DISCOVERY UNDER THE MINING LAWS

FRANK J. BARRY*

In recent years it has grown increasingly difficult to secure patents to mining claims on the public domain. Voices from those interested in the welfare of the mining community are heard saying that the public administrators have changed rules long relied upon and are proceeding illegally. The difficulty, however, is not attributable to missapplication of law.[1] It is due to physical, economic and sociological changes which have occurred since our mining laws were originally adopted.

The Department of the Interior is administering the mineral resources of the United States under two basic laws, one nearly a century old and the other nearly a half-century old. The older law originally applied to all minerals and now applies to almost all minerals. This law invites persons to go upon the public lands in search of minerals, it gives any minerals found and removed free of charge, it grants exclusive possessory rights to lands without payment of rent or royalty and transfers fee simple title for a small price. It was enacted when the western lands of the United States were virtually unoccupied and largely undeveloped. It was intended to encourage settlement of lands, and development of resources. In the light of the needs of the last half of the 19th century, it was a prudent law.

It is a law which works, after a fashion, but it may be possible that, with a large population and conflicting pressures on land for different uses, some better law can be devised to satisfy all public needs.

Under present law one initiates his rights against the government by making a discovery of a valuable mineral deposit and locating a claim. He must comply with state law, usually by posting and recording a location notice, but there is no requirement that he communicate his

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* Solicitor, United States Department of the Interior; B.A., U.C.L.A., LL.B., Loyola of Los Angeles; admitted to practice before the Supreme Court of the United States; member, State Bar of Arizona and the District of Columbia.

[1] Decisions of the Department of the Interior have generally been accepted as correct by the courts. A total of thirty-five Departmental decisions have been appealed to the courts since January 1, 1955. In seventeen, final decisions have affirmed the Department. In two cases, the lower court decisions have affirmed the Department but the cases have been appealed further and are still pending. Fifteen cases are still pending with no court determination as yet. One case has been remanded for further hearings.

claim to the United States. If he desires to acquire fee title, however, he must file an application for patent under oath in the appropriate federal office. This is the first official notice the Government has of his claim.

Until 1910, it was uncommon for any Government representative to inspect the claim to see if there had actually been a "discovery." The oath of the patent applicant was regarded as sufficient in most cases.[2]

About 1910, the General Land Office adopted the practice of hiring local miners to inspect claims and verify discoveries. About 1917, professional geologists and engineers began to be employed for this purpose. Apparently as late as 1940 some claims were allowed without any on-the-ground investigation. Under present procedure there is always a mineral examination of the claim. Either a mining engineer or a geologist makes the examination and submits a detailed report.[3]

Times have changed. In the beginning, the Government welcomed the opportunity to pass public lands into private ownership. If a miner offered to pay five dollars an acre for lands and alleged the claim was valuable for minerals, there was no need to question his word since he could acquire it more cheaply by alleging the land was non-mineral.[4] But even if his application were false, since he would put the land to use, i.e., develop it for some purpose or other, the public interest was served and there was no occasion for great concern. Today, Government lands are closely guarded. Five dollars an acre almost anywhere in the United States is a give-away price. Public lands in the West, especially in the path of growing cities, or in heavily timbered areas, are an obvious temptation to unprincipled claimants. Mineral examiners scrutinize carefully. Government lawyers are skeptical. Times have changed!

Prior to the enactment of the first general mining law in 1866, prospectors and miners had appropriated lands on the public domain for mining purposes. No rights were initiated against the United States, but Congress and the courts recognized that a person might have rights to a particular tract superior to the rights of another, although all rights

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[2] If the tract applied for is claimed in good faith to be mineral in character, and subject to entry under the mining laws, there should be no difficulty in succinctly stating the facts. . . . This proof, in the absence of a protest interposed by an agricultural claimant will be sufficient to enable the officers of the Land Department to pass the entry. 3 LINDLEY, MINES § 689, at 1726 (3d ed. 1914). *Cf.* "Regulations," 49 L.D. 58, 74 (1922).

[3] The information contained in this paragraph and the preceding was secured by the author in interviews within the Department of the Interior.

