the Montana Association of Petroleum Landmen, also spoke as an opponent to the bill. He stressed the fact that a clouded title resulting from passage of the bill would impede development of the minerals.

Also speaking in opposition to the bill were Bill Sternhagen, representing Northwest Mining Association; Jim Mockler, Executive Director of Montana Coal Council; and Bob Gannon, representing the Montana Power Company.

Senator O'Hara asked Senator Towe if there should be a fiscal note with this bill. Senator Towe replied that by repealing the right of entry tax there would be some loss of revenue, but that more than enough new revenue would be collected to offset this loss.

Senator Mazurek expressed his concern that the bill was doing nothing to bring home notice of the adversity of the severed interest, and wondered about its constitutionality.

Senator Crippen stated that he was confused over the intent of the bill as to whom it was trying to benefit. He said that rather than turn over the mineral rights to surface owners, perhaps they should revert to the State, who could then offer them at auction. He also said that there should be clarification of existing rights and that existing titles to property should not be made more confusing.

CONSIDERATION OF SENATE BILL 94:

AN ACT TO PROVIDE THAT A WATER JUDGE MAY BE A RETIRED DISTRICT JUDGE; TO PROVIDE THAT A WATER JUDGE MAY RESIGN; AND TO PERMIT A DISTRICT JUDGE OR RETIRED DISTRICT JUDGE TO SIT AS A WATER JUDGE IN MORE THAN ONE DIVISION WHEN CALLED BY THE CHIEF JUSTICE OR ANOTHER WATER JUDGE.

Senator Paul Boylan, District 38, presented the bill. He stated that the people of Montana have to lay claim to their water as soon as possible, and that this bill would help do this.

John Scully, Chairman of the Water Committee for the last four years, stated that the bill is attempting to use the sources available for the protection of the water rights of the people in Montana. He said that the bill would not make it automatic that the retired judge would have to perform this duty; it would be solicited of them. He then introduced Judge Lessley, who is the state's chief water judge.

Judge Lessley stated that this bill is one of the most important things that would be done in Montana in the next one hundred years, and that the effort to get this started had long been in existence. He stated that he would have the preliminary decree for Powder River ready by the middle of April, and asked the committee to let him speed up the process by passing this bill. He stated that the judges on the retired rolls who would be willing to serve as water judges would give the program a much-needed continuity. He then gave the committee a copy of the resolution adopted by the Select Water Committee (marked Exhibit F and attached to these minutes).

Bill Asher testified that this state lacks expertise on the subject of water, and urged support of the bill.

John Scully stated that Senator Galt also urged support of this bill, even though he was unable to appear at this meeting to voice his support.

There were no opponents to the bill.

Senator Anderson asked Judge Lessley how much time he now spends dealing with water compared with his other court duties. Lessley replied that he spent a lot of time on it, and that he wants to get it done between now and April.

DISPOSITION OF SENATE BILL 94:

Senator S. Brown voiced his approval of the bill, and then moved that the bill DO PASS. His motion was seconded, and passed unanimously.

DISPOSITION OF SENATE BILL 40:

Senator Anderson referred to a letter he had received regarding the bill (marked Exhibit G and attached to these minutes) and recommended an adverse motion. Senator S. Brown moved that the committee recommend DO NOT PASS on the bill. This motion was seconded, and passed unanimously.

Chairman Anderson stated that Tuesday's meeting, January 20, would be a work session, and that Senate Bill 76 would be taken up, with reference to Senator Crippen's information relative to the P.E.R.S. standing of judges.

The meeting adjourned at 11:52 a.m.

Mike Anderson

Senator Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date 1/15/81

NAME	PRESENT	ABSENT	EXCUSED
~~Anderson, Mike, Chr. (R)~~	✓		
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

(1)

SENATE JUDICIARY COMMITTEE

BILLS SB 45 & SB 94 VISITORS' REGISTER DATE 1/15/81

Please note bill no.

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPOS
Peter Jackson	Weta	SB 45		✓
[illegible]	Atlantic Richfield	SB45		✓
[illegible]	Clerk & Recorders	SB45		✓
[illegible]	Montco	SB45		
[illegible]	W.I.T.E.	SB45		
Mick [illegible]	MPC	SB45		
John F. North	Dept. of State Land	SB45		✓
[illegible] PHILLIPS	MYSELF	SB45		✓
[illegible]	MT Assn Pet Landmen	SB45		✓
Bill Sternhagen	Northwest Mining Assn.	SB45		✓
James D. Mockler	Montana Coal Council	SB45		✓
Bob Hannon	Montana Power	SB45		✓
[illegible]		SB45	✓	
John Sullivan	MDU	SB45		✓
Tom Dowling	Mont R.R. Assn	45		✓
Bill Hand	Mt. Mng. Assoc.	45		✓
Don Allen	MT. Petroleum Assn	45		✓

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY

(7)

NAME: _____ DATE: _____

ADDRESS: _____

PHONE: _____

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: _____

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Tom Dowling DATE: 1/15/81

ADDRESS: 3030 N. Montana

PHONE: 442-9000

REPRESENTING WHOM? Mont RR Assn

APPEARING ON WHICH PROPOSAL: S.B 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Bill Hand DATE: Jan 15-81

ADDRESS: 1802 11th AVE. Helena, (Mt. Mng. Assoc.)

