North Dakota Law Review

Volume 54 | Number 3 Article 3

1977

Water as a Locatable Mineral: The Heresy of the Charlestone Case

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WATER AS A LOCATABLE MINERAL: THE HERESY OF THE CHARLESTONE CASE

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I. INTRODUCTION

This article examines the impact of the decision in *Charlestone Stone Products, Inc. v. Andrus*[1] upon the Mineral Location Law of 1872[2] and upon western groundwater law.[3] Only that part of the decision declaring water to be a mineral locatable under the Mineral Location Law of 1872 is considered.[4]

On November 28, 1977, while this article was in process of preparation, the Supreme Court announced that it had granted the Secretary of the Interior's petition for certiorari.[5] Thus, if the high Court speedily decides the matter and reverses the holding of the ninth circuit that water is a locatable mineral under the Mineral Location Law of 1872, *Charlestone* will be relegated to history as the aberration it is, and this article reduced to a muffled protest against that which never happened.

II. PARALLEL DEVELOPMENT OF THE MINING LAWS AND WESTERN WATER LAW

Between 1848 and 1866, there prevailed a total absence of federal legislation governing mining and water rights on the public domain. In this legal vacuum, the California miners, and those elsewhere in the West who followed their example, established mining districts and promulgated rules governing the acquisition, holding and exploi-

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1. 553 F.2d 1209 (9th Cir. 1977).

2. *Mineral Location Law of* 1872 ch. 152, 17 Stat. 91 (codified at 30 U.S.C. §§ 22, 23, 25-28, 29, 30, 33, 34, 37, 39, 40-42 (1971)).

3. *See generally* 5 CLARK, WATER AND WATER RIGHTS 407-46 (1972).

4. The remainder of the decision concerning the overturning of rulings of administrative tribunals within the Department of Interior will not be discussed in this article. Any issue in that portion of the opinion appears to have been rendered moot by the limited scope of the Secretary's application for certiorari to the Supreme Court of the United States. *See* Brief for Petitioner at 2, 7 n.5, Andrus v. Charlestone Stone Products, Inc., No. 77-380 (1977 term).

5. 98 S. Ct. 501 (1977). After this issue was in page proofs, the Supreme Court reversed the holding of the ninth circuit. 46 U.S.L.W. 4561 (1978).

tation of mineral deposits on the public domain.[6] First in time, first in right was the cornerstone of the miners' regulations; discovery, followed by appropriation and development[7] was essential to the validity of a mining claim[8] and a later locator with an earlier discovery will prevail over an earlier locator with a later discovery.[9] Because water was indispensable to the extraction of minerals and processing of ores,[10] application of the prior appropriation and beneficial use doctrines to water rights was both logical and natural.[11]

Beginning in 1866, Congress undertook statutory codification of the law of mining and the prior appropriation doctrine of western water law, as developed by the settlers and miners in the western states and territories.[12] Section 9 of the Lode Law of 1866[13] provides as follows:

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

Section 17 of the Placer Act of 1870[14] provides as follows: "All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, ..."

Section 5 of the 1866 Act[15] provides as follows: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

Section 1 of the Mineral Location Law of 1872[16] provides as follows:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those

