Public Land & Resources Law Review

Volume 43 *To Make a Better Place* Article 16

August 2020

Implementation Of Montana's Strip Mine Legislation

Leo Berry

IMPLEMENTATION OF MONTANA'S STRIP MINE LEGISLATION

Leo Berry

In the spring of 1973, I was a senior at the University of Montana's School of Law and looking for a job. A position was advertised at the Department of Natural Resources and Conservation ("DNRC") which paid $1,000 a month. Most private law firms paid approximately $650.00 a month for a first-year lawyer. I was interested in natural resources law although the Law School only offered one course at that time—barely an introduction. Environmental laws were in their infancy or even pre-infancy in 1973, so there was not much in the way of educational training anywhere. Most of natural resources law was baptism by fire. Because the DNRC position was in the field that interested me, and paid substantially more than private firms, I applied for the job.

However, the Chief Legal Counsel at DNRC was resigning to take a job with the U.S. Forest Service in Missoula. So, the Chief Legal Counsel (the only legal counsel) at the Department of State Lands ("DSL") was taking the Chief Legal Counsel position at DNRC. In order to interview for the DNRC job, I spoke with Mr. John Hensen, who was taking that position (John Hensen later became a State District Judge in Missoula). The interview took place at the DSL offices which were located on the ground floor of the Capitol Building. After the interview, Mr. Hensen said that he had shown my resume to the Commissioner of State Lands, Mr. Ted Schwinden, who wanted to speak with me. I had never heard of Ted Schwinden, and being from Anaconda, I had never heard of the DSL, so I was in the dark. How serendipity would change my career course that day.

After our interview, Commissioner Schwinden asked where I was going next. I told him I was going upstairs to meet with Justice John Conway Harrison about a clerk position with the Montana Supreme Court. He asked me to come back down to talk to him after the completion of that interview, which I did. He asked me what happened, and I told him that Justice Harrison had offered me a position. Commissioner Schwinden asked how much the position paid, and I replied $825 a month. He said, "I'll give you $900." I accepted. Later in the discussion he tried to renegotiate the offer and said that he normally gave people a raise of $50 after 6 months and suggested $850. I declined and said I'd take the $900—to which he agreed, reluctantly. That was the second highest paid position in the 1973 law school class. One of my classmates, Don MacIntyre, also got the job at the DNRC. I was unaware that while I was interviewing with Justice Harrison, Commissioner Schwinden called Professor Duke

Crowley at the law school who gave me a recommendation. Professor Crowley was instrumental in the drafting of the 1972 Constitution. It was during that time that Commissioner Schwinden met Professor Crowley.

Little did I know how much Commissioner Schwinden was involved in the running of state government and shaping the political scene. In fact, at the conclusion of our discussion, I told him that there was one thing that I didn't want anything to do with. He asked me what that was, and I said, "Politics!" I still remember him leaning back in his chair roaring with laughter and saying, "Well, you're going have a hard time working for me." In any case, it turned out to be the best decision of my life.

In 1967, the Legislature had passed a very rudimentary mining reclamation law which required the Montana School of Mines to enter contracts with mine operators to provide for reclamation. There were no standards or guidelines provided for in the law, and the contract was equally brief. During the early 1970's and following the adoption of the 1972 Constitution, which required reclamation of all lands disturbed by mining, the political scene was very active in the adoption of various laws dealing with the extraction and production of natural resources.

Prior to my arrival in Helena, substantial efforts were made to write mining reclamation laws. Legislative history indicates that there were multiple meetings and discussions with all the stakeholders in developing the Strip and Underground Mine Reclamation Act which applied to coal and uranium mining.