[4] Agricultural land is sold for one dollar and twenty-five cents per acre under the Desert Land Act of March 3, 1877, sec. 1, 19 Stat. 377. Under the Homestead Act of May 20, 1862, 12 Stat. 392, it is free of charge.

were subect to the paramount title of the United States and to the power of Congress to dispose of the lands as it might see fit.[5]

In the Act of July 26, 1866,[6] Congress spelled out the terms of the first general law for the disposition of minerals in the public lands. Previous legislation merely took care of occasional special problems which arose from time to time as minerals were found on the public domain.[7]

The discovery of gold in California in 1848 stimulated great interest and raised general hope that the public domain might be the source of great mineral wealth.

> For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines . . . on the public mineral lands.[8]

Congress had passed no general law to cope with the booming mineral activity. The administrators of the public lands took no effective steps to assert the Government's title to the minerals and to the lands from which they were taken. Local laws dealt with the problem. The paramount title was recognized as being in the United States and litigation took the form of contests between rival claimants whose claims were subject to the Government's title.[9] The Supreme Court of California described the state of the law thus:

> The most which can be said is, that the government has forborne to exercise its rights, but this forbearance confers no positive right upon the miner, which would avail as a protection against the assertion of its claims to the mineral. The supposed license from the general government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact, and unwarranted in law.[10]

Congress had given some recognition to this state of affairs in 1865 by providing that:

> . . . [N]o possessory action between individuals in any of the courts of the United States for the recovery of any mining title . . . shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession.[11]

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[5] Act of February 27, 1865, sec. 9, 13 Stat. 440, 441; Forbes v. Gracey, 94 U.S. 762 (1877); Belk v. Meagher, 104 U.S. 279, 283 (1881).

[6] 14 Stat. 251-53 (1866).

[7] In 1807, for example, provision had been made for the leasing of lead mines in Indiana. Act of March 3, 1807, sec. 5, 2 Stat. 448-49.

[8] Jennison v. Kirk, 98 U.S. 453, 458 (1879).

[9] Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1866); Forbes v. Gracey, *supra* note 5.

[10] Boggs v. Merced Mining Company, 14 Cal. 279, 374-75 (1859), *appeal dismissed*, 70 U.S. (3 Wall.) 304 (1866).

[11] Act of February 27, 1865, *supra* note 5.

But not until the next year was legislation enacted to provide for the transfer of the Government's title to mineral lands.

The 1866 Mining Law declared that mineral lands of the public domain were thereafter free and open to exploration and occupation and provided for the location, sale and patenting of such lands. The price for a patent was fixed at five dollars per acre. Six years later Congress again addressed itself to the subject and enacted an even more comprehensive Act,[12] extending the application of the law to all mineral deposits, defining the maximum size of claims, granting extra-lateral rights and restricting the application of the law to lands containing valuable mineral deposits.

In the 1866 Act (Sec. 2) and in the 1872 Act (Sec. 3),[13] recognition was given to prior rights under local law upon compliance with specified conditions. Possessors of mining claims which were otherwise valid could continue in possession and could eventually qualify for patents from the United States.

In order to qualify for any rights conferred by the Act., i.e., the right to occupy the land embraced within the boundaries of the claim and the right to receive a patent, the claimant must find and have within the limits of the claim a "valuable mineral deposit." ". . . [I]t is clear that in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential."[14] Section 2 of the 1872 Act provides that ". . . no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." This has been construed to mean that no rights can be acquired against the United States before discovery[15] but that a miner occupying a claim will be protected against any interruption of his possession by another so long as he is diligently prosecuting his search for minerals.[16]

In 1888, Mr. Justice Field, speaking for the court said:

> It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required. There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question.[17]

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[12] Act of May 10, 1872, 17 Stat. 91-96.
[13] Belk v. Meagher, *supra* note 5 at 281-82.
[14] Union Oil Company v. Smith, 249 U.S. 337, 346 (1918).
[15] *Ibid.*
[16] Union Oil Company v. Smith, *supra* note 14, at 346-49; Cole v. Ralph, 252 U.S. 286, 394-95 (1920); Cochran v. Bonebrake, 57 I.D. 105 (1940). The decisions of the Department of the Interior are collected in bound volumes cited as "Land Decisions" ("L.D." herein) through Volume 52; thereafter as "Interior Decisions" ("I.D." herein).
[17] United States v. Iron Silver Mining Co., 128 U.S. 673, 675-76 (1888). The early decisions of the United States Supreme Court on mining law were written while

The discovery of a valuable mineral deposit ". . . is the most important of all the acts required in proceedings culminating in a perfected location."[18] Congress has declared lands to be free and open to occupation and purchase only if they contain valuable mineral deposits. Discovery of minerals not valuable can give the claimant no rights either to the minerals or to the lands in which they occur.[19]

The problem of discovery is productive of more difficulty than any other problem in mining law. There are two reasons for this. First, the existence of a valuable mineral deposit is the one prerequisite to a valid claim over which the claimant has no control. Second, whether the deposit is sufficiently valuable is a matter of judgment upon which men sometimes differ. Administrators have often differed with claimants. Other private citizens with conflicting claims to the same lands have also disputed the mineral character of mineral claims.

