

PRESENT MARKETABILITY: A PROPER TEST OF MINERAL VALUE UNDER THE MINING LAW?

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THE PROBLEM DEFINED

The mining law of the United States is governed by the Act of May 10, 1872¹ which evolved from acts of 1866² and 1870.³ The act provides for a system of private entry or "location" of public land and a right to purchase when proper requisites have been met. With a few exceptions where minerals have been made subject only to leasing provisions,⁴ or subject to public sale by the Government,⁵ this law governs the disposition of minerals on federal lands.

The basic requisite to mineral location, the traditional "mining claim," is discovery of a "valuable mineral deposit."⁶ The mineral law, however, does not define "valuable mineral" and the matter has been left in the hands of the courts and the Department of the Interior which manages the public lands of the United States. Generally, the basis for this management under both legislative and administrative policy has evolved from an era of disposal of the federal lands to settle the western

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¹ 17 Stat. 91, 30 U.S.C. §§ 22-37 (1964).

² Act of July 26, 1866, ch. 262, 14 Stat. 251. This act provided for location of "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, or copper." The 1872 act added lead and tin to this list.

³ Act of July 9, 1870, ch. 235, 16 Stat. 217. This act added provisions to the existing law for location of "so-called placer" materials.

⁴ The Mineral Leasing Act, 41 Stat. 437 (1920), codified in 30 U.S.C. between §§ 181 and 263 (1964), excluded deposits of oil, coal, phosphate, sodium, oil shale, and gas from location under placer provisions of the mining law and made them subject only to leasing. Deposits of potassium, 44 Stat. 1058 (1927), native asphalt, solid and semisolid bitumen, and bituminous rock, 74 Stat. 790 (1960), were later added to the provisions of the Mineral Leasing Act.

⁵ Common varieties of sand, stone, gravel, pumice, pumicite, and cinders were defined as not being "valuable mineral," thus precluding location under the mining law of 1872, *supra*, note 1, by the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. §§ 611-15 (1964). Prior to this act, common varieties of sand, stone, and gravel not subject to location were subject to sale by the Government under the Materials Act, 61 Stat. 681 (1947), 30 U.S.C. §§ 601-04 (1964). The 1955 act provided that all common varieties would be subject to the sale provisions. Petrified wood was excluded from acquisition under the location laws by an act of Sept. 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (1964), but was not made subject to sale.

⁶ 17 Stat. 91 (1872), 30 U.S.C. § 23 (1964).

United States and raise revenue, toward an era of intensive federal management with an increasing emphasis on conservation.⁷

Mining law has been controlled by this pattern in the definition of value in mineral. The early authorities, beginning in the 1890's, held that the test of value was whether a prudent man would be justified in developing the deposit.⁸ However, when dealing with widespread nonmetallic minerals such as sand and gravel, the Department of the Interior has been applying a test of "present marketability" as part of the traditional prudent man test since 1933.⁹ A variation of the test has also been recently held to include manganese, a metallic or "hard" mineral.¹⁰

The broad scope of the mining law of 1872 invited abuses from nonmining elements who would locate claims for private hunting and fishing reserves and summer cabin sites.¹¹ This was possible because proper location of a mining claim gave the locator an interest in the property that included an exclusive right to the surface.¹² Congress recognized these abuses. By the Act of July 23, 1955,¹³ Congress specified that the United States retained the right to manage surface resources of mining claims prior to patent and defined "common varieties of sand, stone, gravel, pumice, pumicite, or cinders"¹⁴ as not being "valuable mineral" subject to location under the mining law of 1872. Common varieties, however, were defined not to include materials that had a "special and distinct value," and did not include "block pumice" which was defined as occurring in nature in pieces having one dimension of two inches or more.

Because of this definition, questions have arisen as to what mineral resources will be "common varieties" and what effect the remedial legisla-

⁷ M. CLAWSON & B. HELD, *THE FEDERAL LANDS* 22-36 (1957); Payne, *Examination of Mining Claims and Compliance with Law: Clear Listing or Adversary Proceedings*, 5 ROCKY MT. MIN. L. INST. 163-64 (1959).

⁸ *Chrisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 445 (1894).

⁹ Opinion of Acting Solicitor, 54 I.D. 294 (1933), *affirming Layman v. Ellis*, 52 L.D. 714 (1929).

¹⁰ Theodore R. Jenkins, A-30409, GFS (Mining) SO-1966-14 (March 1, 1966); Alvis F. Denison, 71 I.D. 144 (1964), *reversed and remanded for further factual findings*, 248 F. Supp. 942 (D. Ariz. 1965). As used hereafter in citations "GFS" refers to the Gower Federal Service, a loose-leaf service published by the Rocky Mountain Mineral Law Foundation, Boulder, Colo. Opinions of the Solicitor are cited "SO" and those decided by the Bureau of Land Management are cited "BLM." The first level in the BLM is the "hearing examiner" and the second is the "bureau."

¹¹ U.S. CODE CONG. & AD. NEWS 2474, 2478-79 (1955).

¹² Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 28 (1964); *accord*, *Bradford v. Morrison*, 212 U.S. 389, 395 (1909); *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904); *Mt. Rosa Mining, Milling & Land Co. v. Palmer*, 26 Colo. 56, 58 P. 176 (1899).

¹³ 69 Stat. 367, 30 U.S.C. §§ 611-15 (1964).

¹⁴ 30 U.S.C. § 611 (1964).

tion has on the application of the Department's "present marketability" rule. This comment is written in an effort to define the limits of the application of the "present marketability" rule and to offer suggestions concerning existing problems.

DEVELOPMENT OF THE VALUABLE MINERAL CONCEPT

Section 2 of the mining law of 1872¹⁵ provided that "gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" would be subject to private mineral entry. The statute initially gave rise to two questions: What was "valuable," and what kind of "deposit" was envisioned?