PHONE: 443 7297

REPRESENTING WHOM? Mt. Mng Assoc

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Don Allen DATE: 1/15/81

ADDRESS: 2030 - 11 B (17) Helena, Mt. 59601

PHONE: 442-7582

REPRESENTING WHOM? Mt. Petroleum Assn.

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? /

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Gene Phillips DATE: [illegible]

ADDRESS: Kalispell, [illegible]

PHONE: 443-1999

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: SB 25

DO YOU: SUPPORT? ______ AMEND? ______ OPPOSE? [illegible]

COMMENTS: ______

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Karla M Gray DATE: 1/15/81

ADDRESS: 2030 11th Ave. Suite 2A

PHONE: 443-5810

REPRESENTING WHOM? Atlantic Richfield / Anaconda

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: Testimony Provided

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Peter Jackson DATE: 1-15-81

ADDRESS: 2301 Colonial Drive Helena MT.

PHONE: 443-5541

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Joanne P McFarlane DATE: 1-15-81

ADDRESS: Box 115, Boulder, Mont 59632

PHONE: 225-3332

REPRESENTING WHOM? Co. Clerks and Recorders

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: I feel there are too many omissions regarding implementation - too many things to amend

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: John Scully DATE: 1/15

ADDRESS: 3318 Sundance Rd.

PHONE: 587-1365

REPRESENTING WHOM? Select H_2O Corp.

APPEARING ON WHICH PROPOSAL: 94

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: W. W. LESSLEY DATE: 15 Jan 91

ADDRESS: 2221 West Babcock Bozeman Mont

PHONE: 587-7040

REPRESENTING WHOM? Wibaux Judges

APPEARING ON WHICH PROPOSAL: SB 94

DO YOU: SUPPORT? yes AMEND? _____ OPPOSE? _____

COMMENTS:

Represent the Wibaux Courts

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: BILL ASHER DATE: 1-15-81

ADDRESS: P.O. BOX 547 MANHATTAN

PHONE: 284-6664

REPRESENTING WHOM? SCEF

APPEARING ON WHICH PROPOSAL: SB 94

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

NAME: Mac Johnson DATE: 1/15

ADDRESS: 2214 Looney Helena

PHONE: 442 0831

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: SB 45

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Exhibit A

COMMENTS OF MONTANA-DAKOTA UTILITIES CO.

RE: SENTATE BILL 45

My name is John Sullivan, representing Montana-Dakota Utilities.

The purpose of this bill is to provide a means by which surface owners can without cost to themselves acquire ownership of minerals they do not now own. The stated purpose for this scheme of confiscation -- that severed mineral interests impair development of Montana's mineral deposits -- is a sham because this problem was addressed and solved during the last legislative session by enactment of Senate Bill 88. This legislation allows mineral owners to petition the district court for creation of a trust on behalf of other mineral owners who cannot be located. If the benefits of the trust are not claimed, the monies contained therein are credited to the State of Montana.

The provision for adverse possession of severed minerals by surface owners will undoubtedly result in unfair windfalls to surface owners, because it will allow surface owners to acquire minerals for nothing, after having been previously compensated for the minerals at the time of severance.

In addition to being unfair, this preference in favor of the surface owner is of questionable constitutionality. An identical provision was declared invalid by the Supreme Court of Wisconsin in 1977 in the case of Chicago and Northwestern Transportation Company vs. Pedersen. I have attached a copy of the Wisconsin Court's decision to

my written comments, and have left these with the Secretary of this Committee. Although the Wisconsin decision is somewhat lengthy, I believe that two sentences are worth bringing to this Committee's attention. The Wisconsin Court stated:

> "This statute not only provides for a forfeiture of unregistered mineral rights, it also provides that the forfeited rights revert to the surface owner. This procedure violates the rule that the legislature cannot take private property from one person for the private use of another."

The same principle of course applies here in Montana.

For these reasons, MDU respectfully recommends that this Committee vote DO NOT PASS on Senate Bill 45.

and their remedy at law is "adequate." The trial court's order denying a temporary injunction is affirmed.

Order affirmed.

80 Wis.2d 566

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,

v.

Earl H. PEDERSEN, Register of Deeds in and for Bayfield County, Wisconsin, and Victor A. Miller, Attorney General of Wisconsin, and all other officers similarly situated in and of this state and those acting under said officers, Appellants.

No. 75-702.

Supreme Court of Wisconsin.