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6. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in HISTORY OF PUBLIC LAND LAW DEVELOPMENT 708 (Gates ed. 1968).
7. C. COSTIGAN, HANDBOOK ON AMERICAN MINING LAW 2-8 (1908).
8. Erhardt v. Boaro, 113 U.S. 527 (1885); Jennison v. Kirk, 98 U.S. 453 (1878).
9. Cole v. Ralph, 252 U.S. 286 (1919).
10. 1 R. CLARK, WATER AND WATER RIGHTS § 18.1(c) (1972).
11. *Id.*
12. The Mineral Location Act of 1872, ch. 152, 17 Stat. 91 (codified at 30 U.S.C. §§ 22, 23, 25-28, 29, 30, 33, 34, 37, 39, 40-42 (1971)); The Placer Act of 1870, ch. 235, 16 Stat. 217 (codified at 30 U.S.C. §§ 35, 36, 38, 47, 52 (1971)); The Lode Law of 1866, ch. 262, 14 Stat. 251 (codified at 30 U.S.C. §§ 22-51 (1971)).
13. The Lode Law of 1866, ch. 262, § 9, 14 Stat. 253 (codified as amended at 30 U.S.C. § 51 (Supp. 1977)).
14. The Placer Act of 1870, ch. 235, § 17, 16 Stat. 217 (codified as amended at 30 U.S.C. § 52 (Supp. 1977)).
15. Act of July 4, 1866, ch. 166, § 5, 14 Stat. 86 (codified at 30 U.S.C. § 21 (1977)).
16. The Mineral Location Act of 1872, ch. 152, § 1, 17 Stat. 91 (codified as amended at 30 U.S.C. § 22 (1971)).

> who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Despite the apparently broad sweep of the phrases "all valuable mineral deposits" in the 1872 Act and "lands valuable for minerals" in the 1866 Act, not every mineral is subject to location under the mining laws. Coal[17] has never been locatable, and since 1920 petroleum and certain other minerals have been withdrawn from location and made leasable only.[18] The Common Varieties Act[19] withdrew from location and made subject to disposition and sale common varieties of sand, stone, gravel, pumice, pumicite, cinders and petrified wood, such substances being "really building materials and not minerals such as were contemplated to be handled under the Mining Laws."[20]

Within this framework, Interior Department regulations declare as follows:

"Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws."[21] Yet, the Interior Department very early held that various types of water deposits, such as mineral springs[22] and hot springs,[23] are not locatable. As recently as 1973, the water associated with a geothermal steam resource was held not locatable.[24]

Meanwhile, the water rights provisions of the 1866 Act[25] and the 1870 Act[26] remain intact. The effect of these Acts is to protect rights acquired after as well as before 1866, and "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain."[27] Continuing

17. 1 AMERICAN LAW OF MINING § 2.7H (Rocky Mtn. Min. L. Found. ed. 1977).
18. Act of Feb. 7, 1927, ch. 66, 44 Stat. 1057 (codified at 30 U.S.C. §§ 281-87 (1971) (amended Supp. 1977)). Act of Apr. 17, 1926, ch. 158, 44 Stat. 301 (codified at 30 U.S.C. §§ 271-76 (1971) (amended Supp. 1977)). The Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified at 30 U.S.C. §§ 181-263 (1971) (amended Supp. 1977)).
19. Common Varieties Act of 1955, ch. 375, 69 Stat. 367 (codified at 30 U.S.C. § 611-15 (1971).
20. 1 AMERICAN LAW OF MINING § 2.7N (Rocky Mtn. Min. L. Found. ed. 1977).
21. 43 C.F.R. § 3812.1 (1976).
22. Pagosa Springs, 1 L.D. 562 (1882).
23. Morrill v. Margaret Min. Co., 11 L.D. 562 (1890).
24. United States v. Union Oil Co., 369 F. Supp. 1289 (N.D. Colo. 1973), *rev'd on other grounds*, 549 F.2d 1271 (9th Cir. 1977).
25. 30 U.S.C. §§ 22-51 (1971).
26. 30 U.S.C. § 35, 36, 38, 47, 52 (1971).
27. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935).

congressional intent that rights to nonnavigable waters on the public domain be regulated by state law is manifested by the Desert Land Act of 1877.[28] This Act conditioned the right to enter land upon bona fide prior appropriation and beneficial use of water but did not curtail the power of the states to legislate; on the contrary, it left the question of water rights on the public domain subject to the plenary control of the respective states.[29]

In summary, Congress, the Department of the Interior and the courts have consistently made clear that water rights may not be created by the mining laws and that rights to locatable minerals and the lands in which those minerals are found must be predicated upon the discovery of such minerals on the public domain. Until the ninth circuit handed down *Charlestone*, no responsible member of the mining community would have sought to acquire water rights through location of mining claims on the public domain. And until then, no locator would have supposed himself to have accomplished discovery through the mere development of a water well within the boundaries of his claim.