The first widely accepted rule concerning the value of a mineral deposit was stated by the General Land Office in an 1894 administrative decision.¹⁶ The concept was that of the prudent man:

[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.¹⁷

This concept was adopted by the Supreme Court in *Chrisman v. Miller*¹⁸ and is now generally accepted as the basic rule of discovery.¹⁹

The problem of what kind of "deposit" was envisioned by the mining law of 1872 arose because the minerals enumerated clearly possessed "intrinsic" value. Thus, there was considerable confusion concerning whether minerals not intrinsically valuable were also subject to location.

*Freezer v. Sweeney*²⁰ gave a partial answer to the question when the Montana Supreme Court held that building stone was subject to location under the placer provisions of the mining law of 1872. The court said:

It is not presumable that the government of the United States intended to deprive its citizens of the use of, or means of acquiring title to, something so necessary and indispensable as rock or stone is for building purposes²¹

¹⁵ 17 Stat. 91, 30 U.S.C. § 23 (1964).

¹⁶ *Castle v. Womble*, 19 L.D. 455 (1894). See generally Barry, *Discovery Under the Mining Laws*, 8 ARIZ. L. REV. 84, 92-94 (1966) for a discussion of cases prior to 1894.

¹⁷ *Castle v. Womble*, 19 L.D. 445, 457.

¹⁸ 197 U.S. 313 (1905).

¹⁹ *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920); 1 AMERICAN LAW OF MINING § 4.20 at 622-26 (1963); 2 C. LINDLEY, MINES § 336 at 773 (3d ed. 1914).

²⁰ 8 Mont. 508, 21 P. 20 (1889).

²¹ *Id.* at 510, 21 P. at 21.

In recognition of this gap in the mining law, Congress subsequently enacted a provision for the location of building stone in 1892.²²

Sand and gravel, however, presented a different problem. In *Zimmerman v. Brunson*,²³ the General Land Office declared that sand and gravel were not subject to entry under the mining law of 1872. The Office explained:

Deposits of gravel and sand suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws . . . notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.²⁴

The decision was subsequently overruled by *Layman v. Ellis*²⁵ which, reasoning from an economic standpoint, pointed out that gravel deposits were classified as a mineral product in trade and commerce and had a widespread economic value because of the demands of industry. Asst. Sec. John H. Edwards, in overruling *Zimmerman v. Brunson*, said, "[T]he conclusion . . . that the value shown was one chiefly from exceptional and particular conditions in the locality where the deposit was found, is not warranted under present conditions."²⁶ Later the Department affirmed *Layman* and as a test of value laid down the "present marketability" rule.²⁷

BACKGROUND OF THE PRESENT MARKETABILITY RULE

Marketability of ore deposits as a definition of "valuable" was recognized by Curtis Lindley in the first edition of his treatise on mining law in 1897.²⁸ Lindley defined minerals in three categories: (a) those substances which were recognized as such because of their chemical composition, (b) those substances which were classified as mineral in trade or commerce, and (c) those substances which possessed economic value for use in trade, manufacture, science, or the mechanical or ornamental arts. Lindley then stated the following requisite:

[To make the deposit valuable 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 estab-

²² Act of Aug. 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1964).

²³ 39 L.D. 310 (1910).

²⁴ *Id.* at 310 (syllabus).

²⁵ 52 L.D. 714 (1929).

²⁶ *Id.* at 720.

²⁷ Opinion of Acting Solicitor, 54 L.D. 294 (1933).

²⁸ 1 C. LINDLEY, MINES § 98, at 116 (1st ed. 1897).

lished 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.²⁹

Lindley subsequently repeated this requisite in two later editions.³⁰

Cases prior to *Layman v. Ellis* seem generally to follow Lindley's formula. Building sand,³¹ volcanic ash suitable for roof material and abrasive soap,³² trap rock for railroad ballast,³³ and schist particularly resistant to water³⁴ were all found to be subject to location when there was a showing of a ready market for the product.

Layman v. Ellis left no doubt that such minerals were subject to location, and in affirming³⁵ that decision the Department set out the guide for what is now called the "present marketability rule":

[T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.³⁶

This test was upheld outside the Department in *Foster v. Seaton*,³⁷ a case involving sand and gravel claims. It explained that the reason for the rule was "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining."³⁸ It should be noted, however, that the claims involved were located prior to the Act of July 23, 1955, and the case did not involve any special or distinct qualities of the deposit.

In 1962 Frank J. Barry, the Solicitor of the Department of the Interior, reviewed the marketability rule and emphasized that the rule was only one aspect of the prudent man rule.³⁹ The prudent man rule as applied to a valuable mineral deposit was stated to be that which "would justify a man of ordinary prudence in the further expenditure of time and money with the reasonable prospect of success in the effort to develop a *paying* mine."⁴⁰ (Emphasis added.) Mr. Barry stated

²⁹ *Id.* at 116.

³⁰ 1 C. LINDLEY, MINES § 98, at 175 (3d ed. 1914); 1 C. LINDLEY, MINES § 98, at 154 (2d ed. 1903).

³¹ *Loney v. Scott*, 57 Ore. 378, 112 P. 172 (1910).

³² *Bennett v. Moll*, 41 L.D. 584 (1912).

³³ *Stephen E. Day, Jr.*, 50 L.D. 489 (1924).

³⁴ *Lee Davenport*, A-8318 (March 20, 1926).

³⁵ *Opinion of Acting Solicitor*, 54 I.D. 294 (1933).

³⁶ *Id.* at 296.

³⁷ 271 F.2d 836 (D.C. Cir. 1959).

³⁸ *Id.* at 838.

³⁹ *Marketability Rule*, 69 I.D. 145 (1962).

