Notes

MARKETABILITY AND THE MINING LAW: THE EFFECT OF UNITED STATES V. COLEMAN

JAMES B. SULT

The property clause of the Constitution empowers Congress to make all necessary rules and regulations affecting land owned by the United States.[1] In the exercise of this power, Congress has enacted over 6000 statutes[2] dealing with a public domain which at its peak totaled nearly two billion acres and now consists of some 770 million acres.[3] These statutes reflect the varying policies under which Congress, through the executive branch, has discharged this grant of power.

One of the most significant of these statutes is the Mineral Location Act of 1872[4] which was enacted to provide a method for disposing of valuable minerals found on the public domain. The administration of this statute,[5] and most major acts affecting public lands,[6] is a function of the Department of the Interior,[7] which must follow congressional public land policy in carrying out this function. A major problem confronting the Department continues to be the need to reconcile the conflict between the policy expressed in the mining law and current public

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[1] U.S. CONST. art. IV, § 3. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

[2] PUBLIC LAND LAW REVIEW COMMISSION, DIGEST OF PUBLIC LAND LAWS at iv (1968).

[3] The formation of the public domain began when the Original Thirteen States ceded their western lands between 1781 and 1802. This first cession consisted of 236 million acres. Subsequently, the Louisiana Purchase (1803) added 529 million acres; the Spanish Cession (1819) 46 million acres; the Oregon Compromise (1846) 183 million acres; the Mexican Cession (1848) 338 million acres; the Texas Purchase (1850) 78 million acres; the Gadsden Purchase (1853) 18 million acres; and the Alaska Purchase (1867) 375 million acres: BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS at 4 (1963).

[4] 17 Stat. 91, *as amended,* 30 U.S.C. §§ 21-47 (1964).

[5] "[T]he Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-38 (1963).

[6] "Public lands" is often used interchangeably with "public domain" although the latter is technically narrower in scope. For purposes of this note, the terms have the same meaning which includes all lands available for sale, use, entry, or settlement by private parties. See the Classification and Multiple Use Act of 1964, 78 Stat. 982, 43 U.S.C. §§ 1411-18 (1964) giving one statutory definition of public lands for the purpose of administering that act.

[7] The determination of the validity of claims on the public domain was entrusted to the General Land Office in 1812 (Act of April 25, 1812, ch. LXVII, 2 Stat. 716), and transferred to the Department of Interior on its creation in 1849 (9 Stat. 395, 43 U.S.C. §§ 2-17 (1964)). However, control over the National Forests, a large segment of the public domain, was transferred in 1905 to the Department of Agriculture on the ground that forestry was a part of agriculture. (33 Stat. 628, 16 U.S.C. § 472, 48 U.S.C. § 422 (1964)).

land policy which reflects the social, economic, and technological changes that have taken place since passage of the 1872 law.

This note is an examination of these changes in public land policy and an analysis of the Interior Department's interpretation of the mining law in the effort to reconcile law and policy. Special attention will be directed to the Department's use of the so-called "marketability" rule, the controversy surrounding this rule, and the resolution of this controversy by the United States Supreme Court in 1968 in *United States v. Coleman*.[8]

THE REVENUE POLICY

Originally, the public lands were viewed by the Government as a source of revenue to support the national treasury.[9] The first revenue bill passed by the newly formed Congress, the Act of May 18, 1796, provided for sale of large tracts of public land in Ohio at $2 per acre.[10] This Act proved unsatisfactory since few individuals were able to purchase the required 640 acres and the Act was amended by the Act of May 10, 1800, which retained the revenue provision but reduced the minimum acreage requirement to 320 acres.[11] This Act also reflected the desire of the Government to stimulate western settlement by providing for purchase on liberal credit terms. This credit policy resulted in other similar legislation,[12] but by 1819, with over 20 million dollars owing and no prospect of payment,[13] the credit system was abolished.[14]

The revenue policy remained in effect, however, and Congress continued to sell public land on a cash basis. But land speculation, followed by a financial panic in 1837, seriously hindered western migration since the scarcity of ready cash left the potential settler with no money with which to purchase land.[15] As a remedial measure, Congress passed the Pre-Emption Act of 1841 which allowed a settler to stake an exclusive claim to 160 acres and gave him a reasonable time to gather sufficient money to pay the purchase price of $1.25 per acre.[16] For the first time, the idea of revenue was clearly subordinated to the desire for settlement, and this Act marked the transition from the revenue policy to a policy of outright disposal.

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[8] 88 S. Ct. 1327 (1968).
[9] T. DONALDSON, THE PUBLIC DOMAIN 98 (1884).
[10] 1 Stat. 464 (1796).
[11] 2 Stat. 73 (1800).
[12] *E.g.*, Act of March 26, 1804, ch. XXXV, 2 Stat. 277, which provided for disposal of public land in Indiana on the credit system.
[13] R. ROBBINS, OUR LANDED HERITAGE 20-34 (1962) [hereinafter cited as ROBBINS]. The only people to benefit had been the speculators, while the settlers had to petition Congress for relief from their obligations. Between 1821 and 1832, eleven such relief acts were passed until the debt incurred by the West was reduced.
[14] The Act of April 24, 1820, ch. LI, 3 Stat. 566, provided for sale of a minimum of 160 acres at $1.25 per acre and required full payment in cash.
[15] ROBBINS, *supra* note 13, at 59-71.
[16] Act of Sept. 4, 1841, ch. XVI, 5 Stat. 453.

EARLY MINING POLICY

With the passage of the Land Ordinance of 1785, the Continental Congress established an early governmental policy reserving mineral lands from sale under the general land statutes.[17] The earliest method of administering these lands came in 1807 when a leasing system for lead mines was enacted.[18] Such a system was in keeping with the policy of raising revenue but it failed due to the difficulties of collection and was abolished in 1846.[19] For the next twenty years, Congress made no attempt to establish a new method of administering mineral lands.

In 1848 gold was discovered in California, and by 1849 thousands of "forty-niners" were swarming over the public domain in search of valuable minerals. In the absence of any positive federal legislation, the miners set up ground rules among themselves to govern their claims,[20] and the State of California, contrary to its enabling act,[21] passed laws allowing prospectors to enter public lands even though occupied by another for agricultural purposes.[22] But in 1858, a federal court found that the miners were trespassers with no right to the minerals they extracted,[23] and it was evident that new federal legislation was needed if old claims were to be recognized and new ones validated. However, the President and Congress were unable to agree on a specific system for disposing of mineral lands. Some interests favored outright sale of small tracts and others favored licensing on a royalty basis. The placer miners were opposed to any interference with free mining and did not want a title system whereby their holdings could be taxed. However, the lode miners, who needed security for their heavy investment, favored some method of gaining title and the agricultural and commercial interests who were taxed also favored a title system for all miners. In the face of these conflicts of interest, President Fillmore recommended a policy of non-interference until further experience should indicate the best policy to be followed.[24]

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[17] Ordinance of May 20, 1785, 28 JOURNALS OF THE CONTINENTAL CONGRESS 375, 376, 378 (Fitzpatrick ed. 1933).

[18] Act of March 3, 1807, ch. XLIX, 2 Stat. 448. The constitutionality of leasing was challenged on the ground that the power to dispose does not include the power to lease. In United States v. Gratiot, 39 U.S. (14 Pet.) 459 (1840), the Supreme Court rejected this contention and construed the constitutional grant as conferring broad discretionary power on Congress.

[19] Act. of July 11, 1846, ch. XXXVI, 9 Stat. 37.

[20] 1 M-B AMERICAN LAW OF MINING §§ 1.7-1.9 (1967).

[21] Act of Sept. 9, 1850, ch. L, 9 Stat. 452. Section 3 of the Act provided "[T]he said state of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits . . . ."

[22] CAL. GEN. LAWS 1850-1865, § 6790 (1868).

[23] United States v. Parrot, 27 F. Cas. 416 (No. 15,998) (C.C. Cal. 1858).

[24] Ellison, *The Mineral Land Question in California, 1848-1866*, in THE PUBLIC LANDS 71 (V. Carstensen ed. 1963). *See also* G. COSTIGAN, AMERICAN MINING LAW 9 (1908) where it is suggested that the reason behind congressional inaction was California's assertion of state title to all mineral lands in Hicks v. Bell, 3 Cal. 219 (1853). This assertion was abandoned in Moore v. Smaw, 17 Cal. 199 (1861).

