Denver Law Review

Volume 43
Issue 1 *Symposium - Oil Shale*

Article 3

April 2021

Do Unpatented Oil Shale Mining Claims Exist?

Maurice T. Reidy

Do Unpatented Oil Shale Mining Claims Exist?

By MAURICE T. REIDY*

The subject of this article is constipation. Webster's dictionary defines "constipation" as a "state of the bowels in which evacuations are infrequent and difficult." Another definition of constipation in Webster is "costiveness," and "costiveness" means "reserved; slow or stiff in expression or action." In applying these definitions to the problem of unpatented oil shale mining claims, one can readily see that evacuations of oil shale are, to say the least, infrequent and difficult, and the attitude of the United States government relative thereto is reserved or slow in expression or action.

This article is limited to the status of unpatented oil shale mining claims. No definite conclusions will or can be drawn and no binding authority can be cited. The conclusions will be reached in numerous cases pending before the Department of the Interior and the courts. In fact, if you walk into the clerk's office of the United States District Court for Colorado to find the cases pending, all you need to do is mention "oil shale cases" and one of the clerks will deliver a group of files to you. Some of the cases have their own little wrinkles, but the principal problem in most of the cases is the one which will be discussed in this article.

The problem may best be phrased in the question, "Does such a thing as a valid unpatented oil shale mining claim exist?" The answer to this question will ultimately determine the ownership of many thousands of acres of potentially valuable lands in Colorado, Utah, and Wyoming. For this reason, the final answer will probably come only from the United States Supreme Court.

I. GENERAL MINING LAW APPLICABLE

We must first, therefore, review generally the background of the mining law relating to the location of mining claims. The first mining law was set forth in the acts of July 4, 1866[1] and July 26, 1866.[2] These laws basically enacted and made legal the customs and self-made rules and regulations of the prospectors in the days

*Member, Colorado Bar; B.S.C., *Magna cum laude,* University of Notre Dame, 1955; LL.B., *cum laude,* University of Denver, 1957; in private practice.

[1] 14 Stat. 86 (1866), 30 U.S.C. § 21 (1965).

[2] 14 Stat. 251 (1866).

of the Gold Rush in 1849. Until these acts all prior mining claims were technically trespasses upon the public domain. The Placer Act of 1870[3] brought non-lode claims under the mining law. A lode claim is one based upon a discovery of "veins or lodes of quartz or other rock in place"[4] bearing valuable deposits. A placer claim is based upon a discovery of deposits excepting veins of quartz or other rock in place.[5] The pending oil shale claims are based upon placer locations. Whether oil shale is more susceptible to lode claims than placer is, therefore, moot unless the government attacks the claims on this basis, which so far has not been alleged. The act of 1872[6] basically re-enacted the acts of 1866 and 1870 and is the last general mining law enacted by Congress. Other particular statutes will be commented on hereafter, but what determines the validity of a mining claim is controlled by these acts.

The most important fact to be proven in establishing a valid mining claim is a discovery. The historic test of what constitutes a discovery is "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."

This was the prudent man test set forth by the Secretary of the Interior in *Castle v. Womble,*[7] and affirmed by the Supreme Court in *Chrisman v. Miller*[8] and *Cameron v. United States.*[9] The interpretation and application of this test to oil shale claims will be discussed hereinafter.

With the discovery there must be a location of the claim in accordance with the federal mining law as supplemented by state law. This includes the staking of the claim's boundaries, the posting of a location notice, recording location certificates, the performance of required discovery development work, and such matters as may be required under the law of the particular state. In this discussion it will be presumed that claims are properly located, although questions may exist respecting proper location of many claims.