Argued Oct. 4, 1977.

Decided Nov. 14, 1977.

Claimed owners of severed mineral rights brought action to have declared unconstitutional statute providing that owners of such rights may lose them to surface owners and to have enforcement of statute enjoined. The Circuit Court, Bayfield County, Lewis J. Charles, J., held the statute to be unconstitutional and enjoined enforcement and defendants appealed. The Supreme Court, Day, J., held that the statute was invalid, where the enforcement procedures were entirely lacking in substantive and procedural due process and the statute was not viable without the enforcement procedures.

Affirmed.

1. Mines and Minerals ⇐55(1, 7)

Mineral rights are interests in land which may be created or transferred as any other estate in land.

2. Eminent Domain ⇐198(1)

Before person can be deprived of property, he has right to hearing, and, although requirements of hearing will vary from case to case depending on nature of right or property threatened, hearing must allow for consideration of facts essential to the decision.

3. Eminent Domain ⇐180

Implicit in right to hearing before deprivation of property is adequate notice of hearing.

4. Eminent Domain ⇐182

Personal service is always sufficient notice of hearing in which property owner may be deprived of his property and, if his location is known or easily ascertainable, personal service is required, but for persons missing or unknown, publication is adequate notice.

5. Eminent Domain ⇐61
Mines and Minerals ⇐55(7)

Statute providing for forfeiture of unregistered mineral rights and providing that forfeited rights revert to surface owner violates rule that legislature cannot take private property from one person for private use of another and provision is not warranted on theory that private use is so intimately connected with public necessity of clearing up uncertainty over mineral rights ownership that there is quasi-public use which justifies legislative taking of property for that purpose. W.S.A. 700.30

6. Constitutional Law ⇐278(1)
Mines and Minerals ⇐55(7), 66, 7
Statutes ⇐64(2)

Lack of substantive and procedural due process rendered invalid enforcement procedures of statute providing that severed

tions of the credit have been complied with." Since this warranty runs in favor of "all interested parties," including the customer of the bank, it gives an issuer who wrongfully honor a demand a remedy against the beneficiary

mineral rights owners or long term lessees of mineral rights must register mineral rights and pay yearly registration fee on mineral rights within three years or else rights revert to surface fee owners and providing that reversion will occur without hearing or notice of that hearing having been given to severed rights owner and without compensation having been paid to him, and statute was not viable law and would not have same effect as one intended by legislature without its enforcement procedures; thus the whole statute was invalid. W.S.A. 700.30.

7. Statutes ⇐64(1)

Intent of legislature and viability of portion of statute when standing alone are factors to be considered in deciding whether statute should be severed and material provisions of statute may be eliminated if part upheld constitutes, independently of invalid portion, complete law in some reasonable aspect, unless it appears from act itself that legislature intended it to be effective only as entirety and would not have enacted the valid part alone.

Bronson C. La Follette, Atty. Gen., Thomas J. Balistreri, Asst. Atty. Gen., on brief, for appellant, Attorney General.

Thomas P. Fox, Dist. Atty. of Bayfield County, for appellant, Earl H. Pedersen, with oral argument by Thomas J. Balistreri, Milwaukee.

Roger S. Bessey (argued), Terry E. Johnson and Borgelt, Powell, Peterson & Frauen, S. C., Milwaukee, on brief, for respondents.

DAY, Justice.

This is an appeal from a declaratory judgment in which the trial court held secs. 700.30 and 893.075, Stats. (Ch. 260, L.1973) unconstitutional and enjoined all Wisconsin county registers of deeds from carrying out the provisions of the act. We affirm the judgment of the trial court.

Sec. 700.30, Stats., at issue here, reads as follows:

"700.30 *Mineral Rights.* (1) Any person, other than the surface fee owner, who claims title to mineral rights in land arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, shall record his claim with the register of deeds of the county in which the land is situated. The claim shall describe the reserved rights and the land in which the rights are claimed. The register of deeds shall record the claim in a register of mineral rights and the claimant shall pay the recording fee under s. 59.57. In addition, the claimant shall thereafter pay an annual registration fee of 15 cents per acre or fraction thereof with a minimum fee of $2 for each single description registered on the lands wherein such mineral rights are claimed. Failure to register any claim of mineral rights shall result in reversion of such rights to the surface fee owner. Failure to pay the registration fee within 3 years of the annual due date shall cause all rights to revert to the surface fee owner.

"(2) Any claim of mineral rights separate from surface fee ownership arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, and recorded prior to December 31, 1974, shall be void and all rights under such claim shall revert to the surface fee owner unless such claim is recorded prior to December 31, 1977, as provided in this section. Claims of mineral rights separate from surface fee ownership arising from instruments recorded after December 31, 1974, must be recorded as provided in this section within 3 years of the date of recording the instrument creating or reserving such rights; failure to record such claims shall void such claims, which shall then revert to the surface fee owner.