⁴⁰ *Id.* at 145-46. Note that the Solicitor used the word *paying* mine, rather than *valuable* mine. Valuable is used in both *Castle v. Womble*, 19 L.D. 455, 457 (1894) and *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Both cases were cited as the authority for the statement.

that the marketability rule was in fact applied to all minerals, but in the case of nonmetallic minerals of widespread occurrence such as sand and gravel, the Department would require a showing of an existing market.

APPLICATION OF THE PRESENT MARKETABILITY RULE

Nonmetallic minerals of widespread occurrence

As applied to nonmetallic minerals of widespread occurrence, the present marketability test is of necessity limited to locations made before the definition of most of these materials as not being valuable under the provisions of the mining law of 1872 by the Act of July 23, 1955. Exceptions occur where the material has a distinct and special value or was not included within the provisions of the 1955 act.

The present marketability rule, stated in terms of these deposits, is that the material *within the claim itself* must have been marketable on July 23, 1955, and it is not sufficient to show a prospective market, that there was a market for similar materials in the same area,⁴¹ or that a profitable operation could be maintained from a number of claims in combination.⁴²

Sales, as evidence of marketability, are often discussed in departmental decisions. The Department first points out that sales are not the sole test of marketability⁴³ because a lack of sales will not necessarily lead to the conclusion that the material is not marketable;⁴⁴ however, a showing of no sales will apparently make out a prima facie case of no discovery if the validity of the claim is challenged by the Government.⁴⁵ The decisions also point out that evidence of sales will not necessarily

⁴¹ Everett Foster, 65 I.D. 1 (1958), *aff'd.*, 271 F.2d 836 (D.C. Cir. 1959); Keith J. Humphries, A-30239, GFS (Mining) SO-1965-15 (April 16, 1965); H. A. Van Loon, GFS (Mining) BLM-1964-15 (Jan. 27, 1964) (hearing examiner).

⁴² Frank Melluzzo, GFS (Mining) BLM-1965-2 (Nov. 9, 1964) (hearing examiner), *aff'd.*, GFS (Mining) BLM-1966-4 (Feb. 11, 1966) (bureau).

⁴³ Fisher Contracting Co., A-28779, GFS (Mining) SO-1962-25 (Aug. 21, 1962).

⁴⁴ Alfred N. Verrue, GFS (Mining) BLM-1965-1 (Nov. 6, 1964) (hearing examiner).

⁴⁵ The cases seem to indicate two different types of burdens of proof. In the case of an application for mineral patent of nonmetallic minerals of widespread occurrence located prior to July 23, 1955, the applicant clearly has the burden of showing the marketability of his deposit. Opinion of Acting Solicitor, 54 I.D. 294, 296 (1933). When the Government challenges a claim, the cases indicate that the Government must first make out a prima facie case of invalidity. Kenneth McClarty, 71 I.D. 331, 333 (1964); Kelly Shannon, 70 I.D. 136, 139-40 (1963); C. E. Strauss, 59 I.D. 129, 136 (1945). It does not appear, however, that this prima facie case need be very strong. *E.g.*, in Fisher Contracting Co., A-28779, GFS (Mining) SO-1962-25 (Aug. 21, 1962), the Government was held to have made out a prima facie case even though the claimant pointed out that the Government witnesses did not go on the claims but observed them from vantage points on nearby roads. *See also* Sam Barlow, GFS (Mining) BLM-1962-1 (Jan. 15, 1962) (hearing examiner).

validate the claim. The basis for this argument is the Materials Act of 1947⁴⁶ which allows the Government to sell surface materials, including stone, sand, and gravel, providing the materials are not subject to location. This is congressional recognition that some materials are salable although not subject to location.⁴⁷ This type of test is also applied to invalidate claims where a showing of sales is far outweighed by expenditures.⁴⁸

Another factor stressed by the Department, when marketability prior to July 23, 1955 is an issue, is that any work done in the development of the deposit must have been as a "commercial" venture and not merely a program for exploration. This would be true in a situation where a commercial deposit is not economically feasible for a small operator, so development is on a "pay-as-you-go" basis. Such a situation has been held to be merely an exploration program and not sufficient to show a market for the deposit.⁴⁹

As indicated earlier, the materials enumerated by the Act of July 23, 1955 remain "valuable minerals" subject to location under the mining law of 1872 if there is a showing of special and distinct value.⁵⁰ The Department of the Interior has expanded upon this subject in regulations and, in addition to block pumice specifically mentioned in the 1955 act, lists limestone suitable for use in production of cement, metallurgical or chemical grade limestone, and gypsum⁵¹ as not being included in the category of common varieties.⁵² A number of cases have been decided by the Department where distinct and special value has been in dispute.⁵³ *Permanente Cement Co.*⁵⁴ pointed out that when a quartzite deposit had a high silica and low alkali content making it

⁴⁶ 61 Stat. 681, 30 U.S.C. §§ 601-04 (1964). The act was later amended to include common varieties of minerals no longer defined as valuable under the mining law of 1872, 69 Stat. 217 (1955). See discussion *supra* note 5.

⁴⁷ Everett Foster, 65 I.D. 1 (1958); *aff'd.*, 271 F.2d 836 (D.C. Cir. 1959).

⁴⁸ E.g., in Eleanor A. Gray, A-28710, GFS (Mining) SO-1965-14 (April 6, 1965) claims for mineral salts were invalidated on a showing of receipts of \$20,000 against expenditures of \$65,000.

⁴⁹ E. V. Pressentin, 71 I.D. 447 (1964).

⁵⁰ 69 Stat. 367 (1955), 30 U.S.C. § 611 (1964). See discussion note 5 *supra*.