Once there is a valid discovery and proper location, a mining claim, in the language of the Supreme Court, is "real property in

---

[3] 16 Stat. 217 (1870), 30 U.S.C. § 35 (1965).
[4] 17 Stat. 91 (1872), 30 U.S.C. § 23 (1965).
[5] 16 Stat. 217 (1870), 30 U.S.C. § 35 (1965).
[6] 17 Stat. 91 (1872), 30 U.S.C. § 22 (1965).
[7] 19 Land Dec. 455 (1894).
[8] 197 U.S. 313 (1905).
[9] 252 U.S. 450 (1920).

the highest sense."[10] Legal title to the land remains in the United States, but a valid, equitable, and possessory title is in the claimant, subject to taxation, capable of being transferred by deed or devise, and otherwise possessing the incidents of ownership of real property. There is no present requirement that a mining claimant ever apply for a patent from the United States. In fact, until an application for a patent is filed, there is no requirement that notice of the claim be recorded other than by posting on the claim and in the county records. Thus, the United States Government may not even know of the existence of the claim. However, until a patent is obtained, the unpatented claim must be maintained in accordance with the mining law.

The principal requirement under the law to maintain a claim is the performance of annual labor on the claim.[11] The federal requirement is supplemented by state laws concerning recording affidavits of annual assessment work, but the controlling question is whether the work is performed. If a claimant fails to perform such annual labor, the land becomes subject to relocation, and if validly relocated, the claim is extinguished, or the real property interest of the prior claimant terminates. Until a relocation is made, however, the prior claim is valid even though the assessment work is not performed, unless the claim is abandoned.

Thus, relocation and abandonment are the only means by which an unpatented claim may be lost under the archaic mining law. The historic test of abandonment is "intent to abandon." All lawyers know the difficulty in proving intent in any situation. The failure of a claimant to perform annual labor may be considered in the factual question of intent to abandon but is not controlling.

The important distinction to be remembered between relocation and abandonment is that a valid relocation after the failure to perform assessment work extinguishes the prior claim as a matter of law, whereas, in the case of abandonment, the failure to perform annual labor is but one of the facts to be considered in proving the requisite "intent to abandon."

This, in a nutshell, was the status of the mining law at the time of the passage of the Mineral Leasing Act of 1920,[12] and as to minerals other than oil shale and other leasing act minerals, is the present status of the law.

---

[10] Forbes v. Gracey, 94 U.S. 762, 767 (1876).

[11] 17 Stat. 92 (1872), 30 U.S.C. § 28 (1965).

[12] 41 Stat. 437 (1920), 30 U.S.C. §§ 181-263 (1958).

II. PARTICULAR STATUTES, ORDERS, AND DECISIONS HAVING APPLICATION TO OIL SHALE CLAIMS BEING SUBJECT TO THE MINING LAW

After the passage of the 1872 act, serious questions existed as to whether the discovery of petroleum could be used as a basis for a mining claim. This problem was resolved by the act of February 11, 1897,[13] which provided, "Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims." Natural uncertainty remained, however, as to oil shale claims since this mineral is not, strictly speaking, an oil. Shale oil is obtained from kerogen in the rock by crushing and distillation. This uncertainty was eliminated on May 10, 1920, in *Instructions* from the First Assistant Secretary of the Department of the Interior, wherein he stated:

> Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas . . .[14]

Pursuant to such instructions, the first oil shale patent issued for the La Paz claims Numbers 1 to 14, inclusive.[15]

The claims theretofore located were protected in the passage of the Mineral Leasing Act of February 25, 1920, by Section 37 of such act,[16] which provided:

> That the deposit of . . . oil shale . . . shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at the date of the passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

III. HISTORY OF OIL SHALE CLAIMS PRIOR TO PENDING CASES AND CONTESTS

The oil shale claims were originally located from 1916 to February 25, 1920. On that date the Mineral Leasing Act became effective and oil shale was designated as a leasing act mineral.[17]

---

[13] 29 Stat. 526 (1897).

[14] 47 Land Dec. 548 (1920).

[15] Mineral Entry Glenwood Springs-015847 (Denver Land Office, Bureau of Land Management).

[16] 41 Stat. 451 (1920), 30 U.S.C. § 193 (1965).

[17] 41 Stat. 445 (1920), 30 U.S.C. § 241 (1965).