Settlement by Disposal

In the meantime, public land policy was undergoing a change. Congress was gradually abandoning the idea of revenue in favor of a policy of outright disposal at no cost. This policy was founded on the popular belief that the land and its resources were inexhaustible and the public interest could best be served by measures stimulating acquisition and development of the public domain.[25]

Clearly in the public interest at that time was a system of improved transportation, and in response to this need, Congress instituted a policy of railroad land grants. The earliest grants, in the 1850's, were to the states for the benefit of the railroads and included grants of land in aid of construction as well as for right of ways.[26] The largest grants were to the Pacific railroads between 1862 and 1871. The grant to the Northern Pacific, for example, included in addition to the right of way, aid in construction consisting of ten alternate, odd numbered sections per mile on both sides of the track.[27] The total land area in this grant amounted to over 38 million acres, and the total of all railroad grants was almost 130 million acres.[28]

The next step was to settle the lands opened by the construction of the railroads. The Pre-Emption Act of 1841 had, despite its safeguards, proven to be another vehicle for speculation,[29] and there was increasing public pressure for free land.[30] The Republican party platform of 1860 called for immediate enactment of a homestead law,[31] and shortly after that party took office, the Homestead Act of 1862 was passed.[32] The provisions of this statute were similar to those of the Pre-Emption Act, except that title to the land was acquired by continuous residence and cultivation of the land rather than by purchase. The Homestead Act was designed to stimulate settlement and, in the first year of its operation, over one million acres of land were homesteaded.[33]

The Mineral Location Act of *1872*

The passage of the Homestead Act brought the precarious position

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[25] Martz, *Pick and Shovel Mining Laws in an Atomic Age*, 27 Rocky Mt. L. Rev. 375, 379 (1955).

[26] *E.g.*, Illinois Central Grant, Act of Sept. 20, 1850, ch. LXI, 9 Stat. 466.

[27] Northern Pacific Grant, Act of July 2, 1864, ch. CCXVII, 13 Stat. 365.

[28] Bureau of Land Management, Public Land Statistics at 4 (1963).

[29] Robbins, *supra* note 13, at 191-200.

[30] *Id.* at 98-105.

[31] H. Commager, Documents of American History at 363 (5th ed. 1949).

[32] 12 Stat. 392, *as amended*, 43 U.S.C. §§ 161-255 (1964).

[33] Robbins, *supra* note 13, at 327. However, the act did not completely fulfill the aim of making free land available to the small settler. Abuses of the provision allowing commutation of the residence requirement and purchase under pre-emption policies resulted in the creation of large landholdings by people who used dummy entrymen and then purchased the land after proof of the entrymen's intent to cultivate. Note, *The Public Land Laws: Need for Revision*, 39 N.Y.U. L. Rev. 473 (1964).

of the miner into sharp focus. Although mineral lands were excluded from entry under the Act, there was no way of pre-determining the character of a tract of land since the public domain had not yet been classified.[34] Consequently, the settler was free to enter any land he wished and stake his claim to the exclusion of the miner who, as a trespasser, still had no means by which he could acquire title to his claim.[35] This situation, coupled with the need for orderly disposal of mineral resources, led to the adoption of the Mining Act of 1866,[36] which confirmed existing customs and local law and provided for location and patenting of lode claims. However, it neglected to include placer claims, and the Mining Act of 1870 was passed to remedy this defect.[37]

Neither of these acts proved to be sufficient,[38] and they were merged into a new statute, the Mineral Location Act of 1872.[39] This Act provided that upon discovery of a lode or vein of gold, silver, lead, copper, tin, cinnebar, or other valuable deposit, the miner could locate[40] a claim upon the land containing the deposit and, by following the procedure outlined in the statute, could obtain a patent conveying a fee simple title to the land.[41] Placer claims also were made subject to location in the same manner as lode claims.[42]

The Mineral Location Act of 1872 expressed the same policy that transferred millions of acres of public land into private hands by means of railroad grants, the Pre-Emption Act, and the Homestead Act. This policy is clearly reflected in the Act's declaration that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase.[43] The Act also expressed congressional interest in continued exploitation of the country's mineral wealth by continuing the policy of reserving mineral lands from sale under the general land statutes,[44] a policy first enunciated in 1785. These policies manifested congressional belief that development of the country's mineral wealth, like its other resources,

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[34] ROBBINS, *supra* note 13, at 218.

[35] 1 M-B AMERICAN LAW OF MINING § 1.10 (1967).

[36] 14 Stat. 251 (1866).

[37] 16 Stat. 217 (1870).

[38] *See* 1 M-B AMERICAN LAW OF MINING § 1.15 (1967) for a discussion of problems arising under the Mining Act of 1866.

[39] 17 Stat. 91, *as amended*, 30 U.S.C. §§ 21-47 (1964).

[40] The act of "location" is a series of procedural actions (such as posting notice of a claim) which, when accompanied by a "discovery of a valuable mineral deposit," transfers possessory rights in the minerals from the United States to the locator. The federal law does not describe the location acts which are necessary, but leaves this to the various states. State legislation can complement but not contradict the federal statute. See 1 M-B AMERICAN LAW OF MINING §§ 5.45-5.80 for location procedures.

[41] For an outline of the patenting procedure see 1 M-B AMERICAN LAW OF MINING § 1.23 (1967).

[42] For a discussion of the distinction between lodes and placers see 1 M-B AMERICAN LAW OF MINING §§ 5.10, 5.20 (1967).

[43] 30 U.S.C. § 22 (1964).

[44] 30 U.S.C. § 21 (1964).

could best be stimulated by private acquisition of public land; and where such land was valuable for minerals, it should not be disposed of for other purposes.

Interpretation of the Statute

In order to prevent private acquisition of mineral land for other purposes and to insure that mineral deposits found on public land would be exploited, Congress required a discovery of a valuable mineral deposit before a claim could be validated or a patent issued. The key terms became "discovery" and "valuable mineral deposit." Since neither the mining law nor subsequent legislation undertook to define these terms, it fell to the courts and the Department to interpret them in light of the policies expressed by Congress.

In discussing the requirement of "discovery," it should be noted that although discovery is essential to the validation of a mining claim,[45] an individual does have a limited possessory right in a claim prior to discovery. The doctrine of *pedis possessio* protects a miner against forceful intrusions onto his claim.[46] However, this right is not effective against a peaceable entry by another[47] and it was not uncommon to find two prospectors exploring the same land. When one or both of these miners claimed a valid discovery that was disputed, the courts had to determine if in fact one or more discoveries had been made and the direction and location of each valid claim. In these cases, "discovery" meant the actual finding of mineralization within the limits of the claim and it was said that slight evidence of mineralization would support a finding that a discovery had been made.[48]

These early decisions were not primarily concerned with the value of the deposit claimed, since the fact that the miner wished to spend his time and money working it was considered sufficient proof that the deposit would be profitable.[49] However, situations arose where it became necessary to make a precise determination of the value of the deposit. When the Government, as owner of the land, contested the patent application of the mineral locator, or when a claimant under another land statute contested the possession of a mineral locator, or when a lode claimant contested the possession of a placer claimant, the character of the land was at issue. Here, in order to effect congressional policy that only valuable mineral lands should be disposed of

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[45] Cole v. Ralph, 252 U.S. 286 (1920); Belk v. Meagher, 104 U.S. 279 (1881).

[46] Swanson v. Sears, 224 U.S. 180 (1912); Adams v. Benedict, 64 N.M. 234, 327 P.2d 308 (1958).

[47] Hanson v. Craig, 170 F. 62 (9th Cir. 1909); Noyes v. Black, 4 Mont. 527, 2 P. 769 (1883).

[48] Chrisman v. Miller, 197 U.S. 313 (1905); McShane v. Kenkle, 18 Mont. 246, 44 P. 979 (1896); Book v. Justice Mining Co., 58 F. 106 (C.C.D. Nev. 1893).

[49] Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 Rocky Mt. Mineral L. Inst. 467, 472 (1965).

under the mining law, the court found it necessary to determine the validity of a "discovery" in terms of the value of the deposit as well as the actual finding of mineralization.