The Montana Strip and Underground Mine Reclamation Act, sponsored by Senator Bill Bertsche of Great Falls, became effective on March 16, 1973. I arrived three months later in June. My first task was to help draft the rules and regulations implementing the Act. The Act provided that the contracts with the Montana Bureau of Mines be cancelled within 90 days of the effective day of the Act, and that within 90 days of the effective day of the Act every operator of existing mines had to file an application with the DSL for a permit. This meant that those applications had to be on the Department's desk by June 14, 1973. If any contracts with Bureau Mines didn't provide for cancellation, the Legislature made them null and void within 270 days of the effective date of the Act, which would be in December 1973. So, like a three-ring circus, the Department had to cancel current contracts when possible, draft rules and regulations, implement the Act, receive applications from existing and future mine operators, and process those applications within a nine-month period. If you think about it, those parameters were wholly unrealistic. But it happened.

Following the passage of the Act, Commissioner Schwinden made a trip to Kentucky to inspect mining and reclamation projects in that state. During his trip, he met a fellow by the name of CC McCall, who was an

administrator with the Kentucky Coal Mine Reclamation Program. CC loved to hunt big game, and Commissioner Schwinden offered him the opportunity to move to Montana, which he found very attractive. He accepted the position of administrator of the Mine Reclamation Division within the DSL. We were fortunate to have CC's experience available to us in the drafting of the rules and regulations since we were, in essence, making multiple garments from the whole, uncut cloth.

During the rule drafting process, multiple meetings were held with stakeholders in order to get input from all possible sides. There were several contentious points in the development of the program, and several of the companies had highly experienced lawyers. I was fresh out of law school with virtually no experience in rule drafting or handling mine reclamation procedures. I recall that within the first four months of my employment I developed an ulcer. This being my first job as a lawyer, I wanted to make sure everything was done right, and I was often uncertain about my decisions. Fortunately, Governor Judge had hired a lawyer, Mr. Steve Brown, who had one more year of experience than I did, so Steve became a confidant, friend, and advisor. It was just nice to have somebody with whom to bounce around ideas, and he was invaluable—two newbies off on a huge new mission laying groundwork that must stand the test of generations.

The staff of the DSL worked diligently following the passage of the law to implement the program by drafting the necessary rules and regulations. Once they were completed, the stakeholders had the opportunity to comment on the proposed rules which had not yet been published, even in draft form. A series of meetings were held with the interested parties, but they were done separately in order to avoid extended arguments over portions of the rules. I recall that one major point of contention was how topsoil should be salvaged in order to aid reclamation once the mining was completed. Some in the industry, and even some in the university system, did not believe topsoil salvage was necessary to revegetate an area. Salvaging topsoil in separate layers (A horizon and B horizon) is an expensive proposition and some of the companies were arguing that the overburden itself was of sufficient quality to support plant growth. At the end of the day, the rules required that the topsoil be salvaged in separate layers. Another point of contention was how to maintain hydrologic balance in an area that had been strip mined, since the coal seams act as aquafers for the underground water and the springs. The naturally occurring springs were a topic of extensive discussion and debate on how an area could be mined without destroying the natural springs. I remember one of our staff getting into a heated discussion with one of the coal company's representatives. After an extended dialogue, the staffer pointed to me as he walked out of

the room and told the company representative to ". . . talk to my lawyer!" At the end of the day, however, the rules were put in place.

Then the real work began. The operating companies had to file a permit application covering all the requirements of the rules that had been adopted. The DSL staff had to process those applications, and Commissioner Schwinden had to sign the permits by December 16, 1973, or the mines would have to shut down. While the administrative authority was statutorily placed in the State Board of Land Commissioners, the commissioners at that time did not want to be involved in mine reclamation. They perceived their historical function as managing state school trust lands. As a result, the Board delegated its authority to the Commissioner to sign the permits and administer the program.