As noted above, Section 37 of the act contained a savings clause protecting claims existing as of that date and perfected and maintained in accordance with the law. The claims protected under the savings clause are those which are involved in the present controversies. No claims were located subsequent to 1920 because the Mineral Leasing Act in effect withdrew the lands from a location based on a discovery of oil shale.

One result of this was to eliminate the penalty of relocation for failure to perform annual assessment work, unless the relocation was based on the discovery of minerals other than leasing act minerals. As a practical matter, the penalty of relocation has been eliminated since no significant discovery of non-leasing act minerals has been made in the area.

After the passage of the Mineral Leasing Act, annual labor was not performed on many of the claims. Whether the reasons were that the penalty of relocation was removed or that the locators did not care to perform the work and maintain the claims, may never be known since most of the original locators are now dead. The Department of the Interior, however, from 1927 to 1933, brought numerous contest proceedings to cancel claims on the basis of failure to perform assessment work. The authority of the United States to contest the validity of a mining claim at any time before patent is clear.[18] Unless an application for patent pursuant to a mineral entry has been filed with the Bureau of Land Management, however, the procedure for contesting the claims is difficult. The United States, as the moving party, must determine the name of the claim, its description, and the names of the owners. The contests were commenced in accordance with *Instructions* of February 26, 1916,[19] and the Rules of Practice then in effect.[20] In most cases, notices of the contest were mailed to the parties by registered mail. In many cases notices were not mailed to all owners and in some cases the notices were not addressed to any of the owners. In such cases, the Department of the Interior has admitted notice was improper.[21]

Almost all of the contests were based on failure to perform assessment work. In most cases, no answers or appearances were made by the mining claimants and decisions declaring the claims null and void were issued.

---

[18] Cameron v. United States, 252 U.S. 450 (1920); Ickes v. Virginia-Colo. Dev. Corp., 295 U.S. 639 (1935).

[19] 44 Land Dec. 572 (1916).

[20] 51 Land Dec. 547 (1926).

[21] Union Oil Co. of Cal. A-29560 (Supp.) GFS, SO-1965-41.

Some claimants did appear and appealed to the Supreme Court. The Supreme Court, in the case of *Wilbur v. Krushnic* in 1930,[22] and, to clarify a point, in *Ickes v. Virginia-Colorado Development Corporation* in 1935,[23] held that the Interior Department could not declare a claim void for failure to do assessment work since the only penalty under the law was relocation.

Shortly thereafter, in a departmental decision in *The Shale Oil Company*,[24] which case had been suspended pending the Supreme Court decision, the following statement appears:

> In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein, in the instant case, must be held as without authority of law, and void. The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930 are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled.

For a number of years after these decisions, no significant departmental or court cases arose concerning the problem. The general opinion among many attorneys was that the original department decisions voiding claims for failure to do assessment work were void also, which opinion was shared by officers within the Department of the Interior. In fact, patents subsequently issued on some claims which had been declared void prior to the 1935 decision of the Supreme Court.[25]

The limbo continued to exist until the passage of Public Law 585, commonly known as the Multiple Use Act, in 1954.[26] Section 7 of this act[27] established a procedure under which a lessee of a United States oil and gas lease could institute an action to verify the title under such lease. This is necessitated since the mining claimant, if the claim is valid, would own the full equitable title, including oil and gas. Although the Multiple Use Act was enacted to clarify problems between unpatented uranium claims and conflicting federal oil and gas leases, its provisions clearly apply to all unpatented claims. Various proceedings under Section 7 of Public Law 585 have been commenced, many of which concerned conflicts with unpatented oil shale claims. However, no significant decisions were issued since most of the proceedings were settled with the mining claimants

---

[22] 280 U.S. 306 (1930).

[23] 295 U.S. 639 (1935).

[24] 55 Interior Dec. 287 (1935).

[25] Schmidt, *Status of Unpatented Claims*, QUARTERLY OF THE COLORADO SCHOOL OF MINES, July 1964, p. 125.

