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CASE NOTE

MINERAL LAW—Validity of Oil Shale Claims on Public Lands—Mineral Leasing Act of 1920. *Union Oil Co.*, 71 Interior Dec. 169 (1964).

This case is a consolidation of various claims involving identical or similar facts. Plaintiffs are successors in interest to locators of unpatented oil shale placer claims.¹ They applied for patents² on said claims but the patents were rejected by the Manager of the Colorado Land Office, who held that the claims were null and void as a result of an administrative adjudication in 1932 which determined that the claims were invalid for failure to perform annual assessment work. The Manager took the position that the decisions of the Commissioner in 1932 were conclusive, and that regardless of the fact that the original cancellations were subsequently held, by the Supreme Court,³ to be based on erroneous authority and incorrect, the findings cannot now be challenged. The Secretary of Interior assumed supervisory jurisdiction because of the importance of the case and assigned the case to the Solicitor, who upheld the Manager's rejection of the patent applications.⁴ *Held*, The doctrine of finality of administrative action and the ability of the Secretary of Interior to give prospective application only to any change in administrative interpretation of a rule or statute, justifies the determination that the oil placer claims are invalid in the present litigation.⁵

1. A deposit of minerals must be located as a lode or placer claim. Generally speaking, deposits of broken, loose or scattered materials are to be located as placers. *Fuller v. Mountain Sculpture, Inc.*, 6 Utah 2d 385, 314 P.2d 842 (1957). Lode deposits are veins of quartz or other rock in place. Any deposit not locatable as a lode is a placer. Rev. Stat. §2329, 2331 (1891) 30 U.S.C. § 35 (1964). The oil placers are an exception to the general rule because Congress specifically provided for location of certain non-metaliferous deposits as placer claims irrespective of the form in which the deposit occurs. 29 Stat. 526 (1897), 30 U.S.C. § 101 (1964).
2. A patent is evidence of the passage of legal title to public lands from the government to the patentee. *Shaw v. Kellogg*, 170 U.S. 312 (1898). The patent is, in the absence of fraud, a final determination and conclusive in all suits at law if valid on its face when issued. *Steel v. Smelting Co.*, 106 U.S. 447 (1882).
3. *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935).
4. *Union Oil Co.*, 71 Interior Dec. 169 (1964).
5. The appellants have sought relief in the courts by way of a mandatory injunction against the Secretary of Interior to force issuance of the patents. At the present time, this challenge to the Solicitor's ruling has survived a motion to dismiss in the United States District Court for Colorado. *Oil Shale Corp. v. Udall*, 235 F.Supp. 606 (D.C. Colo. 1964). A more recent administrative decision reversed the cancellation of some of the claims in contest on the ground that the original claimholders were not properly served with notice of contest in the administrative adjudications during the

Between 1915 and 1920 approximately 30,000 oil shale mining claims were staked under the Petroleum Placer Act of 1897,⁶ the majority of these in Colorado, Utah and Wyoming.⁷ These claims virtually covered the known oil shale deposits but were mainly speculative and consequently little effort was expended on their development.⁸ Under the Mineral Leasing Act of 1920⁹ the right to locate such claims under the general mining laws was terminated and oil shale deposits became subject to the leasing provisions of this statute. However, no leases on oil shale deposits were actually granted under the statute and in 1930 all deposits of oil shale and lands containing such deposits owned by the United States were withdrawn by executive order from lease or other disposal subject to valid existing claims.¹⁰ This executive order is still in effect and it appears that the Department of Interior considers it inadvisable to revoke the withdrawal because of the large number of outstanding unpatented mining claims on the oil shale lands.¹¹

Due to the uncertainty of the status of many of these claims and in order to clarify the situation, the Interior Department has, intermittently over the past 30 years, initiated contests against many claimholders alleging lack of discovery, abandonment or prior adjudication of nullity.¹² The issue has

early 1930's. However, the Solicitor indicated that before patents are issued there will be a complete evaluation of all the evidence to determine the existence on each claim of a discovery within the meaning of the mining laws as of February 25, 1920. Union Oil Co., Sol. Op. 1965-41.

6. 29 Stat. 526 (1897), 30 U.S.C. § 101 (1964).