⁵¹ *But see Hearing on S. 2281 and S. 3485 Before Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs*, 89th Cong., 2d Sess. 73-76 (1966) [hereinafter cited as *1966 Hearings*] where a reproduced memorandum from the regional level of the United States Forest Service stated the following:

The gypsum occurring on the subject claims must be concentrated, this concentrate is now being used for only one purpose, namely, as a retarder in portland cement. This does not require a highly pure gypsum and the product contains impurities of clay stone and siltstone. Accordingly, the product produced is not gypsum in the true sense of the word, but it is principally valuable for the gypsum contained therein.

⁵² 43 C.F.R. § 3511.1(b) (1966).

⁵³ For an examination 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).

⁵⁴ GFS (Mining) BLM-1965-3 (Oct. 15, 1964) (hearing examiner).

more valuable than usual quartzite deposits in the manufacture of cement, such was not a sufficient showing of special and distinct value. In *J. R. Cardwell*,⁵⁵ the same rule is seen with respect to a location for granite and gemstone.⁵⁶ The Department stated that a special adaptability of the material for purposes recognized as ordinary uses would not take it out of the category of a common variety. In *Mary A. Matthey*,⁵⁷ the Department invalidated claims for a clay deposit though it was alleged that the clay contained a component shale that made it particularly valuable in the manufacture of sewer pipe. The Department stated that the clay had no qualities that it did not share with other common clays and could be used only as any other common clay.

The rule is applied also where the mineral is not essential in the manufacture of a commodity but is used merely to give added beauty.⁵⁸ Also, the Department has stated that a combination of various common varieties would not place a deposit into the category of an uncommon variety. Thus, in *L. N. Basich*⁵⁹ a claim was invalidated when the claimant contended that a combination of sand and gravel was not covered by the act because it was a mixture.

Therefore, to have a special and distinct characteristic, a material must (a) be specifically adapted for "non-ordinary" uses, and (b) be an essential element in the manufacture of the commodity concerned.
Block pumice and other distinct and special materials

Block pumice, as defined by statute,⁶⁰ was specifically excepted from the Act of July 23, 1955. Apparently this was to give it a statutory "distinct and special" classification.⁶¹ Also, as indicated *supra*, the Department's regulations provide that some varieties of limestone, gypsum,⁶² and marble⁶³ are not common varieties. But the question

⁵⁵ GFS (Mining) BLM-1962-21 (March 2, 1962) (hearing examiner), *aff'd.*, A-29819, GFS (Mining) SO-1964-14 (March 11, 1964).

⁵⁶ The decision also explained that quartz stones of gem quality would have to show qualities of "beauty, durability and rarity" to be subject to location after July 23, 1955. BLM-1962-21, at 6.

⁵⁷ 67 I.D. 63 (1960).

⁵⁸ *E.g.*, in Maurice W. Faulkner, GFS (Mining) BLM-1964-34 (Nov. 3, 1964) (bureau), a location of onyx for use as ornamental stone-slab fillers for plastic table tops was found not to be essential for the manufacture of such items as both common and uncommon rocks could be used.

⁵⁹ A-30017, GFS (Mining) SO-1964-51 (Sept. 23, 1964).

⁶⁰ 69 Stat. 367 (1955), 30 U.S.C. § 611 (1964) states that block pumice is that which occurs in nature in pieces having one dimension of two inches or more.

⁶¹ U.S. CODE CONG. & AD. NEWS 2474, 2482 (1955).

⁶² 43 C.F.R. § 3511.1(b) (1966). *But see*, 1966 Hearings, at 73-76.

⁶³ Marble was used as an example of a special and distinct variety of stone in 43 C.F.R. § 185.121(b) n.2 (1962 Supp.). However, the footnote was deleted in the regulation effective Sept. 14, 1962, 27 Fed. Reg. 9137 (1962), which contains the current regulation, 43 C.F.R. § 3511.1 (1966). Laura Duvall, 65 I.D. 458, 462 (1958) (dictum). *But see*, 1966 Hearings, at 15, 27-28, 31, that gave indications, at least at lower departmental levels, that marble was being treated as a common variety.

remains: Is the requirement of an existing market also applicable to these materials?

In defining a material with a distinct and special value, the departmental regulations require a showing of commercial value. The regulations explain:

In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographic location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material.⁶⁴

In speaking of "existing or proposed facilities," the regulation might seem to indicate that an existing market need not be shown, but departmental decisions appear to be otherwise. In *Clare Williamson*⁶⁵ the Department invalidated claims for "lump or block pumice" and made the following statement:

Lump or block pumice is not a common variety under the 1955 Act . . . and it still may be located under the mining laws; however, it has no intrinsic value such as counsel for the contestee contends. It is a nonmetallic mineral and a deposit of it is not valuable unless it can be mined and marketed at a profit. The Department has long held that to satisfy the requirements of discovery on mining claims located for nonmetallic minerals of common occurrence, such as pumice, it must be shown that the deposit can be extracted, removed and marketed at a profit. This was true even when the common variety mineral materials now defined in the 1955 Act . . . could be located under the mining laws.⁶⁶

If this reasoning is followed, it will impose a present marketability rule on all nonmetallic minerals regardless of the fact that they possess a distinct and special value.

Building stone

Unlike sand and gravel, whose location prior to July 23, 1955 is supported by court decisions,⁶⁷ building stone is specifically made subject to placer location under the mining law of 1872 by the Act of August 4, 1892.⁶⁸ The act does not define building stone; however, the only exclusion seems to be that the stone cannot be used as an

⁶⁴ 43 C.F.R. § 3511.1(b) (1966).

⁶⁵ GFS (Mining) BLM-1966-13 (March 31, 1966) (bureau).

⁶⁶ *Id.* at 3.

⁶⁷ *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); Opinion of Acting Solicitor, 54 I.D. 294 (1933); *Layman v. Ellis*, 52 L.D. 714 (1929). *Contra*, *Anchorage Sand & Gravel Co. v. Schubert*, 114 F. Supp. 436 (D. Alaska 1953) (sand and gravel claims invalidated on authority of *Zimmerman v. Brunson*, 39 L.D. 310 (1910) which was overruled by *Layman v. Ellis*, *supra*).

