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NOTES

ECONOMIC FACTORS IN DETERMINING A VALID MINERAL DISCOVERY AS APPLIED BY THE DEPARTMENT OF THE INTERIOR

The possessory title initiated by the location of a mining claim on the unappropriated public domain of the United States is dependent upon the discovery of a valuable mineral deposit.[1] In the event no valid discovery has been made a contest may be initiated within the Department of Interior to have the mining claim declared null and void.[2] Many of these contest proceedings have been instigated by the Forest Service where mining claims have been located in National Forests open to mineral entry, essentially for the purpose of determining the right to the use of the surface and surface resources. The issue of a valid discovery also arises in the event a locator attempts to patent a mining claim. A third class of cases involving the validity of a discovery are cases dealing with common varieties of minerals which are not locatable under the mining laws unless they have a special, distinct and peculiar value.

The contest cases follow a general procedure. (1) The Bureau of Land Management or United States Forest Service initiates the contest

1. 30 U.S.C. §§ 23, 28 (1958); United States v. Harliman, 51 L.D. 258, 262 (1926); United States v. Carlile, 67 I.D. 417 (1960); 30 U.S.C. § 601 (1958).
2. See, for example, The Dredge Corporation, 65 I.D. 336 (1958).

against a mining claimant alleging that there is no valid discovery of a valuable mineral within the limits of the mining claim. (2) The case is then set for hearing before a Bureau of Land Management hearing examiner who takes the testimony and evidence subject to the Administrative Procedure Act[3]. At the hearing, a mineral examiner for the government, forest service geologist, mining engineer employed by the forest service or other government employee versed in mining is duly qualified to testify as an expert. The claimant at this time is also given an opportunity to present his case. (3) If the hearing examiner rules that there has been no valid discovery, the claim is declared null and void. (4) The claimant has a right to review by the Director of the Bureau of Land Management and a further right of appeal to the Secretary of the Department of Interior (actually delegated to the Solicitor).

There are two basic doctrines which the Bureau of Land Management examiners have relied upon to reach their decision of no valid discovery. These are (1) the reasonable and prudent man test and (2) the marketability test.

Since 1955, minerals have been classified into two basic types. These are minerals of limited occurrence and Common varieties of certain specified non-metallic minerals of widespread occurrence.

To have a valuable discovery of minerals of limited occurrence, the prudent man test of *Castle v. Womble*[4] which is a quotation from *Chrisman v. Miller*[5] is applied:

> Where 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.

As a general rule, since 1955, Common varieties of non-metallic minerals of widespread occurrence are not subject to location under the mining laws of the United States. This is a result of the Multiple Use of Surface Act of July 23, 1955[6], which provides that:

> A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws.

Petrified wood was included in the Act by an amendment in 1962.[7]

An exception to the general rule is provided in the Act of 1955 by a provision that "Common varieties does not include deposits of such mater-

3. 60 Stat. § 237 (1946); 5 U.S.C.A. § 1001 (1946); 43 C.F.R. § 221.67 (1961); Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957).
4. 19 L.D. 455 (1894).
5. 197 U.S. 313 (1905).
6. 30 U.S.C. § 601 (1958); 69 Stat. 367 (1955).
7. 30 U.S.C. § 611 (1962); Pub. L. 87-713 (1962).

ials which are valuable because the deposit has some property giving it distinct and special value. . . ."

The Department of Interior has interpreted this exception to require not only that the deposit contain some property giving it a distinct and special value, but also that marketability of the specific deposit be shown. If either of these elements are missing, the claim is invalid. In *United States v. Mary A. Mattey*[8], decided by the Solicitor of the Department of Interior on February 29, 1960, the element of marketability was present but the other element was missing. The claim was located for clay for which there was a market. The clay was being sold and used in the manufacture of vitrified sewer pipe as a bulk substance. The clay was ordinary clay and other private deposits of the same existed within the area. The Solicitor said that "in order to satisfy the requirements of discovery on a mining claim located for a deposit of one of the mineral substances of wide occurrence, such as clay, it must be shown that the deposit can be extracted and removed at a profit. This includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand." This is the specific marketability test. The Solicitor further stated that marketability is not the sole test of the validity of a mining claim of this nature. The claimant must also show that the clay is of an exceptional nature with unusual qualities and different in composition from any other common clay. This element was missing as the claim covered a common ordinary type clay containing no property giving it a distinct and special value. The claim was declared null and void since it was based on a common variety mineral which was non-locatable.

In *United States v. Sam Barlow,*[9] decided January 15, 1962, the Solicitor was confronted with the problem of determining what test to apply to a claim located for a common variety mineral which was located prior to the Act of July 23, 1955. The case involved a placer claim located on March 2, 1955 for cinders. The Act of July 23, 1955 said that cinders shall not be deemed a valuable mineral deposit unless a valid discovery was prior to July 23, 1955. The question then was whether a valid discovery was made prior to the passage of the Act and if not, then whether a valid discovery within the terms of the Act existed at the time of contest. The claimant introduced evidence that there was a market for the cinders but that only minor sales had been made subsequent to July 23, 1955. The government made a prima facie case of no sales and no marketability between the date of location March 2, 1955 and July 23, 1955 and that a prudent man would not be justified in trying to make a paying mining property out of this claim prior to the Act. The court held that no valid

8. 67 I.D. 63 (1960). Although the claim was located prior to the adoption of the Surface Resources Act, 30 U.S.C. § 601 (1955), the Solicitor in effect held that the 1955 Act requirements of "distinct and special values" had always been applicable in determining whether a deposit consisuted a locatable mineral. But compare Layman v. Ellis, 52 L.D. 714 (1929).
9. Gower Federal Service (Mining), B.L.M.-1962-1.

discovery was made piror to the Act and that the cinders were of such a common variety that a valid discovery was not made subsequent to the Act. This case then stands for the proposition that the marketability test will be applied to claims covering common variety minerals located prior to the Act of July 23, 1955 for a valid discovery and the further proposition that marketability must be shown at the time of contest.