"(3) Mineral rights, other than mineral rights claimed by the surface fee owner of record, may not be claimed unless based on a recorded instrument which shall be specifically referred to in the

registration of such rights required by this section.

"(4) Of the annual registration fee, one-third shall go to the county in which the land is located, one-third to the municipality in which the land is located and the remaining one-third to the geological and natural history survey to be used for identification and evaluation of mineral resources of the state. The register of deeds shall collect such payments and maintain records sufficient to identify delinquencies in payments and he shall turn the payments over to the county treasurer who shall forward the payments to those entitled to them under this subsection no later than February 28 of the year following the due date.

"(5) Municipalities and counties shall register all lands owned by them on which they claim mineral rights but shall not be required to pay a fee. Lessees of mineral rights on lands owned by counties or municipalities shall be required to pay the fee under sub. (1).

"(6) If the fee under this section is not paid on or before the due date of December 31 of each year, it will be subject to the interest rate under s. 71.13(1) accruing from the preceding December 1."

Sec. 893.075, Stats. reads as follows:

"893.075 *Adverse Possession Of Mineral Rights Defined.* Adverse possession of the land as defined in this chapter shall be deemed to include adverse possession of all mineral rights not registered under s. 700.30.

"*Section 2. Effective Date.* The first registration fee under this act shall be paid for the year 1974 and shall be paid not later than December 31, 1974. On enactment hereof, the attorney general shall promptly commence an action seeking a declaratory judgment regarding the constitutionality of this act."

Sec. 700.30, Stats. requires persons, other than surface fee owners and lessees holding leases of less than ten years, who claim title to mineral rights in land, to record their claims and pay a recording fee. Non-exempt claimants are also required to pay an annual registration fee of fifteen cents for each acre of mineral rights claimed. Failure to record claims of mineral rights or pay the annual registration fee results in reversion of the mineral rights to the surface fee owner.

The plaintiff-respondent railroad companies (hereinafter plaintiffs) claim in excess of 250,000 acres of severed mineral rights in Wisconsin, including claims in Bayfield county. The plaintiffs started a declaratory judgment action to have the statutes declared unconstitutional and to have their enforcement enjoined.

Following a hearing, the trial court issued a memorandum opinion holding the statutes were unconstitutional as violating the due process and equal protection clauses of the United States Constitution, and the uniformity of taxation clause of the Wisconsin Constitution.

Judgment was entered January 12, 1976 declaring Ch. 260 of the Laws of 1973 unconstitutional in its entirety and permanently enjoining the defendant-respondent registers of deeds (hereinafter defendants) from carrying out its provisions.

We hold that sec. 700.30, Stats., is unconstitutional because its enforcement provisions deny procedural and substantive due process.[1] The enforcement provisions in the statute are not severable from the statute as a whole so the entire statute fails.[2]

Sec. 700.30, Stats. provides that owners of severed mineral rights may lose those rights

1. The plaintiffs claim a denial of due process under both the state and federal constitutions. ". . . Art. I, Sec. 1 of the Wisconsin Constitution is . . . substantially equivalent to the due-process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." *State ex rel. Sonneborn v. Sylvester*, 26 Wis.2d 43, 49, 132 N.W.2d 249, 252 (1965). *State ex rel. Cresci v. H & SS Dept.*, 62 Wis.2d 400, 414, 215 N.W.2d 361 (1974).

2. The plaintiffs also argue that the statute denies equal protection and offends Art. VIII, Sec. 1 of the Wisconsin Constitution. The latter section requires that property taxes be uniform. We do not reach these issues.

to the surface owners under a number of circumstances more fully described below.

[1] Mineral rights are an interest in land which may be created or transferred as any other estate in land. *Gillett and another v. Treganza*, 6 Wis. 343, 348 (1858); *Ganter and others v. Atkinson and others*, 35 Wis. 48, 51 (1874).

Where the mineral right is severed from the surface fee

". . . it has been held to be property, distinct from the land itself vendible, inheritable and taxable." *Elder v. Wood*, 208 U.S. 226, 232, 28 S.Ct. 263, 264, 52 L.Ed. 464 (1908).

[2] Before a person may be deprived of property, that person has a right to a hearing. The requirements of the hearing will vary from case to case depending on the nature of the right or property threatened, but the hearing must allow for consideration of facts essential to the decision. *Bell v. Burson*, 402 U.S. 535, 540–542, 91 S.Ct. 1586, 29 L.Ed. 90 (1971).

In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes are not paid on them. At the least, the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid.

[3, 4] Implicit in the right to a hearing is adequate notice of the hearing. Personal service is always sufficient notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Where a person's location is known or easily ascertainable personal service is also required. *Shroeder v. City of New York*, 371 U.S. 208, 212, 213, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962). But for, ". . . persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . ." For such persons publication is adequate notice. *Mullane, supra*, at 339 U.S. 306, 317, 70 S.Ct. at 658.