III. THE CHARLESTONE STONE CASE

The *Charlestone* case is a classic example of what George E. Reeves had in mind when he observed as follows:

> The law of discovery is being made on the fringes of the mining industry. The rules of discovery are being developed, for the most part, in contests involving sand and gravel and other common varieties of minerals. . . . Sometimes the Secretary [of the Interior] does not seem to realize that the rules he is developing will be of general application in the mining industry.[30]

Charlestone is, to be sure, on the outer periphery of the mining industry, and Mr. Reeves' concern cannot be alleviated by the fact that it is the ninth circuit, rather than the Secretary of the Interior, which is engaged in the development of ill-considered rules. To eliminate any doubt of the common-place nature of the case, let us briefly examine the history of *Charlestone*.

In 1942, Murphy and Pine located the Charlestone Placer Claims

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28. Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-29 (1971).

29. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935). However, the United States may reserve and appropriate both surface water (whether navigable or nonnavigable) and groundwater, for use in any federal enclosure, and in so doing need not comply with state law. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041, (1975) *aff'd*, 426 U.S. 128 (1976); Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958).

30. Reeves, *The Law of Discovery Since Coleman*, 21 ROCKY MTN. L. INST. 415, 472 (1975).

Nos. 1 to 22. Charlestone Stone Products, Inc., acquired the claims in 1960. These claims embraced an extensive sand and gravel deposit in southern Nevada, where they are accessible by road to the city of Las Vegas and its suburbs. During the 1940s, material from the claims had been extracted, sold and used in construction projects in and around Las Vegas. After a period of inactivity during and immediately after World War II, the claims were reactivated in the early 1950s. On July 23, 1955, the Common Varieties Act[31] came into effect, withdrawing common varieties of such materials as sand and gravel from location under the mining laws.

In 1965, the Secretary of the Interior initiated a claim contest, attacking the validity of the Charlestone Placer Claims, alleging lack of discovery of valuable mineral prior to the critical date; July 23, 1955. After a hearing, the administrative law judge declared all the Charlestone Placer Claims except claims No. 9 and No. 10 to be invalid.[32] On appeal (and cross-appeal by the government against the holding of validity of the two claims), the Interior Board of Land Appeals affirmed the ruling holding twenty of the claims invalid and Claim No. 10 valid, but reversed the ruling holding Claim No. 9 valid.[33]

The United States District Court for the District of Nevada reversed, holding Charlestone Placer Claims Nos. 1 to 16 valid and ordering that "access to Claim No. 22 . . . be permitted so that the water produced from the well on that claim may be made available to the operations on the valid claims."[34]

On appeal, the ninth circuit affirmed and further held that Charlestone Placer No. 22 was also valid.[35] In reaching this conclusion, the court of appeals reasoned that water may be classified as a "mineral," that Congress has manifested no intention of excluding water from the general category of minerals locatable under the mining law (which it might have done, as with oil, gas, sand and gravel), and that therefore water is locatable.

On November 28, 1977, the United States Supreme Court granted the Secretary's petition for certiorari.[36] The sole issue presented for review is whether water is a locatable mineral under the Mineral Location Law of 1872.[37]

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31. Common Varieties Act of 1955, ch. 375, 69 Stat. 367 (codified at 30 U.S.C. § 611-15 (1971)).
32. United States v. Charlestone Stone Products, BLM Nevada 065729 A to Q (1970); BLM Nevada 065721 A and B (1970).
33. United States v. Charlestone Stone Products, 9 I.B.L.A. 94 (1973).
34. Charlestone Stone Products Co., Inc. v. Morton, Civil No. LV-2039 BRT (D.C. Nev. 1974).
35. Andrus v. Charlestone Stone Products Co., 554 F.2d 1209 (9th Cir. 1977).
36. 98 S. Ct. 501 (1977).
37. 30 U.S.C. §§ 22, 23, 25-28, 29, 30, 33, 34, 37, 39, 40-42 (1971).