The 1872 Act is entitled "An Act to promote the Development of the mining Resources of the United States." To carry out this purpose the words "valuable mineral deposits" must be interpreted in such way that lands containing such deposits will be developed, i.e., that locations will be protected and patents issued in those cases where mining resources will be developed. Conversely, where valuable minerals have not been found, mining locations will not be recognized and mining patents will not be issued because to do so would not promote development of mining resources.

While value as an abstract concept can be defined with relative ease, it is often a difficult concept to apply in a specific case. Value in relation to a particular purpose is still more difficult to define. What "value" will promote the development of the mining resources of the United States?

The mineral deposit which will encourage and inspire a miner to develop a mine must be such as will offer him a reward for his enterprise and effort. A deposit of mineral in some remote wilderness far from roads and electric power will be less tempting than a deposit of the same value on a railroad with plenty of cheap power readily available. In both cases the ore containing the mineral may be of the same value: say it contains fifteen dollars worth of gold in each ton of ore. But if, in the first case, it costs twenty dollars per ton to mine and ship the mineral to market and in the second case it

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Mr. Justice Stephen J. Field was a member. Mr. Justice Field had joined the gold rush to California in 1849, had participated actively as a lawyer and judge in frontier life and had served for several years as a member of the Supreme Court of the State. California was the crucible in which the patterns of American mining law were formed. See generally Swisher, *Stephen J. Field, Craftsman of the Law* (1930).

[18] 2 LINDLEY, MINES § 392, at 920 (3d ed. 1914).

[19] The 1866 Act was not in effect long enough to accumulate judicial interpretation. It is reasonable to suggest, however, that it, too, applied only to *valuable*

costs ten dollars per ton, obviously the first deposit would not be valuable and would not support the issuance of a patent while the second deposit probably would.

One of the motives for the adoption of the 1872 Act was to secure the settlement of western lands by people who would live upon them and develop them. Representative Sargent, a principal supporter of the bill (H.R. 1016) explained the purpose for giving the miners an interest in the land:

> . . . [T]hese people [the miners] were to a great extent nomadic and unsettled, in one section this year, and next year in some other place, and it was necessary to attach them to the soil, so that they would make more permanent improvements, and acquire for themselves lands which they could improve, upon which they could build their little homes. Where agricultural land was connected with mining lands, and these are almost inextricably intermixed, the miner would make improvements, cultivate his land, raise his peach trees and potatoes, and conduct his mining and farming operations at the same time, or at different seasons of the year, and the result would be a more settled community, and the creation of more taxable property to the benefit of both the State and General Governments.[20]

The 1872 Act was, of course, interpreted in economic terms from the beginning. The term "valuable mineral deposits" was construed to mean such deposits as would probably yield a profit for their extraction and processing.

Some concern was expressed during the Senate debate on the 1872 Act that it might permit lands to be held by their owners for ". . . an indefinite length of time without working them to the exclusion of the miners of the neighborhood." Senator Cole of California wanted an amendment to provide that even patents would be forfeited for failure to use the land for mining purposes.[21] His proposal was rejected but it was pointed out by the sponsors of the bill that the requirement that $100 of assessment work be done each year would ensure that unpatented mining claims could not be held indefinitely without regular contributions of labor and capital.

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mineral deposits. It is unlikely to suppose that all lands were eligible for mineral patent, but the definition of the word "mineral" embraces the entire mineral kingdom and would require such a result. It was probably not intended by Congress in 1866 to include lands without mineral value. Congress had put mineral lands in a special category and would not permit their appropriation for non-mineral purposes. Aricultural lands were not available for pre-emption if they contained "known mines." Act of September 4, 1841, sec. 10, 5 Stat. 453, 456. The Railroad grants excluded known mineral lands. *Cf.* Northern Pacific Grant, Act of July 2, 1864, 13 Stat. 365, 367. The court construed these statutes to except only lands *valuable* for minerals. Colorado Coal and Iron Co. v. United States, 123 U.S. 307 (1887); Northern Pacific Railroad Co. v. Soderberg, 188 U.S. 526 (1903).