In an in rem proceeding for the collection of property taxes the standards for the required notice are less stringent. In *Devitt v. Milwaukee*, 261 Wis. 276, 52 N.W.2d 872 (1952), the City of Milwaukee adopted an ordinance in conformity with sec. 75.521, Stats. which allowed for the enforcement of property taxes by an in rem action where tax certificates remained unpaid for over three years. The procedure set out in the act required that a petition of foreclosure be filed with the circuit court and that the petition would have the same effect as a lis pendens. A copy of the petition would be sent by registered mail to the last known addresses of owners and mortgagees and notice of the petition would appear in the city newspaper with the largest circulation once a week for three weeks. In deciding that the procedure complied with due process, this court stated that,

> "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain." *Devitt, supra*, at 261 Wis. 276, 52 N.W.2d at 873, quoting from *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 239, 10 S.Ct. 533, 33 L.Ed. 892 (1890).

The payment of the fees under sec. 700.30, Stats. is a tax. The fees raise revenues beyond what is necessary to the administration of the registration scheme. Sec. 700.30(4), Stats. provides that one-third of the fees will go to the state geological and natural history survey.[3] In contrast to the notice procedure approved in *Devitt, supra*, nothing in sec. 700.30, Stats. provides for any procedural due process. Therefore, the law unconstitutionally allows for the deprivation of property without due process.[4]

3. All the parties to this appeal agree that the registration fees are a tax.

4. The attorney general contends that the act itself is notice. There is no authority for that argument which is a novel approach to the problem of notice. The attorney general also contends that there is nothing that needs to be decided at a hearing. As was pointed out above, a severed mineral rights owner may want to at least raise the factual issues of

The attorney general contends that if the statute lacks procedural due process, this court should formulate due process safeguards and read them into the terms of the statute. Procedural due process requirements have been read into other statutes.[5] Because a number of alternative methods are possible, it is more fitting for the legislature to make the choice than for this court to do so.

Substantive Due Process

The plaintiffs contend that the forfeiture provisions of the statute deny them substantive due process by an unreasonable use of the police power because their mineral rights revert to the surface owners if the rights are not registered or taxes are not paid on them.

The test for a proper exercise of the police power is whether,

> ". . . the means chosen have a reasonable . . . relationship to the purpose or object of the enactment, if it has, and the object is a proper one, the exercise of the police power is valid." *State v. Jackman*, 60 Wis.2d 700, 705, 211 N.W.2d 480, 484 (1973).

[5] This statute not only provides for a forfeiture of unregistered mineral rights, it also provides that the forfeited rights revert to the surface owner. This procedure violates the rule that the legislature cannot take private property from one person for the private use of another. *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N.W. 849 (1901).

The attorney general admits that there is a private use here, but argues that this private use is so intimately connected with the public necessity of clearing up uncertainty over mineral right ownership that there is a quasi-public use so as to justify the legislative taking of property for that purpose. *Chicago & N. W. R. Co.*, *supra*, and 16a C.J.S. Constitutional Law § 647a, pp. 940–941. The attorney general's argument is unpersuasive. First, it's questionable whether the purpose of clearing up mineral title uncertainty is so important that the reversion of mineral rights to the surface owner becomes a quasi-public use. Second, in *Chicago & N. W.*, *supra*, the private parties were given compensation for the property taken for the quasi-public use. Sec. 700.30, Stats. provides for no such compensation.

[6] Sec. 700.30, Stats. provides that severed mineral rights owners or long term lessees of mineral rights must register their mineral rights and pay a yearly registration fee on the mineral rights within three years or else the rights revert to the surface fee owner. This reversion would occur without a hearing or notice of that hearing having been given to the severed rights owner, and without compensation having been paid to them. These enforcement procedures are entirely lacking in substantive and procedural due process.

The attorney general contends that the statute is severable because the enforcement provisions may be separated from the rest of the statute.

[7] The intent of the legislature and the viability of the severed portion of the statute when standing alone are the factors to consider when deciding whether a statute should be severed. Material provisions of a statute may be eliminated,

> ". . . if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part

whether the registration was done or the tax paid.

5. In *State ex rel. Kovach v. Schubert*, 64 Wis.2d 612, 219 N.W.2d 341 (1974), this court held that due process required that a defendant who had been found guilty and mentally defective at the time of the crime, be given a third phase in his trial to determine if he was still mentally defective. In *Steele v. Gray*, 64 Wis.2d 422, 223 N.W.2d 614 (1974), due process required a hearing prior to administrative revocation of a prison inmate's good time. In *State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 185 N.W. 306 (1971), due process required a hearing before revocation of parole.

alone." *Madison v. Nickel*, 66 Wis.2d 71, 79, 223 N.W.2d 865, 870 (1974). *City of Milwaukee County v. Boos*, 8 Wis.2d 215, 224, 99 N.W.2d 139 (1959).