The early decisions in which the question of value arose set out certain criteria. In *United States v. Iron Silver Mining Company,*[50] involving an alleged misrepresentation of land as placer mining ground, the Supreme Court stated, "[I]f the land contains gold or other valuable deposits in loose earth, sand, or gravel which can be secured with profit, that fact will satisfy the demand of the Government as to the character of the land as placer ground . . . ."[51] In *Iron Silver Mining Company v. Mike and Starr Gold and Silver Mining Company,*[52] a majority of the Supreme Court held that the amount of ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation. The minority, dissenting on a question of fact, stated:

> [T]here can be no location of a lode or vein until the discovery of a precious metal in it has been had . . . . No purpose or policy would be subserved by excepting from sale and patent, veins and lodes yielding no remunerative return for labor expended upon them.[53]

The Department also enumerated certain qualities which a mineral deposit must possess to be considered valuable. In *John Downs,*[54] the Secretary ruled that the existence of mineralization, in such quantities as to justify expenditures in an effort to secure it, should be established as a present fact in order to bring the land within the class subject to mineral entry. In *State of Washington v. McBride,*[55] the Department stated:

> The principle question in this controversy is whether there exists upon the claim, as a present fact, deposits of gold or other mineral in paying quantities, by which must be meant such quantities as, in view of the physical difficulties to be overcome, would justify mining.[56]

The standards by which value was defined in these early decisions attest to the effort of the courts and the Department to interpret the mining law in accordance with the policies expressed by Congress. In order to insure that a mineral deposit was valuable and would be exploited, the decisions required that the deposit exist in such *quantity* that it would yield a remunerative return, or *profit,* and thus justify expenditures in an effort to secure it. A showing that a mineral deposit

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[50] 128 U.S. 673 (1888).
[51] *Id.* at 675.
[52] 143 U.S. 394 (1892).
[53] *Id.* at 423-24.
[54] 7 L.D. 71 (1888).
[55] 18 L.D. 199 (1894).
[56] *Id.* at 202.

would yield a profit would leave no doubt that it would be mined and the minerals added to the country's wealth. And, in order to prevent disposal of public land on a conjectural or speculative basis, or for other purposes, it was required that the evidence show, as a *present fact,* that the deposit existed in such quantities that it could be secured with profit. In this way, public land clearly mineral in character was reserved for disposal under the mining law, but land not clearly mineral remained available for disposal under other land statutes.

In 1894, the Department formulated the so-called "prudent man" test of value which incorporated these criteria of value into one standard capable of general application. This rule was first set forth in *Castle v. Womble,*[57] a contest involving competing claims of a homestead entryman and a mineral claimant.

> [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.[58]

The opinion clarified what kind of facts were necessary to constitute evidence of a character sufficient to justify a prudent man's expenditures:

> In other words, it may be said that the requirement relating to discovery refers to present facts, and not to the probabilities of the future.[59]

The prudent man rule was approved by the Supreme Court in *Chrisman v. Miller.*[60]

The prudent man rule set forth two requirements that an applicant must meet to establish a valid claim. First, there must have been a finding of mineralization; and second, evidence based on present facts must be of a nature that would justify a prudent man in further expenditures to develop the deposit. However, neither the Department nor the Court stated what specific facts constitute justification; consequently, the task of clarifying the prudent man rule was reserved for later cases.

In *Jefferson-Montana Copper Mines Company,*[61] the Department listed considerations warranting the prudent man's expenditure of time and money.

> The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines

[57] 19 L.D. 455 (1894).
[58] *Id.* at 457.
[59] *Id.*
[60] 197 U.S. 313 (1905).
[61] 41 L.D. 320 (1912).

> and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, would all be considered by a prudent man . . . .[62]

In *Diamond Coal and Coke Company v. United States,*[63] the Supreme Court discussed the profit incentive.

> [I]t must appear that the known conditions at the time of these proceedings (action to annual homestead patents) were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.[64]

In *Cataract Gold Mining Company,*[65] the Department further emphasized profit as an element of value.

> In other words, the mineral deposit must be a 'valuable' one; such a mineral deposit as can probably be worked profitably; for, otherwise there would be no inducement for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.[66]

In *Layman v. Ellis,*[67] the Department, in considering whether gravel could be a "locatable mineral," determined that a substance classified in trade or commerce as a mineral would be "locatable" if it could be mined, removed, and marketed at a profit. In affirming this decision,[68] the acting Solicitor clarified the profitability aspect of the prudent man rule in answer to an objection that allowing location of common minerals would invite abuse of the mining laws.

> Furthermore, the objection mentioned is not of much force when it is considered that the 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 deposit is of such value that it can be mined, removed and disposed of at a profit.[69]

This statement has come to be referred to as the "marketability rule."

These cases demonstrate that a mineral deposit under the prudent man rule is judged by the same criteria set forth in the earlier cases. That is, a valuable deposit justifying a prudent man's expenditures is one which is of such *quality* and exists in such *quantity* as to render its extraction *profitable,* and evidence establishing these factors must be

[62] *Id.* at 323-24.
[63] 233 U.S. 236 (1914).
[64] *Id.* at 240.
[65] 43 L.D. 248 (1914).
[66] *Id.* at 254.
[67] 52 I.D. 714 (1929).
[68] Opinion, *Taking of Sand and Gravel From Public Lands for Federal Aid Highway,* 54 I.D. 294 (1933).
[69] *Id.* at 296.

based on *present facts*. Evidence of the physical factors of quality and quantity required by the prudent man rule is clearly defined in *Jefferson-Montana Copper Mines Company*, and the required evidence of economic profit is clearly expressed in the marketability rule.

MODIFICATION OF THE DISPOSAL POLICY

At the time the prudent man rule was formulated, the policy of disposal of public land into private hands was dominant. In accordance with this policy and the continuing encouragement of mineral development, the rule was liberally interpreted, and a great variety of mineral deposits were found to be valuable. Such common minerals as building sand,[70] volcanic ash,[71] and trap rock[72] were found to be subject to location as valuable minerals when a market for them was shown. In finding gravel locatable, *Layman v. Ellis* reflected the Department's most liberal application of the prudent man rule.

But a modification of the disposal policy was definitely needed. For several years responsible citizens voiced doubt about the wisdom of such a policy. The distortions and subterfuge of the land laws had resulted in the creation of large private landholdings and farm tenancy was flourishing.[73] By 1900 less than half of the original public domain remained open to entry and settlement and much of this was arid or mountainous property.[74] In 1879, the Public Lands Commission[75] reported to Congress on the depredations of timber land on the public domain.[76] In response to this report, the first major conservation act, the Forest Reserve Act of 1891, was passed, authorizing the President to reserve from disposal public land wholly or partly covered by timber.[77] Under this authority, large amounts of public land were withdrawn from the operation of the general land statutes[78] until 1907, when an alarmed Congress amended the Act, prohibiting further withdrawals in certain states without its approval.[79]

The conservation movement was not to be denied, and in response to President Taft's request for legislation validating his 1909 withdrawal of over 3 million acres of western land from entry under the statute providing for location of oil deposits, Congress passed the Pickett

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[70] Loney v. Scott, 57 Ore. 378, 112 P. 172 (1910).
[71] Bennett v. Moll, 41 L.D. 584 (1912).
[72] Stephen E. Day, 50 L.D. 489 (1924).
[73] M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT at 27 (1957).
[74] E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN at 8 (1951).
[75] Created by the Act of March 3, 1879, ch. 182, 20 Stat. 394.
[76] REPORT OF THE PUBLIC LANDS COMMISSION, H.R. EXEC. DOC. No. 46, 46th Cong., 2d Sess. (1880) (cited in ROBBINS, *supra* note 13, at 289-290).
[77] 26 Stat. 1103 (1891), *as amended*, 16 U.S.C. § 471 (1964).
[78] During his administration, President Roosevelt, an ardent conservationist, withdrew some 140 million cares. PEFFER, *supra* note 74, at 106.
[79] Act of March 4, 1907, ch. 2907, 34 Stat. 1271.

Act of 1910.[80] This Act authorized the executive to make temporary[81] withdrawals of public lands for classification as water power sites, irrigation projects, or other public purposes.[82] During the decade following passage of the Pickett Act substantially all the unappropriated public domain was withdrawn from non-metalliferous entry due to the fear that oil, coal, and phosphate were being depleted, and by 1920 much of the nation's land and resources, with the exception of hard minerals, were subject to some form of conservation measure.[83]

Yet, the disposal policy did not die easily. The withdrawal of much of the public domain from entry and exploitation had given rise to the feeling that Congress had locked up the nation's resources and thrown away the key.[84] A reaction to conservation set in when the Republican party took office in the 1920's. The reaction reached its peak in the infamous Teapot Dome scandal where previously withdrawn oil reserves were secretly leased by Secretary of the Interior Fall to some major oil figures. The Secretary, who was personally opposed to the conservation movement, received illegal payments for his action and when a congressional investigation revealed the extent of the corruption,[85] the public was outraged. President Hoover proposed turning over the public domain to the states as a solution to the conflict between conservationists and those favoring disposal, but this proposal was never implemented.[86] When the Democratic party regained power in 1932, disposal as the sole public land policy was rejected and the Government's attention was directed toward formulating a policy providing for a combination of public use of withdrawn lands or limited disposal when in the public interest.