[20] CONG. GLOBE, 42d Cong. 2d Sess. 534 (1872).

[21] *Id.* at 2459.

A year after the 1872 Act became law the Commissioner of the General Land Office construing the phrase "valuable mineral deposits," said:

> The meaning of the word valuable need not be discussed. Anything that a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable.[22]

During the last quarter of the 19th century the Department of the Interior and the courts laid the foundations for American mining law as we know it today. The question of the adequacy of discovery was considered often and early determinations sketched the outlines of what has become established as the law of discovery.

Minerals either occur in lodes or veins ("rock in place") which occupy fissures in the earth's crust or are scattered through accumulations of sand, gravel or other alluvium.[23] A vein containing mineral is likely to be more valuable than a placer deposit of mineral because it is more likely to extend to depth. Consequently, Section 6 of the 1872 Act provided that lode claims would be sold for five dollars per acre and placer claims for two dollars and fifty cents per acre.

Section 11 provided in part as follows:

> That where the same person, association or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement it includes such vein or lode, and in such case . . . a patent shall issue for the placer-claim, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode . . . is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

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[22] Copp, *United States Mineral Lands* 61 (1881).

[23] While two kinds of location — lode and placer — differ in some respects, a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place, bearing valuable mineral . . .; and to sustain a placer location it must be of some other form of valuable mineral deposit . . ., one such being scattered particles of gold found in the softer covering of the earth. Cole v. Ralph, 252 U.S. 286, 295 (1920).

This provision gave rise to many disputes. In *Iron Silver Mining Co. v. Mike & Starr Gold and Silver Mining Co.*,[24] a placer patentee brought an action to recover a portion of its claim occupied by one who asserted rights under a lode location. At the time of the application for patent there had been a tunnel in existence extending beneath the surface of the placer. The tunnel exposed a vein of ore not visible on the surface. The patentee professed not to know of the existence of the vein at the time of its application for patent.

The majority of the court took the view that there was adequate evidence that the vein contained valuable mineral to submit the issue to the jury. It held that the value must be sufficient to justify exploitation and that the question of value had been decided by the jury on proper instructions. Mr. Justice Field dissented upon the ground that the evidence of value was insufficient to support the verdict. The majority held that:

> . . . [N]ot every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute.[25]

It was held that the patentee could not ignore evidence in plain view and that it could not ignore the tunnel and contend it did not know what an investigation would disclose. "The applicant must be adjudged to have know that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government."[26] The court rejected the idea that the value of mineral in the vein was ". . . decisive as to whether the vein justified exploitation. . . . [T]he amount of ore, the facility for reaching and working it, as well as the production per ton, are all to be considered in determining whether the vein is one which justified exploitation and working."[27]

Mr. Justice Field said, in his dissenting opinion, "The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."[28] The dissent is important because it does not differ with the decision of the majority in principle. The only difference was whether the vein in the tunnel contained minerals ". . . in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development."[29]

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[24] 143 U.S. 394 (1892).
[25] *Id.* at 404.
[26] *Id.* at 403.
[27] *Id.* at 405.
[28] *Id.* at 412.
[29] *Id.* at 424.

About the time mining laws were being considered and passed, an during the period they were being applied and interpreted, Congress and the courts were giving their attention to other legislation affected by the fact that mineral wealth existed in the public lands.[30] Such legislation is in *pari materia* with the mining laws.[31]

Iron Silver Mining Co. v. Mike & Starr Gold and Silver Mining Co., supra, cites *Deffeback v. Hawke,*[32] and *Colorado Coal and Iron Co. v. United States.*[33] *Deffeback v. Hawke* considered a dispute between a mineral claimant and one who claimed to a townsite. The Townsite Acts[34] specifically excluded from the effect of their provisions land known to be valuable for minerals. The Court pointed out that not all mineral lands are exempt from entry under the Townsite Acts ". . . as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them."[35]

Colorado Coal and Iron Company v. United States, supra, involved the pre-emption statutes[36] which provided that pre-emption entries could not be made on lands containing "known mines." An action was brought by the United States to cancel patents to lands acquired under the pre-emption statutes alleging fraud in that the entrymen had known that there were valuable deposits of coal on the lands when they made their entries. After patents had issued the lands in question were found to contain valuable deposits of coal. However, the evidence failed to show that there were more than scant indications that coal was present when entry was made. The court denied the Government's petition to cancel the patents:

> We hold . . . that to constitute the exemption contemplated by the Preemption Act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that

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[30] Act of September 4, 1841, *supra* note 19 (Pre-emption Act); Acts of March 3, 1865, 13 Stat. 529, 530, and Act of March 2, 1867, 14 Stat. 541 (Townsite Acts); Acts of July 1, 1862, sec. 3, 12 Stat. 489, July 2, 1864, sec. 4, 13 Stat. 356, and Act of July 2, 1864, *supra* note 19 (Railroad grants); Act. of June 3, 1878, 20 Stat. 89 (Timber grant).

[31] Colorado Coal and Iron Co. v. United States, *supra* note 19; Northern Pacific Railroad Co. v. Soderberg, *supra* note 19; Deffeback v. Hawke, 115 U.S. 392 (1885); United States v. Plowman, 216 U.S. 372, 374 (1910). For a discussion of the doctrine of *pari materia* see United States v. Barnes, 222 U.S. 513, 520 (1912).

[32] *Supra* note 31.

[33] *Supra* note 19.

[34] *Supra* note 30.

[35] 115 U.S. at 404 (1885).

[36] Act of September 4, 1841, *supra* note 19.

> the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the Preemption Act cannot be successfully assailed.[37]

In *United States v. Plowman*,[38] an action had been brought by the Government to recover for timber taken from the public lands. The defense was that Congress had authorized the taking in the Act of June 3, 1878,[39] by granting the privilege of taking timber from mineral lands to residents of the state in which the lands were located. The trial court had admitted evidence of the existence of nearby mines and had instructed the jury that it might conclude from such evidence that all of the lands in the vicinity were mineral and therefore find for the defendant. Judgment was rendered against the United States. On appeal the Supreme Court reversed. The Court held that mineral lands are those from which minerals can be extracted at a profit and that there was no evidence to support the judgment below since there was no showing that the lands from which the timber was taken contained valuable mineral deposits.

In *United States v. Iron Silver Mining Company*,[40] it was contended by the Government that mineral placer patents theretofore issued should be cancelled for fraud. It was alleged that the patentee had falsely represented the character of the deposit as placer when it was actually a lode deposit; the purpose of the deceit being to secure the land for two dollars and fifty cents per acre instead of five dollars. The evidence was that there were, indeed, veins and lodes within the limits of the claim, but it was not shown they contained valuable minerals. The court refused to cancel the patents.

> It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.[41]

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[37] 123 U.S. at 328 (1887).
[38] 216 U.S. 372 (1910).
[39] *Supra* note 30.
[40] *Supra* note 17.
[41] 128 U.S. at 683 (1888).

The court concluded that there was a sufficient discovery to satisfy the requirements of the law with respect to placer claims.

> If 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. . . .[42]

It was in the context of these cases that *Castle v. Womble*[43] was decided in 1894 by the Secretary of the Interior.

Castle v. Womble involved a dispute between an agricultural entryman and a mining claimant. Womble, the farmer, filed an entry. It was cancelled later to the extent that it was in conflict with Castle's claim. Womble apparently argued that the mineral was not "discovered" within the meaning of the statute until a mine is remunerative. The Secretary rejected this contention but stated that the discovery of mineral cannot be based upon mere speculation and belief. The mineral must actually be discovered.

> . . . [I]t may be said that the requirement relating to discovery refers to present facts, and not to probabilities of the future. In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which . . . show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed. After a careful consideration of the subject, it is my opinion that *where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.* To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase." For, if as soon as minerals are shown to exist, and at anytime during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do. (Emphasis added.)

The portion of the foregoing quotation which is underscored has become known as the prudent man rule of discovery. It was accepted by the Supreme Court a few years later in *Christman v.*

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[42] *Id.* at 684.
[43] 19 L.D. 455 (1894).

Miller.[44] Subsequent discussion of the subject of discovery has tended to be a construction and re-construction of the rule of *Castle v. Womble*. The rule continues to be the basic standard applied by the administrative tribunals of the Department of the Interior and by the courts.

It should be observed that the rule of *Castle v. Womble* states an objective test and does not relate to the enthusiasm or willingness of the mineral claimant. The question is not, what would this claimant be willing to do, but what would the hypothetical "prudent man" be justified in doing.