⁶⁸ 27 Stat. 348, 30 U.S.C. § 161 (1964).

aggregate⁶⁹ which, presumably, falls into the same category as sand and gravel.⁷⁰

In the opinion of the Acting Solicitor, affirming the decision in *Layman v. Ellis*,⁷¹ the contention that allowing location of sand and gravel would allow acquisition of title to large areas of land containing sand and gravel for purposes other than mining was refuted. The opinion explained:

[T]his objection may be urged with as much reason against other mineral substances of wide occurrence and extent *which under the same limitations and qualifications* are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and *building stone*.⁷² (Emphasis added.)

This statement would seem to indicate that in 1933 the Department considered building stone, along with all other types of stone, subject to a test of present marketability. Since the decision, the Department has consistently treated building stone as subject to the same present marketability requirements as applied to sand and gravel, and in addition has considered it included within the terms of the Act of July 23, 1955.⁷³

In *C. E. Strauss*⁷⁴ the Department was concerned with placer location for oil, oil shale,⁷⁵ building stone, limestone, sandstone, and gypsum. The opinion recognized the materials as minerals but added:

[W]hether particular deposits of these and other mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit*.⁷⁶

The decision then quoted the rule as stated in the *Layman* case and the

⁶⁹ *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F.2d 351 (D. Utah 1926); Jack J. Swain, GFS (Mining) BLM-1962-11 (Feb. 8, 1962) (hearing examiner) ("building" stone found to be common variety when used as aggregate).

⁷⁰ See notes 41-59 *supra* and accompanying text.

⁷¹ 54 I.D. 294 (1933).

⁷² *Id.* at 296.

⁷³ Kenneth McClarty, 71 I.D. 331 (1964); R. R. Hensler, A-29973, GFS (Mining) SO-1964-26 (May 14, 1964); J. R. Cardwell, GFS (Mining) BLM-1962-21 (March 2, 1962) (hearing examiner), *aff'd.*, A-29819, GFS (Mining) SO-1964-14 (March 11, 1964); Kelly Shannon, 70 I.D. 136 (1963); D. G. Ligier, A-29011, GFS (Mining) SO-1962-33 (Oct. 8, 1962); J. R. Henderson, 68 I.D. 26 (1961); Frank Melluzzo, GFS (Mining) BLM-1965-2 (Nov. 9, 1964) (hearing examiner), *aff'd.*, GFS (Mining) BLM-1966-4 (Feb. 11, 1966) (bureau).

⁷⁴ 59 I.D. 129 (1945).

⁷⁵ Note that oil and oil shale were excluded from mineral location and subject only to leasing under the Mineral Leasing Act of 1920, 41 Stat. 437, codified in 30 U.S.C. between §§ 181 and 263 (1964).

⁷⁶ *C. E. Strauss*, 59 I.D. 129, 138 (1945).

1933 opinion of the Acting Solicitor. The *Strauss* decision was specifically followed in *George W. Black*⁷⁷ which was concerned with a location of building stone under the 1892 act.

For locations before July 23, 1955 the Department has applied the same tests of marketability, and sales are not considered presumptive one way or the other.⁷⁸ For locations subsequent to July 23, 1955, the Department has required a showing of distinct and special qualities. *Kenneth McClarty*⁷⁹ is an excellent example of the Department's application of the rules in this area. The stone in question was located in 1960 and had previously been subject to a special use permit under the Materials Act of 1947.⁸⁰ The claimant was able to show that the stone existed on the claim in commercial quantities and that 70 per cent was orderly fractured and vari-colored. The Solicitor held that although the stone did not require much cutting or shaping, this factor did not endow the stone with the character of an uncommon variety, and explained that it was not established that the stone from the claim was more varied in color or that its colors were more desirable for construction purposes than other marketable building stone. The Department has also said that although a building stone had unique physical properties, it was not an uncommon variety where the unique properties did not give it a special value for use as building stone.⁸¹

Recently, however, the application of the present marketability test to building stone was questioned in *Coleman v. United States*⁸² where building stone claims were protested by the Forest Service. The Ninth Circuit Court of Appeals, in reversing the Department of the Interior, held that the present marketability test, as applied to non-metallic minerals of widespread occurrence prior to the Act of July 23, 1955, did not apply to building stone. The court saw the "present profit" requisite of the Department as an incorrect analysis of *Foster v. Seaton*,⁸³ the correct interpretation being a "judicial recognition of the requirement of good faith of the applicant for a mineral patent"⁸⁴ — finding a statutory base in 30 U.S.C. § 29.⁸⁵ The court concluded that by enacting the Act of July 23, 1955, Congress was addressing itself to

⁷⁷ 64 I.D. 93 (1957).

⁷⁸ See, e.g., Robert M. Willey, A-30420, GFS (Mining) SO-1965-38 (Oct. 29, 1965) where it was held that evidence of one isolated sale for \$25 in 1952 and evidence of negotiation for sale of mineral as fill would not be sufficient evidence of marketability prior to July 23, 1955. The opinion was also careful to point out that the sale of material for use as fill had been held by the Solicitor not to make a material marketable. M-36295 (Aug. 1, 1955).

⁷⁹ 71 I.D. 331 (1964).

⁸⁰ 61 Stat. 681, 30 U.S.C. §§ 601-04 (1964).

⁸¹ E. M. Johnson, A-30191, GFS (Mining) SO-1965-13 (April 2, 1965).

⁸² 363 F.2d 190, rehearing granted (9th Cir. 1966).

⁸³ 271 F.2d 836 (D.C. Cir. 1959).

⁸⁴ 363 F.2d at 200.