[26] 68 Stat. 708 (1954), 30 U.S.C. § 521 (1958).

[27] 68 Stat. 711 (1954), 30 U.S.C. § 527 (1965).

prior to hearing by means of protective leases from the claimants or options for leases. Assuming the regularity of the proceeding, if a mining claimant failed to file a verified statement within the time allowed during such a proceeding, it is clear that the claimant has lost all rights to leasing act minerals,[28] and consequently, in the case of oil shale, the claimant will have lost his claim.

In connection with the passage of Public Law 585, however, one significant case did arise. In 1954, Union Oil Company applied for patent on numerous oil shale placer claims. The proceedings had progressed to the point where a final certificate had been issued to Union and only the issuance of patent remained. However, no action had been taken by a lessee of a federal oil and gas lease covering the same lands. Another oil company which had control of this lease challenged Union's right to a patent. The Secretary of the Interior decided that Union would be required to bring contest proceedings to cancel the lease before patent could issue.[29] There had been a flurry of general oil and gas activity in the area, but by the time of the Secretary's decision, the oil and gas lessee had lost interest in the area. However, when Union appealed to the district court, the Secretary of the Interior stayed in the fight. The decisions of both the district court[30] and the court of appeals[31] affirmed the Secretary's decision requiring the contest proceedings.

This decision is most significant, not in its holdings, but in the change in attitude of the Department of the Interior which resulted thereby. Prior to this case, patents were being issued on oil shale claims; subsequently, to this author's knowledge, no oil shale patents have been issued and attempts to obtain the same have been strongly resisted by the Department of the Interior. This brings us to the current status of constipation.

IV. Decision of Secretary of the Interior on April 17, 1964

On February 16 and 23, 1962, the Manager of the Denver Land Office of the Bureau of Land Management issued decisions rejecting mineral patent applications on some 257 oil shale placer claims. No hearings were conducted on the merits of the claims, *e.g.,* valid location and discovery. The Manager's decisions were based on the grounds that the claims had been declared null and void in contest proceedings initiated from 1927 to 1931, and that

---

[28] 68 Stat. 711 (1954), 30 U.S.C. § 527(b) (1965).

[29] Union Oil Co. of Cal. v. Calvert, 65 Interior Dec. 245 (1958).

[30] Union Oil Co. of Cal. v. Seaton, Civil No. 3042-58, D.D.C. (1960).

[31] Union Oil Co. of Cal. v. Udall, 289 F.2d 790 (D.C. Cir. 1961).

under the "principles of finality of administrative action, estoppel by adjudication, and res judicata," the prior decisions in the contests could not now be challenged. All of the prior decisions involved were of the type discussed above, wherein the Government in the earlier contest proceedings had alleged failure to perform assessment work. All of the prior decisions had been issued before the Suprme Court decision in *Ickes v. Virginia-Colorado Development Corporation.*[32] Some of the contests had been commenced prior to the *Krushnic* case, but apparently new contest proceedings were commenced after the *Krushnic* case.[33]

Twenty-seven different appeals were taken to the Director, Bureau of Land Management, from the Manager's decisions. Such appeals were considered together by the Secretary of the Interior, who assumed supervisory jurisdiction. In *Union Oil Company of California,*[34] decided on April 17, 1964, the Secretary affirmed the Manager's decisions on the principles of res judicata, finality of administrative action, and laches. The Manager and Secretary both held that the earlier decisions in the contest proceedings could not now be challenged, even though possibly incorrect as a matter of law. The Secretary's decision of April 17, 1964, relied heavily on the fact that the opinion in *The Shale Oil Company*[35] case in 1935, which was issued after the *Virginia-Colorado*[36] decision of the Supreme Court, merely overruled certain cases and specifically vacated and recalled other cases. By overruling cases, the Secretary contends such cases merely lose their precedent and authority for future decisions, but the decisions in such cases are not affected.

