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Mining - The Marketability Test and the Prudent Man Test - Building Stone as a Comman Variety Mineral - Coleman v. United States

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CASE NOTE

MINING—The Marketability Test and the Prudent Man test—building stone as a comman variety mineral. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966).

In a suit brought by the United States for ejectment of Coleman from his mining claims, the District Court entered summary judgment for the United States and dismissed Coleman's counterclaim to review the decision of the Interior Department.[1] Coleman had located several mining claims for building stone in a national forest and for nearly ten years had developed them. During this period his improvements were valued at $17,200 which included a home and he had produced $15,900 worth of building stone most of which he sold. When Coleman applied for a patent for the claims it was denied on the ground that Coleman had not satisfied all the requirements for discovery of a valuable mineral deposit including a showing that the material could be extracted, removed, and marketed at a profit.[2] The Interior Department also ruled that since the area surrounding Coleman's claims contained the same type quartzite, the stone must be considered a "common variety" under the Surface Resources Act of 1955.[3] Upon appeal, the Ninth Circuit Court of Appeals *held* that since building stone is specifically excluded from the Surface Resources Act due to section 161 of the mederal mining law,[4] the prudent man test applies as in other mining

1. It is significant that the court felt that Coleman's counterclaim to the ejectment suit was an appropriate method for judicial review of the agency action rather than requiring him to directly appeal for review of the agency action. The court refused to recognize the distinction argued by the government that this was a collateral attack upon final agency rather than a direct review thereof, and therefore judicial surveillance would be under a more restrictive standard.

   This allows the claimant to choose his court in such proceedings because he can wait for the government to file an ejectment action and then have the case heard in his domicile. The 1962 amendments to the federal venue statute [28 U.S.C. § 1391(e) (1964)] accomplish the same result and the reader is referred to Sperling & Cooney, *Judicial Review of Administrative Decisions Under the Mineral Leasing Act of 1920*, 1 LAND & WATER L. REV. 423 (1966), for an extended discussion concerning the judicial review of administrative decisions by the Department of Interior.

   In this connection the United States has filed a petition for rehearing with the Ninth Circuit, and the court has requested Coleman to reply "with special attention to the question of whether the Secretary of Interior is an indispensable party to the counterclaim" filed by Coleman's attorney in the trial court. GOWER, 1966 FEDERAL SERVICE-MINING, Newsletters Oct. 10, at 2.
2. United States v. Coleman, A-28557 (1962), *affirming in part and reversing in part*, Contest No. 6833 (Mining) Los Angeles No. 0137951. GOWER, 1962 FEDERAL SERVICE—MINING, Solicitor's Opinion No. 4.
3. 69 Stat. 368 (1955), 30 U.S.C. § 611 (1964).
4. 27 Stat. 348 (1892), 30 U.S.C. § 161 (1964).

claims and the requirement of present market-ability is relevant only with respect to the issue of claimant's good faith.[5]

A discovery of a valuable mineral deposit must be made under federal mining law in order to validate a claim.[6] The standard to determine the existence of a discovery is the prudent man test, first stated by the Interior Department in *Castle v. Womble:*[7]

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.[8]

The valuable mineral in the *Castle* case was gold and the prudent man test provided a workable standard for similar intrinsically valuable minerals of limited occurrence. Difficulty arose however when the prudent man criteria was applied to nonmetallic minerals of widespread occurrence such as sand and gravel and, to a lesser degree, low grade metallic mineral deposits.

Consequently, in 1929, the marketability requirement was introduced by the Interior Department in *Layman v. Ellis,*[9] which held that sand and gravel were locatable minerals under federal mining law. This opinion quoted from Lindley on *Mines,* section 98, which offered the marketability requirement as an alternative to the prudent man test depending upon the type of mineral deposit being examined.

In the second *Layman v. Ellis* decision[10] which affirmed the first ruling, the solicitor stated that the marketability or profitability test must be used by the claimant to justify his claim:

> [T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the de-

5. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966).
6. REV. STAT. § 2319 (1875), 30 U.S.C. § 22 (1964).
7. 19 Interior Dec. 455 (1894).
8. *Id.* at 457.
9. 52 Interior Dec. 714 (1929).
10. 54 Interior Dec. 294 (1933).

