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Private Rights of Action Against Foreign Entities Under the United States Mineral Leasing Acts

by Robert G. Berger*

I. INTRODUCTION

The spate of attempted takeovers of domestic mineral lease-holding and mineral producing corporations, including those specializing in energy-related minerals, by foreign entities during the last two years¹, has

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¹ A widespread concern with regard to the rapid growth in foreign direct investment in all sectors of the American economy led to passage of the Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974) (authorizing the Secretary of Commerce to prepare a report to Congress concerning foreign direct investment in the United States) and the International Investment Survey Act of 1976, codified at 22 U.S.C. § 3101-3108 (1976) (authorizing ongoing, regular and comprehensive data collection with respect to foreign direct investment in the United States). See generally *Hearings on Foreign Investment in the United States Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. (1974); Andrews, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 147 (1974); Bernard, *Foreign Investment in the United States: Is America for Sale?*, 12 HOUS. L. REV. 661 (1975); Finkelstein, *Stock Transfer Restrictions on Alien Ownership Under Delaware Law*, 38 BUS. LAW. (1983); Heleniak, *Restrictions on Foreign Investment: Developments in United States Law*, 3 J. COMP. CORP. L. & SEC. REG. 330 (1981); Levinson, *Foreign Investment in United States Real Estate: Federal and State Regulation*, 12 CASE W. RES. J. INT'L L. 231 (1980); Marans & Phillips, *Federal Restrictions on Foreign Direct Investment in Energy Resources*, in FOREIGN INVESTMENT IN THE UNITED STATES 471 (Marans et al. ed. 1980); MORRISON & KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION (Agricultural Economic Report No. 284, May, 1975); Wilson, *Foreign Investment: Investment Disclosure Requirements*, 22 HARV. INT'L L. J. 694 (1981).

Indicative of the spur to this rising concern is the fact that by the end of 1977 foreign direct investment, defined to mean foreign ownership of 10 percent or more of the voting securities of a United States corporation, had increased to 34.1 billion dollars, or approximately 11 percent over 1976. U.S. Department of Commerce, Bureau of Economic Analysis, "Survey of Current Business," Vol. 58, No. 8, Aug. 1978, at 39, as cited in De Vos, *Foreign Entities Investing in the United States*, 37 N.Y.U. INSTR. 23-1, 23-2 (1979). In fact, in 1980, a further step was taken with the passage of the Foreign Investment in Real Property Act of 1980, Pub. L. No. 96-499, 94 Stat. 2682, which regarded investment in real property in the United States as effectively connected with United States trade, i.e., as if the taxpayer were engaged in trade or business within the United States during the taxable year and as if such

raised important questions concerning the potential foreign control of U.S. mineral resource industries. The purpose of this article is to discuss any potential rights of action a domestic corporation may have against a foreign entity under the Mineral Leasing Act of 1920², the Mineral Leas-

gain or loss were effectively connected with such trade or business. This Act ended the ability of foreign holders of United States real property to avoid payment of capital gains on disposal. Allen, *Regulating Foreign Investments in the United States*, 125 SOLIC. J. 838 (1981). The 1980 Act effectively should serve as a de facto barrier to, and sanction against, further foreign direct investment in this country. It is interesting to note for purposes of this article that, under the terms of the Act, 'real property' is defined to include interests in mines, wells, or other natural deposits, as well as in any domestic corporation. *Id.* at 839.

² Mineral-Leasing Act of 1920, Pub. L. No. 146, ch. 85, 41 Stat. 437 (1920), codified at 30 U.S.C. § 181 *et seq.* The Mineral Leasing Act of 1920 provides in pertinent part:

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semi-solid bitumen, and bituminous rock . . . or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof or in the case of coal, oil, oil shale, or gas, to municipalities. *Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.*

30 U.S.C. § 181 (emphasis added to the 'reciprocity' clause). Section 189 of the Act further provides: "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act. . . ." The Secretary of the Interior is provided with general authority over public lands by virtue of 43 U.S.C. § 1457. The Commissioner of the General Land Office (Director of the Bureau of Land Management) or a designated officer is provided with the authority, under the direction of the Secretary of the Interior, to perform all executive duties generally pertaining to the administration of the public lands by virtue of 43 U.S.C. §§ 2, 1201, and 60 Stat 1100.

There are two primary enforcement provisions of the Mineral Leasing Act of 1920. Section 184 (h)(1) provides:

If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the defendant may be found.

And, Section 188(a) provides in pertinent part:

Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified condi-

ing Act for Acquired Lands³, and the Mining Law of 1872.⁴ This article will also discuss whether in the alternative, a mandamus action⁵ may be brought against the Secretary of the Interior or the Attorney General in order to compel such officials to enforce the provisions of the applicable laws concerning alien ownership or control of mineral leasing rights in the United States. Laws which previously had lain relatively dormant for as long as a century have suddenly taken on a new importance in the new and rapidly developing economic and industrial configuration of the United States. Particularly where a mineral-oriented firm is faced with a quick-moving, capital-laden foreign takeover bid, the previously mentioned acts may appear to provide the most potent sanctions and defenses

tions thereof.

Compare 30 U.S.C. § 184(a) and *Boesche v. Udall*, 373 U.S. 472 (1963) (affirming authority of Secretary of Interior to cancel, in an administrative proceeding, a lease of public lands issued under the provisions of the Mineral Leasing Act of 1920 in circumstances where such lease was granted in violation of the Act and regulations promulgated thereunder, i.e., was void from inception); *Winkler v. Andrus*, 614 F.2d 707 (10th Cir. 1980); *Texas Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668 (D.D.C. 1980).