7. See Cameron, *Current Problems in Oil Shale Development*, 10 ROCKY MT. MINERAL LAW INSTITUTE 533 (1965).

8. See Miller, *Impediments to Public Domain Oil Shale Development*, 35 U. COLO. L. REV. 171 (1963). Further development was obviously curtailed by the discovery of crude oil in large quantities during the 1920's.

9. 41 Stat. 451 (1920), 30 U.S.C. § 193 (1964).

10. Exec. Order No. 5327 (1930).

11. See Miller, *supra* note 8, at 172.

12. Many of these claims were never valid while many remain valid today though unpatented. As the area covered by these claims approximates 4 million acres the value of determining their status is evident. Perhaps the impetus behind the present activity concerning the validity of the claims is a revived interest in oil shale as a source of liquid fuels, and the desire of private industry to develop its potential. Contrary to this position is a policy of the Interior Department advocating the planned management of public lands and resources under the control of the Secretary of Interior. It is contended that this governmental control would enable a balanced and multiple usage of public lands and best reconcile conflicting interests such as forest control, wildlife management and recreation. See generally, Cameron, *supra* note 7 and Landstrom, *Administration of Mineral Patent*

been joined in some instances, as in the principal case, by rejection of application for patent. As early as 1927 the Department attempted to invalidate some of the claims for failure to perform annual assessment work but this approach was thwarted in *Wilbur v. Krushnic*.¹³ This decision interpreted section 37 of the Mineral Leasing Act as prohibiting invalidation of claims for failure to perform assessment work if work on the claim had been resumed before the action was commenced.¹⁴ Relying on the inference that the United States might divest title before resumption of assessment work, the Secretary again initiated proceedings against claimholders, but the Supreme Court in *Ickes v. Virginia-Colorado Dev. Corp.* found that any attempt to hold a mining claim invalid solely for failure to perform assessment work exceeded his authority under the Act.¹⁵

Many of the claimholders failed to appear at the administrative hearings which invalidated their claims and many failed to appeal the administrative determinations. A few persisted through the courts and ultimately obtained a reversal of the rulings.¹⁶ The Interior Department has asserted that the failure of the present litigants' predecessors in interest to preserve their right of appeal from the early adjudications precludes any re-examination concerning the validity of the claims.¹⁷ However, after the *Virginia-Colorado Dev. Corp.*¹⁸ decision and the Departments' own ruling in *Shale Oil Corp.*¹⁹ there was a long-standing and consistent departmental policy, supported by correspondence from agency officials, that recognized the validity of the claims previously declared null and void.²⁰ This long-standing and consistent policy was suddenly reversed when the present applications for patent were made in 1962.²¹

Laws, 9 ROCKY MT. MINERAL LAW INSTITUTE 67 (1964). See also, unpublished report, *The Interim Report of the Oil Shale Advisory Board to the Secretary of the Interior* (February 1, 1965).

13. *Wilbur v. Krushnic*, 280 U.S. 306 (1930).

14. *Id.* at 317, 318.

15. *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935).

16. *Ibid.*

17. *Union Oil Co.*, *supra* note 4.

18. *Ickes v. Virginia-Colorado Dev. Corp.*, *supra* note 15.

19. *Shale Oil Corp.*, 55 Interior Dec. 287 (1935).

20. *Union Oil Co.*, *supra* note 4, Appendix C-1, C-2, C-3, C-4, C-5 and C-6.

21. *Oil Shale Corp. v. Udall*, 235 F.Supp. 606 (D.C. Colo. 1964).

The position taken by the Secretary of Interior in the present controversy is that the decision in *Shale Oil Corp.*,²² decided in 1935, did not reinstate the oil shale claims invalidated by prior administrative adjudication but only vacated similar cases being then presently considered by the Department. The cases then in litigation were "recalled" and "vacated" while those previously brought to final determination were merely "overruled."²³ The effect of this tautology is to give prospective application to a reversal of departmental policy. The Secretary has recently been upheld in his authority to limit a change in interpretation of administrative rulings or policy to prospective application.²⁴ *Safarik v. Udall*, however, is distinguishable because competing private interests would have been adversely affected by a retroactive application, while in the principal case the only other competing interest was the Interior Department.