Sec. 700.30, Stats. cannot stand without the objectionable enforcement provisions. Without the enforcement provisions, severed mineral rights owners would be required to register their rights and pay fees on them, but absolutely nothing would happen if they did not.

The attorney general suggests that the payment of fees could be enforced the same as other taxes on real or personal property, but that was not the legislature's intent. The legislature intended that the mineral rights would revert to the surface owner, which violates substantive due process as pointed out above. Without its enforcement procedures, sec. 700.30, Stats. is not a viable law and would not have the same effect as the one intended by the legislature.

Judgment affirmed.

The Treasure State

MONTANA MINING ASSOCIATION

P.O. Box 132,
Helena, Montana 59601
(406) 443-7297

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
Thursday, January 15, 1981
Rm 331, The Honorable Mike Anderson
By Bill Hand, Executive Secretary
Montana Mining Association
Helena, MT

Exhibit B

Reservation of mineral rights has long been a way to hand down a legacy of the pioneer days. Helena, our capital city, is a historical example of the "strike it rich" dream that miners held then and still hold today. This dream has been passed down through many generations of humble, hard working individuals. These individuals have suffered through many difficult economic times, including the great depression, but have always retained their mineral rights.

We feel, however, that Senate Bill 45 would be a hardship on these individuals and distroy their small mining heritage. As mining people, we find it repugnant to necessarily combine surface and sub-surface rights.

The individuals that the Montana Mining Association represents who, by and large are people of modest means, cannot afford the attorney's fees required for the necessary title searchs. Therefore, they will not file the needed documents in order to retain their interests.

For the members of our Association, the most startling provision of Senate Bill 45 is the adverse possession clause. In effect, this clause, in a short period of time, could surrender the mineral estate to the surface owner.

As vast and complex as Montana's laws and regulations are today, how many of the committee members wives would understand or be concerned with mineral rights? It is entirely possible for both men and women to abandon their mineral rights because of apathy or ignorance of the law.

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
Thursday, January 15, 1981

The Montana Mining Association is stedfastly opposed to any measurs that encroach upon the rights of our some 550 small miners. Senate Bill 45 is such a bill and we respectfully submit our opposition.

DONALD B KENNEDY DIRECTOR OF MI
WEST 705 1 AVE TAF-C4
SPOKANE WA 99220

western union Mailgram

4-045055S013 01/13/81 ICS IPMMTZZ CSP HELA
5094567480 MGM TDMT SPOKANE WA 331 01-13 0508P EST

Exhibit C

MONTANA PETROLEUM ASSN
ATTN DON L ALLEN
2030 11 AVE STE 17
HELENA MT 59601

DEAR SIR:

WE HAVE JUST RECENTLY BEEN ADVISED OF THE INTRODUCTION OF MONTANA SENATE BILL #45-(THE ACT OF RECORDING OF ALL SEVERED MINERAL INTEREST) AND WISH TO EXPRESS OUR VIGOROUS OPPOSITION. WE HAVE NOT AS YET SEEN A COPY OF THE BILL, BUT HAVE LEARNED OF THE FEES INVOLVED AND OF THE ANNUAL RECORDING REQUIREMENT.

THE FEDERAL LAND BANK OF SPOKANE FEELS THAT THIS BILL DISCRIMINATES AGAINST OWNERS OF SEVERED MINERAL RIGHTS LEGALLY ACQUIRED THROUGH CONTRACT. THE BANK DOES LEGALLY OWN A FAIRLY LARGE HOLDING OF SEVERED MINERAL RIGHTS IN MONTANA. INCOME DERIVED FROM THESE MINERAL RIGHTS HELP TO OBTAIN OUR GOAL TO MAINTAIN LONG-TERM FINANCING FOR AGRICULTURAL PURPOSES AT THE LOWEST POSSIBLE RATE. INCREASED TAXATION COULD VERY WELL INCREASE THE RATE MONTANA FARMERS WOULD HAVE TO PAY FOR FINANCING THROUGH THIS ORGANIZATION.

ALSO, BECAUSE OF POOR RECORD KEEPING ON OUR PART IN THE PAST, WE HAVE LOST TRACK OF MINERALS RIGHTS WHICH WE HAVE ACQUIRED. ONLY AS MINERAL DEVELOPMENT INCREASES THROUGHOUT THE STATE DO WE LEARN OF OUR OWNERSHIP OF THESE RIGHTS WHICH ARE PRESENTLY UNKNOWNED TO US. THIS IS ESPECIALLY TRUE IN WESTERN MONTANA WHERE MINERAL TITLE CHECKS BY THE ENERGY COMPANIES HAVE ONLY BEGUN IN EARNEST THE LAST FEW YEARS. THIS BILL WOULD ERASE OUR OWNERSHIP TO THESE "LOST TRACTS" AND THEREFORE ERASE THE BENEFIT 8657 MEMBER BORROWERS OF THIS BANK IN MONTANA WOULD REALIZE FROM OUR OWNERSHIP.