³ Mineral Leasing Act for Acquired Lands, Pub. L. No. 382, ch. 513, 61 Stat. 913 (1947), codified at 30 U.S.C. § 351 *et seq.* The Mineral Leasing Act for Acquired Lands provides that lands administered thereunder "may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof," thereby incorporating the 'reciprocity' provision of the Mineral Leasing Act of 1920.

Regulations contained at 43 C.F.R. §§ 3102.2, 3502.1-1(a) (1970) implement the limited proscription against alien ownership of mineral lease rights contained in 30 U.S.C. §§ 181, 352. Section 3102.2 provides:

[Oil and gas] leases or interests therein may be acquired and held by aliens *only* through stock ownership, stock holdings and stock control; and *only* if the laws, customs or regulations of their country do not deny similar or like privileges to citizens or corporations of the United States. (Emphasis added).

Section 3502.1-1(a) similarly provides:

Aliens may not acquire or hold any direct or indirect interest in *permits or leases* [involving minerals other than oil or gas], except that they may own or control stock in corporations holding permits or leases if the laws of their country do not deny similar or like privileges to citizens of the United States. If any appreciable percentage of the stock of a corporation is held by aliens who are citizens of a country denying similar or like privileges to U.S. citizens, its application will be denied. (Emphasis added).

⁴ Act of May 10, 1872, ch. 152, 17 Stat. 91 (1872), codified at 30 U.S.C. § 22 *et seq.*

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to 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 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. (Emphasis added).

⁵ 28 U.S.C. § 1361 (1962).

against such attempts. Alternatively, the threat of such legal actions theoretically could provide a significant impetus for foreign states such as Canada, with its highly restrictive Canadian Oil and Gas Act (COGA),⁶ to allow reciprocal⁷ entry of American corporate interests into their own mineral and energy-related industrial establishments.⁸

The fact that foreign takeovers of such U.S.-based mineral giants as Conoco and St. Joe Minerals have fallen short in the last two years may prove to be of little comfort in light of the successful acquisitions that have occurred throughout the 1970's. For example, the French Government-controlled corporation, Elf Aquitaine, has acquired control of the largest sulfur resources in America.⁹ Standard Oil of Ohio is controlled by the British Government through its instrument, British Petroleum; through Standard Oil, the British in turn control Kennecott Copper, the largest U.S. copper producer.¹⁰ Similarly, in 1975 a French-controlled

⁶ This Act was originally introduced on December 9, 1980 in the House of Commons as Bill C-48, 1st Sess., 32nd Parliament, 29 Elizabeth II, 1980. Canada had previously adopted its Foreign Investment Review Act of 1973, 2 Eliz., ch. 46 (Can.)(FIRA) which provides for governmental review and approval of all foreign acquisitions of 50 percent or more of the voting stock of Canadian enterprises. See Andrews, *supra* note 1, at 166-167.

⁷ Ironically, the original version of the Mineral Leasing Act of 1920, introduced in the Senate on August 15, 1919, by Senator Smoot of Utah, provided for a complete exclusion of aliens from leasing rights under the Act. It was only in reaction to concern that such a complete ban would engender "retaliatory action against America's investors in foreign countries" that the 'reciprocity clause' was substituted by the House and later passed into law. See H. REP. No. 398, 66th Cong., 1st Sess. (1919); similarly, see 58 CONG. REC. 4167-68 (1919)(remarks of Senator King). At the same time, the reciprocity clause was intended to offset concern that "foreign control of domestic corporations operating a lease under the act would result in large exportations of oil, coal, and other minerals covered by the act . . . thereby deplet[ing] the domestic supply," by providing that U.S. citizens "could largely offset such a result by their own operations in foreign countries. . . ." H. REP. No. 398, 66th Cong., 1st Sess. (1919). Furthermore, it was also intended to provide the same protection to U.S. citizens as foreign citizens already received in their own nations, some of which, such as Great Britain, had previously limited ownership of their public domain lands to their own citizens. See, e.g., 58 CONG. REC. at 4162, 4169 (remarks of Senator Phelan); *id.* at 7529 (remarks of Senator Sinnot).

⁸ Of major American trade partners, Japan, France and Canada have the most restrictive policies with respect to foreign direct investment. For example, in Japan, virtually all direct investment by aliens requires governmental sanction from the Ministry of Finance and other competent ministries. See Andrews, *supra* note 1, at 163-165. France has rules much the same as Japan: prior governmental approval is required for all foreign direct investment, including investments made by French companies under foreign control and French branches of foreign corporate entities. *Id.* at 165-166. With respect to Canada, see *supra* note 6.

By contrast, West Germany and the United Kingdom have far more liberal access policies. See Andrews, *supra* note 1, at 169-173.

⁹ T. White, AMERICA IN SEARCH OF ITSELF, 424 (1982). See generally K. CROWE, AMERICA FOR SALE (1980).

¹⁰ T. White, *supra* note 9, at 424-425.

chemical company purchased property in central Florida for phosphate mining.¹¹

Historically, control of a state's mineral resources has been recognized as critical to the national well-being of that state.¹² Only recently, however, has the national impact of foreign control over critical domestic mineral resources begun to be recognized as stemming from sources other than the mere physical exportation of minerals. The problem of mere physical exportation is easily perceived and remediable.¹³ The far more important impact of foreign direct investment concerns decision-making responsibility with respect to significant and strategically critical sectors of the domestic economy. Furthermore, control of major natural resource interests can, and has been shown to translate directly into, major political influence in the corridors of the Capitol and White House.¹⁴ Finally, in times of true national danger, crisis or international conflict, there is a question of the reliability, cooperation and flexibility of decision-making when major, strategically-critical industries are controlled by foreigners with potentially different (if not antipathetic) vested interests and/or are being managed from afar.