> There is a material difference between a discoverer being *willing* to spend his time and money in exploiting the ground and being *justified* in doing so. The former is a question to be answered by the miner himself; the latter would present a question for expert testimony and determination by a jury. But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.[45]

It is important not to lose sight of the fact that the rule enunciated in *Castle v. Womble, supra,* is itself an effort to interpret a statute and more particularly to define what minerals and what lands are those declared by the statute to be "free and open" for appropriation. Thus the application of the prudent man rule in any particular case must also be checked against the less specific standards stated in the Act.

To sum up the early interpretations of the 1872 Mining Law, it is clear that the words "valuable mineral deposits" in Section 1 are not to be understood to mean any quantity of a valuable mineral, however small. Something more than a trace or a small quantity is required. There must be a valuable mineral deposit rather than merely a deposit of a valuable mineral. The early decisions, in an apparent effort to carry out the purpose of the Act "to promote the development of the mineral resurces," construed it to mean that the Government would make land and minerals available where doing so would actually result in such development. Hence, the prudent man rule was formulated to require that a mineral claimant have an actual exposure of mineral within the limits of his claim and evidence sufficient to induce a prudent man to expend labor and capital to develop an economically successful venture.

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[44] 197 U.S. 313 (1905).
[45] 2 LINDLEY, MINES § 336, at 773 (3d ed. 1914).

It is not necessary that the economic success of a proposed mining undertaking be proved to a certainty. It is sufficient if there is evidence establishing a reasonable probability of success. *A fortiori*, a mining locator is not required to justify his occupation of public lands by proof that he has a paying mine, as was contended by the agricultural entryman in *Castle v. Womble, supra.*

In short, the test applied has two elements: (a) certain physical facts must be present; (b) they must be known to the miner. If no facts are shown to establish the probability of the existence of a mineral deposit of such quantity and quality as would induce a prudent man to expend labor and capital in the reasonable expectation of developing a valuable mine, then the claim is not valid, notwithstanding that subsequent explorations might have resulted in the development of the richest of mines.[46]

It should again be remembered that the purpose of the 1872 Act is to promote the development of mining resources. The Department of the Interior and the courts have had occasion to deal with applications for patents in situations where, although there may have been a discovery initially, such as might then have supported the issuance of a patent, for one reason or another there is no mineral on the claim of sufficient quantity and quality to justify exploitation when application is made. The issuance of a patent under the Act is proper only when its purpose will be promoted. Therefore, a patent will not issue if valuable minerals are not shown to exist at the time of application.

The public lands of the United States are administered by the Department of the Interior which has the authority to determine whether claims to the public lands are valid and, if so, to take such action as the law prescribes, e.g., to issue patents.[47] The Supreme Court has held that ". . . the Secretary of the Interior, as head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."[48]

Where there is substantial evidence in the record to support the Secretary's findings of fact the courts will not attempt to resolve conflicts in the facts. The function of a court reviewing an administrative decision of the Secretary is to examine the record to determine whether there is evidence to support it.[49]

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[46] Colorado Coal and Iron Co. v. United States, *supra* note 19; Iron Silver Mining Co. v. Mike & Starr Gold and Silver Mining Co., *supra* note 24.

[47] Cameron v. United States, 252 U.S. 450, 459-460 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963); Act of April 25, 1812, 2 Stat. 716; Act of July 4, 1836, 5 Stat. 107; Act of March 3, 1849, 9 Stat. 395.

[48] Cameron v. United States, 252 U.S. 450, 460 (1920).

[49] Cameron v. United States, *supra* note 48; Best v. Humboldt Placer Mining Co., *supra* note 47; Hendrickson v. Udall, 229 F. Supp. 510 (N.D. Cal. 1964), *aff'd.*, 350 F.2d 949 (9th Cir. 1965).