THE INCREASED BURDEN ON ANNUAL RECORDING ALSO CONCERNS US. OUR SMALL STAFF IN THE MINERAL AREA PROBABLY COULD NOT ADEQUATELY HANDLE THIS TASK. THEREFORE, ADDED PERSONNEL MEANS ADDED COST TO US.

THIS BILL DOES NOT COMPLIMENT OUR OBJECTIVE TO KEEP EXPENSES DOWN IN ORDER TO KEEP OUR INTEREST RATE DOWN. WE, THEREFORE, BELIEVE THAT MONTANA AGRICULTURE WOULD BENEFIT FROM THE DEFEAT OF THIS BILL.
SINCERELY
DONALD B KENNEDY DIRECTOR OF MINERAL OPERATIONS FEDERAL LAND BANK OF SPOKANE
WEST 705 1 AVE TAF-C4
SPOKANE WA 99220

509- 456-1444

Exhibit D

TESTIMONY
SB 45
DEPARTMENT OF STATE LANDS

The state of Montana owns over one million acres of severed mineral interests. This ownership interest is the result of prior sales in which certain minerals were reserved as required by law. SB 45 would have an adverse effect on state-owned severed mineral interests and, as currently written, is contrary to the Constitution and state and federal law in its application to state land.

It appears that the purpose of SB 45 is to provide a system for locating severed mineral interests. The Department has no objection to the intent of the act. However, the Department maintains a complete record of all interests administered by the Department. In addition, Section 2-17-126 requires other state agencies to file mineral interests with the Department. As a result, all state severed mineral interests are locatable within the Department, and such records are completely open to the public. Also, all documents granting interests to the State Land Board have already been recorded with the counties. Thus, state lands should be exempted from Section 2(1) or amendatory language stating that re-recording is not required should be added.

SB 45 conflicts with Montana's Constitution. Article X, Section 11(2) states:

> *No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.*

This provision, when coupled with the state's Enabling Act, makes it clear

that the state cannot dispose of mineral interests without receiving the full market value for those interests. SB 45 however establishes a system of adverse possession by which a surface owner could acquire state mineral interests without compensating the state.

In addition to the constitutional and Enabling Act conflicts, the bill runs contrary to state and federal law. The state school trust acquired many of its mineral interests through a federal act of 1927 (43 USC 870, 44 Stat. 1026). When the surface is sold, the act specifically requires the state to reserve all minerals and the right to prospect for, mine, and remove those minerals. This act has been codified in 77-2-304 MCA. To dispose of severed mineral interests through adverse possession would conflict with these federal and state laws and could cause forfeiture of state trust lands back to the United States under the terms of the 1927 Act. For these reasons the Department also recommends that if Section 2, Subsection (1) of SB 45 is not amended as requested above, that section 5(1)(b) be amended to exclude state-owned lands.

If the legislature passes SB 45 in its current form, and if the bill requires the Department to re-record its interests, the Department would need a $30,000 to $50,000 general fund appropriation to comply with its provisions.

Exhibit E

COMMENTS OF THE ANACONDA COMPANY
BEFORE SENATE JUDICIARY COMMITTEE

RE: SENATE BILL 45

My name is Karla Gray, representing The Anaconda Company.

Senate Bill 45 reflects legislative concern that the existence of obscure and fractionalized mineral interest ownership "makes it difficult to identify and locate the owners of severed mineral interests, thus impairing the development of this state's mineral deposits in a period of increasing demand for the development of new mineral sources." Even if these assumptions were accurate, SB 45 does not provide a remedy. Generally, all SB 45 calls for is the recording and registration of severed minerals with eventual adverse possession of those minerals by the surface owner where the mineral owner fails to record.

The two main problems which this bill purports to correct are 1) the identity of owners of severed mineral interests; and 2) the locatability of those owners. As I will mention later, identity is not an actual problem and, thus, the primary focus of this bill--the recording and registration provision--is unnecessary and superfluous.

The locatability issue is a problem only insofar as it "impairs development." The enactment in 1979 of Section 82-1-302 MCA specifically remedies this problem by permitting mineral owners to petition for the creation of a trust on behalf of an unlocatable owner. Under this procedure, development goes forward, and eventually, the benefits of the trust, if not claimed, accrue to the state of Montana.

SB 45 requires that all severed mineral interests be recorded with the county clerk. As noted previously, the purported purpose of this provision is to establish the identity of severed mineral interests. Many questions arise from this requirement, such as what is a "mineral" and what constitutes a

"severed mineral." The bottom line, however, is this: Mineral interests are severed through reservation or by deed or other conveyance, and as such, are obviously recorded. Thus, ownership is not obscure or unidentifiable.