In short, the need exists, first, for a sanction against foreign restrictions on U.S. investment overseas; second, for a "reverse-sanction" which would serve as an incentive for foreign nations to liberalize their policies

¹¹ Levinson, *supra* note 1, at 232.

¹² Such considerations were at the heart of the original Senate exclusion of *all* alien leasing rights in the 1920 Act. Those concerns, as expressed by Senator Smoot of Utah, the Chairman of the Senate Committee on Public Lands, were that: "[U]nless it [the total bar] is incorporated in the law the result will be serious to our own country and its control of the oil produced in it. All men know that the control of the oil in a country means a control of the commerce of that country." 58 CONG. REC. 4112 (1919).

There was also the related concern that an alien securing such a lease might decide not to work the lease:

[I]f an alien secures a lease upon valuable oil properties in this country we desire a provision which will compel him to work them or which will allow us to work them when the oil is needed. That is the prime object of this provision, as I understand it after conversation with my colleagues—that no alien should be allowed to acquire property and then refuse to work it, or any way hamper the production or have the power to work it and take the oil out of this country if it were needed here.

58 CONG. REC. 4160 (1919)(remarks of Senator Fall).

¹³ As the drafters of the final version of the 1920 Act themselves recognized: "[I]f an acute situation ever developed, a general embargo against exportation would be a sufficient remedy." H. REP. NO. 398, 66th Cong., 1st Sess. (1919). Similarly, at least some contemporary commentators have made the erroneous assumption that Presidential authority to control exports to prevent a drain on scarce resources by virtue of the Export Administration Act of 1979, 50 U.S.C. §§ 2401-13, is sufficient to resolve any problem. *See, e.g.*, Bernard, *supra* note 1, at 684 n. 205. In fact, imposing any such embargo itself may be a most difficult political and diplomatic act, despite the appearance of authority.

¹⁴ *See, e.g.*, White, *supra* note 9, at 424-425.

on foreign direct investment; and third, for a security safeguard vis-à-vis continued domestic control of strategic natural resources. Private rights of action under the Mineral Leasing and Mining Acts potentially offer such a combined sanction, incentive and safeguard.¹⁵

Part I of this article reviews those cases which have implicated the right of aliens to own or control mineral leases obtained pursuant to the aforementioned acts. Part II discusses the availability of a writ of mandamus against either the Secretary of the Interior¹⁶ or the Attorney General of the United States.¹⁷

II. RIGHTS OF OWNERSHIP AND CONTROL BY ALIENS

In *Isaacs v. De Hon*¹⁸ the defendant sought to avoid his obligations under a grubstake agreement in an oil claim and a prospecting permit on the basis that plaintiffs were aliens and therefore not allowed under the Mineral Leasing Act of 1920 to hold such a permit. In rejecting the defendant's argument, the court reasoned:

If the plaintiffs are aliens, appellant is in no position to take advantage of this circumstance. No one but the sovereign has any right to complain of a trust in real estate in favor of an alien disqualified to hold title. Such a trust is valid until, at the instance of the government, the alienage is judicially established.¹⁹

¹⁵ Other superficially strong barriers and disincentives for such foreign direct investment exist by virtue of the U.S. securities, tax, and antitrust laws. By virtue of foreign corporations' increasing willingness to retain and rely on U.S. counsel knowledgeable with such legal problems, however, such barriers are more apparent than real. See De Vos, *supra* note 1; Young, *The Acquisition of United States Businesses by Foreign Investors*, 30 Bus. LAW. 111 (1974); Young, *The Acquisition of United States Businesses by Overseas Investors*, BRIT. TAX REV. 339 (1973).

¹⁶ Pursuant to his or her duties under 30 U.S.C. §§ 181, 187, 189.

¹⁷ Pursuant to his or her responsibilities under 30 U.S.C. §§ 181, 184(h)(1).

¹⁸ *Isaacs v. De Hon*, 11 F.2d 943 (9th Cir. 1926).

¹⁹ *Id.* at 944 (citations omitted). The court went on to state: "The Secretary of the Interior would not have been a proper party to this suit. The courts will not interfere by mandamus or injunction with his performance of his duties under the public land laws. *Marquez v. Frisbie*, 101 U.S. 473, 475, 25 L.Ed. 800."

Recovery Oil Co. v. Van Acker, 79 Cal. App. 2d 639, 180 P.2d 436 (1947) involved a situation where a lessee holding interests in an oil lease under the 1920 Act, assigned a portion of his rights to a second party. These rights eventually came to be assigned to the defendants. The lessee later assigned all of his remaining rights to Recovery Oil. The assignments to defendants were never filed in the appropriate district land office of the Department of the Interior, as provided for by regulation and statute. Recovery Oil brought suit to quiet title and claimed all rights to the land, on the basis that regulation provided that permits could not be assigned except "to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior." The court, in finding against Recovery Oil, relied on *Isaacs* in stating that "These and similar laws and regulations against assignments have been before the courts numerous times. It is the established rule that they are for the