The decision of April 17, 1964, also relies heavily on the decision of the Circuit Court for the District of Columbia in *Gabbs Exploration Company v. Udall.*[37] The *Gabbs* case parallels the factual situation of the earlier contest proceedings used as a basis for the April 17 decision with one important exception. The original notice of contest in the *Gabbs* case, in addition to alleging failure to perform assessment work, also alleged abandonment. Thus, the earlier *Gabbs* decision would not be incorrect as a matter of law under the *Virginia-Colorado* case, since the Government may challenge unpatented claims on the basis of abandonment as stated in the *Virginia-Colorado* case.[38]

---

[32] 295 U.S. 639 (1935).
[33] 280 U.S. 306 (1930).
[34] 71 Interior Dec. 169 (1964).
[35] 55 Interior Dec. 287 (1935).
[36] 295 U.S. 639 (1935).
[37] 315 F.2d 37 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 822 (1963).
[38] 295 U.S. 639 (1935).

The decision of the court of appeals in the *Gabbs* case does, however, lend some authority to the doctrines of res judicata and finality of administrative action asserted by the Secretary in his decision of April 17, 1964, but the *Gabbs* case does not cite any court authority in this respect.[39]

The Secretary's decision of April 17, 1964, considered the question of notice in the prior contest proceedings. As to some claims it held the notice proper and the decision was final. As to other claims, the finality of the decision was held in abeyance pending a determination of the sufficiency of notice of contest in the early proceedings. Such determination has now been made and is set forth in the supplemental decision in *Union Oil Company of California,* decided July 30, 1965.[40] The supplemental decision upholds service of notice by registered mail, with the proof thereof being a return receipt signed by the owner of the claims or his authorized agent, if such authorization is in writing. The decision adds to the constipation by declaring fractional interests in some claims cancelled and other fractional interests in the same claims not cancelled. The supplemental decision does not, however, change the basis of the April 17, 1964, decision and considers only the notice question.

V. Appeals of Decisions of April 17, 1964, and July 30, 1965

Several appeals were immediately prosecuted to the United States District Court for the District of Colorado after the April 17, 1964, decision. Additional appeals can now be expected after the supplemental decision of July 30, 1965.

In *The Oil Shale Corporation, et al., v. Udall,*[41] the Government filed a motion to dismiss on the grounds that the complaint failed to state a claim and was premature since the plaintiff had not exhausted its administrative remedies, that the primary authority in the matter was in the Secretary of the Interior, and that the United States was an indispensable party. The motion to dismiss was denied by Judge William E. Doyle on November 27, 1964.[42] Thereafter, the Government filed its answer including the same grounds as were included in the motion to dismiss, and in addition alleged laches, estoppel, res judicata, and finality of administrative action. The government's answer curiously alleges therefore both that the plaintiffs are too early by not exhausting their administrative

[39] 315 F.2d 37, 40-41 (D.C. Cir. 1963).
[40] A-29560 (Supp.) GFS, SO-1965-41.
[41] Civ. Act. No. 8680, U.S.D.C., Colo. (pending).
[42] 235 F. Supp. 606 (D. Colo. 1964).

remedies and too late by reason of laches and estoppel. It is possible that either or both of these grounds will ultimately prove successful.

The typical type of relief sought in the appeals is that prayed for in *Napier v. Udall.*[43] The plaintiffs in this case seek a mandatory order requiring the Secretary of the Interior to process the patent application and take such action as is necessary to issue the patent, as well as orders declaring the early contest decision null and void and the Manager's decision of February 16, 1962, and Secretary's decision of April 17, 1964, invalid.

If the Secretary of the Interior is successful in defending these appeals, and it is a sure thing that such success will only be achieved after action or denial of review by the Supreme Court, the problem as to claims involved in the appeals will be resolved. If, however, the Secretary's decision is reversed, all of these claims will then be remanded to the Manager's office for hearings on the merits of the claims. The position of the Secretary in such hearings, as well as in hearings on claims not declared invalid by reason of improper notice, is indicated by additional directions of the Secretary.