> posit is of such value that it can be mined, removed and disposed of at a profit.[11]

In 1959, this concept was given judicial approval in *Foster v. Seaton,*[12] which affirmed an Interior Department ruling that refused to allow mining claims to be filed for sand and gravel deposits in the Las Vegas, Nevada area. The court in *Foster* recognized the prudent man test, but limited its application to minerals of limited occurrence. With respect to widespread nonmetallic minerals the court quoted with approval the statement of the solicitor in *Layman v. Ellis*[13] and made the marketability test a requirement that had to be met before a valid claim could be obtained for a nonmetallic mineral of widespread occurrence. This concept was justified as a means to prevent the public domain from being misappropriated under the mining law for purposes other than mining.

An important aspect of *Coleman* and related cases discussed in detail below is the meaning of marketability as used by the Interior Department and the courts. The Interior Department issued Solicitor's Opinion M-36642[14] in 1962 in an attempt to clarify the Department's position.

> The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.
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> An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent man man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State.[15]

11. *Id.* at 296.
12. 271 F. 2d 836 (D. C. Cir. 1959).
13. 54 Interior Dec. 294 (1933).
14. M-36642 Review of the "Marketability Rule" as Applied to the Law of Discovery, 69 Interior Dec. 145 (1962).
15. *Id.* at 146.

It may then be possible to categorize the marketability test as applied by the Interior Department as follows:

(1) If the mineral has intrinsic value, it will by its nature be considered marketable.

(2) However, as the cases show, there may be low grade deposits of intrinsically valuable minerals, where, although a market exists for the mineral, generally there is no prospect of producing the particular deposit at a profit, and thus marketability in this context is related to profitability.

(3) In nonmetallic mineral deposits of limited occurrence, the solicitor's opinion infers that the marketability requirement, as part of the prudent man test, is satisfied if the claimant can show the existence of a market.

(4) In nonmetallic mineral deposits of widespread occurrence, the marketability test requires the claimant to show both a market and that his particular deposit can be marketed at a profit considering the various costs, including mining, processing, its proximity to the market, and transportation involved in the operation.

The cases below illustrate the difficulty courts have had in placing a particular fact situation in a specific category with the result that confusion exists as to the distinction between marketability and profitability.

Adams v. United States,[16] decided by the Ninth Circuit in 1963, concerned gold mining claims in California. Adams had filed the claims in 1929 and had sporadically worked them until 1937. When the hearing to determine the validity of the claims was held in 1954, the claims were declared null and void by the Interior Department and this was upheld by the court. The Department concluded that Adams did not show that enough gold remained on the claims in 1954 to justify a prudent man in expending his time and money in developing the claim. The marketability test, meaning in this context prospective profitability, was raised by the Interior De-

16. 318 F.2d 861, 870 (9th Cir. 1963).

partment and evidence was offered to show that the cost of extracting what little gold was left would preclude a profitable operation. The court said that this evidence was acceptable when treated in its proper context as part of the consideration to be made to determine if a prudent man would undertake the venture.

Mulkern v. Hammitt,[17] decided by the same court in 1964, affirmed a Nevada District Court decision that refused to enjoin the cancellation of certain placer mining claims for gypsum and sand. These claims dated back to 1922 and had never been exploited. A collateral fact here was that the area involved had been made part of a National Wildlife Reserve in 1926 which withdrew the area after that date from mineral exploration. The court affirmed the order cancelling the claims and gave approval to the evidence offered by the Interior Department that at the time of the hearing in 1957, "the nature of the minerals, the cost of extracting and transporting them, the extent of the market and its distance from the land were such that 'a prudent man would not be warranted in expending his time and money on the claims.' "[18] Here marketability again relates to profitability.

Denison v. Udall[19] was a review of an Interior Department ruling denying patents to manganese mining claims. The hearings were held in 1963 and involved claims that did contain low grade manganese.[20] All sales from the claims were made during World War II and thereafter, but, prior to 1959, when the government stopped buying manganese in carload lots. From that date on domestic manganese could not compete with foreign imports and the price fell from $90 to $40-$50 per ton. The solicitor ruled that the claimant had not sustained the burden of showing a market for the ore and therefore denied the patents.