Osterman v. Baldwin,²⁰ relied on by the court in *Isaacs*, was a very early case concerning an alien-plaintiff who, in contravention of the constitution of the independent state of Texas, had purchased Texas property. The plaintiff had created a trust in one of the defendants in order to circumvent the prohibition; this defendant later transferred the property to another defendant. The court stated:

It is true, as the defendants insist, that when the purchases were made by Baldwin, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. But the defendants cannot object on that ground. Until office found, Baldwin was competent to hold land against third persons. No one has any right to complain in a collateral proceeding if the sovereign does not enforce his prerogative. This court, in *Cross v. De Valle*, [1 Wall. 8] says: "That an alien may take by deed, or devise, and hold against any one but the sovereign, until office found," is a familiar principle of law, which it requires no citation of authorities to establish.²¹

Osterman did not implicate any of the Mineral Leasing Acts with which this article is concerned, predating each of the acts. However, the principles established in *Osterman* have been cited repeatedly in support of the proposition that only the sovereign, as opposed to private parties, has a right of action to void lease or permit rights acquired under the acts on the basis that the holder is an alien.

For example, in *Manuel v. Wulff*,²² two claimants to a quartz lode mine discovered upon U.S. land sought the right to file for an appropriate land patent in the local federal land office pursuant to the Mining Act of 1872. One of the two claimants, Moses Manuel, held his right under a deed granted by the original locator; while the locator was an American citizen, Manuel had been an alien until shortly before judgment was rendered. The Court stated:

[W]e are of opinion on this record that, as Alfred Manuel was a citizen, if his location were valid, his claim passed to his grantees, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter [defendant] to take and hold by reason of alienage was, under the circumstances, *open to question by the government only*. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a [land] patent, *the objection of alienage*

benefit and protection of the government. Their prohibition can only be raised by the sovereign, is 'available only to the government' and 'is not available to an individual.'" 180 P.2d at 438 (citations omitted). While *Recovery* is not an 'alien' case itself, it reaffirms the principles there involved.

²⁰ *Osterman v. Baldwin*, 6 Wall. 116, 121-22, 73 U.S. 116, 121-22 (1867).

²¹ *Id.*, 73 U.S. at 121-22.

²² *Manuel v. Wulff*, 152 U.S. 505 (1894).

was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered.²³

Manuel presents two important points. First, it reinforces the conclusion that only the sovereign may challenge a holder's land claim on the basis that the holder is an alien. Second, the language italicized in the quotation above suggests that, contrary to the holding in *Isaacs*, a private party may in fact be competent to raise a challenge based on citizenship at least where it is done "in right and on behalf of the government." This suggestion is reinforced by dictum contained in *O'Reilly v. Campbell*.²⁴

O'Reilly involved an action to determine the validity of the plaintiff's adverse claim to a portion of mining land covered by the defendant's survey and plat. The action arose under the Mining Act of 1872. On appeal, the defendant attempted to put the plaintiff's citizenship into issue. The Court stated:

It is true that the mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such; and had the objection been taken in the court below that such citizenship of the plaintiffs had not been shown, it might, if not obviated, have been fatal.²⁵

Taken in conjunction with *Manuel*, *O'Reilly* provides further support for the inference that, contrary to *Isaacs*, individuals may raise the question of a rival leaseholder's citizenship in an action between private parties.

The later case of *McKinley Creek Mining Co. v. Alaska United Mining Co.*²⁶ reaffirmed the basic holding of *Manuel* without satisfactorily resolving the question of whether in fact a private party could attack, at least on behalf of the government, an individual's land claim based on citizenship. *McKinley Creek* involved a "bill in equity brought by the appellee company [Alaska], who [sic] was plaintiff below, to establish title to two placer mining claims against a like claim of appellant company to the same ground."²⁷ In the course of its opinion, the Court explicated and reaffirmed its *Manuel* decision: "The meaning of *Manuel v. Wulff*, is that the location by an alien and all the rights following from such location are voidable, not void, and are free from attack by any one except the government."²⁸

The Court, in reaching its conclusion, explained the rationale behind

²³ *Id.* at 511 (emphasis added).

²⁴ *O'Reilly v. Campbell*, 116 U.S. 418 (1886).

²⁵ *Id.* at 420.

²⁶ *McKinley Creek Mining Co. v. Alaska United Mining Co.*, 183 U.S. 563 (1902).

²⁷ *Id.* at 563.

²⁸ *Id.* at 572.

Manuel and its current holding:

In *Manuel v. Wulff*, this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the Supreme Court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase and can only be divested of it by office found. The case of *Gouverneur v. Robertson*, 11 Wheat. 332, was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite. . . .

. . . .
 . . . I copy it from Bacon, not having had leisure to examine the authority which he cites for it: "*Every person,*" says he, "*is supposed a natural born subject that is a resident in the kingdom and that owes a local allegiance to the king, till the contrary be found by office.*" This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.'

That grantees of the public land take by purchase this court, in *Manuel v. Wulff*, left no doubt. It was said that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession.²⁹

Unfortunately, the Supreme Court has not addressed the question of who may attack an individual federal mining lease interest on the basis of citizenship since *McKinley Creek Isaacs* is the only case which applies the holdings of those cases decided pursuant to the Mining Act of 1872 to the more recent Mineral Leasing Act of 1920. As previously noted,³⁰ the Mining Act of 1872 did not contain a reciprocity provision similar to the one contained in the 1920 Act.³¹ Furthermore, there is only one case di-

²⁹ *Id.* at 571-72 (emphasis added).

³⁰ See *supra* note 2 and 3, 30 U.S.C. §§ 181, 352.