While there were bumps along the way, the program was fairly and efficiently implemented. In April of 1976, Commissioner Schwinden resigned in order to run as a lieutenant governor candidate with Governor Tom Judge. Governor Judge then appointed me as acting State Land Commissioner at the ripe old age of 27 with literally no administrative experience. Prior to that time, I could go into Commissioner Schwinden's office, sit on the opposite side of the desk, give him advice, and leave the decisions to him. I found it quite overwhelming to be sitting in the chair-side of that desk, but somehow managed to muddle along until 1977. In 1977, Congress adopted the Federal Surface Mining Control and Reclamation Act ("SMCRA"). While Montana and Wyoming had comprehensive strip mine acts in place, SMCRA required all states to submit their program to the Office of Surface Mining ("OSM") for approval, much like the Clean Air Act and Clean Water Act. While the Federal Act was modeled after Montana's law, as it was being carried by Senator Lee Metcalf, there were still substantial revisions that had to be made to Montana's law. While few operational changes took place on the ground, a lot of clarification language had to be added to the Montana Act. One example was the old issue of the separate salvage of A horizon B horizon topsoil in prime farmlands. That requirement was not in the Montana statute, although it was in the regulations. OSM wanted more requirements included in the statute.

In 1978, the Department started drafting a bill to be introduced in the 1979 legislature to bring Montana's law into compliance with the Federal requirements. Once drafted, I asked Lieutenant Governor Schwinden who the best sponsor would be. He believed Senator Carroll Graham ". . . from coal country" was best. So, I contacted Senator Graham at the start of the 1979 session and asked him to carry the bill. Senator Graham was a large man—a cowboy from Lodge Grass, and he sat in the back row of the Senate chamber near "lobbyist row" so I could watch the debate through the windows of the Senate chamber and listen to it on the speaker

in the hallway. While Senator Graham was a well-respected legislator, he was not overly familiar with this piece of legislation. During the debate on the bill, Senator Towe, Billings, asked Senator Graham to yield to a question. Senator Towe said he didn't understand some language on one of the pages of the bill. Senator Graham, who always had a chew, took his time turning around and spitting into the wastepaper basket near his desk before replying, "Well, Senator Towe, the reason why you don't understand that is because it's written in cowboy language, not lawyer language." Then he sat back down, and that was the end of the debate. The bill passed overwhelmingly because everybody knew that it had to be done.

Now that we had the legislation, we needed to prepare an application to submit to OSM under SMCRA. Fortunately, Wyoming was the first state to submit their program for approval. OSM, being overly cautious because this was the first program it reviewed, required multiple attorney general opinions from Wyoming assuring OSM that it had the authority to do some of the things OSM required. I could envision a never-ending back and forth between Wyoming and OSM on what authority they had and whether the attorney general opinions were sufficient to gain OSM approval.

Mike Greeley was the Attorney General of Montana at that time. Following the passage of the Montana Administrative Procedures Act in 1971, most of the State agencies had hired their own attorneys. A dispute had arisen between Governor Judge and then Attorney General Bob Woodahl. Woodahl challenged the executive branch agencies hiring their own attorneys claiming that only the Attorney General's office could represent the State of Montana. Litigation followed and Judge Gordon Bennett of Helena ruled that the State agencies did have the authority to hire their own attorneys and represent that individual agency. A settlement of the case was made by Woodahl and Judge agreeing that the Attorney General's office could deputize the executive branch lawyers. So, John North, who was DSL's chief legal counsel, was also a Deputy Assistant Attorney General.

So off to Washington D.C. we went, to meet with OSM and wade yet again through our application. We spent an entire day going through details and responding to questions and challenges by the OSM personnel as to whether we had the authority to do what was laid out in our application. Each time OSM raised a question about DSL's authority, we asked whether an affirmative Attorney General's opinion would solve the issue. They said that it would. After we got through the review, I asked if they had a typewriter we could borrow. This predates computers. They had very puzzled looks on their faces.

Prior to leaving for D.C., I had approached Attorney General Greeley, explained the situation to him, and asked if I could take some of his letterhead with me to write official Attorney General's opinions. Amazingly, he agreed—a delegation of trust that would never happen today. So, John North, in front of the astonished OSM personnel, started to type out official Attorney General's opinions according to our authority. The upshot was that Montana's program was approved on the spot.

As a result, Montana was the leader of its time in adopting the comprehensive strip mine reclamation law in 1973—one that was a model for the federal legislation. While some minor modifications have been made over the years, the original principles adopted in 1973 were implemented and administered to accomplish the original goals.