VI. SECRETARY'S MEMORANDUM OF APRIL 17, 1964

On the same date the Secretary issued his decision in *Union Oil Company of California, et al.,*[44] the Secretary also issued a Memonrandum to the Director, Bureau of Land Management concerning the determination of rights to outstanding unpatented oil shale mining claims. The Bureau of Land Management was directed to determine all remaining claims, and as to those which were not the subject of contests or patent applications, to initiate contest proceedings to test the adequacy of discovery, and to assert any ground for contest which might be justified by the facts. The Secretary directed that to qualify as valid, the discovery must have been such, on the date it was made, as would justify a person of ordinary prudence in the further expenditure of labor and means, with reasonable prospect of success, in developing a valuable mine. This is the historic test of a discovery as noted above.[45] However, the application of the test is controlling. In this connection, the following is quoted from the Secretary's Memorandum:

> 4. In applying the test of discovery, the Bureau should observe the following guidelines:
>
> a) The fact that any given deposit of oil shale may be a valuable resource for future use does not render the

---

[43] Civ. Act. No. 8691, U.S.D.C., Colo. (pending).

[44] 41 Interior Dec. 169 (1964).

[45] Cameron v. United States, 252 U.S. 450 (1920); Crisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 Land Dec. 445 (1894).

> discovery valid under the mining laws unless a person of ordinary prudence would be justified in the further expenditure of labor and means with the reasonable prospect of developing a valuable mine;
>
> b) The finding or exposure of an isolated bit of mineral or quantities of low-grade mineral, not connected with or leading to valuable mineral deposits, will not in itself be considered a sufficient discovery;
>
> c) The mineral deposit actually found or exposed by the locator must itself have been of such character as to meet the test of discovery without regard to other physical evidence or information not obtained from within the boundaries of the claim from which the existence of substantial values beneath the surface may be inferred.
>
> 5. In further contest proceedings, the Bureau will raise the question of the economic or commercial value of oil shale, as of the time the claims were located, as one of the elements in the application of the standard test of discovery discussed above. The lack of any economically or commercially feasible method of extraction and production of shale oil from oil shale is a relevant, although not necessarily decisive, consideration in determining whether a discovery was made. In this regard, the mere showing of an outcrop of the Mahogany Ledge, in circumstances which heretofore have provided the basis for patent, will no longer be accepted as *prima facie* evidence of compliance with the requirements of the mining laws. This does not mean that the claimant is required to demonstrate the immediate marketability of oil shale as in the case of certain non-metallic minerals of widespread or common occurrence.

It is noted that the Secretary cited authority in other parts of his Memorandum, but cited no authority in the above quoted parts of the Memorandum. There is no real objection to this since the "guidelines" are now established for the future, except the increased constipation which will result therefrom.

The guidelines, by their own admission, conflict with the past application of the test of discovery. The general rule of discovery in oil shale claims heretofore followed by the Department of the Interior was set forth in the case of *Freeman v. Summers*.[46] The test to be applied hereafter apparently is set forth in the Secretary's Memorandum quoted above. As noted above, the *Instructions* of May 10, 1920, from the First Assistant Secretary of the Interior[47] recognized the value of oil shale and authorized the issuance of patents. No discoveries have been made since such date because the Mineral Leasing Act of February 25, 1920, prohibited further locations. As early as 1916 the United States Geological Survey issued regulations governing what would be considered valuable oil shale.[48] Such regulations included considerations of the depth of the shale

[46] 52 Land Dec. 201 (1927).

[47] 47 Land Dec. 548 (1920).

[48] Cited in Empire Gas & Fuel Co., 51 Land Dec. 424, 429 (1926).

from the surface, the thickness of the bed, and the ultimate yield in gallons per ton of the shale discovered. The regulations were later revoked as being possibly too strict.[49] However, they did constitute a recognition by the Department of the Interior of the value of oil shale. In effect, the Supreme Court decisions in the *Krushnic*[50] and *Virginia-Colorado Development Corporation*[51] cases acknowledged discoveries prior to 1920 were sufficient under the mining law, and, of course, the numerous patents heretofore granted were based upon similar discoveries.