³¹ It is important to note, however, that unlike the later Mineral Acts, under the Mining Act of 1872 "the citizenship necessary to participate in such purchases apparently is defined so as to include corporations chartered domestically but having alien stockholders." Elmer & Johnson, *Legal Obstacles to Foreign Acquisitions of U.S. Corporations*, 30 Bus. Law. 681, 696 (1975), explicating *Doe v. Waterloo Min. Co.*, 70 F. 455 (9th Cir. 1895). In *Doe* the court held:

In considering the question of jurisdiction in the federal courts, it is established that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller v. Dows*, 94 U.S. 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872. The practice in the United States land office has been, I think, universal not to require of a corporation seeking to patent mining ground proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. * * * It would have been a great hardship on a corporation to have had to prove that all of its stockholders were citizens of the United States. The practice

rectly implicating the reciprocity provision of the 1920 Act.³² Accordingly, the same rationale underlying the proscription against a private party attacking an individual's leasehold claim on the basis of citizenship apparently would apply with equal force to an attack on an indirect corporate holder.

One potential line of attack does remain open, however, and may present a viable alternative to a direct action by a domestic corporate entity as a private party *qua* private party against a foreign entity. It has already been suggested that *Manuel* and *O'Reilly* leave unresolved the question of whether a private party is competent to raise a challenge based on citizenship in right and on behalf of the government. Although the *O'Reilly* dictum arguably might support a direct private right of action, *Manuel*, *McKinley Creek*, and *Isaacs* seem to foreclose such an option. Neither *McKinley Creek* nor *Isaacs*, however, addresses the alter-

in the land department of the United States under this statute should have great weight in construing it.

Id. at 463.

³² *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981) involved the construction of an oil pipeline from Port Angeles, Washington to Minnesota. Plaintiffs claimed that Northern Tier Pipeline Company (NTPC) was ineligible to hold the requisite right-of-way permit across federal land, necessary for construction, which had been issued under the 1920 Act, 30 U.S.C. § 185(a). Plaintiffs' claim was predicated on the fact that 26 percent of NTPC was owned by Western Crude, Inc.; that in turn Getty Oil owned 100 percent of Western; and that ultimately the government of Kuwait owned 200,000 shares of Getty. Accordingly, plaintiffs argued that NTPC was ineligible to hold the permit as it was owned by foreign citizens of a "non-reciprocating" country. The court held, first, that all companies involved were corporations organized under the laws of the various states. Second, that Kuwait did not own an interest in the permit by stock ownership, i.e., it did not hold any NTPC stock directly. Third, Kuwait could not be charged with indirect control by virtue of its stock holding, as its small, fractional share of Getty had not been shown to invest Kuwait with such control. And fourth, in dictum, the court, citing *Isaacs*, stated: "[I]t appears unlikely that plaintiffs have standing to raise the issue. It does not appear that plaintiffs' injury, if any, is 'arguably within the zone of interests to be protected or regulated' [by § 181 of the 1920 Act]." 520 F. Supp. at 360.

The dictum in *No Oilport!* merely serves to reinforce the discussion and conclusion presented above.

Ironically, plaintiffs' claim with respect to Kuwait has been borne out by subsequent events. For the first time in the 63-year history of the 1920 Mineral Leasing Act, the Department of the Interior has barred citizens of a foreign nation, i.e., Kuwait, from owning an interest in the covered federal mineral leases. During the week of March 11, 1983, Interior Secretary James G. Watt declared Kuwait, to be a "non-reciprocal nation." *Interior Dept. Bars Kuwaitis From U.S. Mineral Holdings*, Washington Post, Mar. 11, 1983, at A18; *Kuwait Barred from U.S. Federal Mineral Leases, Reciprocal Limits on Oil Cited*, 7 U.S. IMPORT WEEKLY 768-69 (Mar. 16, 1983). Secretary Watt, however, based his decision on a questionable and controversial interpretation of the 1920 Act, in as much as he held Kuwait to be nonreciprocal because it discriminated specifically against the U.S., not all foreign countries. The Act clearly does not make a distinction as to whether a foreign nation's lack of reciprocity is across the board or, like Kuwait, specifically targets the United States.

nate option suggested by *O'Reilly* and *Manuel*. While to date no one has attempted to exploit that option, several of the recent corporate takeover situations have presented highly attractive settings in which this alternate option might have been raised for the first time.

Each of the early grubstake cases presented a simple situation where two or more frontier miners sought to establish claim to a small lode or vein. Each permit or lease application, and each assignment thereof, had to come before the Secretary of the Interior for approval, pursuant to the applicable regulations. In each case the government interest to be protected, as well as the private interest, was sufficiently *de minimus* that there was no need to allow private parties an independent cause of action in order to protect the sovereign. In fact, even in cases where assignments were never submitted for approval, as required,³³ the interests to be protected were not sufficiently major to require the finding of an implied private right of action. In several of the recent situations, however, where multibillion dollar-a-year corporations were involved, both overriding governmental and private interests have been engaged and irreparably affected before any governmental action was forthcoming under the applicable mineral leasing acts. Furthermore, unlike the turn-of-the century cases previously discussed, in several of the recent takeover situations, the foreign entity involved would neither be applying for nor receiving an assignment of mineral permits or leases. The ownership of the lease and permit rights would technically continue to reside in the newly-acquired U.S. domestic corporation for at least as long as it remained a separate corporate entity, even if the entity was merely a wholly-owned subsidiary of the foreign acquirer. As such, no transfer of rights would have taken place and therefore, arguably, the transactions engendered by a tender offer might never engage the registration and approval requirements of the applicable federal regulations.³⁴ Accordingly, the sovereign technically may never have reason to know of potentially illegal foreign ownership and control of domestic mineral leases and permits. The fact that by statute and regulation the sovereign automatically was made aware of all lease applications and assignments partially underlay the rationale of the early mining cases which, at this time, provide the sole judicial interpretation of the mining and mineral leasing acts. A limited argument can be made for an implied private cause of action under the reciprocity provisions of the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, especially in light of: the option left open by both *Manuel* and *O'Reilly* for a private party to sue on behalf of the government; the amount of time which has passed since the last of the mineral leasing cases was decided by the Court; the massive public and private interests