MULTIPLE USE

One of the first measures reflecting this new policy was the Taylor

[80] 36 Stat. 847 (1910), *as amended*, 43 U.S.C §§ 141-58 (1964). Subsequent to the passage of the Pickett Act, the constitutionality of the 1909 withdrawal was challenged. In United States v. Midwest Oil Co., 236 U.S. 459 (1914) the Supreme Court held the executive withdrawal constitutional. The Court found implied consent in the acquiesence by Congress to the practice over an extended period of time of making withdrawals for public purposes by presidential order.

[81] The duration of the term "temporary" is better understood by considering the provision of the Pickett Act which states that withdrawals are to remain effective until either Congress or the President takes some affirmative action releasing the area withdrawn. 43 U.S.C. § 141 (1964). Many "temporary" withdrawals under the Act are still in force today.

[82] The Pickett Act has been construed by the Attorney General as not limiting the executive to withdrawals under its authority. The President may authorize withdrawals under authority asserted prior to 1910 and confirmed in United States v. Midwest Oil Co., 236 U.S. 459 (1914). 40 OP. ATT'Y GEN. 73 (1941).

[83] ROBBINS, *supra* note 13, at 367. As amended in 1912, the withdrawal authority under the Pickett Act did not extend to metalliferous minerals.

[84] *Id.* at 371-74.

[85] Joint Resolution, 43 Stat. 5 (1924). *See* Mammoth Oil Co. v. United States, 275 U.S. 456 (1927). In United States v. Fall, 49 F.2d 506 (D.C. Cir.), *cert. denied*, 283 U.S. 867 (1931), Secretary of the Interior Albert Fall was convicted of accepting a bribe.

[86] ROBBINS, *supra* note 13, at 412-413.

Grazing Act of 1934[87] which was designed to alleviate the steady deterioration of western range lands. This Act authorized the Secretary of the Interior to establish grazing districts on unappropriated land and issue permits for their use. But this legislation had a more important feature. As amended,[88] it directed the Secretary to *classify* 142 million acres of public land according to their most suitable use. Once classified, the land would be marked for either retention or disposal, and those lands retained would be subject to intensive management by the Government in order to promote conservation and provide for multiple utilization by the maximum number of interests. Thus, a new public land policy of "multiple use"[89] was adopted.[90]

President Franklin Roosevelt implemented the policy of the Taylor Act by withdrawing from non-mineral entry the entire remainder of the public domain for classification under the act.[91] These withdrawals enabled the Secretary to effectively control the non-mineral use of Taylor Act lands. Although the Act provided that areas unsuitable for grazing could be disposed of for other purposes, any prospective private user, rather than entering and improving a tract on his own, now had to apply for a specified parcel of land. This parcel then had to be classified and, if suitable for the proposed use, declared open to entry. By means of this procedure, the Department was able to greatly limit proposed acquisitions by setting extremely high standards for classifying land as suitable for private use.[92]

Multiple Use and the Marketability Rule

This procedure was reflected in the Department's policy declaration to the effect that, in administering the Taylor Act it intended to (1) discourage further private acquisition of public land unless such land had inherent or special use values higher than public values;

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[87] 48 Stat. 1269 (1934), *as amended,* 43 U.S.C. §§ 315-315r (1964).

[88] 49 Stat. 1976 (1936). The 142 million acre limitation was removed in 1954. (68 Stat. 151 (1954)).

[89] A statutory definition of "multiple use" was first set forth in 1960 in the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. §§ 528-31 (1964). As defined, it limits the term to actual management of retained public lands. However, "multiple use" is often broadly used to describe a general land policy encompassing standards of disposal as well as standards of management of retained lands. For purposes of this note, the latter meaning will be used.

[90] The principle of multiple use was not entirely new. Since 1897 the forest reserves had been administered for watershed as well as timber purposes (16 U.S.C. § 475 (1964)), and in 1906 they were opened for limited agricultural entry (Act of June 11, 1906, 34 Stat. 233). Mineral leasing began in 1920 when the minerals withdrawn from location by President Taft were made subject to lease (30 U.S.C. §§ 184-263 (1964)). Although the lessee has an exclusive right to removal of the mineral, he does not have the right to exclusive use of the surface nor can he obtain a patent to the land.

[91] Exec. Order No. 6910 (Nov. 26, 1934); Exec. Order No. 6964 (Feb. 5, 1935). These withdrawals were made under the authority of the Pickett Act of 1910.

[92] Annual Report of the Secretary of Interior 335 (1939).

and (2) consolidate public ownership wherever possible.[93] The Department's grant of power, however, was not broad enough to fully implement this goal. A major barrier was the Mineral Location Act of 1872, a relic of the disposal era; it encouraged private acquisition of public land. Moreover, Congress had not modified its mining policy to conform to the new concepts of multiple use, and consequently major land withdrawals did not prohibit operation of the mining law in the areas withdrawn.[94] In brief, the Department was faced with the problem of reconciling a policy favoring retention and management with the administration of a statute favoring outright disposal.

In setting about its task, the Department turned its attention to the major problem of dormant mining claims. Since a valid discovery coupled with the required location work gave the locator the right to the exclusive use of the surface,[95] many unpatented and dormant claims were obstructions to state grants, forest withdrawals, reclamation withdrawals, and mineral leases. On many claims no assessment work had been performed for several years although such work was required. A large number of these claims were purchased after withdrawals under the Taylor Act precluded further non-mineral entry and the required assessment work was recommenced. The Department instituted null and void proceedings against these claims on the ground that the assessment work had been allowed to lapse.[96] However, the Supreme Court ruled in *Wilbur v. Krushnic* that failure to perform assessment work could not be challenged by the Government following resumption of work on the claim since this had the effect of preserving an existing estate, good against the government as though no default had occurred.[97] The Department then took the position that a claim could be challenged before assessment work had been resumed,[98] but the Supreme Court also rejected this theory in *Ickes v. Virginia-Colorado Development Company*.[99] The Court held that the Secretary could invalidate a claim on the grounds of fraud, lack of discovery, or abandonment, but failure to perform assessment work did not constitute grounds for invalidation.[100] Thus the locator's failure did not forfeit any rights he originally had against the government by reason of the initial valid location.[101]

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[93] ANNUAL REPORT OF THE SECRETARY OF INTERIOR 336 (1940).

[94] The withdrawals under the Forest Reserve Act, the Pickett Act, and the Taylor Act all specifically excluded the application of the withdrawal to the mining and mineral leasing laws.

[95] 30 U.S.C. § 26 (1964).

[96] Emil Krushnic, 52 I.D. 282 (1927).

[97] 280 U.S. 306 (1930).

[98] Virginia-Colorado Development Corp., 53 I.D. 666 (1932).

[99] 295 U.S. 639 (1935).

[100] *Id.* at 645.

[101] These cases typify the Department's problem which was common to many mineral locations on which assessment work had not been performed. However, these particular cases concerned oil shale locations and their relation to the leasing act as well as the location act. Prior to 1920, when oil shale was made subject to

Since the Department was unable to clear title to substantial areas by attacking the failure to perform assessment work, it concentrated on a thorough investigation of alleged discoveries when either old or new claims were sought to be patented. In doing so, the Department fell back on the economic factors of the prudent man rule in order to impede further unprofitable, speculative, or mala fidé intrusions onto the public domain and to insure that future mineral land disposals would be consistent with the principles of multiple use.

Claims to common non-metallic minerals such as sand, stone, and gravel,[102] posed the greatest problem to the Department in its effort to reconcile the mining law with multiple use. Since these minerals are of widespread occurrence, continued locations on lands containing them could and did tie up large areas better suited to other purposes. The Department insisted that alleged discoveries of these minerals be supported by clear and convincing evidence of the value of the deposit.[103]

The common minerals generally occur in deposits of great quantity and evidence of this requirement of the prudent man rule was usually not in issue. But even large deposits were often of doubtful economic value and in order to insure that disposal of the lands on which the deposits were situated was justified under the multiple use concept, the Department emphasized the necessity for clear and convincing evidence of the profitability requirement. Because the prudent man aspect of marketability served to bring all elements of profitability into sharp focus, an applicant found it necessary to show that by reason of accessibility, bona fides in development, proximity to market, existence of a present demand, and other factors, that the deposit of common minerals could be mined, removed, and disposed of at a profit. Thus, where there was no way to transport the mineral from the claim, a gypsum location was held invalid for failure to make a showing of profitability.[104] In another case, the evidence did not show the existence of a present demand, and a slate deposit of commercial quality suitable for building stone was found not to be valuable.[105]

In addition to the problem of reconciling the mining law with multiple use, the Department also had to contend with individuals who

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leasing only, many claims to deposits containing this mineral were located. When no method of profitably extracting oil shale was developed, most of these claims were abandoned. As the land on which they were located became progressively more valuable, the claims were revived and attempts to patent the land were numerous. For an example of the continuing problem that this has presented for the Department see the report of Union Oil Co. of California, 71 I.D. 169 (1964) in F. TREALEASE, H. BLOOMENTHAL, & J. GERAUD, CASES AND MATERIALS ON NATURAL RESOURCES 666-71 (1965) and notes following.