This does not mean that the Secretary's decision is not reviewable in court. It is not the law that the decision of the Secretary is final in all respects, for he may not arbitrarily deny to the claimant the vested right which comes into existence with a valid discovery. The Secretary must comply with the requirements of due process. That is, he must give notice and an opportunity to be heard. The hearing may be an administrative hearing within the Department. It need not be in the courts.[50] As long as title to public land remains in the United States the statutory authority of the Secretary of the Interior persists.[51] However, when patent issues and title passes, the administrative power to inquire into and revoke rights is extinguished. Thereafter, if grounds exist to overturn a patent to public lands, the Government must proceed through appropriate court action.[52]

Since the obligation of the Secretary is to eliminate invalid claims as well as to recognize valid ones, he may not, until he has evidence that the claimant is entitled to a patent, issue one. Stated in another way, the claimant has the risk of non-persuasion when he presents an application for a patent. If the record fails to show a claimant's entitlement to a patent, the Department of the Interior is without authority to grant title on behalf of the United States.

The cases hold that when the government has made a prima facie case to challenge the validity of a mining claim, the burden shifts to the claimant to establish that he has made a valid discovery.[53] The contention that the recitals in the location notice create a presumption which places the burden upon the Government to prove the non-existence of a valuable mineral deposit has been rejected since ". . . such recitals are mere ex parte, self-serving declarations on the part of the locators, and not evidence of discovery."[54]

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to

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[50] Cameron v. United States, *supra* note 48 at 461; Best v. Humboldt Placer Mining Company, *supra* note 47 at 338; Patterson v. United States, 115 Ct. Cl. 348 (1950).

[51] Orchard v. Alexander, 157 U.S. 372, 382-83 (1895); Michigan Land and Lumber Co. v. Rust, 168 U.S. 589, 593 (1897).

[52] Colorado Coal and Iron Co. v. United States, *supra* note 19; United States v. Iron Silver Mining Co., *supra* note 17.

[53] Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Strauss, 59 I.D. 129 (1945); United States v. Shannon, 70 I.D. 136 (1963).

[54] Cole v. Ralph, *supra* note 16 at 303. See also 2 LINDLEY, MINES § 392, at 920, 921 (3d ed. 1914).

> the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.[55]

A discovery, however, by a qualified locator creates rights good against the United States, as well as any other person. Assuming that he complies with the technical requirements of law, including local law, he has the exclusive right to possession, and the right to appropriate all the minerals without payment of rent or royalty to the Government. His only obligation before patent issues is to perform the annual assessment work to hold the claim against another claimant. He has no obligation to seek a patent, but if he applies for a patent he must pay the United States five dollars per acre for the claim.[56]

In *United States v. Logomarcini*,[57] the evidence submitted on behalf of the patent applicant was that years before, between 1885 and 1909, enough gold had been taken from the claim to support two families. The evidence submitted by the Government was that samples had been taken from all over the claim shortly before the hearing, that insignificant values had been found in some samples and none at all in the others.

> Although the precise issue does not appear to have been decided before, it seems clear that, before a mineral patent can be issued, it must be shown as a present fact, i.e., at the time of the application for patent, that the claim is valuable for minerals. [Citations omitted] In line with this principle, it has been held that where a mining claim has been worked out, the land becomes subject to disposition under the nonmineral land laws and not under the mining law. [Citations omitted]

The courts have thus far accepted the Department's view that the right to a patent can be lost by a change of conditions. *Adams v. United States*,[58] *Mulkern v. Hammett*.[59] In the *Mulkern* case the court said:

> The problem . . . is whether the public lands of the United States should be perpetually incumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, no longer has a market or a reasonable prospect of a future market; or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available.

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[55] Cameron v. United States, *supra* note 48 at 460.

[56] Two dollars and fifty cents per acre in the case of placer claims. Act of May 10, 1872, secs. 6 and 11, 17 Stat. 91, 92, 95; Union Oil Company v. Smith, 249 U.S. 337, 348-49 (1918).

[57] 60 L.D. 371 (1949).

[58] 318 F.2d 861 (9th Cir. 1963).

[59] 326 F.2d 896 (9th Cir. 1964).

Whether a mineral deposit is sufficiently valuable to justify exploitation and to support the issuance of a patent depends in part on whether the mineral can be sold, i.e., whether it has a market. Generally, the existence of a market is taken for granted since the prices of most materials are the subject of published exchange quotation or are fixed in some other public manner. Accordingly, for gold, silver, or copper, the claimant need not introduce evidence of the existence of a market. The tribunal, whether the Department of the Interior or a court, can take judicial notice of the current price quotations.

However, in some instances, especially in the case of minerals of low unit value, the market price fluctuates widely from place to nearby place. The tribunal is unable to determine what the market price of a mineral is without some evidence. In such cases, therefore, proof has been required of the present marketability of the product.[60] It is against such evidence that the costs of mining, processing and sale are measured to determine whether the evidence is such as would induce a prudent man to invest his time and money to develop a mine on the property.