³³ See, e.g., *Recovery Oil v. Van Acker*, 79 Cal. App. 2d 639, 180 P.2d 436 (1947).

³⁴ 43 C.F.R. Parts 3100, 3500 (1981).

which may be irreparably affected by the takeover of a major domestic mineral- or energy-based corporation by a foreign national; and the inapplicability of the normal registration and approval regulations to the modern takeover case.

III. MANDAMUS ACTIONS TO COMPEL GOVERNMENTAL ACTION

An action for writ of mandamus brought by a domestic corporation to compel either the Secretary of the Interior or the Attorney General³⁵ to take steps to prevent a foreign entity from acquiring a domestic corporation on the basis that the acquirer's own country does not accord reciprocal treatment for holders of mineral lease rights, must be taken pursuant to 28 U.S.C. § 1361. Section 1361 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or agency thereof to perform a duty owed to the plaintiff." In order for an action for mandamus to lie: the implicated officer must owe a 'clear duty' to the plaintiff; the plaintiff must have a clear right to relief; the action to be compelled must not lie within the officer's 'zone of permissible discretion'; and another adequate remedy must not be available.³⁶ Mandamus is not precluded, however, solely because judicial construction is required to clarify the duty sought to be enforced.³⁷

The question of whether mandamus will lie against the Secretary of the Interior has been addressed several times in the context of the Mining Act of 1872 and the Mineral Leasing Act of 1920. The seminal case of *Marquez v. Frisbie*³⁸ concerned a suit by plaintiff to compel the Department of the Interior to reverse its decision finding in favor of defendant's claim and denying plaintiff's claim as pre-emptor of a certain quarter section of land. Plaintiff argued that the officer of the Department who made the decision had misapplied the law of the case, and that the decision had been obtained by fraud. The Court stated: "We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus."³⁹ Once a final decision has been made and title to the patent has been vested, mandamus will lie only in clear cases of mistake or fraud.

The right to a writ of mandamus, therefore is carefully circumscribed. Relying on *Marquez*, the court in *Witbeck v. Hardeman*⁴⁰ de-

³⁵ Pursuant to his or her duties under 30 U.S.C. § 184(h)(1).

³⁶ *Ramirez v. Weinberger*, 363 F. Supp. 105 (N.D. Ill. 1973), *aff'd*, 415 U.S. 970 (1974).

³⁷ *Rosati v. Haran*, 459 F. Supp. 1148 (E.D.N.Y. 1977).

³⁸ *Marquez v. Frisbie*, 101 U.S. 473 (1879).

³⁹ *Id.* at 475.

⁴⁰ *Witbeck v. Hardeman*, 51 F.2d 450 (5th Cir. 1931).

clared that the courts would not interfere with the patent issue function of the Land Department. *Witbeck* involved an action to enjoin an alternate applicant for a prospecting patent for oil and gas under the Mineral Leasing Act of 1920, and to judicially establish plaintiff's own right to a prospecting patent. The court held that mandamus would lie only if, having previously decided that the land should be exploited, the Secretary should then refuse to issue a permit in contravention of the plain mandate of the law.⁴¹

Two points can be derived from *Marquez* and *Witbeck*. First, the courts will not compel a governmental officer to reach a certain decision while the question is still being subjected to investigation. Second, once the decision has been made, the courts will only compel its reversal if the judgment was obtained by fraud or if it is clearly in contravention of the statutory mandate.

In light of the above discussion, it must be considered whether a domestic corporation, targeted for a foreign takeover and holding mineral leases or permits on federal lands, would have an action for mandamus against either the Secretary of the Interior or the Attorney General. The mandamus would be to enforce the reciprocity provisions and alien ownership clause of the three mineral leasing and mining acts.

First, is the domestic corporation owed a clear duty by virtue of the reciprocity clauses of the two mineral leasing acts?⁴² To the extent that only the sovereign is entitled to challenge a person's possession, control or ownership of the covered mineral leases and permits, the answer must be "No." If the reciprocity clause is solely for the benefit of the government, then no action of mandamus would lie. However, if an implied private right of action is found to exist, then perhaps it can be argued that a clear duty is owed. Nevertheless, unless such a private right is broader than one simply taken "in right and on behalf of the government," mandamus most likely would not be found to lie.⁴³

⁴¹ *Id.* at 451-52. By contrast with *Witbeck*, an action for mandamus was held to have been properly brought in *Udall v. Tallman*, 380 U.S. 1 (1967), where an applicant for oil and gas leases on 25,000 acres of land in Alaska, pursuant to § 17 of the Mineral Leasing Act of 1920, sought to compel the Secretary of the Interior to reverse his decision denying the applications. The question presented concerned whether the lands had been closed to the public at the time when the successful applicants had submitted their claim. The Bureau of Land Management had considered the two competing applications, had decided who was entitled to the leases, and had issued them. While the Supreme Court found that the Secretary had not been in error, there was no question that an action for mandamus had been taken properly by plaintiffs.