Another case cited by the Solicitor as tending to sustain the contention that the Secretary can give prospective application only to a change in interpretation of administrative rulings is *Gabbs Exploration Co. v. Udall*.²⁵ Appellants in that case were also successors in interest to claimholders whose claims had been declared null and void by administrative action in 1930. This case can also be distinguished in that the original complaint was based on a charge of abandonment as well as failure to perform assessment work. The Director of the Bureau of Land Management affirmed a rejection of the patent application but indicated that the basis for declaring the claims invalid in 1930 of failure to perform assessment work could not serve as a basis for declaring the claims null and void. As he did not refute this statement, but relied on the abandonment issue to support his case, the Secretary of Interior by implication seemed to recognize that if the claims had been declared invalid solely on the charge of failure to perform assessment work in 1930, the Department could

22. *Shale Oil Corp.*, *supra* note 19.

23. *Union Oil Co.*, *supra* note 4.

24. *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir. 1962).

25. *Gabbs Exploration Co. v. Udall*, 315 F.2d 37 (D.C. Cir. 1963).

not carry the burden in a judicial contest on their present validity.²⁶

It is a general rule that a decision of a court overruling an earlier decision is retrospective, as well as prospective in its operation.²⁷ It is true that, in the administration of the Mineral Leasing Act the Secretary of Interior exercises a discretionary rather than a ministerial function,²⁸ and that, when the Secretary has authority to make decisions which will place a different construction on the provisions of the Act from that previously reached by officials of the Department, the decisions may be limited to prospective application.²⁹ However, the executive department cannot exceed the powers granted to it by the Constitution and Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statute, such act is of no legal effect.³⁰

Although Davis points out in his work on Administrative Law that the majority view has supported prospective application of changes in administrative rulings and interpretations because of the detrimental effect a retroactive application might have on private interests who had acted in reliance on the prior interpretations, the reverse situation exists in the case under examination.³¹ A retroactive application to the original administrative rulings would serve to vindicate private interests that had refrained from appealing administrative adjudications in reliance on official assurances that the original cancellations had no effect on the validity of their claims. It is true that courts have often held that the doctrine of estoppel cannot be applied against the government but this concept has been subject to considerable erosion in recent years and the number of holdings in which the government has been estopped has increased. In the *Moser* case the

26. *Gabbs Exploration Co.*, 67 Interior Dec. 160 (1960). On appeal the court concluded that the allegation of abandonment in the original administrative hearing was substantiated by the evidence and within the Secretary's authority. *Gabbs Exploration Co. v. Udall*, *supra* note 25.

27. *Jackson v. Harris*, 43 F.2d 513 (10th Cir. 1930).

28. *Thor-Westcliffe Dev., Inc. v. Udall*, 314 F.2d 257 (D.C. Cir. 1963).

29. *Safarik v. Udall*, *supra* note 24.

30. 91 C.J.S. *United States* § 29 (1955).

31. 1 DAVIS, *ADMINISTRATIVE LAW* § 5.08, 5.09 (1958).

Supreme Court held the government estopped and this seems likely to be the future trend.³²

Regardless of whether the terminology used was "overruled" or "vacated," the Secretary of Interior clearly acted on erroneous authority when he held the claims invalid in the original contests.³³ The power of an administrative officer to administer a federal statute is not the power to make law but the power to adopt regulations to carry into effect the will of Congress as expressed by statute. A regulation which does not do this is a mere nullity.³⁴ A legislative rule is valid only if with granted power, issued pursuant to proper procedure and reasonable.³⁵ However, the Interior Department contends that the failure of those claimants who were properly notified to appear at the initial hearings held to determine the validity of their claims or to appeal the final adjudications which resulted from the hearings precludes any further action on the issues determined even though the decisions were based on erroneous authority.³⁶ The finality of unappealed judgments in courts of law is ordinarily well understood,³⁷ whereas statutory provisions often implicitly deny finality or fail to make clear whether or when administrative action should be considered binding.³⁸ There is even some authority that *res judicata* does not apply to administrative decisions.³⁹ Assuming *res judicata* may be applicable to administrative adjudications, the Restatement of Judgments takes the position that a final judgment in a court of law is not conclusive if injustice would result and Davis feels that the same qualification should apply to any set of rules concerning application of *res judicata* to administrative determinations.⁴⁰

While the above lends credence to the belief the Secretary may be compelled to reverse his decision in the principal case

32. *Moser v. United States*, 341 U.S. 41 (1951). See also 2 DAVIS, ADMINISTRATIVE LAW § 17.09 (1958).