Upon appeal to the District Court of Arizona, the solicitor's opinion was reversed and the case remanded to the Interior Department for futher evidentiary proceedings. The court stated, relying on *Foster v. Seaton,*[21] that the present

17. 326 F.2d 896 (9th Cir. 1964).
18. *Id.* at 897.
19. 248 F. Supp. 942 (D.C. Ariz. 1965).
20. United States v. Denison, 71 Interior Dec. 144 (1964).
21. 271 F.2d 836 (D.C. Cir. 1959).

marketability test did not apply to metallic minerals such as manganese. Moreover, even if the standard did apply, the government failed by its evidence to show that the expectation of a future market was so remote that a prudent man would not expend money in developing the claims. In other words, the court strongly infers that when the marketability test is raised in the context of future profitability, the burden of proof is on the Interior Department to show that a prudent man would not be justified in developing the claims. Thus *Denison* must be considered as a departure from both *Layman v. Ellis*[22] and *Foster v. Seaton*[23] so far as who must raise the issue and who must prove the marketability test. *Denison* may be distinguishable from the other two cases since manganese is a valuable mineral and the critical point of the government's contention was that this particular deposit could not be mined, processed, and marketed at a profit at the present market price. As will be developed later, the court in *Coleman* reaches the same conclusion pertaining to the burden of proof as did the court in *Denison,* but by a different route.

While the court in *Coleman* was concerned with and discussed in detail the marketability requirement for mining claims as imposed by the Interior Department, the decision was also based on statutory interpretation due to the type of mineral in question, building stone. Congress, in 1892, enacted the Building Stone Act which authorized persons to enter the public lands under the mining laws of the United States and file placer mineral claims for building stone.[24]

In 1955, Congress recognized that the mining laws were being abused and were being used to gain entry to and tie up the public domain for purposes other than mining. This led to the enactment of Surface Resources Act under which:

> No deposit of common varieties of sand, *stone,* gravel pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the Uniter States so as to give effective validity to any mining claim hereafter located under such mining laws: . . . "Common varieties" . . . does not include de-

22. 54 Interior Dec. 294 (1933).
23. 271 F.2d 836 (D.C. Cir. 1959).
24. 27 Stat. 348 (1892), 30 U.S.C. § 161 (1964).

> posits of such materials which are valuable because the deposit has some property giving it distinct and special value . . . .[25]

The court in *Coleman* refused to include building stone under the Surface Resources Act because section 161 was not expressly repealed by section 611 and therefore the latter section had no application in the case. However, even without section 161, the court implied that building stone would come under the exception clause of section 611 since building stone is by its very nature not a common variety of stone, and would be locatable because of its distinct properties giving it special value.

This would appear to be contrary to the general classification used by the Interior Department. In *Coleman,* under the court's approach, stone was used as the common variety and building stone was an exception to the common variety and therefore locatable. If the court had decided building stone was the general classification, the building stone belonging to Coleman would not in all probability have been excluded as an uncommon variety. The latter system of classification seems to have been the method adopted by the Interior Department as evidenced in *United States v. Henderson.*[26] In that case the claimant had located sand and gravel deposits of superior quality for use in construction work. Moreover, due to the unique colors of the material, it was suitable for use as a "poor man's terrazzo," and had in fact been used as a facing on some buildings in the area. The Interior Department acknowledged these facts and then held against the claimant since the deposit was going to be used for the same purposes as other less unique deposits that were widely and readily available. Had the court in *Coleman* used the same reasoning the decision would have been for the Interior Department.

By placing special emhpasis on the exception clause of the Surface Resources Act it appears the court in *Coleman* believed that the primary purpose of the act was not to exclude the named minerals from being claimed under mining law, but was to prevent claims from being filed to gain con-

25. 69 Stat. 368 (1955), 30 U.S.C. § 611 (1964) (Emphasis supplied).
26. 68 Interior Dec. 26 (1961).

trol of federal land for purposes other than mining. Consequently, if the potential claimant can show some reason for including the deposit under the exception clause of the act, he should be allowed to file his claim if he can satisfy the requirements of the prudent man test.

Interwoven with the problems of statutory interpretation in *Coleman* is the more important and more far reaching problem of the marketability requirement in federal mining law. As discussed previously, marketability as used both by the Interior Department and the courts often includes the various factors that relate to profitability of the operation and hence the words are sometimes used interchangeably. The *Coleman* court rejected the interpretation of *Foster v. Seaton*[27] made by the Interior Department that imposed upon the claimant of minerals of widespread occurrence the necessity of showing the ability to market the mineral at a profit. The reasoning of the court was that there is nothing in the general mining law which justifies separate rules for minerals of widepsread occurrence and those of more limited occurrence. Moreover, the purpose of the marketability test is to prevent the misappropriation of public lands through the mining laws for purposes other than mining. This purpose can be achieved, the court felt, by adherence to the prudent man test of *Castle v. Womble.*[28] This test should suffice for any type of mineral deposit be it metallic, nonmetallic, widespread, or limited, and there is no reason to establish different standards for placer claims for gold bearing sands and placer claims for building stone.