⁴² 30 U.S.C. §§ 181, 352 (1976).

⁴³ It is important to note, however, that certain portions of the original Senate debate over the 1920 Act strongly suggest that Congress was concerned over the impact on U.S. stockholders of the "reciprocity" clause and that a duty running to private parties was in fact intended. So, for example, Senator Walsh pointed out that:

Second, is some other adequate remedy available? Once the Secre-

An American corporation with stockholders all of whom are Americans secures a lease upon a property. They expend their money and develop it, are successful, and secure oil. They look for a market for their oil, find a foreign market, and sell their oil under a contract to a foreign State or to the nationals of another country, as they are entitled to do. The law does not forbid them to do so at all, and they find an opportunity to make a profitable contract of that character, but some of their stock gets upon the market; it is dealt in on oil exchanges, and eventually a portion of that stock gets into the hands of a national of another country. Thereupon the Secretary of the Interior sends a notice to them that they must not sell any more of their oil to the nationals of any foreign country and commands that they immediately break their contract with the foreigner. It seems to me that would be quite unfair.

58 Cong. Rec. 4166 (August 22, 1919). He then stated:

I should like to have you consider the matter from the standpoint of the original American stockholders who went into the company. They are, let us say, ten in number. They are all Americans. Their corporation is an American corporation. They get this lease. They put their money into the development of the property, and they get the property, and then they make the contract to sell, as they have a right to do under law. Now, one of the stockholders dies and his stock is thrown on the market in some way. Another is unfortunate, and his property is seized under attachment, and it is sold. A third falls out with the rest of his associates, and he finds an opportunity to sell his stock to a foreigner. Now, as I say, the foreigner deserves his fate; but what about the seven original Americans?

58 Cong. Rec. 4166 (August 22, 1919).

Senator Sterling similarly noted that, with respect to the original version of the Act: [I]t occurs to me that provisions are pretty severe on American interests in any event, for it may be the power conferred upon the Secretary of the Interior operate to the disadvantage of American interests. The alien interest may be a very small interest, insignificant, in fact, and yet because there is that small alien interest the Secretary of the Interior is authorized to take possession and operate the entire leased property.

58 Cong. Rec. 4163 (August 22, 1919). In rebuttal, Senator Smoot noted:

The provision is that the Secretary of the Interior may require the sale. It does not say that he shall, and I do not believe that any Secretary of the Interior in a case like that would ever cancel the lease because of the mere fact that it did go into the hands of a foreigner. All that could possibly happen is that when a foreigner purchased stock and the company found out that he was a foreigner, they could say, "Here, we do not want to transfer this stock to you. We will purchase back from you at the price that you gave for it."

58 Cong. Rec. 4167 (August 22, 1919). Taken together with the reasons for later incorporating the "reciprocity" clause, outlined *supra* note 7, a reasonable argument can be made that Congress did in fact intend that private domestic stockholders benefit, and be owed a duty, under the 1920 Act.

We would note that the 1947 Act for Acquired Lands merely incorporated the administrative provisions and intent of the 1920 Act. See H.R. 550, June 9, 1947 at U.S. Code Cong. 1661-1666 (1947).

The four-prong test for determining whether a private remedy should be implied from a statute was first outlined in *Cort v. Ash*, 422 U.S. 66 (1975). The first prong of the *Cort* test, whether the plaintiff is "one of the class for whose especial benefit the statute was enacted," impinges directly on the analysis set forth above. See *Landry v. All American Assurance*

tary of the Interior has denied a petition to find that the foreign acquirer's home country is no longer a nation granting reciprocal mineral rights, arguably, no other adequate remedy would exist. At least with respect to this provision, the tender offer would go forward, and if successful, it would result in a major mineral lease holder or mineral producer being controlled by a foreign entity.

Third, is the decision within the permissive zone of discretion of the Secretary of the Interior or other responsible governmental officers? The reciprocity provision of the 1920 Act⁴⁴ is peremptory in nature. Unless the alien's nation accords U.S. citizens reciprocal rights, the alien "*shall not* by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act." The same provision, however, provides that such rights will be denied unless "similar or like privileges" are extended by the alien's country to U.S. citizens. The governmental officer making the reciprocal determination must look to the foreign country's laws, customs, or regulations. The Secretary of the Interior and the Attorney General have dual responsibility for enforcing this provision: the Attorney General by virtue of his or her responsibility under Section 184 of the 1920 Act;⁴⁵ and the Secretary of the Interior by virtue of his or her responsibility under Section 189.⁴⁶ While the provision⁴⁷ demands that a determination be made with respect to each implicated nation, the use of the highly imprecise words "similar" and "like" introduce a great amount of discretion into the decisions of the responsible officers. Unless the laws of the implicated nation are starkly drawn, therefore, the judgment of the Secretary of Interior and of the Attorney General most likely will be within the permissible zone of discretion by definition.

Finally, does the domestic corporation have a clear right to relief? Briefly, just as a private party probably is not owed a "clear duty," so too the corporation would not have a clear right to relief.

V. CONCLUSION

Although a private party currently will have, at best, a difficult time making out any type of claim under the three mineral acts, it is important that a new approach be considered. Just as the 1872 Mining Law,

Co., 51 U.S.L.W. 1065 (1982). The second prong of the test, the indication of congressional intent, explicit or implicit, to create such a private remedy, is also called into question and is normally dispositive of the issue. See *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979).