The Secretary's application of the test of discovery is not necessarily a new rule, but a new application of the rule to oil shale claims. There have been numerous interpretations or constructions of the so-called "prudent man" test.[52]

The so-called "liberal rule" of construction is usually cited as requiring only that a locator be able to establish that there was such a discovery of mineral within the limits of his claim that would justify an ordinarily prudent man, not necessarily a miner, in expending his time and money thereon in the further development of the property. It should be noted that a purely literal interpretation of this rule would not require the locator to submit any evidence as to the potentially commercial and profit-making nature of his discovery deposit.[53] It is this rule which is most commonly applied in those cases, arising in state courts, the purpose of which is to adjudicate rights of possession between conflicting mineral locators.[54]

The so-called "strict rule" of construction requires that a mineral locator be able to establish mineralization within the limits of his claim to an extent which would make the land more valuable for the purpose of removing and marketing minerals than for any other purpose. Such a rule necessarily seems to imply that the locator be able to establish that his claim can be worked at a profit or that the quantity and quality of his mineral discovery be "in paying quantities." This rule has been applied, either expressly or impliedly, in proceedings involving a contest between an agricultural and a mineral entry,[55] a contest between a placer and lode

---

[49] Pitcher v. Jones, 71 Utah 453, 267 Pac. 184 (1928); 36 AM. JUR. *Mines & Minerals* § 87 (1938).

[50] 280 U.S. 306 (1930).

[51] 295 U.S. 639 (1935).

[52] Cameron v. United States, 252 U.S. 450 (1920); Crisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 Land Dec. 445 (1894).

[53] 3 LINDLEY, MINES § 336 (3d ed. 1914).

[54] Pitcher v. Jones, 71 Utah 453, 267 Pac. 184 (1928); 36 AM. JUR. *Mines & Minerals* § 87.

[55] Davis's Administrator v. Weibold, 139 U.S. 507 (1891).

deposit,[56] applications for patent,[57] and in actions brought by the United States to contest the validity of a location[58] or to set aside a patented claim on the basis of fraud.[59]

The rule generally applied by the Department of the Interior in patent applications until recent years appears to be reflective of a more general rule sufficiently broad to encompass both the liberal and strict constructions. Such rule may be stated as requiring that a locator find mineral in mass so placed that he can follow a vein or other mineral deposit with reasonable hope and assurance that he will ultimately develop a paying mine.[60] For a comprehensive analysis of the problems of discovery, see Title IV of the American Law of Mining (1964).

The sole conclusion to be derived concerning the new guidelines established as to oil shale discoveries is that if the discoveries are not deemed valid, another decision of the United States Supreme Court will be required.

Before leaving a discussion of the Secretary's Memorandum of April 17, 1964, it is noted that although the question of discovery is primarily discussed therein, the Secretary also directed the Bureau of Land Management to assert any other ground for contest which might be justified by the facts. The Secretary's supplemental decision in *Union Oil Company of California, et al.*[61] indicates other grounds which will be asserted. The following is quoted therefrom.

> It should be noted that, as to cases hereinafter remanded for further action and processing by the Bureau of Land Management, this decision is not intended to be the final administrative determination of the possessory rights now claimed by the patent applicants. The patent applications have yet to be examined by the Bureau for the purpose of determining, among other things, whether locations were validly made, whether the claims were validly maintained, and whether the claims were abandoned . . . .
>
> The Bureau must also determine, assuming the claims are otherwise valid, whether the present patent applicants have acquired all of the outstanding uncancelled possessory interests in the claims for which they seek patents. Specifically, there remains open the question whether the Department is bound to accept a State Court's determination regarding the relative rights of possession of alleged co-owners of an association placer claim . . . .
>
> If it is not bound by such decisions, an additional question to be

---

[56] United States v. Iron Silver Mining Co., 128 U.S. 673 (1888).