IV. RAMIFICATIONS OF THE DECISION: THE "HERESY"

The ninth circuit's holding that water is a locatable mineral was gratuitous on the part of that court --neither party had briefed or argued this issue.[38] Unless and until that holding is overturned, the potential impact on both mining law and western groundwater law is considerable.

A. MINING LAW

The decision invites blatant and wholesale prostitution of the mining law.[39] By the Mineral Location Law of 1872, the discoverer of a valuable deposit of a locatable mineral on the public domain acquires the right to appropriate a substantial surface area embracing the discovery, to hold the location and to extract the mineral without payment of rent or royalty, provided he devotes $100 of labor or improvements to the claim each year. In addition, after the claim has been improved to the extent of $500, he may demand and receive a patent at the bargain price of $2.50 or $5.00 per acre, depending on whether the location is lode or placer.[40] In the case of placers, a bona fide association of eight persons may locate placer claims up to 160 acres in size,[41] and there is no limit to the number of placer claims such an association may locate.[42] The misuse and abuse by corporations and others of the association placer claim laws to appropriate larger parcels of land than legally permissible is a time honored but reprehensible practice.[43] That this practice

38. *See* Brief for Petitioner at 6, Andrus v. Charlestone Stone Products Co., Inc., *cert. granted*, 98 S. Ct. 501 (1977).

39. This statement assumes that Congress has never intended that water be deemed a locatable mineral within the meaning of the Mineral Location Law of 1872, 30 U.S.C. §§ 22, 23, 25-28, 29, 30, 33, 34, 37, 39, 40-42 (1971).

Before *Charlestone*, the courts and the Interior Department consistently rejected the contention that water is locatable. *See* United States v. Union Oil Co., 369 F.2d 1289 (N.D. Cal. 1973), *rev'd on other grounds*, 549 F.2d 1249 (9th Cir. 1977); Robert L. Beery, 25 I.B.L.A. 287 (1976); United States v. Bienick, 14 I.B.L.A. 290 (1974); William A. Chessman, 2 L.D. 774 (1883); Pagosa Springs, 1 L.D. 563 (1882).

40. Cole v. Ralph, 252 U.S. 286 (1920).

The Supreme Court in a single decision points out that mineral lands are open to acquisition by every citizen upon conditions easily complied with, but that the government will exact a faithful compliance with the stated conditions. United States v. Iron Silver Mining Co., 128 U.S. 673 (1888). The long-held policy of the Department of the Interior to retain all possible land in federal ownership now finds expression in the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. § 1701(a)(1) (Supp. 1977)). The Act also preserves the Mineral Location Law of 1872 together with rights of locators and claims thereunder. P.L. 94-579, 90 Stat. 2762 (codified at 43 U.S.C. § 1732(b) (Supp. 1977)).

41. 30 U.S.C. §§ 35-36 (1971). For a discussion of pitfalls inherent in association placer claims, especially "accommodation locations" by "dummy" locators, *see* Hill, *Placer Mining Claims—Selected Problems and Suggested Solutions*, 23 ROCKY MTN. MIN. L. INST. 385 (1977).

42. *See* United States v. Cal. Midway Oil Co., 259 F. 343 (D.C. Cal. 1919), *aff'd*, 263 U.S. 682 (1923); Riverside Sand & Cement Mfg. Co. v. Hardwick, 16 N.M. 479, 120 P. 323 (1911).