⁴⁴ 30 U.S.C. § 181 (1976).

⁴⁵ 30 U.S.C. § 184 (1976).

⁴⁶ 30 U.S.C. § 189 (1976).

⁴⁷ 30 U.S.C. § 181 (1976).

which "absorbed the mining customs of the Gold Rush customs adapted to the scale and sophistication of small-scale mining,"⁴⁸ may be no longer able to serve the realities of the modern day mining industry, the acts of 1920 and 1947, as presently interpreted, may be no longer able to serve and police effectively the realities of modern international corporate mergers. The three laws, in tandem, were passed in order to deal with the problems of rival claims by individual prospectors, claims over rights to small placer mines and claims to mineral lodes. The simple mechanisms established no longer serve to protect the national interest in retaining domestic control over its strategically important mineral and energy resources.

A private right of action would greatly aid effective government patrolling of leased mineral rights, while working to safeguard continued domestic control over such vital resources. By giving recognition to those interests most directly and immediately affected by a foreign takeover (such as domestic private interests), the right to challenge takeovers by foreign entities as being "nonreciprocal," a most effective, immediate sanction would be made available to combat potential international trade and economic opportunity imbalances.

The danger, however, is that the 1920 and 1947 Acts hinge on the interpretation of the laws of the foreign acquirer's home nation as being reciprocal or not. This is normally a sensitive political and diplomatic issue, one which should not be entrusted to the vagaries of individual decisions of the far-flung American judiciary. Determinations of this nature have historically, and properly, been left to the Executive and Legislative branches.⁴⁹

⁴⁸ Later, *The 1872 Mining Law: A Statute By-Passed by Twentieth Century Technology and Public Policy*, 1981 UTAH L. REV. 575, 582 (1981). With respect to the disjunct between the prescriptions of the 1872 Act and the exigencies of modern mining, see Knutson & Morris, *Coping with the General Mining Law of 1872 in the 1980's*, 16 LAND & WATER L. REV. 411 (1981).

⁴⁹ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). Also, see *Texasgulf, Inc. v. Canada Development Corp.*, 366 F.Supp. 374 (S.D. Tex. 1973), where, in the context of an American corporate takeover by a Canadian, governmentally-controlled entity, challenged on public policy grounds, the court stated:

It is an issue of public policy and national interest as to the role multinationals will play in the future, but this Court cannot decide generally in the context of this case what this role may be. *It belongs in the Legislature and Executive Branches of government. This broad issue is too fraught with economic subtleties and questions of delicate balances of trade, as well as problems of economic reciprocity.*

Id. at 419 (emphasis added). For an excellent critique of *Texasgulf*, see Hayes, *Recent Developments*, 9 TEX. INT. L. J. 242 (1974); Parker, *Recent Decisions*, 8 VAND. J. TRANS. L. 223 (1974).

Perhaps the best remedy is to amend current decisional law, either by statute or by judicial re-examination of the original Congressional intent⁵⁰ to provide for a 'clear duty' owed by the appropriate governmental officials (the Secretary of the Interior in conjunction with the Secretary of State) to the domestic corporation threatened with a foreign takeover. Such a clear duty might consist of the right to have a definite opinion issued vis-a-vis the reciprocal nature of the acquirer's home nation, within a specified time frame, during which the merger could not be finally consummated. Such a public waiting period might be similar to that provided for in antitrust situations under the Hart-Scott-Rodino Act.⁵¹

The above suggested solution would have a threefold appeal. First, the governmental need to maintain control over foreign acquisitions of domestic mineral resources by creating a potent, privately-triggered sanction against non-reciprocal foreign takeovers would be furthered. Second, at the same time it would serve to protect the interests of those domestic stockholders who wish to retain their existing interests in the target American company and who, after a successful takeover, might find themselves possessed of a substitute equity interest in the successful acquirer, which equity would be seriously jeopardized by the potential loss of the valuable mineral leases acquired under the acts. Third, at the same time, the problem of judicially-prescribed foreign policy, which would exist if direct private rights of action under the acts against foreign entities were allowed to be entertained, would be avoided.

In sum, as the law now stands a domestic corporation probably does not have an implied right of action against a potential foreign acquirer under the three mineral leasing and mining acts, as a private party *qua* private party. Second, a private right of action may exist when taken "in right and on behalf of the government." Finally, it is doubtful whether an action for mandamus would be found to lie against either the Secretary of the Interior or the Attorney General to compel them to find that the alien entity's home nation was not a "reciprocal" nation.⁵²

Unless the official government bodies take the initiative in rapid investigation and enforcement of potential violations of the mineral leasing acts during takeover situations, the most important and far-ranging effects of foreign control of federal mineral resources may escape analysis and regulation. At the same time, domestic corporations seeking to deflect such foreign takeover attempts will be forced back into reliance on

⁵⁰ See *supra* notes 7, 43. As previously noted, *supra* note 32, for the first time in the history of the 1920 Act the Secretary of the Interior has declared a foreign country, Kuwait, a 'non-reciprocal nation.'

⁵¹ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 1311 (1976).

⁵² See generally 30 U.S.C. § 181 (1971).

the same basic matrix of options available in fights over domestic takeovers. Given the growing number of such foreign takeover situations and the critical nature of continued domestic control of our own mineral and energy resources, it is time to re-examine the long dormant authority limiting the application of the mineral leasing laws in private actions. There is a far different economic and industrial situation today than that which was in effect at the time the implicated acts were passed, when grubstake claims were at the forefront of concern.