[57] Royal K. Placer, 13 Land Dec. 86 (1891).

[58] United States v. Dawson, 58 Interior Dec. 670 (1944).

[59] 1 RICKETTS, AMERICAN MINING LAW § 598 (4th ed. 1943).

[60] Cameron v. United States, 252 U.S. 450 (1920); United States v. Minnilee Baker, 60 Interior Dec. 241 (1948); Freeman v. Summers, 52 Land Dec. 201 (1927); Montana Copper Mines Co., 41 Land Dec. 320 (1921); 1 RICKETTS, AMERICAN MINING LAW § 597 (4th ed. 1943).

[61] A-29560 (Supp.) GFS, SO-1965-41.

> determined is whether the Department will recognize an asserted title to an association placer oil shale mining claim where the patent applicant's title is based in part on interests allegedly acquired since 1920 by means of forfeiture notices published in accordance with Rev. Stat. 2324 (30 U.S.C. 28) (1958 ed.).

Thus, slowly but surely, the battle lines are being drawn. It is clear that once hearings on the merits are conducted, the factual presentations in each case will be of great importance, and the probable court review of the denials of patent applications and the ultimate decisions therein will, in themselves, be a comprehensive analysis of the entire mining law.

VII. GENERAL SUMMARY AS TO OIL SHALE DEVELOPMENT

As commented upon earlier herein, no binding authority is cited, the reasons being evident. This article merely brings the problem up to date since an excellent article on the subject in DICTA in 1950.[62] Since that time, a significant change may be noted in the position of the Department of the Interior. The changes may be summarized as follows:

1. The Department now takes a position that the claims were cancelled in the early proceedings if notice was proper. This on the surface would appear to be consistent.
2. However, the Department did not take this position at all times since 1935, as evidenced by the issuance of patents since such date on claims previously declared null and void.
3. The Department's test of discovery to be applied in future patent applications is inconsistent with that previously applied in *Freeman v. Summers*.[63]

Lest a reader think the Government's position seems arbitrary and capricious, a few further comments are necessary. This article was requested to represent both views, *i.e.*, that of the Government and that of the claimant. Since this is more of a factual history than a citation of legal authorities, some more facts should be emphasized.

With few exceptions, most of the claims involved in the present proceedings were acquired after 1935 by the persons or parties now seeking patents. Such acquisitions were made with the record showing the prior decisions declaring the claims null and void, and consequently, with full knowledge of the possible invalidity of the

---

[62] 27 DICTA 195 (1950).

[63] 52 Land Dec. 201 (1927).

claims. No significant development of the properties has yet been made. Consequently, if the mining claimants win, they will have obtained title to thousands of acres of valuable lands for doing nothing from 1920 to the middle 1950's except the nominal work required for patent.[64] After 1955, admittedly the claimants will have expended large sums for attorneys' fees.

As a result, this author has no objection to the Government's contesting the validity of the claims. The objection is to the procedure being followed by the Government in not having hearings on all aspects of the particular cases at one time. The Manager's decisions in February 1962 now have been reversed in part and affirmed in part. Some claimants must now appeal to the courts for the right to have a hearing on the merits, while at the same time, the Government is preparing new attacks which will require additional court appeals if the Manager's decisions of 1962 are ultimately reversed. Maybe logically the Government could respond that since nothing was done from 1920 to 1955, what is the big hurry now. The answer to this is simply that oil shale can not be developed until this problem is resolved, and the Government should encourage the orderly development of our natural resources, and not be in a position of constipating it by its own action.

If the ultimate decisions are reached on the basis of principles of law, the claimants appear to have the better position. If, however, the ultimate decisions are based on principles of equity, such as laches and estoppel, the Government may win if it does not by its new actions create such inequities as would, under the old maxim, prevent it from coming into court "with clean hands."

[64] 221 Stat. 61 (1880), 43 Stat. 144 (1925), 30 U.S.C. § 29 (1965).