To engage in the business of mining has always meant that the miner would sell his product. It was never the law that one could qualify for a patent if the evidence was that he had a mineral which could not be sold. Stated in another way, no prudent man will expend his time and means to extract and ship minerals which cannot be sold. The price of some minerals, such as sand, gravel and building stone, is very responsive to circumstances of the particular case. The undertaking of construction projects in a neighborhood may result in the doubling of the price of such minerals, perhaps rendering a deposit sufficiently valuable to justify exploitation. Nearby large deposits might not be worth the expense of mining. Indeed, if one had an exclusive contract to supply all the sand and gravel for the only construction project in the community, he would have a market.[61] His immediate neighbor would have no market, however well supplied he might be. The former could prudently spend time and money to do that which, for the latter, would be folly.

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[60] Foster v. Seaton, *supra* note 53; Layman v. Ellis, 54 I.D. 294, 296 (1933); Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956); United States v. Charles L. Seeley and Gerald F. Lopez, A-28127 (January 28, 1960), *aff'd*, Seeley v. Secretary of the Interior, C.A. 41094, N.D. Cal., July 29, 1964; United States v. Thomas R. Shuck, *et al.*, A-27965 (February 2, 1960), *aff'd*, Shuck v. Helmandollar, C.A. 682 Pct., D. Ariz., Dec. 7, 1961; United States v. R. B. Borders, *et al.*, A-28624 (October 23, 1961), *aff'd*, Osborne v. Hammett, C.A. 414, D. Nev., Aug. 19, 1964.

[61] *Caveat.* The question has never been presented or decided as to whether a limited market, of relatively short duration, would be sufficient to validate a claim. Common varieties of sand, gravel, stone, etc., have been removed from the general class of locatable minerals by the Act of July 23, 1955, 69 Stat. 368.

The British humorist A. P. Herbert has described the "reasonable man," identical twin of the "prudent man," as follows:

> . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither star-gazes nor is lost in meditation when approaching trap-doors or the margin of a dock; who records in every case upon the counterfoils of cheques such ample details as are desirable, scrupulously substitutes the word "Order" for the word "Bearer," crosses the instrument "a/c Payee only," and registers the package in which it is dispatched; who never mounts a moving omnibus, and does not alight from any car while the train is in motion; who investigates exhaustively the *bona fides* of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; who in the way of business looks only for that narrow margin of profit which twelve men such as himself would reckon to be "fair," and contemplates his fellow-merchants, their agents, and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, gambles, or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving vice, *sans* prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.[62]

The Department of the Interior and the courts are bound by the standards of "this excellent and odious character" as long as the mining law of 1872 remains unchanged. That law and its effect will be a subject of intensive study by the Public Land Law Review Commission. It may be that the Commission and the Congress will want to consider making the mineral resources of the United States available to men who could not qualify as prudent. Many historic successes were initiated by men who gambled at odds their contemporaries thought too long. Columbus and his backers spent their time and money without evidence that their enterprise had any reasonable prospect of yielding a profit.

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[62] Herbert, *Uncommon Law* 3 (1935).

There seems to be general agreement that the development of mineral resources should be promoted if not at all costs, at least where other important resources would not be destroyed or impaired. Although every community wants to grow larger, there seems to be general agreement that we need no longer entertain excessive concern to promote the settlement of the public lands of the West. These were the two great motives for the enactment of the 1872 Mining Law.

In the Mineral Leasing Act of February 25, 1920,[63] Congress found a way to permit an imprudent prospector to secure a right to take certain minerals from the public domain, although he may have had very little evidence of the existence of a valuable deposit. Many widcatters have drilled in vain, but with the security that if a discovery could be made, their risks would have been justified.

Perhaps by casting a new balance and considering the values of significant importance in the light of modern needs, a modern Law, entirely adapted to those needs, can be enacted. It should provide for the development of mineral resources and for the protection of other important interests. It should not retain those features of the 1872 Act which had for their sole purpose the promotion of settlement. It should give an opportunity to the miner with a hunch, or a theory, or perhaps only a crystal ball, to take a gamble, at his own expense, and win.

And finally, since it comes from a long-lived family, an up-to-date Mining Law should have an eye on the needs of the next century as well as its own.

[63] 41 Stat. 437 (1920).