The case of *Foster v. Seaton*,[10] decided by the U.S. Court of Appeals, involved a placer claim for sand and gravel located 13 miles from Las Vegas. The court applied the marketability test and emphasized the factor of existence of a present demand . The proposition set forth from this case is that a claim cannot be sustained as valid on the basis of a prospective market value. The deposit must be of "such value that it can be mined, removed and disposed of at a profit".[11]

On September 20, 1962, the Solicitor for the Department of Interior issued a memorandum dealing with the Marketability Rule as applied to the law of discovery.[12] This memorandum was meant to clarify some confusion which arose concerning the marketability test and its relation to the prudent man test being applied to minerals of limited occurrence. The marketability test had never been specifically applied to minerals of limited occurrence but several cases dealing with the related problem of the necessity of mining at a profit as regards minerals of limited occurrence led to the question of whether the Department was applying a silent or implied marketability test to such deposits. The solicitor stated that his memorandum was not to make any change in the test applied to mining claims in determining whether there has been a valid discovery but only to clarify the existing law. He stressed that "the marketability rule is merely one aspect" of the prudent man test and an important aspect since, in the absence of marketability, no prudent man would seem justified in developing a mineral deposit if the extracted minerals were not marketable. He further stated that the marketability test is in reality applied to all minerals and not just to non-metallic minerals of wide occurrence. Further, under this marketability test, there are two categories of minerals, (1) intrinsically valuable minerals and (2) non-metallic minerals of wide occurence. An intrinsically valuable mineral by its very nature is *deemed* marketable (that is, the existence of a general market for the mineral is sufficient), whereas where the case concerns a non-metallic mineral of wide occurrence, the prudent man test requires that a market for the specific mineral deposit be shown by the locator. From this memorandum the proposition is clear that the Department of Interior now considers the prudent man test applicable to all minerals of limited as well as wide occurrence and that the marketability rule is but one aspect of the prudent man test. The marketability rule will be applied to all minerals; however, intrinsically valuable minerals by their very nature are *deemed* marketable. From this

10. 271 F.2d 836 (1959).
11. See also Layman v. Ellis, 54 I.D. 294, 296 (1933).
12. 69 I.D. 145 (1962); Gower Federal Service (Mining), S.O.-1962-35.

proposition, it would seem that a showing of marketability is dispensed within a contest if the mineral is intrinsically valuable although as yet there are no cases on this presumption.

Another problem of current interest in regard to the prudent man test is whether it is necessary for the validity of a claim to show that the deposit can be mined at a profit. There are as least three alternative criteria to the mining at a profit problem: (1) whether you must show in terms of quanity and grade that the property could be operated at a profit; (2) whether it is merely necessary to show that there is a reasonable possibility based on present information of operating at a profit, and (3) whether it is sufficient to show that as a reasonable and prudent person there is enough information so that additional work is justified with a reasonable propsect of success which may enable development of a profitable mine.

On November 2, 1962, the assistant director for the Bureau of Land Management reviewed and reversed a decision of the hearing examiner.[13] The case involved two lode mining claims located for copper, gold and silver upon which a patent had been applied for and a resulting contention by the Department that a valid discovery had not been made. The primary exploration work done on the claims consisted of several adits and bulldozer trenches exposing the veins on each claim. The veins varied in width from a few inches to 26 inches. The assays ran from $1.24 per ton for the base metals to $72.61 per ton. Most of the assays were in the range of from $2.00 to $10.00 per ton. The hearing examiner held that "an ore chute containing sufficient quantity of valuable ore to be mined profitably had not been identified on either claim." The assistant director said that the hearing examiner's statement "apparently required the existence of a sufficient quantity of valuable ore that can be presently profitably mined. This is not our understanding of the prudent man rule. An actual discovery of profitable ore is not essential to a sufficient and adequate discovery under the prudent man test. A valuable mine need not be profitable mine, but the evidence of value which sustains a discovery must be such that with actual mining operations under proper management, a profitable venture may reasonably be expected to result." After a review of the evidence, the claims in contest were held to be valid suggesting that the third criterion referred to above is the appropriate one: "The record supports a conclusion that a prudent man would be warranted in expending his time and money in sinking on, or tunneling into, the veins on these claims with a reasonable prospect of developing a paying mine."[14] But, in *United States v. Estate of Carroll D. Murphy*,[15] the Solicitor held that sufficient quantity plus values is necessary before a

13. United States v. Kenneth O. Watkins, Gower Federal Service (Mining), B.L.M.-1961-69.

14. Accord Adams v. United States, 318 F.2d 861 (1963) and United States v. Kelly Shannon, 70 I.D. 136, Gower Federal Service (Mining), SO-1963-18.

15. Gower Federal Service (Mining), SO-1963-8.

person of ordinary prudence is justified in expending time and money in developing a valuable mine.

From the foregoing, it seems reasonably clear that the third alternative is the correct proposition being applied by the Department of Interior. In the *Watkins* and *Barton* case discussed above the evidence which was regarded as sufficient did not establish sufficient reserves of ore on which to calculate possible commercial operation, but at best only demonstrated that further development work was warranted from the information obtained with a reasonable expectation that a profitable mine might result. *Carroll D. Murphy* suggests as a *caveat,* however, that a significant quantity and grade of mineralization (but something less than measured commercial values) will ordinarily be required. In view of the widely varying nature of mineral occurences and mining and marketing problems, each deposit will have to be evaluated as a separate case. It is too much to expect application of the foregoing principles with mechanical precision.

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