Inherent in the prudent man test is the good faith of the applicant and this is the proper context, according to the court, in which to apply the marketability test as set forth in *Foster v. Seaton.* Consequently, the court in *Coleman* relegated the marketability requirement to the position of being part of the evidence that can be introduced if the good faith of the claimant is challenged under the prudent man test.

The court chastised the Interior Department for attempting to convert one aspect of the relevant evidence into an ab-

27. 271 F.2d 836 (D.C. Cir. 1959).
28. 19 Interior Dec. 455 (1894).

solute legal requirement and thereby imposing a different standard for different types of mineral claims. Using these guidelines the *Coleman* court felt that the marketability test had been properly applied in both the *Adams* and *Mulkern* cases and saw no inconsistency with their present decision.

Coleman, thus, stands for the proposition that marketability or assurance of profitability is an element to be considered in determining if the good faith of the claimant is an issue in deciding whether or not the requirements of the prudent man test have been satisfied. Moreover, if good faith is to be made an issue, it must be raised by the government. In some fact situations such as *Adams and Mulkern,* marketability may become a large or even the dominant factor, but it is not an absolute requirement in all cases.

There are several practical implications in the *Coleman* decision. First of all, by limiting the concept of common varieties under Surface Resources Act, and expanding the importance of the exception clauses of that act, it may be possible to file claims under the mining law for at least some subclassifications of the materials mentioned in the act if the applicant can show that his deposit has a distinct property having special value. The extent to which this will be carried remains to be seen. For example, there are several marble deposits in Wyoming and surrounding states. If, as under *Coleman,* the common variety is considered to be stone, then marble would be considered an uncommon variety of stone and thus locatable. On the other hand, if marble is considered as the common variety, as the Interior Department contends, a particular deposit of marble would have to satisfy the requirements pertaining to distinct properties and uses as set forth in the following Interior Department regulation:

> Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed man-

> ufacturing, industrial, or processing facilities, and feasible methods of mining and removel of the material.[29]

Although it can be contended that these regulations would suffice to allow some marble deposits to be claimed, the result of *Coleman* is that the claimant need no longer show that his particular marble deposit has a distinctive property that removes it from the common variety classification, since all marble is an uncommon variety of stone.

Coleman obviously excludes building stone from the Surface Resources Act and the question left unanswered is the line of demarcation between common varieties of stone and building stone. Apparently any stone, that can be cut in blocks and can be used to face a building, will be considered building stone.

Coleman also severely limits the use that the Interior Department can make of the marketability test, at least in the Ninth Circuit. Even though the court in *Coleman* felt it had reconciled this decision with *Foster v. Seaton,* there are still discrepancies concerning the importance of the marketability test between the Ninth Circuit and the District of Columbia Circuit which decided *Foster.*

The prudent man test again becomes the key and the marketability test important only as a part of the overall good faith of the claimant. When properly applied this should not be a serious detriment to the Interior Department in administering the public lands since it should be able to prevent misappropriation of public lands for purposes other than mining by strict adherence to the prudent man test.

The Interior Department can still rely on the Surface Resources Act as it applies to the minerals named therein, even though the exception clause of the act has gained new importance.

Moreover, *Coleman* could lead to the development of some low grade mineral deposits on the public lands. For example, there are many low grade uranium deposits in Wyoming and the Four Corners area. Under current conditions,

29. 43 C.F.R. § 3511.1(b) (Rev. 1965).

these deposits cannot be exploited at a profit due to the existing market price of uranium concentrate. Therefore, by a strict application of the marketability test, as set forth by the Interior Department, these deposits would not be locatable.

However, there are many "prudent" men who believe that in the immediate future the private, as contrasted with government, demand for uranium will exceed the present supply thus increasing the price and making the present marginal deposits commercial.

Coupled with this are the rapid technological advances being made in mining and process metallurgy. Even without an increase in market price of the mineral these advances show some promise of making commercial many deposits that are presently noncommercial. Using *Coleman* as a guide these low grade deposits should be locatable. This should serve as a further stimulant to private industry to develop more sophisticated technology since, by already having the deposit claimed, there will be a more direct relationship between research and possible application of this research in field operations and the ultimate receipt of a profit. Under the guidelines established by the Interior Department whereby marketability or profitability was a prerequisite to locate or patent a mineral claim, many concerns would have little interest in low grade deposits. This is especially true of medium and small companies who cannot support expensive research that may develop a new process and then not have any place or any claim upon which to apply it.

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