102 *See* 1 M-B AMERICAN LAW OF MINING § 2.4 (1967) for a listing of non-metallic minerals subject to location.

103 Memo of the Solicitor M-362295 (1955) (unpublished) (cited in 1 M-B-AMERICAN LAW OF MINING § 4.26 (1967)).

104 United States v. Strauss, 59 I.D. 129 (1945).

105 United States v. Estate of Hanney, 63 I.D. 369 (1956).

sought to acquire public land under the mining law for non-mineral purposes. The House Interior and Insular Affairs Committee commented on these activities:

> [T]he ingenuity of American citizens which has made our nation strong has also operated to develop new and better ways of abusing the public land resources through obtaining color of title under the mining law.[106]

In many areas where deposits of common minerals were readily available, the profit, if any, to be gained from mining them was often less attractive than the idea of a summer cabin site. The existence of these deposits invited abuse of the mining law. In attempting to control such activities, the Department found that the marketability aspect of the prudent man rule was useful as a test of the good faith of the claimant. When an application of the rule showed that the claim was valuable due to its profitability, it was likely that the claimant intended to mine the deposit.[107] Conversely, if the claim was located in an area valuable for other reasons, and the deposit was of doubtful economic value, the lack of profitability as measured by the marketability test helped to clarify objectively the intention of the locator, and such claims were generally disallowed.[108]

THE CONTROVERSY OVER MARKETABILITY

The considerable problem presented by claims for common mineral deposits and their vulnerability to a test of profitability when their value was in doubt, resulted in the marketability aspect of the prudent man rule being applied almost exclusively in cases involving such minerals. Moreover, in cases involving metallic minerals of limited occurrence, the issue usually was whether the prudent man requirements of quality and quantity were satisfied. The marketability test was not applied, since it was assumed that a metallic mineral of intrinsic or commercial worth could be mined at a profit if the other requirements had been met.[109]

The application of the marketability test in this manner gave rise to the view that there were *two distinct tests of value* that were to be applied, each depending on the nature of the mineral. To a non-metallic mineral of widespread occurrence the "marketability" rule was applied, and it was necessary to make a clear showing of profitability. With a metallic mineral of limited occurrence, the "prudent man" rule was applied, and it was necessary to show only that the

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[106] H.R. REP. No. 730, 84th Cong., 2d Sess. (1955).
[107] United States v. Al Sarena Mines, Inc., 61 I.D. 369 (1956).
[108] United States v. Dawson, 58 I.D. 670 (1944); United States v. Moorehead, 59 I.D. 192 (1946); United States v. George W. Black, 64 I.D. 93 (1957).
[109] United States v. Mouat, 61 I.D. 289 (1954); United States v. Smith, 66 I.D. 169 (1950).

mineral was of such quality and present in sufficient quantity to justify a prudent man in making further expenditures to mine it. It was said that a showing of economic value was not required and therefore the marketability test did not apply to this class of minerals.[110]

The view that profitability was not a part of the prudent man rule was also based on the either/or definition of a valuable mineral offered by Curtis Lindley in his 1897 treatise on mining law:[111]

> [It should be] demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substances than for any other purpose, and the removing and marketing of such will yield a profit; *or* it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in an effort to obtain it.[112] (emphasis added).

Moreover, the original statement of the prudent man rule in *Castle v. Womble* did not use the terms marketability, or even profitability.[113] Contributing to the development of this dual standard was the Department's decision in *United States v. Heirs of Stack*[114] where it was stated that the prudent man rule applied to metallic minerals and the opinion stressed the additional requirement of marketability for non-metallic minerals of widespread occurrence. In *United States v. C.F. Smith,* the Department went even further and decided that it was unnecessary for the claimant to show the metallic mineral deposit could be worked at a profit or even that it was more probable than not that a profitable mining operation could be established.[115]

In order to correct this misconception, the Department Solicitor

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[110] Mock, *Marketability as a Test of Discovery Under the Federal Mining Laws,* 7 ROCKY MT. MINERAL L. INST. 263 (1962); Walenta, *Recent Mining Legislation and Its Effect on the Law of Discovery,* 2 IDAHO L. REV. 9 (1965); 38 COLO. L. REV. 622 (1966).

[111] 1 C. LINDLEY, MINES § 98 (1st ed. 1897).

[112] *Id.* at 116. This is Lindley's definition and not that of the Department or the courts.

[113] 19 L.D. 455 (1894). A careful reading of Lindley's statement compared to the statement of the prudent man rule will demonstrate that the two are essentially different. Lindley states that a deposit is valuable when "it is established that such substance exists in the lands in such quantities as would justify a prudent man . . . ." (LINDLEY, *supra* note 111 at 116). This is a narrower definition than that stated in *Castle v. Womble* in which the statement reads, "where . . . the evidence is of such a character . . . ." as would justify a prudent man. (19 L.D. at 457). Evidence necessarily embraces all relevant factors, not merely quantity, and when read in light of the decisions that preceded as well as followed the Department's statement, it is clear that the prudent man rule has always required a showing of profitability. A fair inference is that the rule as stated in *Castle v. Womble* conjoins both aspects of Lindley's disjunctive statement.

[114] A-28157 (March 28, 1960) (decision unreported in Interior Dept. reports).

[115] 66 I.D. 169 (1959). This decision is in direct contradiction with Cataract Gold Mining Co., 43 L.D. 248 (1914), and seems to be an anamoly among reported cases.

issued an opinion in 1962 clarifying the status and application of the marketability concept.[116]

> This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to non-metallic minerals of widespread occurrence. . . .
>
> 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. . . .
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> . . . .
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> [But] [T]he marketability test is only one aspect of the prudent man test, albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money.[117] (emphasis added).

However, this statement did not succeed in clearing up the misunderstanding nor in quieting the controversy surrounding marketability. Some individuals believed that application of a marketability test to metallic minerals would impose too harsh a requirement since these minerals are generally located in concealed deposits and require an extensive investment to expose their existence.[118] Since this investment was protected only by minimal pre-discovery rights, it was urged that protection should come from an application of the prudent man rule without the requirement that economic value be shown. A testing of economic value by the marketability concept should be limited to common minerals of widespread occurrence, as a test of good faith to prevent abuse of the mining law.[119]

MULTIPLE USE AND THE CONTROVERSY

The Department, however, was not concerned solely with abuses. In 1955, Congress had moved to curb abuses of the mining law by enacting the Multiple Surface Use Act of 1955[120] which removed deposits of common varieties of sand, stone, gravel, and other minerals from location under the mining law and made the minerals available for sale under the Materials Act of 1947.[121] Henceforth, the only deposits of these common varieties that would be locatable were those with some property giving them a "distinct and special value."[122] This Act also recognized the obstacle to effective multiple use administration posed by unpatented mining claims and accordingly limited the surface and

[116] Opinion, *Review of the "Marketability Rule" as Applied to the Law of Discovery*. 69 I.D. 145 (1962).

[117] *Id.* at 146.

[118] 38 COLO. L. REV. 622, 624 (1966).

[119] Ladendorff, *Suggestions for Congressional Action Relating to the General Mining Law*, 11 ROCKY MT. MINERAL L. INST. 441, 450 (1966).

[120] 69 Stat. 367 (1955), 30 U.S.C. §§ 601-15 (1964).

[121] 61 Stat. 681 (1947), 30 U.S.C. §§ 601-04 (1964).

[122] For a discussion of the "distinct and special value" exception *see*, Comment, *Common Varieties and the Distinct and Special Value Exception in the Mining Act of 1955*, 38 COLO. L. REV. 220 (1966).

subsurface rights of the holder of an unpatented claim to those resources necessary to conduct mining operations. In turn, the Government was required to dispose of or retain and manage the remaining resources, thus extending multiple use principles to unpatented mining claims.

The Act halted many abuses of the mining law, and one writer suggested that the passage of this Act should have signaled the eventual abandonment of the marketability rule.[123] However, the Act only affected the utility of marketability in one aspect. While it was true that the issue of good faith concerning locations of the withdrawn minerals would not arise once they were no longer locatable, there was no particular reason why the same issue could not arise in connection with a claim for a metallic mineral deposit. But of much greater importance than the problem of good faith, was the continuing problem of reconciling the mining law with multiple use. The Act had provided for multiple surface use of unpatented claims only, and had no effect on a claim once it went to patent. Since a holder of an unpatented claim could acquire a patent by showing a "discovery of a valuable mineral deposit," the Department still needed a method of determining that an alleged discovery was economically valuable. This value would give the land a special value higher than continued public use and would justify the private acquisition as consistent with the concept of multiple use. And the most logical method of determining the economic value of a mineral deposit, either metallic or non-metallic, was by a test of marketability.