43. *See* Chanslor-Camfield Midway Oil Co. v. United States, 266 F. 145 (9th Cir. 1920); Cook v. Klonos, 164 F. 429 (9th Cir. 1908); United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963); Centerville M. & M. Co., 49 L.D. 508 (1923); Morrison, MINING RIGHTS ON THE PUBLIC DOMAIN 262 (16th ed. DeSoto 1936).

has seriously impaired the credibility of the mining industry is evident from the remarks of the Associate Director of the Bureau of Land Management at an Institute of the Rocky Mountain Mineral Law Foundation in Salt Lake City in 1965.

> The times require that we have convincing proof that the land preempted for mining use is mineral land and that the claimant has made a valuable mineral discovery. We would like assurance that he intends to devote the land to mining. The $2.50 and $5.00 per acre price tags affixed in 1872 never really expressed the true value of the land, but they came much closer to doing so in 1872 than they do today. We have pending applications to patent placer claims of 160 acres each, which have a value exceeding $3,000 per acre for surface nonmineral development. Naturally, if the Mining Law can be used to turn this kind of profit, a lot of people will suddenly and temporarily become "miners."[44]

If a placer location may be validated by the discovery of ground water within its boundaries, the potential for profit is enormous, and the Bureau may expect a deluge of applications to patent water placers. The situation described by the Associate Director will be greatly aggravated. Responsible mining companies, genuinely concerned about their credibility with regulatory agencies and their public image, can only deplore the ninth circuit's decision in *Charlestone* and its carte blanche for prostitution of the mining law.

B. DISRUPTION OF WATER LAW

In addition to wreaking havoc with the mining law, the *Charlestone* case has great potential to disrupt western groundwater law. By treating water as a "mineral" which, along with the lands in which it is found, is subject to location and purchase under the Mineral Location Law of 1872, the ninth circuit has opened a Pandora's box of deplorable consequences. In deciding *Charlestone*, that court turned its back on congressional policy concerning water rights and set the stage for destruction of state regulation of water rights in the arid western states.

Prior to 1866, most federal legislation in the field of water rights was limited to navigation and drainage, with little or nothing pertaining to other uses.[45] In 1866, Congress formally recognized and gave the force of law to local custom and usage of prior appropria-

44. Hockmuth, *Government Administration and Attitudes in Content and Patent Proceedings*, 10 ROCKY MTN. MIN. L. INST. 467, 488 (1965). *See also* Melich, *Public Land and Mining Legislation*, 17 ROCKY MTN. MIN. L. INST. 31, 40 (1972).

45. 1 R. CLARK, WATER AND WATER RIGHTS § 5.2 (1972).

tion in the law of water rights.[46] The Desert Land Act of 1877[47] authorized citizens, upon payment of twenty-five cents per acre, to enter tracts of desert lands not exceeding one-half section, by applying the land to irrigation within three years.[48] The Act required as follows:

> That the right to the use of water [by the entryman] . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.[49]

In construing the quoted statute, the United States Supreme Court held as follows:

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other contruction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced.[50]

> The Act of July 23, 1955[51] limited a claimant's right to use the surface of unpatented mining claims located after the effective date of the Act, but expressly provided that nothing in the Act shall be construed as affecting or intending to affect or in anyway interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, ap-

46. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253, (codified at 43 U.S.C. § 661 (1971), and 30 U.S.C. § 51 (1971)); Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218, (codified at 30 U.S.C. § 52 (1971)). This recognition of water rights acquired under state and local law operates prospectively as well as retrospectively, protecting rights obtained after enactment of the statutes. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

47. Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. § 321-29 (1971)).

48. 43 U.S.C. § 1 (1964).

49. *Id.*

50. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 161 (1935) (emphasis in original).