⁸⁵ The statute provides that a person who has located mineral ground "for such purposes" may file for patent.

the very problem *Foster v. Seaton* was designed to resolve.⁸⁶ The court also held that the 1955 act did not repeal the 1892 provision for the location of building stone inasmuch as Congress did not specifically repeal the 1892 act with the enactment in 1955 — “[A] general law is not held to repeal or supersede an earlier specific law in the absence of a definite expressed intention.”⁸⁷

Minerals of intrinsic value

One of the main emphases of the Solicitor's review of the marketability rule in 1962⁸⁸ was that it was part of the prudent man rule and was applied to all minerals, not merely to nonmetallic minerals of widespread occurrence. The opinion itself has been said to have been in response to the fear of the mining industry that the Department would apply a present marketability rule to minerals of intrinsic value.⁸⁹

The Department's first step towards applying a marketability test to metallic minerals came in *Alvis F. Denison*⁹⁰ where manganese claims were invalidated on the ground that the economic condition of the manganese market would not justify a prudent man in expending money on the claims. The opinion quoted the Solicitor's opinion reviewing the marketability rule as indicating that minerals of intrinsic value *usually*⁹¹ do meet the test of marketability; but stated that, inasmuch

⁸⁶ Congressional intent would seem to be slightly ambiguous. It is the Government's position that the legislative history of the Act of July 23, 1955 shows an intent to include building stone. See *Coleman v. United States*, No. 20227, 9th Cir., petition for rehearing filed Aug. 19, 1966. The petition refers to a Senate report that stated that the objectives of S. 1713 (a companion bill to H.R. 5891 which was enacted as law) were to “(1) Provide that deposits of common varieties of sand, building stone, gravel . . . where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872.” S. REP. No. 554, 84th Cong., 1st Sess. 2 (1955).

The quoted language, however, was the only reference in the report to “building stone,” other references being either to “stone” or “common stone.” See S. REP. No. 554, 84th Cong., 1st Sess. 2, 7 (1955). See also H.R. REP. No. 730, 84th Cong., 1st Sess. 8, 9 (1955) which refers only to “common varieties of sand, stone, gravel.” Both reports emphasized that the intent of Congress was to prevent abuse of the mining laws by nonmining interests and not to restrict development of natural resources. S. REP. No. 554, 84th Cong., 1st Sess. 2 (1955); H.R. REP. No. 730, 84th Cong., 1st Sess. 10 (1955).

⁸⁷ 363 F.2d at 199.

⁸⁸ 69 I.D. 145.

⁸⁹ Walenta, *Recent Mining Legislation and Its Effect on the Law of Discovery*, 2 IDAHO L. REV. 9, 30 (1965).

⁹⁰ 71 I.D. 144 (1964).

⁹¹ In *Estate of Robert F. Beercroft, GFS (Mining) BLM-1964-1* (Nov. 6, 1963) (bureau) it was concluded that the showing of the nature of an intrinsically valuable mineral would usually meet the test of marketability. It was explained:

The Department has distinguished between a ‘valuable’ mine and a ‘profitable’ mine. It has been held that a valuable mine need not be a profitable mine but that 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. [Citing cases.] As early as 1905 the Department held that it is not necessary, in order to constitute a valid discovery under the general mining laws, to show, when applying for a patent, that the mineral for which the discovery is claimed can be immediately disposed of at a profit. *Narver v. Eastman*, 34 L.D. 123 (1905).

as the last sale of manganese from the claims had been during a Government car lot buying program in 1959 and inasmuch as there was no expectation that prices would return to a profitable level, the claims were invalid. On appeal to the United States District Court, District of Arizona, the case, there titled *Denison v. Udall*,⁹² was reversed and remanded to give the Government a chance to challenge the claimant's good faith in the location, although this point had not been pleaded in the departmental proceedings. However, in a dictum the United States District Judge stated that the marketability test, as applied by the Solicitor, "would appear applicable to common-occurrence nonmetallic mineral claims, but not to the metallic mineral claims in this case."⁹³

The Department apparently has chosen not to follow the *Denison v. Udall* dictum. This is evidenced by *Theodore R. Jenkins*⁹⁴ where a manganese claim in the same area⁹⁵ as those of Denison was invalidated on evidence that there was no market for the minerals from the claim. The *Jenkins* opinion reasoned that the low values encountered on the claim and the uncertainty as to the extent of the deposit failed to make a case for a prudent man because, as pointed out in the *Denison* opinion at the departmental level, the last Government buying was in 1959 and the domestic market was adequately supplied by foreign manganese. The *Jenkins* decision quoted the syllabus from the Solicitor's opinion in the *Denison* case as authority for the ruling and indicated in a footnote that the case had been remanded by the United States District Court, District of Arizona, for further evidentiary proceedings.

As pointed out, *supra*, Curtis Lindley spoke in terms of a mineral deposit having a present market as being valuable, but added, "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."⁹⁶ (Emphasis added.) Lindley's view would seem to indicate that a present marketability requirement would not be an element of the prudent man test. He pointed out that the element of present marketability would make a deposit valuable, but if a market could not be shown the locator would be required to show that the substance existed in such quantities as would justify a prudent man in expending labor and capital in an effort to obtain a marketable product or to produce a market for the product.

⁹² 248 F. Supp. 942 (D. Ariz. 1965).

⁹³ *Id.* at 945.

⁹⁴ A-30409, GFS (Mining) SO-1966-14 (March 1, 1966).

⁹⁵ The claims were within the boundaries of the Sitgreaves National Forest, Coconino County, Arizona. The Department has expressed the opinion that proof of discovery on claims within boundaries of national forests will have to be "clear and convincing." Eleanor A Gray, A-28710, GFS (Mining) SO-1964-25 (May 7, 1964); Laura Duvall, 65 I.D. 458, 461 (1958); George W. Black, 64 I.D. 93, 95 (1957); L. G. Dawson, 58 I.D. 670, 679 (1944).