The Department began applying the specific criteria of the marketability test to metallic minerals in 1964.[124] In *Alvis F. Dennison*, where the evidence revealed that the last sale from the contested manganese claims had been in 1959 and that prices were not expected to return to a profitable level, the claims were invalidated on the ground that the economic condition of the market would not justify a prudent man in expending money on the claims.[125] This case was primarily concerned with the prudent man requirement of profitability. Since the claims were of doubtful economic value, the marketability criterion of present demand was decisive in determining that the claims were not valuable.

In 1966, in *United States v. Theodore Jenkins*, the Department invalidated other manganese claims from the same area as those contested in *Dennison* on the grounds that only low values were present on the claims, the extent of the deposit was unknown, and there was

[123] Ladendorff, *supra* note 119.

[124] Some marketability factors were alluded to in United States v. Eric North, A-27936 (1959) where the evidence indicated that the cost of mining, trucking and smelting would exceed the values recoverable from smelting ore containing gold and silver, but the case actually turned on a question of conflicting evidence as to whether additional work would be justified.

[125] 71 I.D. 144 (1964), *rev'd on other grounds*, 248 F. Supp. 942 (D. Ariz. 1965).

no market for the manganese.[126] In this case, the evidence failed to establish that any of the prudent man requirements were met. The quality of the deposit was poor, its quantity was unknown, and the mineral that was present couldn't be profitably mined since there was no market for it.

A more recent application of the marketability test to a metallic mineral occurred in 1967 in *United States v. New Jersey Zinc Company*.[127] This case involved titaniferous magnetite, a type of iron ore which yields titanium. The claimants sought to prove the value of their low grade deposits by presenting evidence concerning a new process of mining and treating the ore which they believed would make their deposit valuable under the mining law. This process, however, had been applied only in the laboratory on ore of a higher grade and the claimants had presented no evidence by which the profitability of their proposed operation could be determined. In invalidating the claims, the Department held:

> [T]he record must contain evidence of probable costs of extracting, processing, and transporting the mineral product for comparison with the price for which it can be sold. These facts need not be proved to a certainty but the evidence must be of such character taken with all the other evidence to satisfy the Secretary that a person of ordinary prudence would probably make a profit from his investment of labor and capital.[128]

These recent cases demonstrate that where the profitability of a metallic mineral deposit cannot reasonably be assumed, it will be subject to a test of marketability just like non-metallic mineral deposits. Prudent man profitability as measured by marketability is an equally important factor for all types of deposits, since this is the yardstick which the Department uses to determine whether the disposal of the land containing the deposit is justified under the concept of multiple use. Since there can be no guarantee that a particular metallic mineral will always be profitable, it appears that the marketability test will continue to be applied to all types of minerals.

CONGRESS AND MULTIPLE USE

As evidenced by the Multiple Surface Use Act of 1955, Congress is aware of the many problems associated with the administration of the mining law and other land statutes under multiple use concepts. In 1964, the Public Land Law Review Commission was established to study existing land law and policy and to make recommendations concerning revisions.[129] In hearings on the bill establishing this com-

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[126] A-30409, GFS (Mining) SO-1966-14 (March 1, 1966).
[127] 74 I.D. 191 (1967).
[128] *Id.* at 208.
[129] 78 Stat. 982, 43 U.S.C. §§ 1391-1400 (1964).

mission, the House Committee on Interior and Insular Affairs heard testimony concerning the Department's use of marketability in its effort to administer the mining law in conformance with principles of multiple use. In response to a question concerning problems with the Mineral Location Act of 1872, Acting Secretary John Carver testified concerning the pressures on the Department from various sources for use of public lands. He stated that where these sources contest a doubtful mining claim, a definition of discovery tied to the economics of the marketability test is the Department's only effective tool for removing the locator from the land.[130]

Pending completion of the Commission's report, Congress passed the Classification and Multiple Use Act of 1964 declaring an interim policy of multiple use of the public domain.[131] The Act authorized the Secretary to classify all lands administered by the Interior Department in order to provide for their disposal or retention and management under principles of multiple use.[132] The authority given the Secretary to classify public lands included, for the first time, the power to withdraw land classified for a certain use from the operation of the mining law.[133] In modifying its mining policy by allowing the Secretary to withdraw previously accessible lands, Congress demonstrated strong support of the Department's effort to administer the mining law under the concept of multiple use and indicated at least implied approval of the Department's use of the marketability test in this effort.

UNITED STATES *v.* COLEMAN — THE CONTROVERSY RESOLVED

Despite this congressional action, the announced position of the Department, and the application of the marketability test to metallic minerals, the controversy over the scope and application of marketability continued. Some groups still held to the conviction that there was one test of value for metallic minerals of limited occurrence and another test for non-metallic minerals of widespread occurrence.[134] The Department's decisions applying a test of marketability to metallic minerals

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[130] *Hearings on H.R. 8070 Before the House Comm. on Interior and Insular Affairs*, 88th Cong., 1st Sess., ser. 11, pt. 2, at 50 (1964).

[131] 78 Stat. 986, 43 U.S.C.§§ 1411-18 (1964).

[132] A recent report shows that the Secretary, under authority of this act, has classified 100 million acres for retention while only 100,000 acres have been classified for disposal. Tucson Daily Citizen, Nov. 12, 1968, at 12, col. 3. (reporting on a meeting of the Public Land Law Review Comm'n. held in Tucson, Arizona on Nov. 8-9, 1968).

[133] The act does not apply to the National Forests which are administered by the Secretary of Agriculture, and these lands remain open to entry under the mining law supervised by the Bureau of Land Management.

[134] *E.g.*, in Dennison v. Udall, 248 F. Supp. 942 (D. Ariz. 1965), the court reversed the Department's decision in Alvis F. Dennison, 71 I.D. 144 (1964), for procedural error, but indicated in dicta that the marketability rule was restricted in its application to non-metallic minerals of widespread occurrence. 248 F. Supp. at 945.

were met with a strong protest,[135] and it was still contended that the law of discovery did not require proof of ability to mine a deposit at a profit.[136] It remained for the Supreme Court to resolve the conflict in the case of *United States v. Coleman.*

In 1956, Alfred Coleman applied for a patent on eighteen building stone claims[137] located on a quartzite deposit in 720 acres of the San Bernadino National Forest. The Forest Service instituted a contest proceeding charging that a valid discovery had not been made. At the hearing, Coleman testified to removals of rock valued at $15,990, most of which he sold; improvements including a house valued at $17,200; and personal labor estimated to be worth $157,500. He admitted he had not made a profit but contended that he was waiting until he obtained a patent before developing an extensive operation. A Government witness concluded that due to the limited demand for the stone in the area and the difficulty of producing any more usable rock, a prudent man would not be justified in further expenditures of money and time with a reasonable chance of developing a valuable mine.

The hearing examiner invalidated thirteen of the claims, the Acting Director of the Bureau of Land Management invalidated an additional claim and part of another, and on appeal to the Department of Interior, the remaining claims were declared null and void.[138] The Department ruled that in view of the immense quantities (28,000 acres) of identical stone surrounding the claims, the stone must be considered a common variety and thus removed from location by the Multiple Surface Use Act of 1955. Therefore, it was necessary for Coleman to show that as of the date of that Act, the deposit could have been mined, removed, and marketed at a profit. Inasmuch as there had been no sales from the claims in 1955 and since Coleman had admitted he had not made a profit, the Department concluded that Coleman had failed to show that by reason of all pertinent factors, including existence of a present demand, the deposit could be mined, removed, and marketed at a profit. As a result, the proof of a valid discovery of a "valuable mineral deposit" was insufficient.

Coleman remained on the land, and in 1963 the Government brought an action of ejectment against him. Coleman counterclaimed,

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[135] *E.g.*, Walenta, *Recent Mining Legislation and Its Effect on the Law of Discovery*, 2 IDAHO L. REV. 9 (1965).

[136] Gray, *New Concept of Discovery and Title to Unpatented Mining Claims*, 10 ROCKY MT. MINERAL L. INST. 491, 498 (1965).

[137] In 1891, (during the disposal era) building stone was made subject to location if the lands on which it was found were chiefly valuable therefor. (27 Stat. 348, 30 U.S.C. § 161 (1964)).