51. Act of July 23, 1955, ch. 375, § 4, 69 Stat. 368 (codified at 30 U.S.C. § 612 (1971)).

propriation, use, and distribution of ground or surface water within any unpatented mining claim.[52]

Thus, the consistent intent of Congress, as manifested by its Acts from 1866 to the present, is plainly evident; that the appropriation of nonnavigable sources of water be regulated under state law. The states of the arid and semi-arid West have been under great pressure to adopt conservation measures calculated to maximize public benefit from their scarce and limited water resources. A ground water aquifer, unlike the typical ore body, is within limits a renewable resource. The natural hydrologic cycle will replenish the supply provided withdrawals do not exceed the average annual recharge or safe yield.[53] To protect prior appropriators, state legislation may provide for restriction of withdrawals to conform to priority rights.[54] In some states, for example, Arizona,[55] the Doctrine of Prior Appropriation does not apply to groundwater, but appropriations are limited by the Doctrine of Correlative Rights, or as it is sometimes called, the Doctrine of Reasonable Use.[56] Regardless of which doctrine is applied, regulation of water use to prevent overdraft of an aquifer requires the determination of average recharge or safe yield and the limiting of withdrawals to that level. Such a determination involves the examination of numerous complex factors,[57] but the fundamental fact remains clear that ground water aquifers do not constitute an inexhaustible supply. The practice of aquifer overdraft (or ground water "mining" as it is sometimes termed),[58] is controversial, and despite policies in Colorado, Nevada, New Mexico, Oklahoma and Utah to limit overdraft, it continues to occur in those states as well as in Arizona, California and Texas where the Correlative Rights Doctrine is in effect.[59] Noteworthy in the present context is the fact that all these states have adopted legislation designed to alleviate the problem.[60] The ninth circuit's decision in *Charlestone*, if allowed to stand, may well frustrate these efforts and emasculate much of the ground water law of the Western States.

If, as the Ninth Circuit states, water is a mineral locatable under

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52. *Id.*
53. Bagley, *Water Rights and Public Policies Relating to Ground Water "Mining" in the Southwestern States*, 4 J. LAW. & ECON. 144, 166 (1961).
54. *E.g.*, NEV. REV. STAT. § 534.110(6),(7) (1973).
55. *See* Southwest Eng'r Co v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955).
56. *Id.*
57. McGuiness, *Water Law with Special Reference to Ground Water*, UNITED STATES GEOLOGICAL SURVEY CIRCULAR 117 (1951).
58. Bagley, *supra* note 53; McGuiness, *supra* note 57. *See* Fundingsland v. Colo. Ground Water Comm'n, 171 Colo. 487, 468 P.2d 835 (1970).
59. McGuiness, *supra* note 57.
60. *See* ARIZ. REV. STAT. § 45-313 (1956); CAL. WATER CODE §§ 1005.1 to 1005.4 (West Supp. 1977)); COLO. REV. STAT. §§ 37-90-102 to 37-90-141 (1973); N.M. STAT. ANN. § 75-11-3 (Supp. 1975); OKLA. STAT. ANN. § 1020.1 to 1020.22 (West Supp. 1977); TEX. WATER CODE ANN. tit. 4 §§ 52.021, 52.108, 52.117 (Vernon Supp. 1976); UTAH CODE ANN. § 73-5-1 (1968).

the Mineral Location Law of 1872, a "miner" is free to install wells on the public domain, and totally deplete the "mineral deposit" (ground water aquifer) with smug impunity against state laws regulating water appropriation and use. Surely, this result flagrantly contravenes public policy enunciated by both the Federal and State legislatures, and flies in the face of public interests.[61]

V. CONCLUSION

The devastating effects of *Charlestone* as decided by the ninth circuit, upon both the mining laws and western water law, are clearly apparent. The decision invites abuse and misuse of the mining laws and is well calculated to create utter chaos in the water law.

Hopefully, the Supreme Court will recognize *Charlestone* for the aberration it is, and reverse.

61. *See* 5 R. CLARK, WATER AND WATER RIGHTS § 446 (1972).

> In the West, where land is relatively abundant, and where water is critically short, should it be the public policy of any state to adopt a rule of law which will give the land owner an absolute right to develop his land without any liability for destroying the percolating waters which are necessary to a valid appropriated right? The question answers itself. There should be no such policy.
>
> Nor, it is submitted, should the federal courts adopt such a policy in the face of contrary legislation.