33. *Ickes v. Virginia-Colorado Dev. Corp.*, *supra* note 15.

34. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936).

35. 1 DAVIS, ADMINISTRATIVE LAW § 5.11 (1958).

36. *Union Oil Co.*, *supra* note 4.

37. RESTATEMENT, JUDGMENTS § 1 (1942).

38. 2 DAVIS, ADMINISTRATIVE LAW § 18.01 (1958).

39. *Churchill Tabernacle v. F.C.C.*, 160 F.2d 244 (D.C. Cir. 1947).

40. RESTATEMENT, JUDGMENTS § 70 (1942). 2 DAVIS, ADMINISTRATIVE LAW § 18.03 (1958).

this does not assure that appellants will prevail in the final analysis.⁴¹ The decision did not consider whether these claims were abandoned prior to the effort to revive them by new assessment work nor whether a valuable mineral discovery had been made on the claims involved.⁴² The decision was based solely upon the legal conclusion that the question of validity or invalidity of the mining property was not open for further consideration. The ultimate judicial decision will probably be limited to this same legal conclusion and thereby permit the government, or others who may have an interest,⁴³ to prove in future administrative or judicial proceedings that the mining locations were abandoned or otherwise invalid. That the Secretary would be within his capacity under the statute in declaring claims null and void by reason of abandonment seems to be settled.⁴⁴

Although an observation in 1955 that oil placers were of little commercial importance was applicable at that time,⁴⁵ subsequent technological advances resulting in new methods of extracting and processing oil shale have encouraged expectations that oil shale will become an economical source of liquid fuels.⁴⁶ The known reserves of oil shale in the Piceance Basin of Colorado alone equal that of the estimated crude oil reserves in the world.⁴⁷ The fact that approximately 75% of the oil shale deposits are on federal land, and unavailable for acquisition at the present time, illustrates the

41. The plaintiffs position is somewhat improved strategically by a new venue law which permits claims against the Secretary of Interior to be brought in the state where the land lies whereas previously such actions could only be brought in the District of Columbia Court of Appeals. 76 Stat. 744 (1962), 28 U.S.C. § 139(e) (Supp. U. 1964). The 10th Circuit has been more amenable towards private interests in conflict with the Interior Department. *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649 (10th Cir. 1960), cert. denied 366 U.S. 936 (1961).

42. As to what constitutes a valid discovery, see 1 AMERICAN LAW OF MINING §§ 4.19, 4.28 and 4.44 (1964).

43. Executive Order No. 6016 (1933) authorized the issuance of oil and gas leases on land withdrawn by Exec. Order No. 5327 (1930). Oil and gas lessees may initiate proceedings under the Multiple Mineral Development Act. 68 Stat. 710 (1954), 30 U.S.C. § 521 (1964), which provides that if a claimant does not file a claim verification within a specified time he loses all claim to minerals covered by the Mineral Leasing Act and the claim is invalid as to such minerals.

44. *Gabbs Exploration Co. v. Udall*, supra note 25.

45. Senior, *Oil Placers and Unproductive Mining Claims*, 1 ROCKY MT. MINERAL LAW INSTITUTE 289 (1955).

46. Cameron, supra note 7.

47. Duncan, *Oil Shale Deposits in the United States*, The Independent Petroleum Association of America Monthly, vol. 29, No. 4 (Aug. 1958).

extreme importance of this case to the development of an oil shale industry. Of the remaining oil shale land supposedly in private hands by far the most economic reserves and richer deposits are on unpatented mining claims such as are in dispute here.⁴⁸ Even should the appellants prevail in the present litigation the obstacles to full development will remain as long as title to the claims remain in doubt, assuming the Department of Interior continues to press for invalidity on the abandonment or some other theory. The full potential of the oil shale industry will probably not be reached until all title questions are resolved on the unpatented placers. Unfortunately, litigation regarding their validity could drag on indefinitely due to the large number of claims and complicated fact situations. Perhaps the real solution, and the only one that holds any hope of fruition in the near future is legislative and/or executive action to release the vast amount of withdrawn federal lands containing oil shale to private leasing on such terms as can be mutually beneficial to private as well as public interests.⁴⁹

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48. Cameron, *supra* note 7.

49. See generally, unpublished report, *The Interim Report of the Oil Shale Advisory Board to the Secretary of the Interior* (February 1, 1965).