[138] United States v. Coleman, A-28557 (1962), *affirming in part and reversing in part*, Contest No. 6833 (Mining) Los Angeles No. 0137951. GFS (Mining) SO-1962-4 (March 27, 1962).

seeking judicial review of the Department's decision denying his application for a patent. The district court granted summary judgment for the Government and on appeal, the Ninth Circuit Court of Appeals reversed, holding:[139] (1) building stone was not removed from location by the 1955 Act; (2) proof of discovery as of the time of the contest proceedings is all that is required; (3) the only test of a "valuable mineral deposit" in *all* types of claims is whether a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine; and, (4) present marketability at a profit is relevant only to determine the good faith of the claimant and is not a test of value.

In holding building stone locatable, the court found that there was nothing in the legislative history of the Multiple Surface Use Act of 1955 expressly indicating an intent to repeal the Building Stone Act. Therefore, the court concluded, the Building Stone Act still applied since a general law does not repeal a specific law in the absence of an express intention to do so. The court then added that stone chiefly valuable for building stone is, by that very fact, not a common variety of stone.[140]

On the issue of value, the court ruled that the prudent man test as expressed in *Castle v. Womble* is the only judicially approved standard of value. The court reasoned that the requirement of present marketability at a profit imposed on non-metallic minerals of widespread occurrence is the imposition of a different standard than that imposed on metallic minerals and is not justified by anything in the mining law.[141] The court also took issue with the Department's reliance on the absence of any marketing of products from the claim and the great weight placed on Coleman's testimony as to the value of his labor. The court found that the *Castle v. Womble* prudent man rule implies a reasonable expectation of profit, not present marketability at a profit, and does not take into account the expense of a claimant's labor in determining profitability.[142]

The United States petitioned the Supreme Court for a writ of certiorari, and in granting the writ the Court noted the importance of the decision to utilization of the public lands.[143] In reversing the court of appeals' decision,[144] the Supreme Court held: (1) profitability is an essential consideration in applying the prudent man test, and the marketability concept recognizes this; (2) the marketability test is not

[139] Coleman v. United States, 363 F.2d 190 (9th Cir.), *aff'd on rehearing*, 379 F.2d 555 (9th Cir. 1967).
[140] 363 F.2d at 199.
[141] *Id.* at 200.
[142] *Id.* at 202-03. The decision of the court of appeals was noted and approved in Comment, *Present Marketability: A Proper Test of Mineral Value Under the Mining Law*, 9 ARIZ. L. REV. 70 (1967); and 2 LAND & WATER L. REV. 365 (1967).
[143] 389 U.S. 970 (1967).
[144] United States v. Coleman, 88 S. Ct. 1327 (1968).

distinct from the prudent man test, but rather is a logical and necessary complement thereto which identifies with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable," and (3) the Multiple Surface Use Act of 1955 removed from the coverage of the mining laws "common varieties" of building stone, but left the Building Stone Act effective as to building stone with some characteristics giving it a distinct and special value.

In an 8-0 decision, the Court observed that the intent of Congress in making public lands available for mining valuable materials was to reward and encourage the discovery of minerals that are valuable in an economic sense.[145] Minerals which no prudent man would extract, because there is no demand for them at a price higher than the costs of extraction and transportation, are hardly economically valuable.[146] Thus, profitability is an important consideration in applying the prudent man test, and marketability is an essential aspect of this test.

In response to Coleman's contention that marketability was proper only as a test of good faith, the Court stated that good faith and value are inextricably bound together. Evidence supplied by the marketability test that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit, may well suggest that a claimant seeks the land for other purposes.[147]

Regarding the objection that marketability involves the imposition of a different standard on widespread minerals, the Court pointed out that the prudent man test and the marketability test are not distinct standards but are complementary in that marketability is a refinement of the prudent man rule. Although it is true that marketability is usually the critical factor in cases involving non-metallic minerals of widespread occurrence, this is understandable, because rare metals in great demand sell at a price high enough to remove any doubt that they can be extracted and removed at a profit.[148]

The Court concluded by agreeing with the Department that the disputed stone was a common variety due to the large quantities of identical stone surrounding the claim. Coleman's contention that building stone is not, by its nature, a common variety and his interpretation of the Multiple Surface Use Act of 1955 which would make it inapplicable to building stone, failed to take into account the purpose of the Act. The legislative history referred to by the Court indicates that building stone was considered a common variety; the same history clearly shows that Congress removed common varieties from the operation of the mining law in order to permit their disposal without disposing of the land on which they are located.[149]

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[145] 88 S. Ct. at 1330.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1330-31.
[149] *Id.* at 1331.

Effect of Coleman

Coleman's primary importance lies in the Court's decision that economic profit as defined by the marketability test is not a separate indicator of value but an essential part of the prudent man rule. In recognizing that profitability is inherent in the prudent man rule, *Coleman* is consistent with the previous applications of the rule as well as the earliest decisions construing the mining statute. In approving marketability as definitive of profit and essential to the prudent man rule as a test of value, *Coleman* has cleared away much semantic confusion, simplified a technical rule, and greatly diminished the area of future controversy.

Under the court of appeals' decision, the prudent man rule would have been almost completely ineffective as a test of value. With no better method of measuring a mineral deposit's potential for profit, the Department would have been required to determine value by relying on the quality and quantity of the deposit without considering those economic factors such as demand and accessibility to which prudent men habitually refer. In fact, the court of appeals' decision would have left the prudent man test adequate only in cases where economic value could readily be assumed. Undoubtedly, such a rule would invite increased abuse of the mining law. But more significantly, this result would seriously hamper the Department's ability to administer effectively the mining law under the multiple use concept, as there would be no realistic way to measure private acquisitions against continued public uses in order to determine which were more valuable.

Fortunately, the Supreme Court saw that congressional purpose requires that the prudent man test of value include economic as well as physical evidence of value before a patent can be issued under the mining law. Since profit is the most objective evidence of economic value, it is properly an element of the prudent man rule. But the theoretical concept of profit can only be meaningful when related to concrete economic criteria, and the Court felt that the marketability test served this purpose well.

With the meaning of economic value much clearer, the Department can continue to administer the mining law consistent with the principles of multiple use. Equally important to this effort was the Court's decision concerning the relation between the building stone statute and the 1955 Act. The court of appeals had reasoned that stone chiefly valuable as building stone necessarily belonged in the "distinct and special value" exception to the 1955 Act. This construction of the statutory exception coupled with the elimination of marketability from the prudent man rule, would have subjected the public lands to numerous claims on deposits of common minerals, each claimant alleging "distinct and special value" by right of this construction.

But the Supreme Court recognized the multiple use policy underlying the Act. The Court saw that the purpose of the Act was to prevent disposal of lands containing common minerals, thereby leaving the other resources on these lands available for public use. Thus, the distinct and special value exception was strictly construed so as not to defeat the purpose of the Act. Because the legislative history of the Act does specify building stone as a common variety, the Court was able to conclude that Congress, in the 1955 Act, did not intend that *all* building stone remain subject to location. On the contrary, Congress specified that only stone having a distinct and special value should be locatable. The stone in *Coleman* was not shown to have such a value, and therefore it was excluded from location at the time of the act.[150]

This precise construction of the distinct and special value exception together with the approval of the marketability test, should have a beneficial impact on public land policy and the law of mining. *Coleman* affirmed the congressional goal of providing for administration of public lands under principles of multiple use and also approved the Department's method of reconciling the mining law with the concept of multiple use.

Coleman is significant in another important respect. In approving an interpretation of the mining law that tends to scrutinize carefully, if not restrict, proposed acquisition of mineral lands, *Coleman* points out the inadequacy of the Mineral Location Act of 1872 in protecting the legitimate miner's interest and investments in exploration and prediscovery work. Much of the resistance to the marketability test stems from the fact that prior to a discovery, the only interest a miner has in his claim is the limited possessory right afforded by the doctrine of *pedis possessio*. This right is good only against forcible, fraudulent, or clandestine intrusions onto the claim,[151] and is effective only so long as the miner is engaged in persistent and diligent exploration.[152] But

[150] It should be noted here that there are different dates that could control the time by which it is necessary that a valid discovery must have been made. Where a contest arises or a patent application is made, a discovery must be shown at the date of the hearing. Adams v. United States, 318 F.2d 861 (9th Cir. 1963); Diamond Coal and Coke Co. v. United States, 233 U.S. 236 (1914). Where the mineral claimed has been removed from location under the mining law, or where the lands have been withdrawn from operation of the mining law subject to a vested right, it is necessary to show that as of the date of removal or withdrawal a discovery had been made. United States v. Mulkern, A-27745 (1959); United States v. Proctor, A-27889 (1959). Where a patent application is made after a removal or withdrawal, it is necessary to show a discovery at the date of the patent hearing as well as the date of the removal or withdrawal. Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). In declaring Coleman's claims null and void, the Deputy Solicitor commented on the fact that there had been no sales in 1955, the date the mineral was removed from location, nor had there been any sales in 1958, the date of the patent application.