Along with recording and registration of these interests, SB 45 requires the owner to pay an initial fee of $1 per interest and, thereafter, an annual registration fee. It is unlikely that these fees will adequately compensate the county for the work required in recording and registering these interests much less contribute "toward the general operating costs of government," as is contemplated in the legislative findings. Furthermore, even if an initial recording were deemed necessary, the annual registration and fee requirements are unneeded and unjustified. Once recorded, a record exists through which the owner of the interest or its successor or beneficiary can be ascertained. Finally on this point, the fees appear to be a taxation measure called by another name.

Senate Bill 45 permits the county assessor to exercise discretion in determining whether to conduct a title search to discover ownership of severed mineral interests. This provision raises many questions: When is the assessor to act? Is he to act at his own behest or that of a surface owner or of a severed mineral interest owner? How is he to determine in advance that the cost of the title search would exceed the fees required to be paid by the owner of the severed mineral interest? The bill provides no answers.

SB 45 allows the surface owner of the land overlying a severed mineral interest to adversely possess and claim title to those minerals after five years and payment of the fees to the county. This portion of the bill raises many concerns, only a few of which are touched on here.

The adverse possession may be established if the owner of the severed interest has not recorded the interest or has not subsequently paid the annual

fee. This language contemplates that the owner of the interest could initially record the interest and still lose the mineral interest by failing to pay the annual fee. If the primary purpose of this bill is "to identify and clarify the ownership of severed mineral interests," the purpose has already been accomplished by the recording of instruments reserving or conveying the mineral interest. Allowing the surface owner to acquire the interest merely transfers, rather than clarifying or identifying, ownership.

Finally, the potential for a windfall to surface owners is clear, unjustified and not in the best interests of the state. The original owner of the severed mineral interest was compensated at the time of the severance and neither the original nor the present surface owner should be allowed to reap such benefits. As mentioned previously, the benefits of the mineral trust for unlocatable owners, if not claimed, will benefit the entire state rather than merely the surface owner. At very least, this bill should provide similar provisions whereby, ultimately, interested parties might bid on the interests at public sale after public notice, with proceeds accruing to the state.

For these reasons, it is respectfully recommended that the Senate Judiciary Committee recommend a DO NOT PASS to Senate Bill 45.

Respectfully submitted this 15th day of January, 1981.

Karla M. Gray
Attorney
THE ANACONDA COMPANY
2030 Elevneth Avenue, Suite 22
Helena, Montana 59601

Exhibit F

R E S O L U T I O N

CHAPTER SB 76

WHEREAS, the Water Courts as created by the Montana Legislature (Chapter 697 SL79) have reported to us that they are proceeding as directed by the Legislature to "expedite" and "facilitate" the adjudication of the waters of Montana;

AND WHEREAS, those Courts to continue to so proceed need to use the services of retired district judges;

AND WHEREAS, certain further changes in the present law will expedite the Water Courts mandate from the Legislature;

AND WHEREAS, their report to us of the present progress of the Water Courts clearly indicates their desire and their ability to carry out the charge by the Legislature;

AND WHEREAS, from their report to us we are convinced the Courts can and will continue to do the tasks assigned;

AND WHEREAS, the Judges of Montana, Supreme Court and District, commend, approve, and support the Water Courts' past, present, and future plans, programs, and progress;

NOW THEREFORE, be it resolved, in meeting assembled here in Helena, Montana, on November 12 and 13, 1980, that such approval and support be made a matter of record and copies of this Resolution be made public and forwarded to the Governor, the Speaker of the House, the President of the Senate, and the Secretary of State.

Exhibit G

LINCOLN COUNTY
MONTANA

OFFICE OF
ELLIOTT F. HOLDER
CLERK OF THE DISTRICT COURT

PHONE: 293-7781
EXT. 221 OR 222

LIBBY, MONTANA
59923

January 12,1981

Senator William Hafferman
Montana State Senate
Capitol Station
Helena, Montana 59601

Re: Court Costs

Dear Senator Hafferman,

Currently pending in Lincoln County District Court is cause No. DV-79-0112. In that case a man who is a Washington resident was hurt while working for the railroad in the railroad yard in Spokane. He is suing his employer in our Court. There is no contact by the employee with Montana other than the railroad is here.

We have searched for other cases and while we believe there are some, we are unable to come up with further ones.

Very truly yours,
Elliott F. Holder
Clerk of District Court
by Dina Samey
Deputy

STANDING COMMITTEE REPORT

January 15 19 91

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 94

Respectfully report as follows: That SENATE Bill No. 94

DO PASS

Mike Anderson Chairman.

STATE PUB. CO.
Helena, Mont.

(7)

STANDING COMMITTEE REPORT

January 15 19 81

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 40

Respectfully report as follows: That SENATE Bill No. 40

DO NOT PASS

~~DO PASS~~

Mike Anderson Chairman.

STATE PUB. CO.
Helena, Mont.

(7)