⁹⁶ 1 C. LINDLEY, MINES § 98, at 175 (3d ed. 1914).

This rule of discovery of valuable mineral was expressed in *United States v. Lavenson*⁹⁷ as follows:

To constitute discovery, it is necessary that mineral bearing rock in place be found, under such circumstances and of such character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money in developing it, with reasonable expectation of finding ore in paying quantities.⁹⁸

The *Lavenson* case cancelled patents on a showing of assays of gold ranging from nothing to 80 cents per ton, and a showing that the locations were not made for mining purposes but as a source of power. The marketability involved with this particular deposit was evidence of the bona fides of the locator and not necessarily the value of the deposit.⁹⁹

The Ninth Circuit has not departed from this test and in the latest decision on the prudent man rule, as applied to minerals of intrinsic value,¹⁰⁰ held that a valuable mineral, in the sense of supporting a valid location, did not include the ability to mine the deposit at a profit. The opinion explained that the evidence of the cost of extraction¹⁰¹ would be relevant and should be considered "not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed."¹⁰²

This conflict presents a two-fold problem: first, what are common varieties as distinguished from uncommon varieties; and second, where should the marketability rule be applied.

SOME POSSIBLE ANSWERS

Relief concerning the problem of distinguishing common varieties from uncommon varieties would seem to lie with the Legislature. S. 3485, which passed the Senate on September 21, 1966, would clarify the meaning of "common varieties" by amending 30 U.S.C. § 611 to read as follows:

⁹⁷ 206 F. 755 (W.D. Wash. 1913).

⁹⁸ *Id.* at 762.

⁹⁹ *Accord*, E. M. Palmer, 38 L.D. 294 (1909) where evidence of a sale of the timber from a claim before mineral entry was held admissible on the question of the applicant's good faith.

¹⁰⁰ *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963).

¹⁰¹ The Department of the Interior has expressed this view in *Vernon O. White*, 72 I.D. 522 (1965) and *E. M. Johnson*, A-30191, GFS (Mining) SO-1965-13 (April 2, 1965). Both opinions said that labor costs of the locator should be taken into account in applying the prudent man test, and added that this was not imposing a marketability test.

¹⁰² 318 F.2d at 870.

'Common varieties' as used in this Act shall not include, among others: (1) limestones suitable for use in the production of cement, lime, extenders or fillers, or metallurgical or chemical grade limestones, or gypsum, talc, perlite, vermiculite, diatomaceous earth, and the like, whether or not any such material may require treatment, beneficiation or additives; or (2) travertine, marble, limestones, granites, or gabbros, suitable for use with or without shaping or sizing in the commercial construction of exposed portions of buildings, or suitable for high polishing or accurate shaping for monument, building plate, or surface plate purposes, or so-called block pumice which occurs in nature in pieces having one dimension of two inches or more. 'Common varieties' as used in this Act shall include, among others, deposits of sand, stone, gravel, pumice, pumicite, and cinders valuable and suitable for use only as fill, or as riprap, road base, or any other purpose where only lack or presence of the physical properties of mere weight, volume, or strength is required¹⁰³

This definition of common varieties would provide some clarification in a near void even though, in the opinion of one administrator, such a law may still leave grey areas for objection to possible abuses.¹⁰⁴

Both the Department of the Interior and the Department of Agriculture advocate the abolition of the distinction between "common" and "uncommon" varieties of nonmetallic minerals and would make all such materials salable under the Materials Act of 1947,¹⁰⁵ rather than locatable.¹⁰⁶ Both agencies have also urged that any remedial action be deferred until the Public Land Law Review Commission¹⁰⁷ makes its report on this matter in connection with its overall study.¹⁰⁸ This seems an unsatisfactory suggestion, however, since it would push the solutions to the problems aside until the adoption of a new mining law which, perhaps, is as much as five to ten years away.

Exploring other possibilities for disposition of "uncommon variety" materials, programs similar to sale-through-public-bids under the Mate-

¹⁰³ S. 3485, 89th Cong., 2d Sess. (1966).

¹⁰⁴ Orville L. Freeman, Secretary of Agriculture, in a letter to Sen. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs, 1966 *Hearings*, at 5.

¹⁰⁵ 61 Stat. 681, 30 U.S.C. §§ 601-04 (1964).

¹⁰⁶ See letters by Orville L. Freeman, Secretary of Agriculture, and Frank J. Barry, Solicitor, Department of the Interior, 1966 *Hearings*, at 6-8.

¹⁰⁷ The Public Land Law Review Commission was set up under an Act of Sept. 19, 1964, 78 Stat. 982, 43 U.S.C. §§ 1391-1400 (1964). The Commission brings together members of Congress and persons appointed by the President working with an Advisory Council comprised of representatives of industries and Federal agencies as well as individuals. In addition, the Governor of each of the states has a representative to work with the Commission, the Advisory Council, and the staff. A full-time staff of professional persons conducts the fact-finding and analysis needed by Commission members. The Commission's conclusions and recommendations are due to be submitted to the President and Congress on Dec. 31, 1968. For a summary of the purpose of the Commission see Aspinall, *The Public Land Law Review Commission: Its Purpose and Objectives*, 8 ARIZ. L. REV. 4 (1966).

¹⁰⁸ See note 106 *supra*.

rials Act of 1947¹⁰⁹ and leasing under the Mineral Leasing Act of 1920¹¹⁰ do not seem to furnish adequate solutions.

First, it would seem that a public sale would be impractical and unfair with a requirement for public bidding. Such a system would not give any benefit to the prospector who discovered the deposit and would allow a competitor to outbid the discoverer who must cover his own exploration costs.