[151] Union Oil Co. of California v. Smith, 249 U.S. 337 (1919). *See* cases cited note 46 *supra.*

[152] Adams v. Benedict, 64 N.M. 234, 327 P.2d 308 (1958).

a miner is not protected against peaceable entry by another miner, nor is he protected if the land on which his claim is located is withdrawn from mineral entry.[153]

Geologists and mining experts believe that most of the easily discovered ore bodies near the surface have been located. This means that modern mining exploration involves extensive investments in machinery, technical personnel, and material necessary to expose the existence of ore bodies at great depths.[154] Such mining operations cannot begin the process of exploration only to learn that an area is withdrawn from mineral entry. Such a prospect would effectively discourage future explorations.

Coleman makes it clear that the Department will continue to apply the prudent man rule with its test of economic value. This development raises a serious question for Congress in its effort to revise public land law. The problem of pre-discovery rights is only one of many areas of mining law that need consideration. But as a consequence of *Coleman,* it raises the most immediate concern. It is necessary that Congress extend adequate protection to the miner during the exploration period similar to that enjoyed by the mineral lessee.[155] This would not impede the Department in carrying out its policy of administering the mining law under the principles of multiple use while at the same time legitimate mining operations will have the necessary encouragement and protection to carry on exploration without fear of sudden loss.

One final aspect of *Coleman* merits discussion. If Congress does not completely revamp the mining law in the near future, what effect will *Coleman,* in its approval of the marketability test, have on the mining industry's efforts at long range planning? A major factor affecting the economic stability of mining companies involved in extracting minerals from low-grade ore is a successful exploration program resulting in discoveries of extensive deposits of necessary ore. However, these deposits are not always extractable at a profit using techniques of mining known at the time they are discovered.[156] Thus, an application of the prudent man aspect of marketability precludes any valid location or patent on these deposits.

This result leaves the land on which the deposits are located subject to several dispositions: (1) Since the land remains part of the public domain[157] it may be subject to entry and patent by a claimant under another land statute. (2) The land could be withdrawn for a

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[153] *Id.*

[154] Martz, *Pick and Shovel Mining Laws in an Atomic Age,* 27 ROCKY MT. L. REV. 375 (1955).

[155] For a discussion of pre-discovery problems and proposed remedial legislation see Ladendorff, *Proposed Legislation to Enlarge Pre-Discovery Rights of Mineral Locators,* 1 NATURAL RESOURCES 76 (1961).

[156] Evans, *Significant Developments in the Law of Mining,* 6 ROCKY MT. MINERAL L. INST. 375, 399 (1961).

[157] United States v. Carlile, 67 I.D. 417 (1960).

specified use inconsistent with mining, precluding a future location by the original claimant. (3) At some future date, when the ore is extractable at a profit, another mining claimant, not the original claimant, could enter and claim the deposit. (4) Finally, none of the above could occur and the original claimant may be able to establish a valid claim at some time in the future when the deposit can be mined at a profit. Although possible, this last alternative is the most unlikely.

The resulting insecurity to the mining industry is obvious. If the industry is to develop the reserves necessary to meet the inevitable future demand of our metal-consuming society, some allowance, either statutory or judicial, must be made for the exploration and protection of mineralized deposits when there is no possibility of a valid location or patent. Preferably, Congress should devise some method whereby the Department can recognize and protect the existence of presently marginal mineral reserves. In the absence of such action, it seems necessary for the Department to propose a more workable prudent man rule to encourage development and location of these deposits. In doing so, the Department must still reconcile this location and possible patent acquisition with principles of multiple use.

One possible solution would be a relaxation, under restricted conditions, of the prudent man requirement of present profitability. Of course, if the land has been withdrawn, profitability at the time of the withdrawal must remain as a requirement so as not to controvert the basic concept of multiple use.[158] However, if the question arises only upon application for a patent, and there is no reasonably forseeable conflicting use for the land in question, it would seem that upon presentation of substantial evidence showing that within a reasonable specified period of time the company will have the plant, equipment, and technology required to mine the deposit at a profit, a patent should issue or a location be validated even though the deposit is not presently capable of being extracted at a profit.[159] Such a compromise between

[158] *See* note 150 *supra*.

[159] A recent case in the Ninth Circuit Court of Appeals has attempted to meet the problems of mineral locators by indirectly limiting the Department's use of the marketability rule. In Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), a case involving lead, copper and zinc claims, the court affirmed the Department's decision finding the claims, contested by the Forest Service, invalid due to the lack of a valid discovery. (72 I.D. 141 (1965)). The Departmental finding was reached by applying the prudent man rule without considering the specific criteria of the marketability rule. Although the Department considered some economic factors, including the remoteness and inaccessibility of the claim and the slight evidence of mineralization, no mention of the necessity for showing present profitability was made. In fact, the Assistant Director of the Bureau of Land Management stated that a *reasonable expectation* of profit was all that was necessary. These Departmental decisions were made before marketability began to be specifically applied to metallic minerals and, of course, before the Supreme Court's decision in *Coleman*.

The court of appeals affirmed the Department's decision and noted that in light of *Coleman*, it must be held that marketability applies to all mining claims. However, the court then went on to distinguish between claims located on land the prudent man requirement of present profitability and the necessities of the mining industry would offer some encouragement to the industry and yet guarantee that the land in question has, at least for the forseeable future, a higher value for private use than for continued public use. Thus, the policy underlying the mining law could be further reconciled with the policy of multiple use to the benefit of the public interest represented in both the mining industry and the concept of multiple use.[160]

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containing the minerals actually enumerated in the mining statute (30 U.S.C. § 23 (1964); *supra*, note 39) and claims located for other minerals. The court set forth a test of discovery for the statutory minerals stating that when the validity of a claim to one of these minerals was in issue, there need not be a full showing of marketability. The fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation in order to determine whether an ordinarily prudent man would be justified in the further expenditure of his labor and means, *but the locator need not show that he will in fact develop a profitable mine.*

In setting forth this test, the court was actually approving the Department's limited use of marketability in this specific case. There is no chance that the Supreme Court will have the opportunity to consider this new attack on marketability since it is unlikely that Converse will appeal. However, it is probable that this test, which attempts to limit the use of the marketability rule, would be definitely disapproved by the Court if an appeal were taken. For one thing, the proposed test imposes a different standard on minerals not listed in the statute, and it was the supposed creation of an elite class of minerals that led to the court of appeals decision in *Coleman* disapproving the test of marketability.

This inconsistency in the Ninth Circuit seems to boil down to an attempt to avoid the requirement that present profitability must be shown. However, the court's statement that the locator need not show that he will in fact develop a profitable mine would preclude any necessity for showing that the mine will ever become profitable. Such a result contradicts the spirit of *Coleman*, which recognizes the necessity of showing profitability and insists on the use of the marketability test in so doing. If in fact the court was trying to relax the restrictions of the prudent man rule in order to assist mineral locators in solving such problems as pre-discovery rights or long range planning, a different approach would have been preferable. Rather than create a privileged class of minerals exempt from a full showing of marketability, the court should have followed its own acknowledgment that marketability applies with equal force to all minerals. The court could then have found that the test of marketability is susceptible to an interpretation that would still require a showing that a deposit will in fact be profitable, *but not necessarily presently profitable.* As suggested here, if a locator can present substantial evidence that within a specified and reasonable time in the future, the deposit will be operated at a profit, the claim should be recognized as valid regardless of the type of mineral involved. Such a showing should not be very difficult in the case of the minerals listed in the mining statute since a ready market for them exists not only today but in the forseeable future as well.

The court's decision in *Converse* indicates that the controversy over marketability is not completely resolved. Since it is unlikely that this case will reach the Supreme Court, a future resolution must await a decision by the court of appeals, in a case involving a mineral listed in the statute, holding that the claim is valid despite a failure to show that the deposit will in fact be profitable. When this occurs, it is likely that on the basis of *Coleman* and its support of the policy of multiple use, as well as its approval of marketability as being applicable to all minerals, this latest test proposed by the Ninth Circuit Court of Appeals will be disapproved.

160 *See* PUBLIC LAND LAW REVIEW COMM., HISTORY OF PUBLIC LAND LAW DEVELOPMENT, ch. XXIII (1968), for the most recent history of mining law in relation to the public lands.