Second, under a leasing program similar to that of the Mineral Leasing Act of 1920, which applies to oil and gas production on federal land, the same problems are encountered. Under a leasing arrangement, any additional rental costs or royalties, as under the present oil and gas system, may prevent the small operator from attempting to develop a commercial operation since such an operation takes time, money, and extensive development.¹¹¹ In oil and gas production, the only substantial capital expense after geophysical and geological exploration is drilling. The results from drill holes give a positive indication as to the presence of oil or gas, and the project can go into immediate production or be dropped.¹¹² However, if the operation is marginal, a lease and royalty payment arrangement can effectively shut off main avenues of economic expansion.¹¹³

In Arizona, this problem is brought into particular focus by the fact that Arizona companies active in mining nonmetallic materials are usually very small operations¹¹⁴ and such a leasing program could elim-

¹⁰⁹ 61 Stat. 681, 30 U.S.C. §§ 601-04 (1964).

¹¹⁰ 41 Stat. 437, codified in 30 U.S.C. between §§ 181 and 263 (1964).

¹¹¹ See, 1966 Hearings, at 45.

¹¹² 41 Stat. 437 (1920), 30 U.S.C. § 223 (1964) provides that once oil or gas is discovered, the lessor may continue production under the lease so long as there is compliance with the applicable statutes.

¹¹³ See, 1966 Hearings, at 56.

¹¹⁴ The October 1966 Active Mine List of the Arizona Department of Mineral Resources lists the following nonmetallic mining operations with the number of men employed by each:

MINE	EMPLOYEES	ORE
	<i>Apache County</i>	
Burnt Water, Houck Plant	11	Sand
Cheto, Sec. 15	10	Bentonite
Nancy Group #2	24	Silica
	<i>Coconino County</i>	
Maesta Stone	3	Flagstone
	<i>Gila County</i>	
Copper Hill	3	Silica
Hoopes Quarry	15	Limestone
Lucky Seven	3-15	Asbestos
Phillips Asbestos & K & M Mines	17-25	Asbestos
Regal & Chrysotile	40	Asbestos
	<i>Graham County</i>	
Harmony #1	2	Quartz
	<i>Maricopa County</i>	
Blackstone	2	Marble
Buckeye & Mill	7	Mica
Lemons	3	Ornamental stone

inate them from competition, allowing only large operations to continue. Unless an entirely new system of disposal of these materials is devised, such as perhaps guaranteed leases to the first applicant on a royalty-free basis, the proposals of S. 3485 would help small operators continue in business by allowing location of such nonmetallic materials.

Another important aspect of S. 3485 is the definition of common varieties as "those materials used only as fill, riprap, road base, etc." Such a definition clearly eliminates many of the problems attending the definition of building stone. In order to eliminate future dispute, the provision for the location of building stone should be brought into accord with the common-varieties act by including in the building stone location statute¹¹⁵ a specific definition. This writer suggests defining building stone as including stone having a value that would bring a premium price over and above common stone being used for the same purpose. Such a test precludes location of areas containing common variety stone when such stone can be used only for actual building purposes.

Another problem in this area is the matter of proof by the claimant. The typical small operator cannot afford to hire numerous expert witnesses to testify in his behalf; whereas, the Government draws its expert witnesses from the ranks of its own employees. A possible solution is to allow a disinterested panel of expert witnesses to determine the feasibility of the operation of contested claims. Their decision would

Phoenix Clay Pit	2	Clay
Wallapai Pit	2	Clay
	<i>Mohave County</i>	
T & K Quarry	3	Rhyolite
White Spar	10	Silica
	<i>Pima County</i>	
Andrada	4	Marble
Arizona Portland Cement	110	Cement-limestone
Sheridan Pit	6	Silica
	<i>Pinal County</i>	
Adams	7	Perlite
Arizona Gypsum	8	Gypsum
El Marmol	2	Ornamental stone
Garcia	2	Gypsum
National Gypsum	4-6	Gypsum
Pico & Orizaba	2	Silica
Superior Perlite	3	Perlite
	<i>Yavapai County</i>	
Baum	4-20	Flagstone
Blue Bell	2	Rock
Clarkdale Cement	95	Cement
Dunbar Stone	6-8	Flagstone
Harley Gray Quarry	4	Flagstone
Harson Quarry	6	Gypsum
Nelson Quarries	12	Lime
Western States	6	Flagstone-rock
	<i>Yuma County</i>	
White Marble	10	Marble quartz

¹¹⁵ 27 Stat. 348 (1892), 30 U.S.C. § 161 (1964).

thus form the basis of the *factual* finding, allowing the final decision of legality to remain in the purview of the Solicitor's office. Some colleges and universities are probably one source of disinterested experts, and arrangements could be made for their services.

However, such bills as S. 3485 will not alleviate the problem of the application of the present marketability rule by the Department. *Coleman v. United States*¹¹⁶ expressed the view that the present marketability rule, as approved by the District of Columbia Circuit in 1959 in *Foster v. Seaton*,¹¹⁷ was applicable only to nonmetallic minerals of widespread occurrence before the enactment of the Act of July 23, 1955, and that the act was designed to prevent the same evil the present marketability rule was designed to solve, *i.e.*, location of mining claims for purposes other than mining. The decision seems well-reasoned and sound on this point.

Therefore, challenging claims on the basis of lack of a present market should be limited to those claims of nonmetallic minerals of common occurrence located before July 23, 1955; however, the thrust of the challenge should be at the good faith of the mining operation. For claims of nonmetallic materials of special and distinct value and metallic minerals located after July 23, 1955, the test to be applied should be that of the prudent man; but also, in the light of public necessity, the good faith of the mining operation should be carefully examined.

¹¹⁶ 363 F.2d 190, *rehearing granted* (9th Cir. 1966).

¹¹⁷ 271 F.2d 836 (D.C. Cir. 1959).